STATE OF NEW MEXICO
COUNTY OF SAN JUAN
IN THE DISTRICT COURT

FILED
DISTRICT COURT
SAN JUAN COUNTY
N.M

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TIMOTH B JOHNSON ,
Plaintiff,

vs.

Case No: D-1116-CV-0009700572

BURLINGTON RESOURCES OIL & GAS
Defendant,

NOTICE OF COST BILL

Notice is hereby given that costs have been taxed in the above named cause in the amount of $1924.01.

Any further action will be as prescribed by law.

Gregory T. Ireland
DISTRICT COURT CLERK

By: Patricia Chavez
Deputy

cc: JASON E. DOUGHTY
MARILYN S. HEBERT
W.THOMAS KELLAHIN
JOHN BEMIS

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et. al.,	)	
Appellants,	)	
vs.	)	**Cause No. CV-97-572-3**
Burlington Resources Oil & Gas Company, a corporation, and The New Mexico Oil Conservation Commission,	)	
Appellees.	)	

TAXATION OF COSTS

I, Gregory T. Ireland, Clerk of the District Court of the Eleventh Judicial District of the State of New Mexico, County of San Juan, do hereby certify that costs in the amount of $1,924.01are taxed in favor of the appellants Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., and against the appellees, Burlington Resources Oil and Gas Company and the New Mexico Oil Conservation Commission in accordance with the Bill of Costs heretofore filed.

Gregory T. Ireland
CLERK OF THE DISTRICT COURT

(SEAL)

By: _____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Taxation of costs was mailed to counsel for appellants and appellees on this 17th day of February, 1998.

Gregory T. Ireland
CLERK OF THE DISTRICT COURT

(SEAL)

By: Nicole Mahan

District Court Clerk
11th Judicial District
103 South Oliver
Aztec, New Mexico 87410

MARILYN S. HEBERT
NEW MEXICO OIL CONVERVATION COMMISSION
2040 SOUTH PACHECO
SANTA FE, NEW MEXICO 87505

87505-5472 57

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

TIMOTHY B. JOHNSON, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et al.

Plaintiffs,

vs. **No. CV 97-572-3**

BURLINGTON RESOURCES OIL & GAS COMPANY, a corporation, and the NEW MEXICO OIL CONSERVATION COMMISSION,

Defendants.

OIL CONSERVATION COMMISSION'S EXCEPTION TO APPELLANTS' COST BILL

COMES NOW Defendant New Mexico Oil Conservation Commission ("Commission) and asks the Court to disallow certain costs from the Defendants' Cost Bill and as grounds therefore states:

1. Rule 1-074 NMRA 1998 requires the Commission to file the record on appeal within thirty days of the filing of the notice of appeal in District Court.

2. The record on appeal to be filed with the District Court by the Commission includes the following: copies of all papers and pleadings filed in the Commission's proceedings; copies of exhibits; and the transcript of the Commission's proceedings.

3. The Plaintiffs took it upon themselves to copy and file the pleadings and papers, the transcripts and the exhibits with the District Court at the time they filed their Petition, the first

pleading in this case, on July 18, 1998.

4. The Commission should not have to pay for the cost of the copies of the papers and pleadings, the transcripts and the exhibits the Plaintiffs voluntarily prepared and filed with the District Court. The Commission would have filed these copies with the District Court, pursuant to Rule 1-074, had the Commission been given the opportunity to do so.

5. The copying cost of $1664.06 for the record on appeal should be disallowed from the Cost Bill.

Respectfully submitted,

Marilyn S. Hebert
Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that copies of the Oil Conservation Commission's Exception to Appellants' Cost Bill was mailed to all counsel of record on the 12th day of February, 1998.

Marilyn S. Hebert

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et. al.,	)	
Appellants,	)	
vs.	)	**Cause No. CV-97-572-3**
Burlington Resources Oil & Gas Company, a corporation, and The New Mexico Oil Conservation Commission,	)	
Appellees.	)	

APPELLANTS' COST BILL

COME NOW appellants, Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "appellants"), having prevailed in this matter and having been granted costs as allowed by law pursuant to the Opinion and Final Judgment entered herein and in accordance with Rule 1-054(E) NMRA1997, present the following as their costs bill to be taxed against appellees Burlington Resources Oil and Gas Company and the New Mexico Oil Conservation Commission. The undersigned hereby certifies that the costs listed below were actually and necessarily incurred by appellants during the course of this case.

Item	Amount Paid	Amount Claimed
District Court Filing Fee	$91.20	$91.20

Service of Process Fee	$55	$55
Trial Exhibits	$113.75	$113.75
In-office Photocopies, including copying the complete Oil Conservation Commission record for the Court, the appellants' counsel and appellees' counsel. (9,038 copies at $.15/page)	$1,401.30	$1,401.30
Out of Office Photocopies including color photocopies and copies of large maps as necessary for copying the complete Oil Conservation Commission record for the Court, the appellants' counsel and appellees' counsel.	$262.76	$262.76
Total		**$1,924.01**

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

Jason E. Doughty, being first duly sworn on oath, deposes and states that he is one of the attorneys for appellants Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., and that the costs claimed herein as taxable costs on behalf of appellants were reasonably and necessarily incurred by appellants.

Jason E. Doughty
JASON E. DOUGHTY

SUBSCRIBED AND SWORN to before me on this 10th day of February, 1998.

Sandra Dalley
NOTARY PUBLIC

My Commission Expires:

11-5-98

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By _____
J.E. GALLEGOS
JASON E. DOUGHTY

460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Appellants' Cost Bill to be served on this 10th day of February, 1998 to the following counsel of record:

VIA FAX AND U.S. MAIL
Marilyn S. Hebert
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

VIA FAX AND U.S. MAIL
W. Thomas Kellahin
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504

VIA FAX AND U.S. MAIL
John Bemis, Esq.
Burlington Resources
P.O. Box 4289
Farmington, New Mexico 87499

_____
Jason E. Doughty

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

TIMOTHY B. JOHNSON, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et al.,

Plaintiffs,

vs. **No. CV 97-572-3**

BURLINGTON RESOURCES OIL & GAS COMPANY, a corporation, and the NEW MEXICO OIL CONSERVATION COMMISSION,

Defendants.

MOTION FOR RECONSIDERATION OF THE NEW MEXICO OIL CONSERVATION COMMISSION

The New Mexico Oil Conservation Commission ("Commission"), by and through its undersigned attorney, moves the Court to reconsider its Opinion and Final Judgment ("Judgment") in this matter pursuant to Rule 1-074(R) NMRA 1998 and as grounds therefore states:

1. The Judgment, in it first paragraph, states:

> This case involves an appeal of the New Mexico Oil Conservation Commission ("Commission") Order No. R-10815 entered June 5, 1997 which, inter alia, **amended** the New Mexico Oil Conservation Division ("Division") **Rules**

104.B(2)(a) and 104.C(3)(a) and **adopted** new **rules** 104.B(2)(b) and 104.C(3)(b), by changing the spacing unit for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico from 160 to 640 acres.

(emphasis added.)

2. Paragraph 7 of the Judgment finds that the Commission provided notice by publication of the March 19, 1997 public hearing on the rulemaking proceedings regarding the Oil Conservation Division ("OCD") Rule 104.

3. Paragraph 9 of the Judgment finds that on June 5, 1997, the Commission entered its Order No. R-10815 that amended OCD Rule 104.

4. Paragraph 12 of the Judgment holds that *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991) is controlling in this case.

5. Paragraph 13 of the Judgment holds that the Commission's Order No. R-10815 that amended OCD Rule 104 "...is void as to only the appellants and the 640-acre spacing provided for therein and in the amended New Mexico Oil Conservation Division Rule 104 is of no force and effect as to their property interests in the San Juan Basin."

6. The Commission order at issue in *Uhden* involved a special pool rule of limited applicability; it did not involve a statewide rule of general applicability. In fact, the Supreme Court in *Uhden* made the distinction between a special pool rule of limited applicability that pertains to a particular reservoir and the statewide rules of general applicability citing specifically OCD Rule 104 as such a statewide rule. *See Uhden,* 112 N.M. at 530.

7. Following the reasoning in *Uhden*, the Commission amended a statewide rule of general applicability on June 5, 1997 when it amended OCD Rule 104, and the only notice

required by law for such rulemaking is notice by publication, not notice by personal service. *See* NMSA 1978, § 10-15-1(D), NMSA 1978, § 70-2-23, and OCD Rule 1204.

8. The validity of the Commission's amendment to OCD Rule 104 depends on whether the notice provided by the Commission was legally sufficient; the amendment's effectiveness is not dependent on actions taken or not taken by Defendant Burlington.

9. If the amendments to a statewide rule are effective, they are applicable to everyone and cannot be void as to the Plaintiffs.

Wherefore, the Commission requests the Court rescind its Judgment filed January 27, 1998, and enter an order affirming the Commission's amendments to OCD Rule 104 without exceptions.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505)827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the Motion for Reconsideration was mailed to all counsel of record on the February 2, 1998.

Marilyn S. Hebert

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et. al.,	
Plaintiffs,	
vs.	**Cause No. CV-97-572-3**
Burlington Resources Oil & Gas Company, a corporation, and The New Mexico Oil Conservation Commission,	
Defendants.	

OPINION AND FINAL JUDGMENT

This case involves an appeal of New Mexico Oil Conservation Commission ("Commission") Order No. R-10815 entered June 5, 1997 which, inter alia, amended the New Mexico Oil Conservation Division ("Division") Rules 104.B(2)(a) and 104.C(3)(a) and adopted new rules 104.B(2)(b) and 104.C(3)(b), by changing the spacing unit for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico from 160 to 640 acres. After being fully briefed and the record from the Commission assembled and filed, the case came before the Court for oral argument on December 17, 1997 with the appellants appearing by their attorney, J.E. Gallegos, the appellee Commission appearing by its attorney Marilyn S. Hebert and appellee Burlington Resources Oil and Gas Company ("Burlington") appearing by its attorney W. Thomas Kellahin. The Court has considered the pleadings, briefs and legal authorities and received arguments of counsel and is fully advised. The Court concludes as follows and IT IS SO ORDERED.

A. THE PARTIES

1. Each of the appellants are the holders of operating rights interests in, inter alia, formations below the base of the Dakota formation located in Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico ("Section 9") under United States Oil and Gas Lease SF 078389 and SF 078389-A covering 2,480 acres, more or less. The appellants are the owners of over 80% of the working interest in the Pennsylvanian formation in the east half and southwest quarter of Section 9. The appellants are listed on the Exhibit "A" attached hereto and incorporated herein.

2. Appellee Burlington is a prominent operator of wells in the San Juan Basin and is also a working interest owner in, inter alia, formations below the base of the Dakota formation located in Section 9. Burlington is the applicant in Commission Case 11745 which resulted in the challenged order.

3. Appellee Commission is an agency of the State of New Mexico created by statute which, inter alia regulates certain aspects of oil and gas operations within the State of New Mexico, to include the spacing of gas wells in the San Juan Basin.

B. THE SPACING CASE (COMMISSION CASE NO. 11745) AND ITS EFFECT ON THE APPELLANTS' PROPERTY RIGHTS

4. Since December 1, 1950, Division Rule 104.B.(2)(a) has required that wildcat gas wells in San Juan County be located on a designated drilling tract consisting of 160 contiguous surface acres.

5. Beginning in June, 1996, Burlington has sent correspondence at various times to the appellants seeking to either purchase or farmout the appellants' acreage in, inter alia, Section 9 for the drilling of wildcat wells to test the Deep Pennsylvanian formation. By February 20, 1996, Burlington had already selected

Section 9 as the location for one of its initial Deep Pennsylvanian test wells, the Scott Well No. 24, and had prepared a detailed Authority for Expenditure for this well.

6. At no time did Burlington's communications advise the appellants of its plans to make an application to the Commission for the purpose of changing the Rule 104 spacing requirements from 160 to 640-acres for wildcat gas wells below the base of the Dakota formation in San Juan County, New Mexico. On February 27, 1997 Burlington filed an application with the Commission to change the spacing unit for deep gas wells in the San Juan Basin from 160 to 640 acres. This case was docketed as Commission Case No. 11745 ("Case 11745").

7. At the public hearing of Case 11745 held on March 19, 1997, Burlington's counsel informed the Commission that Burlington had provided personal notice of its application and of the Commission hearing of Case 11745 by registered mail to some 267 operators in the San Juan Basin. In addition, the Commission provided notice by publication and to parties on its mailing list. However, neither Burlington nor the Commission provided personal notice of Case 11745 to the appellants. No party appeared in opposition to Burlington's application in Case 11745.

8. Appellants' names and addresses were known to Burlington well before its application in Case No. 11745 was filed. Burlington remits overriding royalty payments to each of the appellants on a monthly basis. The appellants and Burlington have been engaged in litigation since 1992. In addition, Burlington maintains a computerized database of the names and addresses of the appellants and could have given them actual notice of its application and of the public hearing in this case.

9. On June 5, 1997, the Commission entered its Order No. R-10815 finding, inter alia, that Division Rule 104 should be amended on a permanent basis to

provide for 640-acre gas spacing units for deep gas formations of the San Juan Basin. ("Order R-10815.")

10. On June 11, 1997, six days after the Commission issued Order R-10815, Burlington filed an application with the Division seeking to compulsory pool the appellants' interests in the east half and southwest quarter of Section 9 for its proposed Scott Well No 24, which was to be located in the northwest quarter of Section 9 on a 640-acre spacing unit. Obtaining Order No. R-10815 from the Commission modifying the Rule 104 wildcat well spacing requirements from 160 acres to 640 acres was a necessary condition precedent to Burlington's initiation of compulsory pooling proceedings against the appellants' interests in Section 9. Pursuant to Division Rule 104 as it existed prior to the 1997 amendment, the appellants' operating rights interest in the east half and southwest quarter of Section 9 could not have been compulsorily pooled with the northeast quarter of Section 9 to form a 640 acre spacing unit for Burlington's Scott Well No. 24.

11. On June 24, 1997, the appellants timely filed their Application for Rehearing of Order R-10815 with the Commission pursuant to NMSA 1978, §70-2-25 (A) and Division Rule 1222. Pursuant to §70-2-25 (A), the appellants' Application was considered denied on July 4, 1997 when the Commission failed to act thereon within 10 days. Such failure to act by the Commission on the appellants' Application is deemed a refusal thereof and a final disposition of such Application. The appellants properly and timely appeal this matter pursuant to NMSA 1978 §70-2-25 (B).

