STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:	)	
APPLICATION OF BURLINGTON RESOURCES OIL AND GAS COMPANY FOR COMPULSORY POOLING, SAN JUAN COUNTY, NEW MEXICO	)	CASE NO. 12,276
APPLICATION OF BURLINGTON RESOURCES OIL AND GAS COMPANY FOR COMPULSORY POOLING, SAN JUAN COUNTY, NEW MEXICO	)	CASE NO. 12,277 (Consolidated)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

ORIGINAL

OIL CONSERVATION DIV
00 FEB 17 AM 9:03

BEFORE: MARK ASHLEY, Hearing Examiner

February 3rd, 2000

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Division, MARK ASHLEY, Hearing Examiner, on Thursday, February 3rd, 2000, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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I N D E X

February 3rd, 2000
Examiner Hearing
CASE NOS. 12,276 and 12,277 (Consolidated)

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E X H I B I T S

Applicant's	Identified	Admitted
Memorandum	14	-

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A P P E A R A N C E S

FOR THE DIVISION:

LYN S. HEBERT
Legal Counsel to the Division
Energy, Minerals and Natural Resources Department
2040 South Pacheco
Santa Fe, New Mexico 87505

FOR THE APPLICANT:

KELLAHIN & KELLAHIN
117 N. Guadalupe
P.O. Box 2265
Santa Fe, New Mexico 87504-2265
By: W. THOMAS KELLAHIN

FOR ENERGEN RESOURCES CORPORATION; WESTPORT OIL AND GAS COMPANY; BANK OF AMERICA, OIL AND GAS ASSETS DIVISION; CAROLYN NIELSEN SEDBERRY; C. FRED LUTHY, JR.; CYRENE L. INMAN; THE F.A. AND H.B. CRONICAN REVOCABLE TRUST; WILLIAM C. BRIGGS; HERBERT R. BRIGGS; MARCIA BERGER; and WWR ENTERPRISES:

MILLER, STRATVERT and TORGERSON, P.A.
150 Washington
Suite 300
Santa Fe, New Mexico 87501
By: J. SCOTT HALL

* * *

WHEREUPON, the following proceedings were had at 11:40 a.m.:

EXAMINER ASHLEY: I'm Mark Ashley, Division-appointed Examiner for Cases 12,276 and 12,277, which were continued from the January 20th, 2000, docket.

At this time the Division calls Case 12,276 and Case 12,277.

Call for appearances.

MR. KELLAHIN: Mr. Examiner, I'm Tom Kellahin of the Santa Fe law firm of Kellahin and Kellahin, appearing on behalf of Burlington Resources Oil and Gas Company in both of these cases.

EXAMINER ASHLEY: Additional appearances?

MR. HALL: Mr. Examiner, Scott Hall from the Miller Stratvert Torgerson law firm, Santa Fe. We appear on behalf of Energen Resources Corporation; Westport Oil and Gas Company; Bank of America, Oil and Gas Assets Division; and the remainder of the GLA-46 interest owners, who are identified in our pleadings.

EXAMINER ASHLEY: Any additional appearances?

This case was continued from the January 20th docket to give the Applicants time to file amended applications, as well as file briefs regarding this case.

And at this time a motion to strike has been filed by Mr. Hall on behalf of the GLA group. And so I

guess at this time we will hear testimony regarding this motion.

Mr. Hall?

MR. HALL: Mr. Examiner, it was my understanding where we left things on January 20th that during the course of that hearing, in view of the evidence that came in on Burlington's original application for compulsory pooling relief under Section 70-2-17, subsection C, that Burlington would seek leave to amend its application.

At that hearing we objected to that. There was no ruling from the Examiner at the time granting Burlington relief to so file an amended application.

Subsequently, on January 24th, amended applications were submitted. We accordingly filed our motion to strike, to clarify proceedings with respect to those amended applications.

As a basis for our motion to strike, and as we had stated at the hearing on January 20th, we objected to amended applications because they request additional relief we think is not supported by the existing record. The relief under subsection E of the pooling statute is, in fact, inconsistent with the relief that Burlington originally sought.

Burlington came forward with what it had called plain vanilla compulsory pooling cases, and as a premise to

that case, as it was noticed and pleaded by Burlington, Burlington argued that there was not voluntary agreement among the parties, and therefore compulsory pooling relief was appropriate.

