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PLEASE REPLY TO SANTA FE

July 8, 1997

Hand Delivered

Mr. David Catnach
New Mexico Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505

Re: NMOCD Case Nos. 11808 and 11809; Application of Burlington Resources Oil and Gas Company for Compulsory Pooling, San Juan County, New Mexico

Dear David:

In the rush to provide you with our Motion to Dismiss this morning, a number of typographical errors were left uncorrected in the version of the motion delivered to you. Accordingly, I request that the enclosed corrected version be substituted for the earlier version. Other than the corrections of the typographical errors, the substance of the motion is unchanged.

Very truly yours,

MILLER, STRATVERT & TORGERSON, P.A.

J. Scott Hall, Esq.

JSH/rac
Enclosure

cc: W. Thomas Kellahin, Esq. (w/encl. by facsimile)
Jason Doughty, Esq. (w/encl. by facsimile)
Rand Carroll, Esq. (w/encl. by facsimile)

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

IN THE MATTER OF THE APPLICATION
OF BURLINGTON RESOURCES OIL & GAS
COMPANY FOR COMPULSORY POOLING
AND A NON-STANDARD GAS PRORATION AND SPACING UNIT FOR ITS
SCOTT WELL NO. 24 (SECTION 9, T31N, R10W)
SAN JUAN COUNTY, NEW MEXICO

CASE NO. 11808

IN THE MATTER OF THE APPLICATION
OF BURLINGTON RESOURCES OIL & GAS
COMPANY FOR COMPULSORY POOLING,
AN UNORTHODOX GAS WELL LOCATION AND
NON-STANDARD GAS PRORATION AND
SPACING UNIT FOR ITS MARCOTTE WELL NO. 2
(SECTION 8, T31N, R10W)
SAN JUAN COUNTY, NEW MEXICO

CASE NO. 11809

TOTAL MINATOME CORPORATION'S
MOTION TO DISMISS

TOTAL MINATOME CORPORATION ("Total"), by and through its counsel of record, Miller, Stratvert & Torgerson, P.A., moves pursuant to 70-2-13 N.M. Stat. Ann. (1978 Comp.) that the Division enter its Order dismissing the two applications for compulsory pooling filed by Burlington Resources Oil and Gas Company ("Burlington"). In support, Total states:

The Burlington compulsory pooling applications are improper and should be dismissed for two separate but equally compelling reasons:

I. TOTAL MINATOME CORPORATION HAS VOLUNTARILY COMMITTED ITS INTERESTS TO THE SUBJECT WELLS

II. BURLINGTON IMPROPERLY INVOKES THE PROCESS OF THE STATE TO ABOLISH REAL PROPERTY AND CONTRACT RIGHTS

I. The Voluntary Joinder Issue.

Section 70-2-18 N.M. Stat. Ann. (1978 Comp.) obliges the operator of a well to obtain the voluntary agreement pooling separately owned tracts or undivided interests within a spacing unit dedicated to the well. Such is the circumstance with respect to the voluntary commitment of Total's interest to both Marcotte No. 2 and Scott No. 24 wells proposed by Burlington. In its response to the Moore-Bard Group's Motion to Dismiss, Burlington represents, incorrectly, that "Moore/Bard/Minatome have thus far rejected all of Burlington's proposals." (Affidavit of James R.J. Strickler page 4.) In fact, the opposite it true: On April 22, 1997, Burlington directed its proposal letter and AFE for the Marcotte No. 2 to the working interest owners in Section 8 soliciting their participation in the 14,000 foot well to test the Pennsylvanian formation. On May 23, 1997, Total responded favorably to Burlington's proposal and executed Burlington's participation letter. Likewise, Total provided its consent to Burlington's Scott No. 24 well proposal on May 30, 1997. See Exhibits A and B, attached.

As it had done in numerous other well proposals, Total participated under the terms of that Operating Agreement dated November 27, 1951 between Brookhaven Oil Company and San Juan Production Company, predecessors in interest to Total and Burlington, respectively. Subsequently, Total was surprised to learn that Burlington regarded Total as a nonconsenting interest owner when it received Burlington's application for compulsory pooling. Total was further surprised when, having learned that the drilling of Marcotte No. 2 had commenced, its request for drilling reports were pointedly rejected by Burlington's land man for the reason that Burlington did not recognize Total as a participating partner.