C. HOLDING

12. The decision in Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991) is controlling on this appeal. Knowing of its plan to

pool the interests of the appellants for a wildcat well on 640-acre spacing and knowing the identities and whereabouts of the appellants, Burlington's failure to provide personal notice to them of the spacing case proceeding underlying Order No. R-10815 deprived the appellants of their property without due process of law in violation of the United States and New Mexico constitutions. Burlington breached its duty of good faith by failing to provide personal notice to the appellants of the spacing case proceeding underlying Order No. R-10815.

13. Order No. R-10815 is void as to only the appellants and the 640-acre spacing provided for therein and in the amended New Mexico Oil Conservation Division Rule 104 is of no force and effect as to their property interests in the San Juan Basin. Appellants are entitled to and are hereby granted judgment in their favor and against the defendants and shall recover costs as allowed by law.

DATED: January 26, 1998.

ORIGINAL SIGNED BY
BYRON CATON

Honorable Byron Caton, District Judge

SUBMITTED:

J.E. GALLEGOS
JASON E. DOUGHTY
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686

Attorney for Plaintiffs

COPIES MAILED TO COUNSEL OF RECORD
Gallegos
Hebert
Killahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et. al.,	)	
Appellants,	)	
vs.	)	Cause No. CV-97-572-3
Burlington Resources Oil & Gas Company, a corporation, and The New Mexico Oil Conservation Commission,	)	
Appellees	)	

REPLY BRIEF OF TIMOTHY B. JOHNSON, TRUSTEE FOR RALPH A. BARD, JR. TRUST U/A/D FEBRUARY 12, 1983; ET. AL.,

APPELLANTS

Appeal from the New Mexico Oil Conservation Commission

J. E. Gallegos
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I.

PRELIMINARY STATEMENT

In their Appellees' Answer Briefs, Burlington Resources Oil and Gas Company ("Burlington") and the New Mexico Oil Conservation Commission ("Commission") once again strive mightily to muddy the waters on the manifestly clear issue of notice. Their obvious goal: to escape the clear mandate of Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) that under the facts, the appellants were entitled to actual notice of Case 11745. Appellees' arguments present nothing novel, but rather are a rehash of the same inapposite "rulemaking vs. adjudication" babble advanced ad nauseum in every pleading before this court.

The Uhden case is controlling on all fours in this appeal, making this Court's analysis of the facts and law exceedingly simple. Under Uhden since Burlington knew the identity and whereabouts of the appellants and knew beforehand the immediate adverse effect the outcome of the spacing rule change would have on the appellants' real property interests, Burlington had a responsibility to give the appellants' actual notice of its application and of the Commission proceedings in Case 11745.

The Commission's factual findings supporting a change of this long-established spacing rule must be based upon and supported by substantial evidence, e.g. sound technical, geologic, geophysical, reservoir engineering and economic data indicating that San Juan Basin deep gas wells can efficiently and economically drain 640 acres. Burlington did not present any evidence to the Commission that a deep gas well in the San Juan Basin will efficiently and economically drain 640 acres. No such well exists. Lacking information as to drainage qualities of a formation, the default rule for wildcat wells has historically been 160-acres. It can only be changed when evidence proves it

unsuitable.

II.

ARGUMENT AND AUTHORITIES

POINT ONE

THE DUE PROCESS GUARANTEES OF ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION GUARANTEE THAT A PARTY WHOSE PROPERTY RIGHTS ARE THREATENED BY STATE ACTION IS ENTITLED TO NOTICE AND A FAIR HEARING

A. CASE 11745 WAS AN ADJUDICATION OF THE APPELLANTS' PROPERTY RIGHTS IN THE SAN JUAN BASIN THUS ENTITLING THEM TO ACTUAL NOTICE OF AND AN OPPORTUNITY TO BE HEARD IN CASE 11745

With near evangelical fervor appellees continue their misguided crusade to distinguish the Uhden case from the instant appeal by convincing this Court that the change in San Juan Basin wildcat gas well spacing from 160 to 640 acres requested and obtained by Burlington in Commission Case 11745 (the "spacing change") was a broad-based Commission general "rulemaking", as contrasted with an adjudication of the appellants' San Juan Basin property rights.

To set the stage, appellees go to lengths to describe just how wide reaching the effects of the spacing change may be. Appellees theorize that the spacing change potentially affects the property rights of "over 300,000" interest owners in over "5,760,000 acres of the San Juan Basin." Commission's Answer Brief at p. 10. "The persons affected by the rule . . . are most definitely not limited in number nor are they identifiable with any degree of certainty. Id. at p. 5. Indeed, appellees estimate that it "would take at least 161 land brokers a year to verify the working and royalty interest ownership in the 9,000 square mile area", and that "personal service of notice on each interest owner would in each case take months, if not years..." Id. at p. 11. Thus, the

ploy to get by without effective notice to impacted parties is to make the breadth of the application huge instead of responsibly focusing it on the true geological target.

Appellants' diversionary bombast concerning its self-made difficulty of locating and providing actual notice to thousands of interest owners in over 5,000,000 acres of the San Juan Basin and the potentially preclusive effect such notice would have on the Commission's rulemaking responsibility **is completely irrelevant** in the instant appeal. As this Court and the appellees well know, the present appeal is brought by a very narrow and well defined set of some 61 interest owners whose names and addresses have been uniquely well know to Burlington for years[1], who have been uniquely affected by the spacing change[2], and whose acreage was undisputably the objective of the spacing change, being Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico ("Section 9").

Burlington knew beyond a shadow of doubt that the appellants' property interests in Section 9 would be immediately affected by the outcome of Case 11745 if its application were granted by the Commission. Indeed, Burlington's own documents prove that on February 20, 1997, a week before it served its notice to all "interested

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[1] Burlington does not dispute that it knows, and has known for years, the appellants names and whereabouts. For many years Burlington has submitted royalty payments to each and every one of the appellants, or their predecessors, on a monthly basis and has in place a computerized mail-merge capability to send mail to the appellants. There is also the fact that Burlington and the appellants have been embroiled in contentious litigation since late 1992.

[2] Appellees would like the Court to believe that appellants haven't suffered any particularized harm distinct from the thousands of other San Juan Basin interest owners. Witness Burlington's absurd mischaracterization that: "Appellants. . . have not even pretended to present any evidence that the Commission's rulemaking is somehow more, less, or differently applicable to them than to the tens of thousands of other San Juan Basin owners and operators affected by it." Burlington's Answer Brief at p. 8. Burlington's claim is truly beyond ridiculous. Indeed, the appellants appeal is premised upon the very fact that their property interests have been uniquely and directly affected by the spacing change. As evidence, the Court need look no further than Burlington's October 20, 1997 "Notification of Election" letter ("Letter") attached hereto as Exhibit "A" wherein Burlington demands that the appellants either pay their share of Burlington's Scott Well No. 24 on 640 acre spacing, or alternatively lose their interest until 300% of this amount is recovered from production. Did hundreds of thousands of owners in 5,000,000+ acres of the San Juan Basin receive such a letter from Burlington? No, they did not. However, each and every one of the appellants did, notwithstanding this Court's unambiguous Order that 640-acre spacing does not apply to the appellants.

parties" of its application in this case on February 27, 1997, and **a month before the Commission hearing** held on March 19, 1997, Burlington had already prepared its detailed Authority for Expenditure itemizing the projected costs for its proposed Scott well on a 640 acre spacing unit with Section 9 the chosen location.[3]

Despite the appellees' disingenuous smokescreens, the factual and legal analysis required of this Court could not be more simple. Indeed, having established that: (1) the identity and whereabouts of the appellants were known to Burlington prior to filing its application in Case 11745, and (2) Burlington knew prior to filing its application in Case 11745 that the appellants' property rights may be affected as a result, this Court's factual analysis is completed. Upon these facts, it simply could not be clearer that under the holding of the Supreme Court in Uhden, Burlington was obligated to provide notice to the appellants by **personal service**. See Uhden, supra 112 N.M. at 531 ("we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions **requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.**")[4] Id. (emphasis added.)

Obviously, Burlington wants this Court to buy the inane proposition that since it may not have know the identity and addresses of **all** parties who might be affected by its application in Case 11745, it is therefore excused from providing actual notice to the

[3] Burlington continues to misrepresent the facts by stating: "On April 23, 1997, Burlington selected Section 9 as the location for the Scott Well No. 24. . .", thus deceptively leading this court to believe that the location for the Scott Well was selected **after** the Commission hearing in Case 11745. See Burlington's Answer at p. 4, ¶10. As Burlington's February 20, 1997 AFE for the Scott well, attached hereto as Exhibit B, well makes clear this is absolutely false.

[4] Note that the Uhden court placed the burden of providing notice by personal service in such situations **on the applicant**, Burlington in the instant case, and **not the Commission**. Thus, the Commission's cautionary claims about its inability to perform its statutory duties if it has to provide notice to all parties potentially affected by a commission action are simply inapposite.

very narrow and well defined group of sixty-one appellants who it knew beyond doubt would be directly and immediately affected if its requested spacing change were granted. Burlington's "logic" is illogical and directly contrary to the express mandate of Uhden. As to the appellants San Juan Basin property interests, which is the true focus here, the spacing change was an adjudication. See Appellants Trial Brief pp. 5-8.

B. BUT FOR THE SPACING CHANGE, BURLINGTON COULD NOT HAVE COMPULSORY POOLED THE APPELLANTS' ACREAGE IN SECTION 9

The Commission knows that the spacing order is a loser, so they wish to change the subject by arguing that the appellants' real gripe does not lie with the spacing change. See Commission's Answer Brief at p. 8. Rather, the Commission argues that it is the Division compulsory pooling order, Order No. R-10877 which involuntarily pooled the appellants' acreage in Section 9 for Burlington's Scott Well No. 24 on 640-acre spacing, that has adversely impacted the appellants property rights. "The Plaintiffs are simply protesting the wrong order of the Commission." Id. Likewise, Burlington claims "the most that Appellants can do is allege that the Commission's rulemaking has somehow had an "impact" on their ownership interests." See Burlington's Answer Brief at p. 14.

These are the same disingenuous arguments advanced by these very same appellants, and rejected by the Supreme Court, in the Uhden case. In Uhden, the Commission and Burlington argued "the voluntary pooling clause in her [Mrs. Uhden's] lease, not the state's action in approving the 320 acre spacing pool, caused the reduction of her royalty interest. Uhden, supra 112 N.M. at 530. The Supreme Court refused to buy this nonsensical "distinction", finding as follows:

> Without the subject spacing orders, Amoco could never have pooled leases to form 320 acre well units. The Commission's order authorizing 320 acre spacing was a condition precedent to pooling tracts to form a

320 acre well unit. See Gulf Stream Petroleum Corp. v. Layden, 632 P.2d 376 (Okla. 1981) (entry of a spacing order is a jurisdictional prerequisite to pooling). Thus, it was the spacing order, and not the pooling clause, which harmed Uhden. Pooling is therefore immaterial under these circumstances, and the spacing order deprived Uhden of a property interest.

Id. 112 N.M. at 530.

C. PURSUANT TO UHDEN DECISION THE APPELLANTS WERE ENTITLED TO ACTUAL NOTICE OF CASE 11745 EVEN IF NOT EXPRESSLY REQUIRED BY RELEVANT STATUTES AND COMMISSION RULES

Once again the appellees engage in lengthy arguments concerning notice requirements under the New Mexico Oil and Gas Act, Oil Conservation Division Rules, and the New Mexico Open Meetings Act, all of which they must inartfully contort to require mere publication notice of Case 11745. Appellants have addressed these statutes and rules at length to demonstrate why the appellees are absolutely dead wrong on this point in appellants' Statement of Appellate issues, pages 5-6, and appellants Trial Brief, pages 8-10, as well as in other pleadings before this Court. These arguments will not be repeated herein. It should not be forgotten, however, that Burlington saw fit to send actual notice to some 300 or so owners addressed to "All Interested Parties," but systematically excluded plaintiffs. Why did Burlington not just rely on publication rather than making this record of a sham actual notice?

In analyzing the law concerning notice to affected interest owners of spacing changes, the Uhden court noted that it found several Oklahoma cases to be persuasive on this issue. Uhden, supra, 112 N.M. at 531. Indeed, the case which the Supreme Court ultimately followed in reaching its holding in Uhden was the Oklahoma Supreme Court case, Cravens v. Corporation Commission, 613 P.2d 442 (Okla. 1980), cert. denied, 450 U.S. 964, 101 S. Ct. 1479, 67 L. Ed. 2d 613 (1981). In Cravens, as in the instant case, an operator had made an application to the applicable state agency for an

increase in well spacing. See Uhden, supra, 112 N.M. at 531. Also, as in the instant case, although the applicant knew the identity and whereabouts of a certain individual whose interests would be affected by the change in spacing, no attempt was made to provide actual notice. Id.

Unlike the instant case, however, it was clear in Cravens that pursuant to the relevant Oklahoma statute and rule, only publication notice was required. However, notwithstanding the stipulated fact that the applicant had provided publication notice, the court determined that such notice was inadequate to satisfy constitutional due process requirements. Rather, the court held: "When the names and addresses of the parties are known, or are easily ascertainable by the exercise of diligence, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process under federal or Oklahoma constitutions." Cravens, supra, 613 P.2d at 444; see also Uhden, supra, 112 N.M. at 531. The Uhden court ultimately reached a holding almost verbatim to that of the Oklahoma Supreme Court in Cravens. See Uhden, supra, 112 N.M. at 531.

The stated premise for the Courts' holdings in both the Craven and Uhden that mere publication notice was inadequate to meet the due process guarantees of their respective state and the Federal Constitutions was the fact that the applicant for the spacing change knew the "names and whereabouts" of certain parties that may be affected thereby. See Uhden, supra, 112 N.M. at 531 ("In all of the foregoing cases, great emphasis is placed on whether the identity and whereabouts of the person entitled to notice are reasonably ascertainable.") The appellees' inapposite "rulemaking vs. adjudication" rantings notwithstanding, it is upon this simple issue that this Court must focus in analyzing the instant appeal.

With the analysis thus properly framed, it is beyond dispute that the facts before the Supreme Court in Uhden are absolutely indistinguishable from the instant facts.

