

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)	CASE NO. 12,276
AND GAS COMPANY FOR COMPULSORY POOLING,)	
SAN JUAN COUNTY, NEW MEXICO)	
)	
APPLICATION OF BURLINGTON RESOURCES OIL)	CASE NO. 12,277
AND GAS COMPANY FOR COMPULSORY POOLING,)	
SAN JUAN COUNTY, NEW MEXICO)	(Consolidated)
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: MARK ASHLEY, Hearing Examiner

February 3rd, 2000

Santa Fe, New Mexico

COFFEE 17 AM 9:04
OIL CONSERVATION DIV

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.

* * *

STEVEN T. BRENNER, CCR
(505) 989-9317

I N D E X

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

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A P P E A R A N C E S

FOR THE DIVISION:

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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

* * *

1 WHEREUPON, the following proceedings were had at
2 11:40 a.m.:

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

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

8 Call for appearances.

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

13 EXAMINER ASHLEY: Additional appearances?

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

20 EXAMINER ASHLEY: Any additional appearances?

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

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

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

3 Mr. Hall?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 What I would suggest you do is that you take that

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

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

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

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

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

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

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

13 So given that, that concludes our comments.

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

17 MR. HALL: That's correct.

18 EXAMINER ASHLEY: Okay, that's all.

19 Mr. Kellahin?

20 MR. KELLAHIN: Thank you, Mr. Examiner.

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

1 haven't agreed to pool their interest.

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

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

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

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

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

25 That agreement has constraints which, if they

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

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

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

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

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

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

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

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

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

20 Our contention under this alternative remedy is
21 that it is economically impossible to continue with the
22 Mesaverde development plan agreed to back in 1951 with the
23 cost limitations, and it will be wasteful if these wells
24 are not drilled. And that was our evidence back on the
25 20th.

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

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

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

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

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

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

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

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

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

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

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

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

1 accommodate Mr. Hall in his concern of surprise, and we'll
2 put this back on your docket, Mr. Ashley, on March 2nd, and
3 we can come back in here and Mr. Hall can have again an
4 opportunity to present an engineering witness to show why
5 it's reasonable to have a \$90,000 cost limitation on a
6 Mesaverde well applied to a well that now costs \$300,000 to
7 \$400,000.

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

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

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

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

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

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

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

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

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

25 EXAMINER ASHLEY: Okay.

1 Mr. Hall?

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

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

15 So that was the posture of the case on January
16 20th, and that's what we were prepared to meet.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 (Off the record)

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

18 That concludes today's hearing.

19 MR. HALL: Nothing further.

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

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

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

1 MR. KELLAHIN: Yes, sir.

2 MR. HALL: Yes.

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

5 (Thereupon, these proceedings were concluded at
6 12:10 p.m.)

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I do hereby certify that the foregoing is
a complete record of the proceedings in
the Examiner hearing of Case No. 1226, 1227
heard by me on 2-3 X 2000
Mark Ashley, Examiner
Off Conservation Division

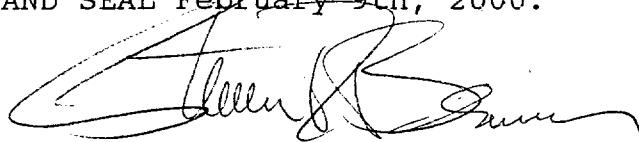
CERTIFICATE OF REPORTER

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