At the hearing there was a sufficient amount of evidence to refute that premise. Indeed, even Burlington's own witnesses admitted on the record that the GLA-46 agreement continued to apply, that it continued to apply the acreage that is the subject of these pooling applications.

Based on the status of the record on that particular point, we have argued in our memorandum that the Division cannot accord compulsory pooling relief for the reason that there is an agreement in place that binds the parties.

In view of that, as I say, Burlington in midstream sought to amend its proceedings and request relief under subsection E of the pooling statute. That, in effect, places you, the Examiner, in the position of having to rewrite a private contractual agreement between the parties.

That constitutes surprise. We were not prepared to address that issue, we don't think the evidence is adequate on that issue. We would need to consider just exactly the nature of that relief. We need an opportunity

to meet the pleadings, see whether dispositive motions are required or see whether additional evidence and testimony are required on just what it is that Burlington wants the Division to do with a private contract.

That's why we filed the motion to strike. We think it's inappropriate for the Division to consider the amended applications at this time.

Burlington has said that the relief it seeks under subsection E is alternative relief. In fact, I think it is inconsistent relief. Even in the pleadings and procedures before the Division, the doctrine of estoppel applies.

You can't come in and present testimony and ask the Division to take the case under consideration and then, subsequent to that, ask for alternative relief, inconsistent relief. At some point, Burlington is obliged to make an election of its remedies, and it's obliged to put on pleadings, notice and evidence according to its elected remedy. That's what they haven't done.

So where does that put us here? I think that you -- I think Mr. Kellahin will agree that the evidence and testimony with respect to the compulsory pooling aspect of the case, under subsection C, is complete. You probably don't need any more testimony or evidence on that.

What I would suggest you do is that you take that

aspect of the case under advisement on the existing record, and dismiss or deny the application.

Now, that leaves us with the remaining issue, what do we do with the request to amend? I think you can do one of two things. You can deny the amended applications, which would require Mr. Kellahin to simply refile, renotify, and we set it for hearing sometime down the road.

We're willing to agree, because that's simply a procedural aspect at this point, that the case could proceed under subsection E. But we may need additional time. The record is inadequate at this point for us to proceed on subsection E relief. As I say, we want to address the issues as they are pleaded, see if subsection E is appropriate relief under these circumstances.

We also want an opportunity to meet the evidence, present our countervailing evidence, and indeed we may want the opportunity to do some discovery or at least to try to enter into negotiations with Burlington as to what discovery documents we may need to present an adequate case under subsection E.

I think you need to consider, when you look at the amended application, the original application, when you look at subsection C and you look at subsection E, really take a hard look at the language under subsection E and see

if it's appropriate. It asks, first of all, that the Division approve a plan for the development of a pool. Is that what Burlington has been after all this time? I don't know. They're going to have to plead that, put on evidence on that, as I believe.

Once they establish that and the Division approves a plan of development for a pool, then they're going to have to come back before you with proof asking that that pool-development plan be modified. What exactly do they want in that regard? It's not clear, based on the current status of the pleadings and on the current status of the record.

So given that, that concludes our comments.

EXAMINER ASHLEY: Just a second. So your motion to strike is to strike Burlington's amended application to seek relief under subsection E; is that correct?

MR. HALL: That's correct.

EXAMINER ASHLEY: Okay, that's all.

Mr. Kellahin?

MR. KELLAHIN: Thank you, Mr. Examiner.

For benefit of Mrs. Hebert, we may talk about some of the background information that she was not involved with in this case. Principally, we're talking about two portions of 70-2-17. The first one deals with subsection C where the circumstances are, the parties

haven't agreed to pool their interest.

Burlington's claim under that section is that the parties have refused to accept and pay for their share of current well costs.

The two cases involve three wells. One case involves two Mesaverde-Chacra dual completions. The cost for those wells back in 1998 was something over $427,000. The cost for the other well was a single Mesaverde well. Back in 1998, it cost more than $386,000.

The GLA-46 group has refused to accept Burlington's proposal to adopt those as fair and reasonable costs and to pay their share of those costs.

Under subsection C, it goes on in the second paragraph and says, All orders affecting pooling, et cetera, et cetera, will provide an opportunity for all parties to participate without unnecessary expense, received a just and fair and equitable share.

Burlington's position is that the 1951 GLA-46 agreements have some outdated constraints on the economic development of the Chacra and Mesaverde. The testimony on January 20th was, from Mr. Ralph Nelms, that Burlington could not and would not proceed to drill these wells under the financial and economic constraints of the old 1951 agreement.