POINT TWO

COMMISSION ORDERS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR THAT ARE ARBITRARY, CAPRICIOUS OR CONSTITUTE AN ABUSE OF DISCRETION AND MUST BE SET ASIDE

Appellees also challenge Order No. R-10815 as being unsupported by substantial evidence, and as being arbitrary, capricious and an abuse of discretion by the Commission. In an obvious effort to deflect the court's attention away from the woefully deficient evidentiary record supporting Rule R-10815, Burlington grossly mischaracterizes the focus of this portion of appellants' appeal by stating: "Appellants' entire argument about standard of review is based on the patently wrong theory that, because some evidence was presented by Amoco to the Commission that purportedly conflicted with its decision to change the general spacing rule, the Commission's decision should be invalidated." Burlington's Answer Brief at p. 24.

Burlington has it backwards. Appellants' challenge of Order No. R-10815 is premised upon the incontrovertible fact that Burlington, the applicant in Case 11745, did not present any evidence to the Commission, substantial or otherwise, establishing that based upon a change in conditions, or change in the knowledge of conditions it is now known that a deep gas well in the San Juan Basin will efficiently and economically drain 640 acres, and not 160 acres or some other spacing unit. Burlington did not, and indeed cannot, make the requisite evidentiary showing. Burlington itself admits that no such knowledge currently exists. See Transcript at p. 45, Record at p.73.

What happened here is a large, influential company desired the economic, risk spreading advantages of controlling large acreage for its exploratory wells. No other

type of oil or gas well has larger than 320 acre spacing in the San Juan Basin.[5] The authority of the Commission is to "prevent waste . . . and to protect correlative rights. . ., Section 70-2-11A. NMSA 1978, not accommodate the financially driven whims of Burlington.

As a consequence, the Commission's findings are simply not supported by the requisite substantial evidence showing, clearly required by New Mexico law, that due to a change of conditions, or change in knowledge of conditions, arising since the prior spacing rule was instituted, such a dramatic and broad reaching change to the long established spacing rule is appropriate. See Uhden, supra 112 N.M. at 530 ("Additionally, a spacing order can only be modified upon substantial evidence showing a change of conditions, or change in knowledge of conditions, arising since the prior spacing rule was instituted." citing Phillips Petroleum Co. v. Corporation Commission, 461 P.2d 597, 599 (Okla. 1969)); see also Appellants Trial Brief at pp. 10-12.

Without substantial evidence upon which to base its findings in support of Order No. R-10815, the Commission's decision to effect such a dramatic and broad reaching change to the long established spacing rule was arbitrary, capricious, without substantial justification, and an abuse of discretion. Therefore, Order No. R-10815 must be reversed. See Rule 1-074 NMRA 1997 ("The district court may reverse the decision of the agency if: (1) the agency acted fraudulently, arbitrarily or capriciously; (2) based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;. . . "); see also Santa Fe Exploration Co. v. Oil Conservation Comm'n 114 N.M. 103, 115 (1992) ("Arbitrary and capricious action by an

[5] Burlington has applications before the Commission Docket Nos. 11879 and 11880 to space Mesa Verde wells on 80 acres instead of 320 acres after about four decades of experience.

administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis". . .An abuse of discretion is established if . . .the order or decision is not supported by the findings, or the findings are not supported by the evidence")(citations omitted).

III.

CONCLUSION

For the foregoing reasons, Commission Order No. R-10815 is void as to the Appellants given the failure of Burlington and the Commission to provide them with actual notice of Burlington's application and of the Commission's proceedings in Case 11745. In addition, Commission Order No. R-10815 is void as to all parties as being unsupported by substantial evidence; and arbitrary, capricious, and an abuse of discretion by the Commission.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By _____

J.E. GALLEGOS
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460 St. Michael's Drive, Bldg. 300
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(505) 983-6686

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing pleading was served on this 17th day of November, 1997 to the following counsel of record:

Marilyn S. Hebert — Via U.S. Mail
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

W. Thomas Kellahin — Via U.S. Mail
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504

John Bemis, Esq. — Via U.S. Mail
Burlington Resources
P.O. Box 4289
Farmington, New Mexico 87499

Jason E. Doughty

NO. 586-0741

BURLINGTON RESOURCES

SAN JUAN DIVISION

October 20, 1997

Certified Mail-Return Receipt Requested

ROBERT DOUGLAS STUART, JR.
NORTHERN TRUST BNK/LAKE FOREST
& ROBERT DOUGLAS STUART JR
CO-TRSTE U/A ROBT D STUART
PO BOX 226270
DALLAS, TX 75222

RE: NOTIFICATION OF ELECTION
Compulsory Pooling
Scott Well No. 24
Section 9, T31N, R10W, NMPM
San Juan County, New Mexico
NMOCD Case 10808, Order R-10877

On September 12, 1997, the New Mexico Oil Conservation Division issued Order R-10877 which is a compulsory pooling order which involuntarily committed your interest in a 640-acre spacing unit to be dedicated to the referenced well.

On behalf of Burlington Resources Oil & Gas Company and in accordance with the terms of Order R-10877, copy enclosed, I am providing you with notice of your right to elect to participate in the well to be drilled pursuant to this order.

It is our information that at the time the application in this case was filed on June 12, 1997, you held a **0.774329%** working interest ownership in this 640 acre spacing unit for all formations below the base of the Dakota formation to the total depth drilled in this well. Should you desire to participate in this well and avoid the payment of the 200% risk factor out of your share of production, then within thirty days of the date you receive this letter, Burlington must receive a cashier's check for **$17,940.99** being your **0.774329%** of the completed well costs and a letter signed by you agreeing to participate in this well pursuant to said order. Enclosed is a copy of the AFE for this well.

If you decide not to participate then you need do nothing further. In that event, you will be a non-consenting party and Burlington will pay your share of the costs of the well and will recover your share out of production plus an additional 200 percent. Thereafter, you will commence to receive your working interest share of production. If you are an unleased mineral owner, then 1/8th of you share is deemed to be a royalty and 7/8ths is deemed to be a working interest.

EXHIBIT A

The executed authority for Expenditure and the prepayment of well costs must be returned to Burlington at the letterhead address within thirty (30) days of your receipt of this letter.

If you do not voluntarily join the well within the thirty (30) day period or if we do not receive your joinder pursuant to the referenced order within the thirty (30) day period, it will be assumed that you have elected not to participate in the well. Burlington under the terms of the order has the right to drill the well and recover your pro-rata share of reasonable well costs from production. Burlington will also be allowed to recover an additional two hundred percent (200%) of reasonable well costs as a charge for bearing risk of drilling the well.

In the event you do not desire to have your interest subject to this pooling order, Burlington desires to offer you the following options:

(a) farmout under similar terms and conditions as outlined in my June 6, 1997 offer letter, with appropriate date changes.

(b) sell your interest under similar terms and conditions as outlined in my July 31, 1997 offer letter, with appropriate date changes.

I look forward to hearing from you on this matter. If you have any questions or require further information, please advise.

Yours very truly,

James R.J. Strickler, CPL
Senior Staff Landman
(505) 326-9756

JRS:dg
c:dawn/R10877_1.doc

Enclosures: Order R-10877
AFE for subject well

cc: Director NMOCD-Santa Fe

BURLINGTON RESOURCES
Farmington Region
Post Office Box 4289
Farmington, New Mexico, 87499
(505) 326-9700

AUTHORITY FOR EXPENDITURE

AFE No.: _____ Property Number: _____ Date: 2/20/97

Lease/Well Name: Scott #24 DP Number: _____

Field Prospect: San Juan Basin Penn Operator: Burlington Resources Region: Farmington

Location: Sec. 9, T31N, R10W County: San Juan State: NM

AFE Type: 1 - New Drill Original: X Supplement: _____ Addendum: _____ API Well Type: _____

Objective Formation: Pennsylvanian Authorized Total Depth (Feet): 14,000'

Project Description: Pennsylvanian test in San Juan Basin - Exploratory well - Arch Rock Prospect

Estimated Start Date: 2nd Qtr 1997

Estimated Completion Date: 2nd Qtr 1997

Prepared By: C. E. Lane

GROSS WELL DATA

	Drilling		Workover/	Construction	
	Dry Hole	Suspended	Completion	Facility	Total
Days:	58	2	12	0	72
This AFE:	$1,713,800	$77,100	$407,073	$119,000	$2,316,973
Prior AFE's:	0				$0
TOTAL COSTS:	$1,713,800	$77,100	$407,073	$119,000	$2,316,973

JOINT INTEREST OWNERS

Company:	Working Interest Percent	Dry Hole $	Completed $
Burlington Resources:	10.311905%	$ 176,725	$ 238,924
Trust:	0.00%	0	$0
Others :	90.689550%	$1,064,514	$ 2,101,252
AFE TOTAL:	100.00%	$1,713,800	$2,316,973

BURLINGTON RESOURCES APPROVAL

Approved: _____ Approved: Robert J. Kennedy
Title: Reg. Drlg Supt Date: 4/16/97 Title: Land Manager Date: 4-14-97

Approved: Danny W. Hill Approved: _____
Title: Manager Date: 4/16/97 Title: _____ Date: _____

PARTNER APPROVAL

Company Name: _____ Date: _____

Authorized By: _____ Title: _____

EXHIBIT B

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

TIMOTHY B. JOHNSON, Trustee for
Ralph A. Bard, Jr., et al.

Plaintiffs,

vs. No. CV 97-572-3

BURLINGTON RESOURCES OIL & GAS
COMPANY, a corporation, and the
NEW MEXICO OIL CONSERVATION COMMISSION,

Defendants.

ANSWER BRIEF OF THE NEW MEXICO OIL CONSERVATION COMMISSION Defendants

---

Appeal from the New Mexico Oil Conservation Commission

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation
Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S SUPREME COURT CASE

NEW MEXICO CASES CITED

CASES FROM OTHER JURISDICTIONS CITED

STATUTES CITED

RULES CITED

SUMMARY OF PROCEEDINGS

The Plaintiffs' Brief did not contain a summary of proceedings, therefore the Defendant New Mexico Oil Conservation Commission ("Commission") provides the following summary.

On February 25, 1997, Defendant Burlington Resources Oil & Gas Company ("Burlington") filed an application with the Commission to amend OCD Rule 104 to change from 160 to 640- acre spacing for gas production below the base of the Dakota Formation in San Juan, Rio Arriba, Sandoval and McKinley Counties ("Application"). R.P. 002-006. The Application for the rule amendment was assigned Case No. 11745.

After the required public notice was provided, Case No. 11745 was heard by the Commission at a public hearing on March 19, 1997. On June 5, 1997, the Commission entered its order amending OCD Rule 104. R.P. 258-265.

On June 24, 1997, the Plaintiffs filed their Request for Rehearing with the Commission pursuant to NMSA 1978, § 70-2-25(A). R.P. 267-294. The Commission did not act on the application for rehearing, and it was therefore deemed denied pursuant to NMSA 1978, § 70-2-25(A). The Plaintiffs then appealed to the District Court pursuant to NMSA 1978, § 70-2-25(B) and Rule 1-074 NMRA 1997.

POINT I

THE COMMISSION AMENDED A RULE; THE COMMISSION DID NOT ADJUDICATE PROPERTY RIGHTS

The Oil and Gas Act, NMSA 1978, §§ 70-2-1 through 70-2-38, confers on the Oil Conservation Commission ("Commission") and the Oil Conservation Division ("Division") broad powers to prevent waste and to protect correlative rights. The Legislature used expansive language in its grant to the Commission and the Division. NMSA 1978, § 70-2-11 states:

> A. The division is hereby empowered, and it is its duty, to prevent waste prohibited by this act and to protect correlative rights, as in this act provided. To that end, **the division is empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act whether or not indicated or specified in any section hereof.**
> B. The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law.

(emphasis added).

The courts give special weight and credence to the technical competence and specialized knowledge of the Commission. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 532 P.2d 582 (1975).* The Supreme Court has recognized that the powers and authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or purpose. *Public Service Co. v. New Mexico Envtl. Improvement Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1983).

It is in this context that the amendment to OCD Rule 104 must be considered *vis a vis* the decision in *Uhden v. Oil Conservation Comm'n,* 112 N.M. 528, 817 P.2d 721 (1991). As set

forth in the Commission's Statement of Appellate Issues there are many factors that distinguish *Uhden* from this case before the Court. However, the fundamental distinction is that in this case the Commission amended a statewide rule of general applicability; in fact, it was the very same rule, OCD Rule 104, that the Supreme Court in *Uhden* specifically characterized as a statewide rule of general applicability. In *Uhden*, the Commission was asked to change a spacing order for a particular reservoir of limited size. The Commission changed a spacing order in the Cedar Hills-Fruitland Base Coal Gas Pool, a pool that consisted of approximately 10,000 acres. In this case before the Court, the Commission changed a statewide rule of general applicability that affects property in four counties of the state.

Attached to this brief as Exhibit A is a copy of a portion of OCD Rule 104, subsections A through C, as it existed prior to the amendment at issue in this case. Attached to this brief as Exhibit B is a copy of OCD Rule 104, subsections A through C, as amended in 1997.[1] The structure of the rule itself is illustrative of the fact the OCD Rule 104 is a statewide rule of general applicability. The first three subsections of OCD Rule 104 are arranged as follows:

104. WELL SPACING: ACREAGE REQUIREMENTS FOR DRILLING TRACTS

104.A. CLASSIFICATION OF WELLS: WILDCAT WELLS AND DEVELOPMENT WELLS

(1) San Juan, Rio Arriba, Sandoval, and McKinley Counties

(2) All Counties Except San Juan, Rio Arriba, Sandoval, and McKinley

* * * * *

104.B ACREAGE AND WELL LOCATION REQUIREMENTS FOR WILDCATS

(1) Lea, Chaves, Eddy and Roosevelt Counties

---

[1] The portions of the rule are provided for the convenience of the Court. The rule has the force and effect of law, and the Court can take judicial notice of it. *See T.W.I. W., Inc. v. Rhudy*, 96 N.M. 354, 356, 630 P.2d 753, 755 (1981).