We may expect Burlington to argue along the lines that Total's incorporation of the 1951 Operating Agreement was either a modification or a rejection of the Burlington proposal letter and AFE. If such an argument is made, then the issues of (1) Burlington's good faith efforts to obtain voluntary joinder and (2) Total's actual participation are legitimately placed before the Division for determination under the compulsory pooling statute. Accordingly, should the Division defer a ruling on this motion to dismiss for the present time, then discovery should be allowed to proceed in order to establish proof on, among other things, the course of dealing between the parties. This is no small point in the context of these pooling proceedings: As a general proposition, a course of dealing between two parties is relevant in determining and understanding those parties' expressions and conduct. § 55-1-205 N.M. Stat. Ann. (1978 Comp.). In fact, the course of dealing between the parties may establish both the existence and the terms of a contract. Terrel v. Duke City Lumber Co., Inc., 86 N.M. 405, 429, 524 P.2d 1021, 1045 (Ct. App. 1974) revd. on other grounds.

The Division's authority to pool the interests of those owners who have not voluntarily committed to a well under Section 70-2-17 may be invoked only on certain legislatively prescribed conditions. Among those, Section 70-2-17(C) requires an applicant to show, and the Division to find, inter-alia, that ". . . such owner or owners have not agreed to pool their interests. . ." Then and only then may the Division pool all or any part of such interests in the spacing unit. Burlington cannot make this statutorily required showing here. As explained above, the interests of Total were effectively committed to the Marcotte No. 2 well on May 23, 1997 and the Scott No. 24 on May 30, 1997. Consequently, it is clear that Burlington's Compulsory Pooling Application has another purpose: by invoking the administrative process

of the Division, Burlington seeks to have the Division rewrite the terms of the private lands Agreement between the parties by the issuance of its Compulsory Pooling Order. As such, Burlington's application is an abuse of the administrative process which cannot be countenanced by the Division.

II. Burlington's Efforts to Compel the Release of GLA 46. The November 27, 1951 Operating Agreement, referred to as the GLA 46, has been an instrument of record affecting the respective property interests of Burlington, Total and their predecessors in interest for decades. The terms of the GLA 46 have governed the operations and development of numerous wells in all of the predominant San Juan Basin formations. On information and belief, with the implementation of its scheme to allocate the risk of drilling for its deep formation prospects, Burlington regards the GLA 46 and other similar prevailing lease agreements in the area as "problem contracts" which it seeks to "cure" by the invocation of the Division's administrative processes, among other means. Given the inappropriate effort of Burlington to utilize the administrative process to rewrite private property agreements, the Division should either: (1) grant the Motions to Dismiss filed by Total and the Moore-Bard Group or, alternatively (2) grant the Moore-Bard Motion for Continuance to allow discovery to proceed, and (3) simultaneously deny Burlington's Motion to Quash the Total and Moore-Bard Subpoenas.

In the alternative, Burlington's efforts to effect the administrative modification of an operating agreement is not cognizable under Section 70-2-17(C) N.M. Stat. Ann. (1798 Comp.). Such an application is more properly made, noticed and advertised under a separate section: Section 70-2-17(E) N.M. Stat. Ann (1978 Comp.). Under that separate provision, an interest owner may apply to the Division to modify an operating agreement or development agreement

provided they can demonstrate that such a modification is necessary to prevent waste as prohibited by the Oil & Gas Act. Given this separate administrative remedy, Burlington's application to force pool the interest's of Total Minatome Corporation should be dismissed with prejudice.

III. NO PREJUDICE RESULTS FROM THE CONTINUANCE

Throughout, Burlington's strategy has been to defeat any opposition to its deep drilling program by accelerating the Division's processes where ever it can. As was the case with its "random" and selective notification procedure in Case No. 11745, Burlington has rushed through its APD's and other jurisdictional agency permits, sent its cursory form letters and scheduled a drilling rig before having even filed its pooling applications with the Division. Indeed, its pooling applications in both cases 11808 and 11809 were filed prior to the June 30, 1997 effective date for Order R-10815 establishing 640 acre spacing for deep formation drilling in the area. According to Burlington, any continuance in this case would provide the unjoined interest owners with an unfair opportunity "ride down" the Marcotte No. 2 well which it estimates will reach total depth in some six weeks from now. However, by Burlington's own admission, any delay in the administrative proceedings are of no practical consequence in its forge-ahead drilling program given Burlington's predictions for the prospective issuance of an Order in this case, the post-order 30-day election period and the subsequent opportunity to further contest actual well costs. Because of the extended time required to drill the well and, if successful, place the well on production, no prejudice to Burlington results and consequently there is no good reason these proceedings should not be continued to, among other things, allow discovery to proceed on relevant issues legitimately before the Division.

Respectfully submitted,

MILLER, STRATVERT & TORGERSON, P.A.

By J. Scott Hall
J. SCOTT HALL
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I HEREBY CERTIFY that a true and correct copy of the foregoing pleading has been telefaxed to:

David Catanach, NMOCD
W. Thomas Kellahin, Esq.
Jason Doughty, Esq.
Rand Carroll, Esq.; NMOCD

on this 8th day of July, 1996.

J. Scott Hall
J. SCOTT HALL