That agreement has constraints which, if they

still apply, have some cost limitations, which said that Burlington could not charge more than $90,000 for a Mesaverde well, of which the GLA-46 group had 50-percent interest. And so there's a financial cap on the cost of the well.

After some 45 years, it's amazing to think that someone would argue that that is still a reasonable financial cap, particularly when the wells cost in excess of $386,000 and $427,000. But that's the position that the GLA-46 group has taken.

The other problem with that agreement is, there's a carrying provision. It says that the GLA-46 group doesn't have to pay their share of these costs. What happens is, Burlington recovers the money they spent on behalf of those interest owners, out of only 25 percent of that group's interest. They're very, very limiting in terms of what we do in today's world.

So when we got to the hearing on January 20th, after opening statements and before any evidence was presented, we are talking with Mr. Ashley and Mr. Carroll about the fact that this is not the first time this problem has been before the agency.

We came before the agency back in 1997 for the two 640 deep gas poolings of the Marcotte and the Scott well, in which the GLA-46 issue was raised. Mr. Hall

raised the contention that there is an agreement still in effect that precludes force pooling. We said we think it does not apply.

Mr. Carroll took the position in those orders issued by Mr. Catanach that the contract dispute and interpretation should be referred to the Court, and in the meantime the Division, in fact, would enter a force pooling order, because that pooling order would apply only in the event the contract did not apply. And that was the resolution.

So here we are two years later, back on the same problem with different wells, and we're discussing that issues.

Before the presentation of any evidence, then, Mr. Carroll wants discussion on subsection 17.E. 17.E is the flip side of the page, and it goes through more than Mr. Hall has told you. It says that, Upon hearing and after notice, the Division may subsequently modify any such plan to the extent necessary to prevent waste.

Our contention under this alternative remedy is that it is economically impossible to continue with the Mesaverde development plan agreed to back in 1951 with the cost limitations, and it will be wasteful if these wells are not drilled. And that was our evidence back on the 20th.

Subsection E is not limited simply to how the pool is to be developed. You can read it with care, and it talks about any other plan for the development or operation within the pool.

And that's what we're talking about. We're talking about an agreement 45 years ago to arrange a financial arrangement for the development of Mesaverde wells.

So at the beginning of this hearing, then, before any evidence is presented, Mr. Carroll is reminded of the fact that the Division has issued force pooling orders contrary to the written agreement of the parties. And he makes reference to a case, and I remind him that I believe it is a Burlington-vs.-Hartman case in the San Juan Basin.

At that point, Mr. Hall speaks up and corrects me as to the parties, and he has the case name and the order in front of him. He now claims that this is surprise. But back then, two weeks ago, he was prepared on that issue.

We then went forward with our proof, and we talked about the proof with regards to risk. My witness talked about the fact they could not economically drill this well, and our case is complete on both of these issues.

We presented our evidence on 17.E and 17.C back then. It was my understanding Mr. Carroll was continuing

the case to give me an opportunity to amend the application to plead this alternative remedy. That occurred on Thursday. I filed them on Monday, I've served all the parties, the pleading is before you.

It was my understanding and recollection that Mr. Hall was going to be given an opportunity to provide a memo in objection to doing that. I have prepared and I have with me now to distribute to you my memo on this issue.

The first one is how to handle procedurally what happens. My case is complete. I'm happy to have you take this case under advisement today and issue an order based upon both issues of relief, 17.C or 17.E. We think it's complete at this point.

Although GLA-46 group did not present evidence on that issue back on the 20th -- I think that was their choice -- they certainly could have come forward today and presented it. They've had two weeks to have my exhibits analyzed on that issue and to bring witnesses today. They've chosen not to do that.

My proposal is that you deny the motion to strike, that you take these cases under advisement, and that I'm prepared to give you two draft orders today that will grant the relief we've requested.

If you believe that is not what you want to do, an alternative choice is to deny the motion to strike,

accommodate Mr. Hall in his concern of surprise, and we'll put this back on your docket, Mr. Ashley, on March 2nd, and we can come back in here and Mr. Hall can have again an opportunity to present an engineering witness to show why it's reasonable to have a $90,000 cost limitation on a Mesaverde well applied to a well that now costs $300,000 to $400,000.

We would reserve the right to call rebuttal witnesses -- our proof is in on direct -- and that is a way procedurally for you to move forward.