(3) All Counties except Lea, Chaves, Eddy, Roosevelt, San Juan, Rio Arriba, Sandoval, and McKinley

104.C ACREAGE AND WELL LOCATION REQUIREMENTS FOR DEVELOPMENT WELLS

(1) Oil Wells, All Counties
(2) Lea, Chaves Eddy and Roosevelt Counties
(3) San Juan, Rio Arriba, Sandoval, and McKinley Counties
(4) All Counties except Lea, Chaves, Eddy, Roosevelt, San Juan, Rio Arriba, Sandoval, and McKinley

It is readily ascertainable that subsections A, B and C of OCD Rule 104 divide the state into three sections for purposes of natural gas wells: 1) the gas producing counties in the southeast portion of the state; 2) the gas producing counties of the northwest portion of the state; and 3) all other counties of the state. The rule amendment that is at issue in this case amended subsections B(2) and C(3); both of these subsections prescribe spacing rules for the northwest gas producing counties of the state. The area of the four counties covered by OCD Rule 104(B)(2) and (C)(3) is over five million acres.

In *Uhden*, Amoco Production Company ("Amoco") applied to the Commission to increase a spacing order for just a particular reservoir within the four-county section. The Court in *Uhden* stated:

> Under statewide rules, all gas wells in San Juan County are spaced on 160 acres. See N.M. Oil Conservation Rules 104(B)(2)(a) and 104(C). **These rules are rules of general application, and are not based upon engineering and geological conditions in a particular reservoir.** However, oil and gas interest owners, such as Amoco, can apply to the Commission to increase the spacing required by statewide rules. In this case, this was done by application and hearings where the applicant presented witnesses and evidence regarding the engineering and geological properties of this particular reservoir. After the hearings, the Commission entered an order based upon findings of fact and conclusions of law. **This order was not of general application, but rather pertained to a limited area. The persons affected were limited**

in number and identifiable, and the order had an immediate effect on Uhden.

112 N.M. at 530, 817 P.2d at 723 (emphasis added).

Commission Order No. R-7588, at issue in *Uhden*, created a new pool, the Cedar Hill-Fruitland Basal Coal Pool, comprised of 10,240 acres all within San Juan County. As the Court made clear, Order No. R-7588 in *Uhden*, unlike OCD Rule 104, was not a statewide rule of general application.

The case before this Court is the Commission's order that amended OCD Rule 104(B) and (C), a rule of general applicability as recognized by the Court in *Uhden*. It is applicable to over 5,000,000 acres, not 10,000 acres. The persons affected by the rule, i.e., property interest owners in the 5,000,000 acres, are most definitely not limited in number nor are they identifiable with any degree of certainty. See Burlington's Supplements to the R.P., Affidavit of James R. J. Strickler.

As set forth in the Strickler Affidavit, there are over 300,000 interest owners in the four counties affected by the Commission's amendment to OCD Rule 104. Mr. Strickler projected that it would require at least 161 people working for a year to verify the working and royalty ownership in the over 5,000,000 acres. However, inevitably, at the conclusion of the verification it would be obsolete as interests would continue to be transferred by sale, gift, death and otherwise. It would simply be impossible to serve personally all interests owners affected by a Commission rule of general applicability. That, of course, is why the required statutory notification for the Commission to adopt, amend or appeal a rule is public notice. *See* Open Meetings Act, NMSA 1978, § 10-15-1(D) and NMSA 1978, § 70-2-23. As the Supreme Court

stated in *Livingston v. Ewing*, 98 N.M. 685, 688, 652 P.2d 235, 238 (1992), "There is no fundamental right to notice and hearing before the adoption of a rule; such right is statutory only."

The cases cited in *Uhden* distinguish between a state board or commission's adjudicative function and its rulemaking function. In *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla. 1987) the applicant applied to the Oklahoma Corporation Commission to create a single 640-acre drilling and spacing unit in Caddo County, Oklahoma. The area involved was even smaller than that of *Uhden*. The persons affected were limited in number and identifiable; the commission's order was not of general applicability. The Oklahoma Supreme Court found the commission's order to be adjudicatory rather than rulemaking, just as it was in *Uhden*. The Oklahoma Supreme Court stated: "An agency's authority to make rules is clearly distinguishable from that of adjudication. Rulemaking includes the power to adopt rules and regulations of general application - both substantive and procedural - which are legislative in nature, operate prospectively and have general application." 732 P.2d at 441. As noted above, the New Mexico Supreme Court determined in *Uhden* that OCD Rules 104(B)(2) and Rule 104(C)(3) "...are rules of general application." So while the Commission's order in *Uhden* was deemed adjudicatory; the order at issue in this case before this Court is the general rule itself, and its amendment by the Commission is a rulemaking function.

The facts in *Cravens v. Corporation Commission*, 613 P.2d 442 (Okla. 1980), *cert. denied*, 450 U.S. 964, 101 S. Ct. 1479, 67 L. Ed. 2d 613 (1981) were even more extreme than those in *Uhden* or *Carlile*; and consequently, they have less relevance to the facts before this Court. In *Cravens* the issue was the application to the Oklahoma Corporation Commission to

create a single 160-acre drilling and spacing unit that included an 80-acre producing lease. The applicant did not give notice to the owner of the 80-acre producing lease of his application to create a 160-acre drilling and spacing unit. The Oklahoma Supreme Court again found that the action of the commission was adjudicatory.

The facts in *Louthan v. Amoco Production Co.*, 652 P.2d 308 (Okla. Ct. App. 1982) are very similar to those in *Uhden*, but dissimilar to the rulemaking on review by this Court. In 1961 Amoco Production Co. ("Amoco") completed a well on its 160-acre lease in the southeast quarter of Section 20 in Major County. In 1969 Cherokee Resources, Inc. ("Cherokee") obtained from the Louthans oil and gas leases to the northwest and northeast quarters of section 20. In 1970 Cherokee applied to the Oklahoma Corporation Commission to establish a 640-acre spacing order for only Section 20. The only notice required by statute and the only notice given was by publication. Amoco was not personally served with notice of the application. In 1978 the mineral owners of the three tracts brought an action against Amoco to recover their share of production based on the 1970 640-acre spacing order. Amoco, *inter alia*, claimed that the order was invalid as to them, because Amoco had not received notice of the application. The Oklahoma Supreme Court had no difficulty in applying the decisions in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950) and its own precedent in *Cravens v. Corporation Commission*, 613 P.2d 442 (Okla. 1980) to the facts in this case. The court stated:

> In the situation here it was even more important that all mineral interest owners in section 20 be constitutionally notified since a producing well existed on it - a well that Cherokee knew or should have known about. It could easily have discovered the names and addresses of some if not all owners of both the working as well as the royalty interests of Lawton "A," as well as other areas of section 20.

652 P.2d at 310.

The order entered by the Oklahoma Corporation Commission in *Louthan* affected only 640 acres; the interest owners were of a very limited number and were readily identifiable. The order was definitely not a statewide rule of general applicability affecting in excess of 300,000 interest owners as does the amendment to OCD Rule 104.

The Plaintiffs in their Application for Rehearing filed with the Commission state: "It is undisputed that the outcome of the Commission hearing, which resulted in an increase in well spacing, has resulted in a substantial and immediate adverse effect on the property interests of the Movants [Plaintiffs]." The Plaintiffs continue to explain that the "substantial and immediate adverse effect" was the confiscation of the Plaintiffs' acreage by utilizing **compulsory pooling**. R.P. 270. The Commission's amendments to OCD Rule 104 did not accomplish compulsory pooling. A separate and distinct application in compliance with OCD Rule 1207(A)(1) must be filed with the OCD to accomplish compulsory pooling. It is clear from the Plaintiffs' statement itself that the effect on their property rights is made by compulsory pooling, not by a rule of general applicability amending the spacing rules for wildcat wells. The Plaintiffs are simply protesting the wrong order of the Commission.

The Plaintiffs cite to *Uhden* to support their contention that the Commission's adoption of amendments to OCD Rule 104 is adjudicatory rather than rulemaking in its nature. The facts in *Uhden* are in stark contrast to the facts before this Court. In 1978 Ms. Uhden leased an oil and gas interest to Amoco. Sometime thereafter Amoco drilled a producing well. Amoco began sending royalty checks to Ms. Uhden. In 1983 Amoco filed its application seeking to increase the well spacing for that oil and gas pool from 160 acres to 320 acres. In 1984 the Commission

granted temporary approval of Amoco's application; the Commission issued its final order increasing the spacing for that pool in 1986. From the temporary approval in 1984 through the final order in 1986 Amoco continued to send Ms. Uhden royalty checks based on her interest in the 160 acres rather than based on her pooled interest in the 320 acres. When Amoco realized its mistake, it made demand upon Ms. Uhden for overpayment of royalties of $132,000.00. Amoco had never provided notice to Ms. Uhden of its application to increase the well spacing for that pool.

The decision in *Uhden* was driven by the facts. *Uhden* involved a producing well and royalty owners who were getting regular royalty checks based on their percentage interest in the 160 acres. Ms. Uhden's lease with Amoco contained a voluntary pooling agreement so that Amoco did not have to force pool her interest; the effect of the voluntary pooling agreement meant that Ms. Uhden's only chance to challenge Amoco's action was to appeal the Commission's spacing order since no compulsory pooling was needed in regard to Ms. Uhden. The fact that Amoco mistakenly overpaid royalties and then demanded a substantial sum from her as repayments undoubtedly affected the Court's view of the effect of the spacing order on Ms. Uhden. The effect of basing the royalty owner's payment on twice the acreage resulted in a reduction by half. There can be no question that Ms. Uhden suffered a substantial and immediate adverse economic effect.[2]

In contrast, what have the Plaintiffs in this case before the Court suffered? There has

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[2] It is interesting to note that the *Uhden* Court did not discuss the fact that even though Ms. Uhden's interest was diluted by the increased acreage, her interest was also theoretically doubled in the amount of natural gas in which she had an interest as she now had an interest in 320 acres not just 160 acres.

been little or no production on the acres at issue in this case. The Plaintiffs have not been receiving any royalty checks related to these acres. More importantly, unlike Ms. Uhden, the Plaintiffs are not subject to a voluntary pooling clause. Consequently, they do have the opportunity to appear before the Commission in any compulsory pooling application for the area covered by the 640-acre spacing rule. It is the proceeding before the Commission to consider compulsory pooling that has the potential to affect the Plaintiffs' interests, and pursuant to the OCD Rule 1207(A)(1) the Plaintiffs are entitled to notice of an application for compulsory pooling and an opportunity to be heard. The Plaintiffs in their pleadings acknowledge that it is the effect of compulsory pooling that affects their property interests. See Verified Petition for Review of New Mexico Oil Conservation Commission Administrative Order No. R-10815, ¶¶ 20-22.

In *Uhden* the Court found that the spacing order was confined to a limited area and that the persons affected were limited in number. Again, the facts in this case before the Court are quite different from those in *Uhden*. OCD Rule 104 covers approximately 9000 square miles (5,760,000 acres) and at least 20 different formations below the base of the Dakota formation in the San Juan Basin. The area involved in the *Uhden* case was about 10,000 acres. There are over 300,000 working interest and royalty owners of record in the 5,760,000 acres covered by OCD Rule 104. See Burlington's Supplements to the R.P., Affidavit of James R.J. Strickler. If the spacing order change in *Uhden* involving an existing defined pool cannot be distinguished from the Commission's rules in general, then there are grave implications for the oil and gas industry. How can personal service be made on hundreds of thousands of interests owners when it is necessary to consider a change in a rule of general applicability? How much time would be

required to affect such service? Mr. Strickler's Affidavit states that it would take at least 161 land brokers a year to verify the working and royalty ownership in the 9000 square mile area. Inevitably, in the course of that year, the information would become obsolete. How can the Commission perform its statutory duty of preventing waste if it is restrained by such onerous service requirements from reacting to developments in technology and in the oil and gas fields? Personal service of notice on each interest owner could in each case take months, if not years, to accomplish during which time the interests owners undoubtedly will change. What are the chances that such service will be 100% accurate?

The Oil and Gas Act, NMSA 1978, §§ 70-2-1 through 70-2-38, was enacted in 1935. It would be ironic that while interest ownerships have become ever more fragmented during the past 60 years, the notice required has changed from publication to personal service. The Commission believes that the *Uhden* decision must be limited to the very specific and somewhat unique facts of that case and not extended so as to negate the Commission's ability to perform its statutory duties including that of adopting statewide rules of general applicability.

POINT II

THE COMMISSION PROVIDED THE NOTICE REQUIRED TO AMEND AN OCD RULE

The Commission, as an administrative body of the state, is subject to the Open Meetings Act, NMSA 1978, § 10-15-1(D) whenever the Commission adopts a rule. NMSA 1978, § 10-15-1(D) states:

> Any meetings at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs and at which a

> majority or quorum of the body is in attendance, and any closed meeting, shall be held only after reasonable notice to the public. The affected body shall determine at least annually in a public meeting what notice for a public meeting is reasonable when applied to that body. That notice shall include broadcast stations licensed by the federal communications commission and newspapers of general circulation that have provided a written request for such notice.

The Commission's Open Meetings Resolution adopted on February 13, 1997, states, in part: "Notice of regular meetings will be given ten (10) days in advance of the meeting date."

NMSA 1978, § 70-2-23 states, in part:

> Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the division [OCD]. The division shall first give reasonable notice of such hearing (in no case less than ten days, except in an emergency) and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard.[3]

OCD Rule 1204 states:

> Notice of each hearing before the Commission and before a Division Examiner shall be by publication once in accordance with the requirements of Chapter 14, Article 11, N.M.S.A. 1978, in a

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[3] NMSA 1978, § 70-2-6(B) states:

> The commission shall have concurrent jurisdiction and authority with the division to the extent necessary for the commission to perform its duties as required by law. In addition, any hearing on any matter may be held before the commission if the division director, in his discretion, determines that the commission shall hear the matter.

> counties if there be more than one, in which any land, oil, gas or other property which is affected may be situated.

The Commission complied with above notice requirements when it amended OCD Rule 104 both as to the Commission public hearing on the rule changes on March 19, 1997, and the June 5, 1997 Commission meeting at which the amendments to the rule were adopted. See Burlington's Supplements to R.P., Affidavit of Florene Davidson.

The Plaintiffs simply misstate the notice requirements by alleging that OCD Rule 1207(A)(11) is applicable to Commission rulemaking. OCD Rule 1207 is entitled "Additional Notice Requirements." As the title suggests, these rules are in addition to OCD Rule 1204 set forth above; OCD Rule 1204 together with NMSA 1978, § 70-2-23 and the Open Meetings Act govern the notice required when the Commission engages in rulemaking.

OCD Rule 1207 applies only to the following specific applications: compulsory pooling; unorthodox well locations; non-standard proration unit; special pool rules; amendments to special rules of any OCD designated potash area; downhole commingling; and exceptions to orders controlling surface disposition of produced water or other fluids. Finally, OCD Rule 1207(A)(11) is the catchall "additional notice requirement." It applies to "...cases of applications not listed above...." OCD Rule 1207(A)(11) is for specific applications that may come up, but which have not been listed in the preceding subsections of OCD Rule 1207. OCD Rule 1207 (A)(11) is not the rule that governs the Commission's rulemaking.

POINT III

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The standard of review of the Commission's order amending OCD Rule 104 is whether there is substantial evidence in the record to support the order. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 87 N.M. 286, 532 P.2d 582 (1975). ("substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Grace v. Oil Conservation Comm'n*, 87 N.M. 205, 531 P.2d 939 (1975). A party challenging a rule adopted by an administrative agency has the burden of establishing the invalidity of the rule. *New Mexico Mining Assn.. v. New Mexico Mining Comm'n*, ___ N.M. ___, 942 P.2d 741 (Ct. App. 1996). The Supreme Court gives special weight and credence to the experience, technical competence, and specialized knowledge of the Commission. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, supra. The Court reviews the record in a light most favorable to upholding the Commission's decision. *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 835 P.2d 819 (1992). Additionally, by statute, NMSA 1978, § 70-2-25(B), the Commission's order is prima facie valid.

The evidence presented to the Commission at the public hearing on March 19, 1997, included the testimony of a geologist and a reservoir engineer, both of whom the Commission accepted as expert witnesses. Contrary to the Plaintiffs' contention that the only justification for the rule amendment was economics, there was technical evidence presented to the Commission that supported the increase in spacing from 160 acres to 640 acres.

The geologist testified that there had been many advances in determining the dynamics of gas fields, specifically there were advancements in understanding seismic stratigraphy and 3-D technology since 1950 when the 160-acre spacing rule was adopted. (Tr. 22, 23; R.P. 050, 051). He used three other fields, the Alkali Gulch, Barker Dome and Ute Dome, as analogous fields to the San Juan Basin. (Tr. 23; R.P. 051). He explained in detail why these three fields were appropriate to use as analogue fields. (Tr. 25-29; R.P. 053-057). The key zones and key intervals of the fields correlated with each other. (Tr. 29; R.P. 057). The geologist concluded by stating that there was sufficient continuity to provide a reasonable probability that similar formations would be found in the San Juan Basin as the three other fields, and that 640-acre spacing was appropriate for such fields.

The reservoir engineer testified on two subjects: the drainage area of the fields and the economics of developing 640 acre fields. (Tr. 45; R.P. 073). The engineer stated that since he did not have actual data in the San Juan Basin to determine the drainage area, the analogy method was used. (Tr. 45; R.P. 073). By reviewing the estimated ultimate recovery (EUR) studies and the volumetric analysis, the engineer discovered that in these fields there is interference between wells even though they are on 640-acre spacing. (Tr. 45, 46, 52; R.P. 073, 074, 079). He concluded that a well in the Pennsylvanian is capable of draining 640 acres. (Tr. 46; R.P. 074). He used specific data from wells in the Barker Dome Field to support his conclusion. The wells in that field are expected to drain areas of 785 acres. (Tr. 50; R.P. 078).

A similar challenge was made to an amendment to a rule that increased the gas spacing from 320 acres to 640 acres for wells completed below certain depths in *State Oil and Gas Bd. v. Mississippi Mineral and Royalty Owners Assn.*, 258 So. 2d 767 (Miss. 1971). The Mississippi

Supreme Court stated:

> The Board [State Oil and Gas Board of Mississippi], being cognizant of the multiplicity of problems involved in the production of the deeper beds and the cost necessary to produce such beds, is convinced that the same cannot be accomplished on the basis of the spacing rules adopted in the year 1951, when the complexion of the oil and gas industry within the state was totally different from that which now exists.

258 So. 2d at 770.

As set forth above, the Commission's order amending the OCD Rule 104 is supported by substantial evidence. The Plaintiffs do not like and may not agree with the evidence in the record, but that is not sufficient reason for this Court to set aside the determination of the Commission. The case law in New Mexico illustrates that the courts of the state historically have given great deference to the Commission's decisions on the issues of fact which necessarily involve a great deal of expertise in the areas of petroleum engineering and geology. As the Supreme Court stated in *Fasken v. Oil Conservation Comm'n*, 87 N.M. 292, 293, 532 P.2d 588, 589 (1975), in reference to counsels' arguments in that case: "The difficulty with them [the arguments to the court] is that they emanate from the lips and pens of counsel and are not bolstered by the expertise of the [Oil Conservation] Commission to which we give special weight and credence."

CONCLUSION

The required notice was provided for the Commission's action in adopting amendments to OCD Rule 104. A review of the record reveals that the Commission's decision to amend OCD Rule 104 to change the spacing from 160 acres to 640 acres is supported by substantial evidence. The Order of the Commission should be affirmed.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation
Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the New Mexico Oil Conservation Commission's Brief was mailed to all counsel of record on the 5th day of November, 1997.

Marilyn S. Hebert

101.L. All bonds required by these rules shall be conditioned for well plugging and location cleanup only, and not to secure payment for damages to livestock, range, water, crops, tangible improvements, nor any other purpose. [1-1-50...2-1-96]

101.M. Upon failure of the operator to properly plug and abandon the well(s) covered by a bond, the Division shall give notice to the operator and surety, if applicable, and hold a hearing as to whether the well(s) should be plugged in accordance with a Division-approved plugging program. If, at the hearing, it is determined that the operator has failed to plug the well as provided for in the bond conditions and Division Rules, the Division Director shall issue an order directing the well(s) to be plugged in a time certain. Such an order may also direct the forfeiture of the bond upon the failure or refusal of the operator, surety, or other responsible party to properly plug the well(s). If the proceeds of the bond(s) are not sufficient to cover all of the costs incurred by the Division in plugging the well(s) covered by the bond, the Division shall take such legal action as is necessary to recover such additional costs. Any monies recovered through bond forfeiture or legal actions shall be placed in the Oil & Gas Reclamation Fund. [6-5-86...2-1-96]

102 NOTICE OF INTENTION TO DRILL

102.A. Prior to the commencement of operations, notice shall be delivered to the Division of intention to drill any well for oil or gas or for injection purposes and approval obtained on Form C-101. A copy of the approved Form C-101 must be kept at the well site during drilling operations. [1-1-50...2-1-96]

102.B. No permit shall be approved for the drilling of any well within the corporate limits of any city, town, or village of this state unless notice of intention to drill such well has been given to the duly constituted governing body of such city, town or village or its duly authorized agent. Evidence of such notification shall accompany the application for a permit to drill (Form C-101). [5-22-73...2-1-96]

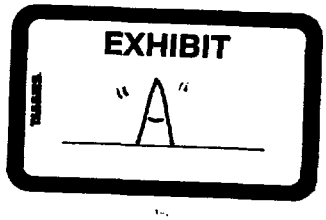
102.C. When filing a permit to drill in any quarter-quarter section containing an existing well or wells, the applicant shall concurrently file a plat or other acceptable document locating and identifying such well(s) and a statement that the operator(s) of such well(s) have been furnished a copy of the permit. [5-22-73...2-1-96]

103 SIGN ON WELLS

All wells subject to these regulations, including drilling, production, and injection wells, shall be identified by a sign, posted on the derrick or not more than 20 feet from such well, and such sign shall be of durable construction and the lettering thereon shall be kept in legible condition and shall be large enough to be legible under normal conditions at a distance of 50 feet. The wells on each lease or property shall be numbered in non-repetitive, logical and distinctive sequence. Each sign shall show the number of the well, the name of the lease (which shall be different or distinctive for each lease), the name of the lessee, owner or operator, and the location by quarter section, township and range. The location, for each sign posted after March 1, 1968, shall indicate the quarter-quarter section, township, and range. [1-1-50... 2-1-96]

104. - WELL SPACING:
ACREAGE REQUIREMENTS FOR DRILLING TRACTS

104.A. CLASSIFICATION OF WELLS: WILDCAT WELLS AND DEVELOPMENT WELLS



(1) San Juan, Rio Arriba, Sandoval, and McKinley Counties

(a) Any well which is to be drilled the spacing unit of which is a distance of 2 miles or more from:

(i) the outer boundary of any defined pool which has produced oil or gas from the formation to which the well is projected; and

(ii) any other well which has produced oil or gas from the formation to which the proposed well is projected, shall be classified as a wildcat well.

[12-29-52...2-1-96]

(2) All Counties Except San Juan, Rio Arriba, Sandoval, and McKinley

(a) Any well which is to be drilled the spacing unit of which is a distance of one mile or more from:

(i) the outer boundary of any defined pool which has produced oil or gas from the formation to which the well is projected; and

(ii) any other well which has produced oil or gas from the formation to which the proposed well is projected, shall be classified as a wildcat well.

[12-29-52...2-1-96]

(3) Any well which is not a wildcat well as defined above shall be classified as a development well for the nearest pool which has produced oil or gas from the formation to which the well is projected. Any such development well shall be spaced, drilled, operated, and produced in accordance with the rules and regulations in effect in such nearest pool, provided the well is completed in the formation to which it was projected. [5-25-64...2-1-96]

(4) Any well classified as a development well for a given pool but which is completed in a producing horizon not included in the vertical limits of said pool shall be operated and produced in accordance with the rules and regulations in effect in the nearest pool within the 2 mile limit in San Juan, Rio Arriba, Sandoval, and McKinley Counties or within one mile everywhere else which is producing from that horizon. If there is no designated pool for said producing horizon within the 2 mile limit in San Juan, Rio Arriba, Sandoval, and McKinley Counties or within one mile everywhere else, the well shall be re-classified as a wildcat well. [5-25-64...2-1-96]

104.B. ACREAGE AND WELL LOCATION REQUIREMENTS FOR WILDCATS

(1) Lea, Chaves, Eddy and Roosevelt Counties

(a) Wildcat Gas Wells. In Lea, Chaves, Eddy and Roosevelt Counties, a wildcat well which is projected as a gas well to a formation and in an area which, in the opinion of the engineer or supervisor approving the application to drill, may reasonably be presumed to be productive of gas rather than oil shall be located on a drilling tract consisting of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Surveys, and

shall be located not closer than 660 feet to any outer boundary of such tract nor closer than 330 feet to any quarter-quarter section or subdivision inner boundary. Provided, however, that any such wildcat gas well which is projected to the Wolfcamp or older formations shall be located on a drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U.S. Public Land Surveys. Any such "deep" wildcat gas well to which is dedicated more than 160 acres shall be located not closer than 660 feet to the nearest side boundary of the dedicated tract nor closer than 1650 feet to the nearest end boundary, nor closer than 330 feet to any quarter-quarter section or subdivision inner boundary. (For the purpose of this rule, "side" boundary is defined as one of the outer boundaries running lengthwise to the tract's greatest overall dimensions; "end" boundary is defined as one of the outer boundaries perpendicular to a side boundary and closing the tract across its least overall dimension.) [5-25-64...2-1-96]

(b) Wildcat Oil Wells. In Lea, Chaves, Eddy, and Roosevelt Counties, a wildcat well which is not a wildcat gas well as defined above shall be located on a tract consisting of approximately 40 surface contiguous acres substantially in the form of a square which is a legal subdivision of the U.S. Public Land Surveys, or on a governmental quarter-quarter section or lot, and shall be located not closer than 330 feet to any boundary of such tract. [5-25-64...2-1-96]

(c) In the event gas production is encountered in a well which was projected as an oil well and which is located accordingly but does not conform to the above gas well location rule, it shall be necessary for the operator to bring the matter to a hearing before approval for the production of gas can be given. [5-25-64...2-1-96]

(2) San Juan, Rio Arriba, Sandoval, and McKinley Counties

(a) Wildcat Gas Wells. In San Juan, Rio Arriba, Sandoval, and McKinley Counties, a wildcat well which is projected to a gas-producing horizon shall be located on a designated drilling tract consisting of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Surveys, and shall be located not closer than 790 feet to any outer boundary of the tract nor closer than 130 feet to any quarter-quarter section or subdivision inner boundary. [5-25-64...2-1-96]

(b) In the event a well drilled as a gas well is completed as an oil well and is located accordingly but does not conform to the oil well location rule below, it shall be necessary for the operator to apply for administrative approval for a non-standard location before an oil allowable will be assigned. An application may be set for hearing by

the Director. If the operator is uncertain as to whether a proposed wildcat well will be an oil well or a gas well, the well should be staked so that it is in a standard location for both oil and gas production. [5-25-64...2-1-96]

(c) Wildcat Oil Wells. A wildcat well which is projected to an oil-producing horizon as recognized by the Division shall be located on a tract consisting of approximately 40 surface contiguous acres substantially in the form of a square which is a legal subdivision of the U.S. Public Land Surveys, or on a governmental quarter-quarter section or lot, and shall be located not closer than 330 feet to any boundary of such tract. [5-25-64...2-1-96]

(d) In the event a well drilled as an oil well is completed as a gas well and is located accordingly but does not conform to the above gas well location rules, it shall be necessary for the operator to apply for administrative approval for a non-standard location before the well can produce. An application may be set for hearing by the Director. If the operator is uncertain as to whether a proposed wildcat well will be an oil well or a gas well, the well should be staked so that it is in a standard location for both oil and gas production. [5-25-64...2-1-96]

(3) All Counties except Lea, Chaves, Eddy, Roosevelt, San Juan, Rio Arriba, Sandoval, and McKinley.

(a) Any wildcat well which is projected as an oil well in any county other than Lea, Chaves, Eddy, Roosevelt, San Juan, Rio Arriba, Sandoval, and McKinley Counties shall be located on a tract consisting of approximately 40 surface contiguous acres substantially in the form of a square which is a legal subdivision of the U.S. Public Land Surveys, or on a governmental quarter-quarter section or lot and shall be located not closer than 330 feet to any boundary of such tract. [1-1-50... 2-1-96]

(b) Any wildcat well which is projected as a gas well to a formation and in an area which, in the opinion of the Division representative approving the application to drill, may reasonably be presumed to be productive of gas rather than oil shall be located on a drilling tract consisting of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Surveys, and shall be located not closer than 660 feet to any outer boundary of such tract nor closer than 330 feet to any quarter-quarter section or subdivision inner boundary. [1-1-50...2-1-96]

104.C. ACREAGE AND WELL LOCATION REQUIREMENTS FOR DEVELOPMENT WELLS

(1) Oil Wells, All Counties.