If you choose Mr. Hall's option of simply denying the amended application, taking the case under advisement, I guess we can walk around the circle again. I can withdraw this application and refile it, and we can come back here in a few months, but I think that's a waste of all our time, talents and energy. We're at the point where we ought to package this case and have a complete resolution of it so the parties can go forward.

It's still up to you to decide whether you want to engage in this contract discussion. You may decide to do what Mr. Catanach and Mr. Carroll decided to do back two years ago, and that is enter a force pooling order and defer the contract dispute to litigation in District Court.

You may choose to do what is the alternative remedy, and that is to do what the Division did under Mr.

Stogner's order, and that was to set aside contract agreements and issue a pooling order as he did in the Meridian Oil Company Hartman case.

You can look for comfort in the memo. I have cited a number cases for you. There's a very interesting New Mexico Supreme Court case, *Sims vs. Mechem*. In fact, in that very case the court goes specifically at the threshold issue, which was entering force pooling orders that were contrary to the specific written agreement of the parties. And they did that because in their judgment it would prevent waste.

So not only do you have court cases telling you you can do this, you have by your own action already done this.

So we would ask that you deny the motion to strike, you allow us to formally amend the pleadings, and that you make a decision on how you want to handle the evidence. If you close out the evidence today, I'm pleased with that, because we've completed our presentation. If you want to give Mr. Hall and additional opportunity to present evidence, we will be back here on that particular day and we'll discuss the additional evidence.

So with your permission, I will give you my memorandum, Mr. Ashley.

EXAMINER ASHLEY: Okay.

Mr. Hall?

MR. HALL: Let's be perfectly clear about one point. No one, including you the Examiner, had notice before January 20th that Burlington would be seeking relief under subsection E, no one. It's not until it came up to hearing that we even had an inkling that that would be the case.

We were aware of the Hartman-Meridian application years before, and the reason we cited it was not for what Mr. Kellahin says, to amend contracts, because that's not what the Division did in that case. We cited it for the proposition that where parties do have a voluntary agreement in place, then compulsory pooling relief is not available to them.

So that was the posture of the case on January 20th, and that's what we were prepared to meet.

Now, I'm still confused what it is that Burlington wants in this case. They still seem to be asking for both types of relief. And again, they have an obligation as a party, specifically after having presented and rested on their evidence, to elect their remedies. It's not clear to me that they've done that.

I think we need to clean up this proceeding, cleanup the pleadings, and I think one way of doing that is having Burlington agree that it will dismiss its case under

subsection C. So I'd ask Mr. Kellahin if he would agree to do that.

MR. KELLAHIN: I wouldn't agree to that. That's not our case and not our position, Mr. Ashley. We can have alternative remedies before this agency, and the first one is that the contract provisions are to be deferred to the court, as Mr. Carroll did two years ago, and you enter a pooling order.

If you believe that that agreement still applies, that's your decision on that issue. However, if you do so, then we contend that you must also consider subsection 17.E, and you don't bifurcate this thing over the niceties of having an alternative remedy. They're not inconsistent, they can be consecutive, and you can resolve that.

And so if you decide to use your authority to modify these agreements, then the record is before you giving you evidence to do that, where you can modify the original plan of these parties as to the costs of development set forth in this 45-year-old agreement. And if you don't, waste occurs.

So I'm not going to agree to that, absolutely not.

MR. HALL: I don't know what you're to do as a Hearing Examiner. You're getting two different opposing requests for relief from the same party. What do you do?

It might be helpful to you if you were to ask the parties to brief the estoppel and election issues for you. We'll be pleased to do that.

MR. KELLAHIN: We can brief this till the cows come home, Mr. Ashley. The point is, you know enough about this already to make a decision. And all you have to do is, if Mr. Hall thinks he's surprised by this issue, you give him more time, and we'll come back here in a month and do some more. That's a choice for you.

But to suggest that we're supposed to dismiss my amended application and I'm supposed to voluntarily dismiss my pooling case, that invites me tomorrow to file it and get back on your March 2nd docket, and we'll be here anyway. And if you want to hear this again from the beginning, I'll be here. If you want to hear it from now forward, we can do that too.

So dismissing this and refiling it in two days gets us to the same place.

And I've briefed all I want to brief. If he wants to throw something else in there, that's up to him.

MR. HALL: Well, I'll brief anything, you know me.

What I'm suggesting you do is, according to Burlington's original suggestion, take the subsection C case under advisement, enter an order dismissing -- denying

that portion of the application, simply because it is inconsistent with their other relief that they apparently elected to pursue.

That would obviate the need for any further evidence on subsection C. We could go forward, if that's what Burlington wants, on their subsection E case. We could have an opportunity to come forward with witnesses and additional arguments at your next available docket setting.

EXAMINER ASHLEY: So your proposal is to deny the amended application?

MR. HALL: I'm proposing that you dismiss the original application, because it is inconsistent with the amended application.

And I think based on the evidence in the record already, Burlington's own witnesses admit -- they admit that GLA-46 applies under the Division precedent we cited to you in our memorandum.

I don't think you have any choice to dismiss the subsection C application. They've failed to prove that there's no agreement.

MS. HEBERT: Mr. Kellahin, by amending your application, did the amended application essentially negate your original application?

MR. KELLAHIN: No, ma'am. Here it is.

MS. HEBERT: So your position is that you have two applications, but you styled one an amended application?

MR. KELLAHIN: Our position is, the first amended application incorporates the original application's claim of relief under 17.C and added a second claim for relief.

MS. HEBERT: So that there is just one application at this point?

MR. KELLAHIN: Yes, ma'am. If you grant my motion to amend my application, you're dealing with the amended application, which has both claims in it.

(Off the record)

EXAMINER ASHLEY: My position in this, or the ruling of the Division, will be that we will grant your motion to strike, relief under 17.E, and we will take the case under advisement pursuant to the original application, which sought compulsory pooling under subsection C.

That concludes today's hearing.

MR. HALL: Nothing further.

EXAMINER ASHLEY: And these cases, Case 12,276 and Case 12,277, will be taken under advisement.

MR. KELLAHIN: Do you want proposed orders today, Mr. Ashley?

EXAMINER ASHLEY: Are you prepared to submit proposed orders today?

MR. KELLAHIN: Yes, sir.

MR. HALL: Yes.

EXAMINER ASHLEY: Yes, proposed orders today would be nice.

(Thereupon, these proceedings were concluded at 12:10 p.m.)

* * *

I do hereby certify that the foregoing is a complete record of the proceedings in the Examiner hearing of Case No. 12276, 12277 heard by me on 2-3 2000

, Examiner
Oil Conservation Division

CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Division was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL February 9th, 2000.

STEVEN T. BRENNER
CCR No. 7

My commission expires: October 14, 2002

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION DIVISION
FOR THE PURPOSE OF CONSIDERING:

CASE NO. 12276
CASE NO. 12277

IN THE MATTER OF THE APPLICATIONS
OF BURLINGTON RESOURCES OIL & GAS
COMPANY FOR COMPULSORY POOLING,
SAN JUAN COUNTY, NEW MEXICO

BURLINGTON RESOURCES OIL & GAS COMPANY'S MEMORANDUM IN SUPPORT OF ITS FIRST AMENDED APPLICATION

Comes now BURLINGTON RESOURCES OIL & GAS COMPANY ("Burlington") by its attorneys, Kellahin & Kellahin, and requests that the New Mexico Oil Conservation Division ("NMOCD") allow it to amend its compulsory pooling applications, over the objection of Energen Resources Corporation and others (collectively the "GLA-46 Group"), to allege that in the event the Division determines that the cost limitations and carrying provisions of a November 27, 1951 farmout/operating agreement (the GLA-46 Agreement) still applies to these proposed wells, then the provisions of Section 70-2-17.E NMSA (1978) apply and Division must modify the GLA-46 Agreement to the extent necessary to prevent waste in accordance with this statutory provision of the New Mexico Oil & Gas Act and in support states:

SUMMARY OF ESSENTIAL FACTS

Division Case 12276:

(1) In Case 12276, Burlington Resources Oil & Gas Company, in accordance with Section 70-2-17.C NMSA (1978), or in the alternative in accordance with Section 70-2-17.E NMSA (1978), seeks an order pooling all uncommitted owners of mineral interests in the Mesaverde formation and the Chacra formation underlying the following described acreage within Section 36, T27N, R8W, NMPM, San Juan County, New Mexico, in the following manner:

(i) a 320-acre gas spacing unit consisting of the W/2 of this section for gas production from the Blanco-Mesaverde Gas Pool to be dedicated to the proposed Brookhaven Com Well No. 8 to be located in the NW/4 and to the Brookhaven Com Well No. 8A to be located in the SW/4 of this section;

(ii) for a standard 160-acre gas spacing unit consisting of the NW/4 of this section for gas production from the Otero-Chacra Gas Pool to be dedicated to the Brookhaven Com Well No. 8; and

(iii) for a standard 160-acre gas spacing unit consisting of the SW/4 of this section for gas production from the Otero-Chacra Gas Pool to be dedicated to the Brookhaven Com Well No. 8A.