(a) Unless otherwise provided in special pool rules,

each development well for a defined oil pool shall be located on a tract consisting of approximately 40 surface contiguous acres substantially in the form of a square which is a legal subdivision of the U.S. Public Land Surveys, or on a governmental quarter-quarter section or lot, and shall be located not closer than 330 feet to any boundary of such tract nor closer than 330 feet to the nearest well drilling to or capable of producing from the same pool, provided however, only tracts committed to active secondary recovery projects shall be permitted more than four wells. [5-25-64...2-1-96]

(2) Lea, Chaves, Eddy and Roosevelt Counties.

(a) Gas Wells. Unless otherwise provided in special pool rules, each development well for a defined gas pool in a formation younger than the Wolfcamp formation, or in the Wolfcamp formation which was created and defined by the Division prior to November 1, 1975, or in a Pennsylvanian age or older formation which was created and defined by the Division prior to June 1, 1964, shall be located on a designated drilling tract consisting of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section being a legal subdivision of the U.S. Public Land Surveys, and shall be located not closer than 660 feet to any outer boundary of such tract nor closer than 330 feet to any quarter-quarter section or subdivision inner boundary nor closer than 1320 feet to the nearest well drilling to or capable of producing from the same pool. [5-25-64...2-1-96]

(b) Unless otherwise provided in the special pool rules, each development well for a defined gas pool in the Wolfcamp formation which was created and defined by the Division after November 1, 1975, or of Pennsylvanian age or older which was created and defined by the Division after June 1, 1964, shall be located on a designated drilling tract consisting of 320 surface contiguous acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the U.S. Public Land Surveys. Any such well having more than 160 acres dedicated to it shall be located not closer than 660 feet to the nearest side boundary of the dedicated tract nor closer than 1650 feet to the nearest end boundary, nor closer than 330 feet to any quarter-quarter section or subdivision inner boundary. (For the purpose of this rule, "side" boundary and "end" boundary are as defined in Rule 104.B(1)(a), above.) [5-25-64...2-1-96]

(3) San Juan, Rio Arriba, Sandoval, and McKinley Counties.

(a) Gas Wells. Unless otherwise provided in special pool rules, each development well for a defined gas pool shall be located on a designated drilling tract consisting of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Surveys, and

shall be located not closer than 790 feet to any outer boundary of the tract nor closer than 130 feet to any quarter-quarter section line or subdivision inner boundary. [5-25-64...2-1-96]

(4) All Counties except Lea, Chaves, Eddy, Roosevelt, San Juan, Rio Arriba, Sandoval, and McKinley.

(a) Gas Wells. Unless otherwise provided in special pool rules, each development well for a defined gas pool shall be located on a designated drilling tract consisting of 160 surface contiguous acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Surveys, and shall be located not closer than 660 feet to any outer boundary of such tract nor closer than 330 feet to any quarter-quarter section or subdivision inner boundary nor closer than 1320 feet to the nearest well drilling to or capable of producing from the same pool. [5-25-64...2-1-96]

104.D. ACREAGE ASSIGNMENT

(1) Well Tests and Classification. It shall be the responsibility of the operator of any wildcat gas well or development gas well to which more than 40 acres has been dedicated to conduct a potential test within 30 days following completion of the well and to file the same with the Division within 10 days following completion of the tests. (See Rule 401.) [5-25-64...2-1-96]

(a) Date of completion for a gas well shall be the date a wellhead is installed or 30 days following conclusion of active completion work on the well, whichever date comes first. [5-25-64...2-1-96]

(b) Upon making a determination that the well should not properly be classified as a gas well, the Division will reduce the acreage dedicated to the well. [5-25-64...2-1-96]

(c) Failure of the operator to file the aforesaid tests within the specified time will also subject the well to such acreage reduction. [5-25-64...2-1-96]

(2) Non-Standard Spacing Units. Any well which does not have the required amount of acreage dedicated to it for the pool or formation in which it is completed may not be produced until a standard spacing unit for the well has been formed and dedicated or until a non-standard spacing unit has been approved. [5-25-64...2-1-96]

(a) The supervisor of the appropriate District Office of the Division shall have the authority to approve non-standard spacing units without notice when the unorthodox size and shape is necessitated by a variation in the legal subdivision of the United States Public Land Surveys and/or consists of an entire governmental section and the non-standard spacing unit is not less than 70% nor more than 130% of a standard spacing unit. Such approval shall consist of acceptance of Division Form C-102 showing the proposed non-standard spacing unit and the acreage contained therein. [5-25-64...2-1-96]

(b) The Division Director may grant administrative approval to non-standard spacing units without

NMAC TRANSMITTAL FC

1 NMAC 3.3.10.22 [Sequence No. ____

1. Agency Name & Mailing Address	2. Agency Account Code
Energy, Minerals & Natural Resources Department Oil Conservation Division 2040 South Pacheco Santa Fe, New Mexico 87505	199-521.07
	3. Type of Rule Action New ____ Emergency ____ Amending XX Repealing ____

4. NMAC Title Name	NMAC Title Number
Natural Resources & Wildlife	19

5. NMAC Chapter Name	NMAC Chapter Number
Oil and Gas	15

6. NMAC Part Name	NMAC Part Number
Drilling	C

7. Modified NMAC Name	Modified NMAC Number
	19 NMAC 15.C.104.B. (1 Filing Date (if applicable) 01 / 18 / 96

8. Are there any materials incorporated by reference?

No X Yes ___ Please list attachments: 1. ____ 2. ____ 3. ____

9. If materials are attached, have copyright permissions been received?

No X Yes ____ Public domain ____

10. Total Number of Pages: 2	11. Hearing Date of Rule: 03 / 19 / 97 12. Effective Date of Rule: 06 / 30 / 97

13. Contact Person: Sally Martinez or Florene Davidson

Phone Number: 505 . 827-7133 or 827-7132

14. Signature & Title of Issuing Authority

Name: William J. LeMay

Title: Division Director

Signature 6/16/97 Date Signed

SRC-95-04

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EXHIBIT B

(2) San Juan, Rio Arriba, Sandoval and McKinley Counties

(a) Shallow Wildcat Gas Wells. In San Juan, Rio Arriba, Sandoval and McKinley Counties, a wildcat well which is projected to a gas-producing horizon in a formation younger than the Dakota formation, or in the Dakota formation, which was created and defined by the Division after March 1, 1997, shall be located on a designated drilling tract consisting of 160 contiguous surface acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Survey, and shall be located not closer than 790 feet to any outer boundary of the tract nor closer than 130 feet to any quarter-quarter section line or subdivision inner boundary. [5-25-64...2-1-96; 6-30-97]

(b) Deep Wildcat Gas Wells.

In San Juan, Rio Arriba, Sandoval and McKinley Counties, a wildcat well which is projected to a gas-producing formation in a formation older than the Dakota formation (below the base of the Cretaceous period) and

(i) located within the surface outcrop of the Pictured Cliffs formations (i.e., the "San Juan Basin") shall be located on a designated drilling tract consisting of 640 contiguous surface acres, more or less, substantially in the form of a square which is a section, being a legal subdivision of the U.S. Public Land Survey, and shall be located not closer than 1200 feet to any outer boundary of the tract nor closer than 130 feet to any quarter section line nor closer than 10 feet to any quarter-quarter section line or subdivision inner boundary; or

(ii) located **outside** the surface outcrop of the Pictured Cliffs formations (i.e., the "San Juan Basin") shall be located on a designated drilling tract consisting of 160 contiguous surface acres, more or less, substantially in the form of a square which is a section, being a legal subdivision of the U.S. Public Land Survey, and shall be located not closer than 790 feet to any outer boundary of the tract nor closer than 130 feet to any quarter section line, quarter-quarter section line or subdivision inner boundary.

[5-25-64...2-1-96; 6-30-97]

(iii) is located outside the surface outcrop of the Pictured Cliffs formations (i.e., the "San Juan Basin") which pool was created and defined by the Division after June 1, 1997, shall be located on a designated drilling tract consisting of 160 contiguous surface acres, more or less, substantially in the form of a square which is a section, being a legal subdivision of the U.S. Public Land Survey, and shall be located not closer than 790 feet to any outer boundary of the tract nor closer than 130 feet to and quarter section line, quarter-quarter section line or subdivision inner boundary.

[5-25-64...2-1-96; 6-30-97]

No. 1

NMAC TRANSMITTAL

1 NMAC 3.3.10.22 [Sequence No. ____

1. Agency Name & Mailing Address	2. Agency Account Code
Energy, Minerals & Natural Resources Department Oil Conservation Division 2040 South Pacheco Santa Fe, New Mexico 87505	199-521.07
	3. Type of Rule Action New ___ Emergency ___ Amending XX Repealing ___

4. NMAC Title Name	NMAC Title Number
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5. NMAC Chapter Name	NMAC Chapter Number
Oil and Gas	15

6. NMAC Part Name	NMAC Part Number
Drilling	C

7. Modified NMAC Name	Modified NMAC Number
	19 NMAC 15.C.104.C.
	Filing Date (if applicable) 01 / 18 / 96

8. Are there any materials incorporated by reference?

No X Yes ___ Please list attachments: 1. ____ 2. ____ 3. ____

9. If materials are attached, have copyright permissions been received?

No X Yes ___ Public domain ___

10. Total Number of Pages: 2	11. Hearing Date of Rule: 03 / 19 / 97 12. Effective Date of Rule: 06 / 30 / 97

13. Contact Person: Sally Martinez or Florene Davidson

Phone Number: 505 . 827-7133 or 827-7132

14. Signature & Title of Issuing Authority

Name: William J. LeMay

Title: Division Director

Signature 6/16/97 Date Signed

SRC-95-04

1997 JUN 16 AM 9:30

STATE RECORDS CENTER

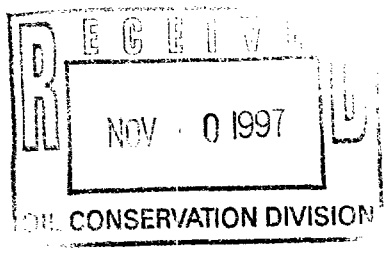
(3) San Juan, Rio Arriba, Sandoval and McKinley Counties:

(a) Shallow Gas Wells. Unless otherwise provided in special pool rules, each development well for a defined gas pool in a formation younger than the Dakota formation, or in the Dakota formation, which was created and defined by the Division after March 1, 1997, shall be located on a designated drilling tract consisting of 160 contiguous surface acres, more or less, substantially in the form of a square which is a quarter section, being a legal subdivision of the U.S. Public Land Survey, and shall be located not closer than 790 feet to any outer boundary of the tract nor closer than 130 feet to any quarter-quarter section line or subdivision inner boundary. [5-25-64...2-1-96; 6-30-97]

(b) Deep Gas Wells. Unless otherwise provided in special pool rules, each development well for a defined gas pool in a formation older than the Dakota formation (below the base of the Cretaceous period) and

(i) is located **within** the surface outcrop of the Pictured Cliffs formations (i.e., the "San Juan Basin") which pool was created and defined by the Division **after** June 1, 1997, shall be located on a designated drilling tract consisting of 640 contiguous surface acres, more or less, substantially in the form of a square which is a section, being a legal subdivision of the U.S. Public Land Survey, and shall be located not closer than 1200 feet to any outer boundary of the tract nor closer than 130 feet to any quarter section line nor closer than 10 feet to any quarter-quarter section line or subdivision inner boundary; or

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT



TIMOTHY B. JOHNSON, Trustee for
Ralph A. Bard, Jr. et al,
Appellants-Appellants,

vs. No. CV-97-572-3

BURLINGTON RESOURCES OIL & GAS
COMPANY, a corporation, and the
OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
Defendants-Appellees.

APPELLEE-BURLINGTON RESOURCES OIL & GAS COMPANY'S

REPLY BRIEF

APPEAL FROM COMMISSION
TO THE ELEVENTH JUDICIAL DISTRICT
SAN JUAN COUNTY
HONORABLE BYRON CATON

W. THOMAS KELLAHIN
KELLAHIN & KELLAHIN
Post Office Box 2265
Santa Fe, New Mexico 87504-2265
(505) 982-4285

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I. SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE

Pursuant to the NMSA 1978, Section 70-2-25(B), this case is before the Court on Appellants' petition for a review of Order R-10815, entered in Case 11745 on June 5, 1997, by Defendant New Mexico Oil Conservation Commission ("the Commission"). This appeal is limited to those issues raised by the Appellants in their "Application for Rehearing" filed with the Commission on June 24, 1997, which was denied by the Commission. Specifically, Appellants contend 1) that they were entitled to actual notice of the hearing held by the Commission regarding Order R-10815; and 2) Order R-10815, which amended Division General Rule 104, was not supported by substantial evidence.

As is explained in detail below, however, both of Appellants' contentions are plainly wrong. First, Appellants were entitled to no notice whatsoever of the Commission's rulemaking under the Federal and State Constitutions, and were entitled only to publication notice under applicable statutes and regulations. Second, there is simply no question that Order R-10815--which was based on extensive expert geologic and petrochemical evidence--was not arbitrary and capricious and was supported by substantial evidence. Appellants' arguments should be rejected, and the Stay on Commission Order R-10815 should be lifted.