(2) On July 30, 1998, Burlington proposed to the other working interest owners in this spacing unit the drilling of the Brookhaven Com Well No. 8 as a Mesaverde/Chacra dual completion at an estimated well cost of $427,630.00 to be governed by the parties signing a new joint operating agreement instead of adopting the cost limitations and carrying provisions of the GLA-46 Agreement.

(3) On September 15, 1999, Burlington proposed to the other working interest owners in this spacing unit the drilling of a second well in this same spacing unit (the "Brookhaven Com Well No. 8A" and identified in Burlington's proposal as the Brookhaven Com Well No. 9.) as a Mesaverde/Chacra dual completion at an estimated well cost of $427,630.00 to be governed by the parties signing a new joint operating agreement instead of adopting the GLA-46 Agreement.

(4) The GLA-46 Group admits that Burlington's AFE estimate of $427,630.00 for each of these wells represents a fair and reasonable estimate of the costs of such wells as of July 30, 1998.

In Case 12277:

(5) In Case 12277, Burlington Resources Oil & Gas Company, in accordance with Section 70-2-17.C NMSA (1978), or in the alternative in accordance with Section 70-2-17.E NMSA (1978), seeks an order pooling all uncommitted owners of mineral interests in the Mesaverde formation underlying the E/2 of Section 16, T31N, R11W, NMPM, San Juan County, New Mexico, for a 320-acre gas spacing unit consisting of this half section for gas production from the Blanco-Mesaverde Gas Pool to be dedicated to the proposed Brookhaven Com B Well No. 3B to be located within the NE/4SE/4 of this section.

(6) On December 14, 1998 and again on September 15, 1999, Burlington proposed to the other working interest owners in this spacing unit the drilling of the Brookhaven Com B Well No. 3B as a Mesaverde formation completion at an estimated well cost of $386,488.00 to be governed by the parties signing a new joint operating agreement instead of adopting the cost limitations and carrying provisions of the GLA-46 Agreement.

(7) The GLA-46 Group admits that Burlington's AFE estimate of $386,488.00 for this well represents a fair and reasonable estimate of the costs as of October 22, 1998.

GLA-46 GROUP'S POSITION

(8) The GLA-46 Group contends that the Division cannot enter a compulsory pooling order for these wells because on November 27, 1951, the original parties contracted for a well development plan which provided for certain cost limitations and carrying provisions which are still in effect.

(9) The GLA-46 Group contends it can adopt and participate in the Brookhaven Wells under the terms of the GLA-46 Agreement which are very favorable to GLA-46 Group and, if adopted, include the right for the GLA-46 Group to be a "carried interest" so that as to the GLA-46 acreage within a spacing unit:

(a) Burlington pays for the total cost of the well, including casing;

(b) then from 25% of the production, Burlington recoups 50% of the costs of a Mesaverde well or a Chacra well (excluding casing);

(c) the total costs (excluding casing) of a Mesaverde well cannot exceed $90,000.00 of which Brookhaven's share is not more than $45,000.00 and cannot exceed $28,500.00 for a Chacra well of which Brookhaven's share is not more than $14,275.00;

(d) the GLA-46 Group keeps its share of 25% of the production until payout of the recoverable costs and then keeps its share of 50% of the production.

BURLINGTON'S POSITION

(10) If the NMOCD believes that the cost limitations and carrying provisions of the GLA-46 Agreement still apply, the Burlington contends that the NMOCD has the authority to issue compulsory pooling orders in these cases thereby modifying the original parties' plan for the costs of the development set forth in the 1951 GLA-46 Agreement so that these wells can be drilled because:

(a) these wells are necessary in order to recover Mesaverde and Chacra reserves which will not otherwise be recovered;

(b) the cost limitations and the carrying provision of GLA-46 Agreement preclude the economic drilling of these wells;

(c) waste will occur in the event the Division fails to modify the GLA-46 Agreement because it is uneconomic for Burlington to drill these marginal wells under the economic limitations imposed by the GLA-46 Agreement and the reserves which could have been produced by these wells will be left unrecovered in the reservoirs;

(d) the provisions of Section 70-2-17.E NMSA (1978) apply and Division should modify the GLA-46 Agreement to the extent necessary to prevent waste in accordance with this statutory provision of the New Mexico Oil & Gas Act; and

(e) Pursuant to Section 70-2-17.E NMSA (1978) and in order to obtain its just and equitable share of production from these wells and these spacing units, the Division should pool the described spacing units and described mineral interests involved.

(11) In support of its claim Burlington introduced evidence which demonstrates that:

(a) these wells are necessary in order to recover Mesaverde and Chacra reserves which will not otherwise be recovered;

(b) both the Mesaverde and Chacra wells will be marginal wells;

(c) if Burlington is not subject to the cost limitations and carrying provisions of the GLA-46 Agreement, then Burlington will spend $247,000 to realize an expected profit of $185,000 on the Brookhaven 8 well; will spend $294,000 to realize an expected profit of $232,000 on the Brookhaven 8A well; and will spend $196,000 to realize an expected profit of $158,000 on the Brookhaven Com B Well No 3B;

(d) however, if Burlington is subject to the cost limitations and carrying provisions of the GLA-46 Agreement, then Burlington will spend $427,000 but realize a profit of only $93,000 on the Brookhaven 8 well; will spend $427,000 but realize a profit of only $163,000 on the Brookhaven 8A well; and will spend $386,000 but realize a profit of only $53,000 on the Brookhaven Com B Well No. 3B;

(e) if Burlington is subject to the cost limitations and carrying provisions of the GLA-46 Agreement, then Burlington will recover its investment in 3.26 years on the Brookhaven 8 well and in 2.27 years on the Brookhaven 8-A well;

(f) correspondingly, if the GLA-46 Group enjoys the cost limitations and carrying provisions of the GLA-46 Agreement then for no investment is expected to enjoy a profit of $236,000 on the Brookhaven 8 well; a profit of $166,000 on the Brookhaven 8A well; and a profit of $259,000 on the Brookhaven Com B Well No. 3B;

(g) however, if the GLA-46 Group's interest is not subject to the cost limitations and carrying provisions of the GLA-46 Agreement then the GLA-46 Group will invest $180,000 and enjoy an estimated profit of $144,000 on the Brookhaven 8

well; invest $133,000 to enjoy an estimated profit of $100,000 on the Brookhaven 8A well; and invest $190,000 to enjoy an estimated profit of $153,000 on the Brookhaven Com B Well No. 3B;

(h) waste will occur because it is uneconomic for Burlington to drill these marginal wells under the economic limitations imposed by the GLA-46 Agreement and the reserves which could have been produced by these wells will be left unrecovered in the reservoirs.

BURLINGTON'S CITATION OF AUTHORITY

Burlington's position is supported by decisions of the New Mexico Supreme Court, the New Mexico Oil & Gas Act, by a prior decision of the Division, and by the GLA-46 Agreement.

Court cases:

In 1963, the New Mexico Supreme Court in Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (NM 1963) considered the compulsory pooling powers of the Commission in a case in which the appellant specifically challenged the Commission's authority to enter a pooling order which "violated" the written agreement of the parties. Although reversed on other grounds, the Court upheld the Commission's action on this point and ruled that any agreement between owners may be modified by the Commission:

> "Unquestionably the commission is authorized to require pooling of property when such pooling has not been agreed upon by the parties (citing to what is now 70-2-17.C NMSA 1978), and it is clear that the pooling of the entire west half of Section 25 had not been agreed upon. It is also clear from sub-section (e) of the same section (citing to what is now 70-2-17.E) that any agreement between owners and lease-holders may be modified by the commission. [emphasis added] But the authority of the commission to pool property or to modify existing agreements relating to production within a pool under either of these sub-sections must be predicted on the prevention of waste."

In 1975, the New Mexico Supreme Court, again, considered the compulsory pooling authority of the Commission and in Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (NM 1975) held that not only did the Commission have compulsory pooling authority to pool separately owned tracts within a spacing or proration unit, it had the power to pool separately owned tracts within an oversize non-standard spacing unit. In doing so, the Court approved of the Commission's decision to compulsory pool a 409-acre spacing unit and a 407-acre spacing unit each of which had a completed well and could have been dedicated to standard 320-acre spacing units for the Washington Ranch-Morrow Gas Pool. (See OCC Order Nos. R-4353 and R-4354). The point is that when necessary to prevent waste, the Division can and did modify the agreement of sharing revenues within a spacing unit, required the inclusion of additional acreage and thereby dilute the royalty interest of Rutter & Wilbanks over its objection.