B. FACTUAL SUMMARY

(1) On February 25, 1997, Burlington filed an application with the New Mexico Oil Conservation Commission docketed as Case 11745 requesting the Commission establish a new rule for well spacing for general application to "deep gas" wells drilled below the base of the Dakota formation within an area covering some 5,700,000 acres within the San Juan Basin of New Mexico. (**Affidavit of Alan Alexander**)

(2) Burlington intended to notify the operators in the San Juan Basin of this application because those operators would be the parties most likely to have the knowledge, experience and data to determine the appropriate spacing size to encourage "deep gas" exploration in the San Juan Basin. (**Affidavit of Alan Alexander**)

(3) On February 27, 1997, Burlington's clerical personnel, instead of using the mailing list for the Mesaverde operators, used another "notice list" which had been prepared for a different Division case which was a list of those owners whose share of Mesaverde production was to be commingled with other production. This is the list that Appellant refers to as the "random notice" list. (**Affidavit of Alan Alexander**)

(4) After discovering this error in notification, on February 27, 1997 Burlington sent notice of this hearing, including a copy of the application, to a list it had of all of the operators of wells in the Mesaverde formation which is the largest group of operators in the San Juan Basin. (**Affidavit of Alexander**)

(5) On February 27, 1997, the Oil Conservation Division sent notice by regular mail of this case to all parties on the Division's general mailing list for hearings which included some 267 operators and interested parties in the State of New Mexico. **(Affidavit of Florene Davidson).**

(6) In addition, the Division published notice of this hearing in four different newspapers including in The Daily Times, Farmington, New Mexico on March 5, 1997, a newspaper which is a paper of general circulation in the San Juan Basin. **(Affidavit of Florene Davidson).**

(7) On March 19, 1997, the Commission held a public hearing in Case 10815. **(Order R-10815)**

(8) On June 5, 1997, the New Mexico Oil Conservation Commission ("Commission") issued Order R-10815 in Commission Case 11745, which established 640 acre spacing, modifying the existing rule for general application to "deep gas" wells drilled below the base of the Dakota formation within an area covering some 9,000 square miles within the San Juan Basin of New Mexico. **(Order R-10815).**

(9) Order R-10815 became effective on June 30, 1997, the day of its publication in the New Mexico Register. **(Order R-10877)**

(10) Burlington and other operators in the San Juan Basin have commenced operations to drill "deep gas" wells within the San Juan Basin including a proposal to locate one of these wells in Section 9, T31N, R10W which is a section in which the Appellants have interests. **(Affidavit of Strickler)**

(11) On April 23, 1997, Burlington selected Section 9 as the location for the Scott Well No. 24 as one of the first sections out of some 500,000 acres in which Burlington had preliminary records of ownership. **(Affidavit of James Strickler)**

(12) On April 29, 1997, Burlington proposed to some 75 owners in Section 9 that Scott Well No. 24 to be dedicated to a spacing unit consisting of all of said Section 9 and which is estimated to cost as follows:

(a) dry hole costs	$1,713,800.	
(b) completion	603,173.	
Total:	$2,316,973.	**(Affidavit of James Strickler)**

(13) On May 8, 1997, Burlington staked the location of the Scott Well No. 24 and prepared Division form C-102. **(Affidavit of James Strickler)**

(14) In Section 9, Burlington has been joined by some 15 owners who collectively control approximately 35% of the working interest. The non-participating parties including the Appellants and others.**(Affidavit of James Strickler)**

(15) On May 16, 1997, Burlington advised the plaintiffs of its intention to establish a 640 acre spacing unit in Section 9. **(Affidavit of James Strickler)**

(16) On June 12, 1997, after failing to obtain the voluntarily agreement of all interest owners, Burlington filed a compulsory pooling application with the Division for pooling Section 9 as a spacing unit for the Scott Well No. 24 which was docketed by the Division as Case 11809. **(Affidavit** of James Strickler)

(17) On June 17, 1997 notice was sent to the plaintiffs that a hearing in Case 11809 was set for July 10, 1997. **(Affidavit of James Strickler)**

(18) On June 24, 1997, the Appellants filed with the Commission an application for rehearing of Case 11745. **(Affidavit of Florene Davidson)**

(19) On July 10, 1997, the New Mexico Oil Conservation Division ("Division") held an adjudication hearing on the application of Burlington in Case 11809 seeking to pool the interests of the Appellants within Section 9, T31N, R10W, San Juan County, New Mexico. **(Affidavit of Florene Davidson)**

(20) On September 12, 1997, the Division entered Order R-10878 in Case 11809 pooling all of the mineral interests, including those of the plaintiffs in Section 9. **(Order R-10877)**.

II. ARGUMENTS AND AUTHORITIES

A. APPELLANTS WERE NOT ENTITLED TO ACTUAL NOTICE OF THE COMMISSION'S RULEMAKING CHANGING DIVISION RULE 104

As is explained in detail in Burlington's Statement of Appellate Issues, it is absolutely clear that Appellants were not entitled to actual notice of the Commission's hearing regarding Order R-10815. First, the Commission's action in prospectively changing Division Rule 104 as it affects tens of thousands of owners and hundreds of operators was without question a general rulemaking and not an adjudication. Second, despite Appellants' blatantly unsupported

assurances to contrary, it is well-settled law that, under both the New Mexico and Federal Constitutions, Appellants simply had no due process right to notice of any kind of the Commission's general rulemaking; such a right could only be statutory. Finally, under applicable statutes and regulations, Appellants were entitled only to publication notice, which notice they were undisputedly given. Appellants' arguments should be disregarded, and the Stay on Commission Order R-10815 should be lifted.

1. **The Commission's Amendment of Rule 104 was a Rulemaking**

As Appellants acknowledge, **Uhden v. New Mexico Oil Conservation Commission**, 112 N.M. 528, 817 P.2d 712 (1991), controls this case. Unfortunately for Appellants, however, **Uhden** does not control in the way they had hoped. Instead, **Uhden** clearly shows that the Commission's action in changing Division Rule 104 was a rulemaking and not an adjudication. In **Uhden** the New Mexico Supreme Court determined that an order increasing the well spacing acreage for specific units in the Cedar Hills Fruitland Coal-Gas Pool was an adjudication and not a rulemaking. The court based this decision on the facts that "[t]his order was not of general application, but rather pertained to a limited area," and that "[t]he persons affected were limited in number ...." **Id.** at 530, 817 P.2d at 723.

As shown in Appellants' statement of appellate issues, the Commission's general well-spacing rule change in the present case is the exact opposite of the adjudicatory order at issue in **Uhden.** Specifically, the Commission Order modifying Rule 104 provides that:

> (1) Division Rule 104 is hereby amended to conform to rule changes hereby adopted by the Commission and as set forth in Exhibit "A" and made part of this Order
>
> (2) Rule 104 as amended shall be effective on the date of its publications (sic) in the New Mexico Register.

See Order R-10815 (emphasis added). Further, Appellants still do not--and cannot--deny the fact that, unlike the narrow adjudication of a small number of interests in Udhen, the Commission's general change of Rule 104 affects tens of thousands of owners and hundreds of operators in the San Juan Basin.

In addition, state statutes distinguishing between rulemakings and adjudications indicate that the type of agency action at issue here was a rulemaking. For example, under the New Mexico Administrative Procedures Act,[1] a "rule making" is defined as "any agency process for the formation, amendment or repeal of a rule." NMSA 1978, Sec 12-8-2(H)(Repl. Pamp 1988). By contrast, an "adjudicatory proceeding" is defined as "one in which legal rights, duties or privileges of a party are required by law to be determined by an

[1] While the Act is not specifically applicable to the Commission, its definitions, which follow federal law, are useful standard to be applied in determining whether an agency's conduct constitutes a rulemaking.

agency after a trial type hearing but does not include a mere rulemaking proceeding." **Id.** Sec 12-8-2(B). In the same vein, as Appellants have acknowledged, the Commission's action was clearly a change of the established well-spacing rule.

Nor are Appellants helped by the authority they have cited on this issue. For example, in **Zamora v. Village of Ruidoso Downs**, 120 N.M. 778, 907 P.2d 182 (1995), relied on in Appellants' Response Brief at 19, n.7, the New Mexico Supreme Court considered the actions of a municipality's board of trustees in terminating the employment of a single municipal worker. **Id.** at 781, 907 P.2d at 185. Again, there is no question that the rule change in the present case was a change of general application affecting thousands of people. Under the criteria set forth in **Uhden**, therefore, the proceeding below was clearly a rulemaking.

Realizing how fatal the rulemaking vs. adjudication distinction will ultimately be to their case, Appellants scramble to argue that the Commission's decision must have been an adjudication by alleging that they are "uniquely and exceptionally affected" by that decision. **See** Appellants' Trial Brief at 8; **see also** Section A(2) below. Appellants, however, have not even pretended to present any evidence that the Commission's rulemaking is somehow more, less, or differently applicable to them than to the tens of thousands of other San Juan Basin owners and operators affected by it. The reason for this failure is

clear. Although purporting to deny the fact that the Commission's action was a rulemaking, Appellants are nevertheless forced to acknowledge that "in its Order No. 10815, the Commission **changed** the long established Rule 104 . . . ." Appellants' Response Brief at 19 (emphasis added). It is difficult to understand how the "change" of a "long established" rule of general application could be anything **but** a rulemaking. Appellants' argument is clearly a bad bluff, and must be rejected. The changing of general Rule 104 by the Commission was a rulemaking, and not an adjudication.

2. **Under Both the Federal and New Mexico Constitutions, Persons Affected by Rulemakings Are Not Entitled To Any Due Process Protection.**

Having established that the Commission's action in this case was a rulemaking, the Court must consider the importance of that fact. In this regard, Appellants make the truly ludicrous argument that Burlington has failed to point to a single relevant Commission statute or rule concerning hearing notice "that makes the distinction between rulemaking vs. adjudication proceedings." Response Brief at 15. Apparently, Appellants believe that the **Uhden** court was writing for no reason at all when it discussed at length and in detail the fact that "**[f]irst, this was an adjudicatory and not a rulemaking proceeding.**" 112 N.M. at 530, 817 P.2d at 723 (emphasis added). The reason that the **Uhden** court had to address this issue first is simple: it is hornbook law that persons affected by rulemakings are not entitled to any due process protection.

The United States Supreme Court established this rule more than eighty years ago in **Bi-Metallic Investment Co. v. State Board of Equalization**, 329 U.S. 441, 36 S. Ct. 141 (1915). In **Bi-Metallic**, a Denver property owner argued that the city's refusal to grant him a hearing to challenge an across-the-board increase of all taxable real property violated constitutional due process protection. Justice Holmes writing for a unanimous Court, answered this argument squarely in the negative, stating that:

> [w]hen a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole....There must be a limit to individual argument in such matters if government is to go on.

Id at 445, 36 S. Ct. at 142. In so doing, the Court unanimously held that protection for individual interests in general rulemaking does **not** lie in the Constitution; rather, these "rights are protected in the only way that they can be in a complex society, by the power, immediate or remote, over those who make the rule." **Id.** Further, as for the specific issue of whether constitutional due process requires notice for general rulemakings, Justice Holmes noted an earlier Supreme Court decision dealing with the same question wherein the Court had held that "it was hard to believe that the proposition was seriously made." **Id.** (citing **State Railroad Tax Cases**, 92 U.S. 575, 609, 23 L.Ed. 672 (1875).

It is clear from **Bi-Metallic**, therefore, that rulemaking actions such as the Commission's action in this case simply do not implicate the due process protections of the federal Constitution. Nor is **Bi-Metallic** some antiquated Supreme Court opinion out of touch with the reality of the modern world. As recently as 1984, the Supreme Court reaffirmed its recognition that the Federal Constitution creates no due process requirement for governments acting in their general policy making capacities. In **Minnesota State Board for Community Colleges v. Knight**, 465 U. S. 271, 285 S. Ct. 1058, 1066 (1984), the Court noted that "[i]n **Bi-Metallic** the Court rejected due process as a source of an obligation [for the government] to listen" The Court then held that:

> the pragmatic considerations identified by Justice Holmes in **Bi-Metallic Investment Co. v. State Board of Equalization**, supra, are as weighty today as they were in 1915. Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policy-making constrained by constitutional requirements on whose voices must be heard. "There must be a limit to individual argument in such matters if government is to go on" **Id.** 239 U. S. at 445, 36 S. Ct. at 142. Absent statutory restrictions, the State must be free to consult or not to consult whomever it pleases.

Id.

Further, the New Mexico Supreme Court has come to precisely the same conclusion with regards to the New Mexico Constitution. In **Livingston v. Ewing**, 98 N.M. 685, 652 P.,2d 235 (1982), the court considered a general resolution passed by the board of regents of the Museum of New Mexico that had the effect of precluding non-Indians from selling crafts under the portal of

Santa Fe's Palace of the Governors. The plaintiff, a non-Indian affected by the resolution, argued that the board's action deprived him of his due process rights of notice and an opportunity to be heard. **Id.** at 688, 652 P.2d at 238. The Supreme Court disagreed, however, expressly holding that "**[t]here is no fundamental right to notice and hearing before the adoption of a rule; such a rights is statutory only.**" **Id** (citing **Bi-Metallic**) (emphasis added).

Further, because of this fundamental difference between rulemakings and adjudications, Appellants' reliance on **Mullane v. Central Hanover Bank & Trust Co.**, 339 U. S. 306, 70 S. Ct. 652 (1950) is simply misguided. **See** Appellants' Trial Brief at 3. **Mullane** involved an action in which a bank sought judicial settlement of its accounts as trustee for a common trust fund. In deciding the adequacy of the notice provided by the bank to the fund's beneficiaries, the Supreme Court held that the beneficiaries were entitled to constitutional due process protections. **Id** at 314, 70 S. Ct at 657. The Supreme Court has subsequently made clear that the protections afforded by **Mullane** are applicable only to adjudications, and not to rulemakings:

> The due process standards of **Mullane** apply to an "adjudication" that is "to be accorded finality." The Court in **Mullane** itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property.

Texaco, Inc. v. Short, 454 U.S. 516, 535, 102 S. Ct. 781, 795 (1982). Thus, when the **Uhden** court relied on **Mullane**, and on several Oklahoma state court

decisions dealing with well-spacing adjudications, it was plainly doing so from their analysis of the due process in adjudicatory actions and not for rulemakings. **See** 112 N.M. at 530, 817 P.2d at 723 ("First, this was an adjudicatory and not a rulemaking proceeding.").

In attempting to avoid the holdings in **Bi-Metallic** and **Livingston**, Appellants offer two theories, both of which are hopelessly contradictory and plainly wrong. In their first theory, Appellants unashamedly contend--without citation to authority--that when Burlington points out that it is well-settled law that persons affected by rulemakings are not entitled to any due process protection, Burlington is advancing an "unsupported and truly ridiculous argument." Appellants' Trial Brief at 6 n.1. To make this misrepresentation, however, Appellants must simply ignore the eighty-year-old line of authority establishing exactly the proposition Burlington advances. **See Bi-Metallic**, 239 U.S. at 445, 36 S. Ct. at 142; **Knight**, 465 U.S. at 285, 104 S. Ct. at 1066; **Livingston**, 98 N.M. at 688, 652 P.2d at 238.