Division cases:

Similarly, the Division has previously modified an existing operating agreement when its terms precluded the drilling of a well which the Division considered necessary in order to prevent waste. On January 11, 1996, in Case 11434, the Division held a hearing on the application of Meridian Oil Company for a compulsory pooling order for a Mesaverde infill well against Doyle Hartman and Four Star Oil & Gas Company. In this case, both Four Star and Hartman contended the Division did not have the authority to authorize the compulsory pooling of a Mesaverde infill well because the original parties in the spacing unit had signed a 1953 operating agreement which contained a plan for the spacing of but one single Mesaverde well within a 320-acre spacing unit. On February 22, 1996, the Division entered Order R-10545 and decided that the Division, in accordance with Section 70-2-17.E NMSA (1978), had the authority and would exercise that authority to modify this 1953 operating agreement to the extent necessary to prevent waste and to issue a compulsory pooling order so that the infill well could be drilled.

A further review of NMOCD compulsory pooling orders, shows that on October 24, 1990, the NMOCD issued Order R-9332 which granted an application by Doyle Hartman for compulsory pooling in which he was allowed to pool his undeveloped acreage in the Eumont Gas Pool into an existing gas spacing unit already operated by Chevron and containing a existing well. Hartman was further authorized to drill a second "infill well" over Chevron's objection. The point is that when necessary to prevent waste, the Division can and did modify the existing voluntary agreement of Chevron for the operations of its existing spacing unit and its well and required the inclusion of additional acreage and additional wells over the objection of Chevron.

The GLA-46 Agreement:

In the 1951 GLA-46 Agreement, the original parties specifically agreed that their agreement would be modified to be consistent with the orders and rules of the NMOCD when they provided at page 11:

> "Unless disapproved by final administrative action by either the Federal or State government, and **until such disapproval**, this agreement shall be binding upon the parties. **In the event of any decision disapproving of this agreement or of any provision or any part thereof,** the parties agree that the intent of this contract shall prevail so that neither party shall be denied the intended rights described herein, and to that end, **they will use their best efforts to agree on the necessary modifications hereof to cure the causes for disapproval**"[emphasis added]

CONCLUSION

Conservation laws and the rules, regulations and orders promulgated thereunder have the effect of modifying the provisions of existing leases and other contracts and agreements. Without that effect, then parties could make agreements which are contrary to or inconsistent with what the NMOCD determines are appropriate rules for development of a pool, including the cost of wells, economic waste caused by drilling too many or to few wells, well locations, well density, spacing unit sizes, production allowables, and gas-oil ratios, etc.

The statutory and administrative compulsory pooling rules and orders are a proper and necessary exercise of the police powers of the State of New Mexico. The NMOCD has jurisdiction to interpret, clarify, amend and supplement is own orders and to resolve any challenges to the public issue of conservation of oil and gas.

The NMOCD is not being asked to resolve the "private rights" of the parties created under the 1951 GLA-46 Agreement. As the Division has already said in Order R-10878 when it previously compulsory pooled the GLA-46 Group's interest: "it is the Division's position that the interpretation of the GLA-46 Agreement should be deferred to the courts."

However, there is no dispute about the fact that the 1951 GLA-46 Agreement precludes the drilling of a necessary well. Burlington can recover only $45,000 from the GLA-46 Group for Mesaverde/Chacra wells which will cost more than $427,000 and for a Mesaverde well which will cost more than $386,000. and in doing so can only be paid out of 25% of the GLA-46 Group's share of that production. If the NMOCD believes that the cost limitations and carrying provisions of the GLA-46 Agreement still apply, then it is simply not possible in the year 2000 to drill new Mesaverde and Chacra wells under the economic constraints of 1973.

The Division has the authority and the responsibility to issue a compulsory pooling order in accordance with Section 70-2-17.C or Section 70-2-17.E NMSA (1978) in these cases so that these wells can be drilled under appropriate terms and conditions which will prevent waste and protect correlative rights.

RESPECTFULLY SUBMITTED:

W. THOMAS KELLAHIN
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87501
(505) 982-4285
ATTORNEYS FOR APPLICANT