Appellants, however, know full well that persons affected by rulemakings are not entitled to any constitutional due process protection. Indeed, in their second theory, Appellants completely contradict their earlier position and admit that the "landmark decision" in **Bi-Metallic** controls this case. Appellants' Trial Brief at 6. Appellants nevertheless twist mightily to escape the grasp of the Supreme Court's holding, wrongly asserting that the Commission's changing of

Rule 104 was an adjudication and not a rulemaking. Appellants' Trial Brief at 6. In so doing, Appellants mistakenly rely on the distinction the Supreme Court made between the large numbers of people affected by the agency rulemaking in **Bi-Metallic** and the "relatively small number of persons . . . who were **exceptionally** affected, **in each case upon individual grounds,**" in the agency adjudication involved in **Londoner v. Denver**, 210 U.S. 373, 28 S. Ct. 708 (1908). **Bi-Metallic**, 239 U.S. at 445, 36 S. Ct. at 142 (emphases added).

As shown in Section A(1) above, however, Appellants simply cannot show how the Commission's general rule change has affected them any differently than the tens of thousands of other San Juan Basin owners and operators. They are not uniquely affected by the rulemaking simply because they are the only persons complaining about it. Indeed, Appellants themselves admit that other San Juan Basin owners are also affected by the Commission's decision to change Rule 104. **See** Appellants' Trial Brief at 1 ("Burlington's application to obtain the spacing change was noticed **to some affected working interest owners** . . . .") (emphasis added).

The most that Appellants can do is allege that the Commission's rulemaking has somehow had an "impact" on their ownership interests. **See** Appellants' Trial Brief at 2. Such an allegation, however, is clearly insufficient as a matter of constitutional law. Indeed, in reaching the conclusion that agency rulemakings implicate no due process protections, Justice Holmes

expressly recognized that "[g]eneral statutes within the state power are passed that affect the person or property of individuals, **sometimes to the point of ruin**, without giving them a chance to be heard." **Bi-Metallic**, 239 U.S. at 445, 36 S. Ct. at 142 (emphasis added).

Because the changing of Rule 104 was clearly a rulemaking, under both the Federal and State constitutions Appellants quite simply were not entitled to any constitutional due process protections, actual notice or otherwise, from either the Commission or from Burlington. Appellants' arguments to the contrary are wrong and should be disregarded.

3. Appellants Were Not Statutorily Entitled to Actual Notice.

As the foregoing shows, and as the New Mexico Supreme Court has made clear, any notice that may have been due the Appellants in this action would have been strictly statutory. **See Livingston**, 98 N.M. at 688, 652 P.2d at 238. Further, as is shown below, any statutory notice they may have been entitled to would have had to come from the Commission, and not from Burlington. In this case, the Commission's publication notices plainly complied with the applicable statutes.

Appellants' argument to contrary come up short. Appellants contend that they were entitled to actual notice under Division Rule 1207. Appellants' Trial Brief at 8-9. Division rule 1207(A)(1-10) lists several types of applications for

Division hearings, all of which are adjudicatory in nature. **See, e.g.** Rule 1207(A)(1-2) (applications for compulsory pooling); Rule 1207(A)(5) (unorthodox well locations); Rule 1207(A)(6) (non-standard proration units). Appellants contend that Rule 1207(A)(11), which deals with "cases of applications not listed above," and which requires actual notice, is applicable in this situation. It clearly is not.

As noted, Rule 1207(A)(11) makes reference to the other types of "applications" preceding it. As those other "applications" plainly deal with adjudicatory types of hearings, the catchall "applications" contemplated by Rule 1207(A)(11) must be read as dealing with other types of adjudications, as well. See **Matter of Melissa H.**, 105 N.M. 678, 679, 735 P.2d 1184, 1185 (Ct. App.) **cert. denied.** 105 N.M. 644, 735 P.2d 1150 (1987) (under doctrine of ejusdem generis, general words in a statute following an enumerations of particular subjects will ordinarily be presumed to be restricted so as to embrace only subjects of the same general character, to the exclusion of all others.) It makes no sense to have a rule for notice which provides for the type of notice to begin in various types of applications seeking adjudications before the Commission and then have a catchall provision that requires actual notice for every other type of application including general rulemakings. Rule 1207(A)(11), therefore, cannot sensibly be interpreted as applicable to the rulemaking at issue before the Commission in this case.

Furthermore, this interpretation of Rule 1207(A)(11) comports with the express interpretation the Commission has provided of its rule. In its brief in support of its motion to dismiss, the Commission unambiguously stated that:

> "Rule 1207 sets forth the required notice that applicants for certain orders from the Commission must provide. It is not the required notice for the rulemaking for the Commission which is set forth in the [Oil and Gas] Act at NMSA 1978 Sec 70-2-23 (Repl. Pamp 1995) and the Open Meetings Act, NMSA 1979 Sec 10-15-1(D) (1997 Supp.)"

Oil Conservation Commission's Memorandum Brief in Support of Its Motion to Dismiss, at 4 (emphasis added). The Commission provides the same unambiguous interpretation of its rules in its Statement of Appellate Issues, at 5. ("The Appellants simply misstate the notice requirements by alleging that OCD Rule 1207(A)(11) is applicable to Commission rulemaking.")

Courts are required to give special weight and are to provide judicial deference to an agency's interpretation of its own regulations. See **Regents of Univ. of N.M. v. Hughes**, 114 N.M. 304, 312, 838 P.2d 458, 464 (1992) ("And, of course, it is hornbook law that an interpretation of a statute by the agency charged with its administration is to be given substantial weight, and is entitled to judicial deference.") (citations omitted); **see also Thomas Jefferson Univ. v. Shalala**, 114 S. Ct. 2381, 2386 (1994) (agency interpretation must be given controlling weight unless plainly erroneous or inconsistent with the

regulation). The reason for such deference is well-established. As the leading commentators on administrative law have stated:

> The powerful effect courts give most agency interpretations of the agency's own regulations is based on common sense. The agency typically is in a superior position to determine what it intended when it issued a rule, how and when it intended the rule to apply, and the interpretation of the rule that makes the most sense given the agency's purpose in issuing the rule.

Kenneth C. Davis & Richard J. Pierce, Jr. I Administrative Law Treatise Sec 6.10 at 282 (3rd ed.). Therefore, under established canons of statutory interpretation and affording proper deference to the Commission's interpretation, the notice requirements of Division Rule 1207 cannot be read as governing notice in the rulemaking proceeding at issue in this case.

As noted by the Commission, the statutes that do apply to this matter are the notice provisions of the Oil and Gas Act and the Open Meetings Act. Specifically Section 70-2-23 of the Oil and Gas Act provides that before any rule shall be made or changed, the Commission shall hold a hearing and "shall first give reasonable notice of such hearing..." Similarly, Section 10-15-1(D) of the Open Meetings Act provides that any meeting at which the adoption of a rule is discussed "shall be held only after reasonable notice to their public" Neither of these statutes provide for the actual notice insisted on by Appellants; instead, **reasonable** notice is the standard. Further, such notice is required to be given, not by private entities such as Burlington, but by the

governmental agency involved, in this case, the Commission.[2] Lastly, the notice provided by the Commission--when it circulated notice of this case on its general mailing list for hearings and by publication notice--was clearly reasonable for this rulemaking. As the Supreme Court indicated in **Bi-Metallic**, it is simply unreasonable in a modern society to require that a governmental agency ensure that every single person who could possibly be affected by a general rulemaking be notified personally before promulgating the rule. **See** 239 U.S. at 445, 36 S. Ct. at 142.

Finally, even if the notice provisions of Division Rule 1207 were held to apply in this situation--and Burlington denies that they do--lack of notice is still not grounds for invalidating the Commission's rule change. Rule 1207(D) specifically provides that, "[e]vidence of failure to provide notice as provided in this rule, may, upon a proper showing be considered cause for reopening the case." Appellants have already applied for a reopening of Commission's rulemaking, and their motion for rehearing was denied. Consequently, even if Rule 1207(A)(11) is applicable in this case, the Commission has already made its administrative evaluation of the merits of Appellant's arguments and evidence, and would clearly re-adopt that rulemaking in any event. As the New Mexico Supreme Court stated in **Livingston**, "requiring the [agency] to re-adopt

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[2]Plaintiffs have never said how or when they heard of the proceeding. The record shows that on May 16, 1997 Burlington informed LaForce, one of their number of this Commission case which the Commission did not decide until June 5, 1997 yet Appellants did not take an action until June 24, 1997.

its resolution would defeat the goals of speed and efficiency basic to the administrative process" 98 N.M. at 688, 652 P.2d at 238 (citations omitted). Therefore, the Commission's modification to Division Rule 104 cannot be invalidated based upon complaint that Appellants were entitled to receive actual notice of the rulemaking that resulted in the modification of that rule.

B. ORDER R-10815 IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT ARBITRARY OR CAPRICIOUS

1. The Court Should Apply an Arbitrary and Capricious Standard of Review to the Commission's Rulemaking

In their Trial Brief, Appellants appear to argue that the Court should review the Commission's rulemaking for substantial evidence. Although there is ample evidence in the record to uphold the validity of the Commission's action under that standard, **see** Section B(2) below, this standard is nevertheless not appropriate. Instead, the correct standard of review for the Commission's rulemaking is whether the agency acted arbitrarily or capriciously.

There is no specific statutory standard of review set out for Commission rulemaking in the Oil and Gas Act. **See, e.g.,** NMSA 1978 Sec. 70-2-25. Rule of Civil Procedure, SCRA 1986, Rule 1-074(Q) of the New Mexico Rules of Civil Procedure, however, does articulate the general standards of review available for district court review of an agency's decision. One of those standards, Rule 1-074(Q)(1), requires the reviewing court to decide whether "the agency acted

fraudulently, arbitrarily, or capriciously." Although the rule provides a choice of other standards, including substantial evidence, the standard of subsection (Q)(1) should apply to Commission's rulemaking.

It is well established that, in the absence of a specific statutory mandate, broad discretion should be afforded an agency promulgating a rule. For example, in **American Paper Institute, Inv. v. American Electric Power Service Corporation**, 461 U.S. 402, 412 n.7, 103 S. Ct. 1921, 1928 n.7 (1983), the United States Supreme Court held that, in the absence of a specific statutory command, the rulemaking at issue "must be reviewed solely under the more lenient arbitrary and capricious standard prescribed by the Administrative Procedures Act for judicial review of informal rulemaking." While the Commission does not fall under the New Mexico Administrative Procedures Act, the reasoning behind the **American Paper** ruling--that in the absence of a specific statute an agency rulemaking should be reviewed under the most lenient standard otherwise available--applies with equal force in this case.

Further, the arbitrary and capricious standard is clearly consistent with the Oil and Gas Act. The Act provides that a challenged Commission action "shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish in invalidity of such action of the commission" NMSA 1978, Sec 70-2-25(B). While there are no cases addressing the standard of review to be applied when assessing the validity of the rulemaking of the Commission, the

New Mexico Supreme Court has noticed that the broad responsibilities of the Commission require that its decisions be provided considerable deference by the Courts. **See Rutter & Wilbanks Corp. v. Oil Conservation Comm'n**, 87 N.M. 286, 532 P.2d 582 (1975). The more deferential arbitrary and capricious standard of review should therefore be applied to the Commission's rulemaking. **See In re Permian Basin Area Rate Cases**, 390 U.S. 747, 767, 88 S. Ct. 1344, 1360 (1968) (because the legislature had entrusted natural gas regulations to a specific government agency, a presumption of validity attached to each exercise of the agency's expertise, and those who would overturn the agency's judgment undertook the hearing burden of showing convincingly that it was unjust and unreasonable under the circumstances). As explained below, the Commission's decision easily satisfies the arbitrary and capricious standard.

2. The Commission's Rulemaking Should Be Upheld Under Either an Arbitrary and Capricious or a Substantial Evidence Standard of Review.

Ultimately, it will not matter whether the Court applies an arbitrary and capricious or a substantial evidence standard in reviewing the Commission's rulemaking. It is simply beyond question that the Commission's decision satisfies both standards of review.

In **Santa Fe Exploration Company vs. Oil Conservation Commission**, 114 N.M. 103, 835 P.2d 819 (1992), the New Mexico Supreme Court clearly laid out the rules applicable in reviewing a Commission decision under both the substantial evidence and the arbitrary and capricious standards. With regard to substantial evidence, the **Santa Fe** court held that it would view the evidence in a light most favorable to upholding the agency determination without completely disregard conflicting evidence, and that it the agency decision would be upheld if the court is satisfied that evidence in the record demonstrates the reasonableness of the agency's decision. 114 N.M. at 114, 835 P.2d at 830. With regard to conflicting evidence, however, the court made clear that "[i]n any contested administrative appeal, conflicting evidence will be produced," and that "**[w]here a state agency possesses and exercises such knowledge [required to resolve and interpret the conflicting evidence], we defer to their judgment.**" **Id.** at 114-15, 835 P.2d at 831-32 (emphasis added).

As for the arbitrary and capricious standard, the **Santa Fe** court held that and agency action would only be invalidated if, when viewed in the light of the whole record, that action "is unreasonable or does not have a rational basis, and 'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.'" **Id.** at 115, 835 P.2d at 832 (citations omitted). As such, an agency's decision "is not arbitrary and capricious 'if exercised honestly and upon due consideration, **even though**

another conclusion might have been reached.'" **Id.** (quoting **Perkins v. Department of Human Servs.**, 106 N.M. 651, 655-56, 748 P.2d 24, 28-29) (emphasis added).

Appellants' entire argument about standard of review is based on the patently wrong theory that, because some evidence was presented by Amoco to the Commission that purportedly conflicted with its decision to change the general spacing rule, the Commission's decision should be invalidated. **See** Appellants' Trial Brief at 10-13. As the above discussion of **Santa Fe** shows, however, if there is substantial evidence on which the Commission could have relied, even in the face of conflicting evidence, the Commission's decision will be upheld on review. In this case, there is simply no way that Appellants can credibly argue that such evidence was not presented to the Commission.

For example, Burlington's geologic expert, Mr. Mike Dawson, using a subsurface stratigraphic well log cross section map, testified that the geology of the deep formations in the San Juan Basin "are probably very similar" to those being produced in the Baker Creek-Barker Dome and Alkali Gulch areas where the Commission has adopted 640-acre well spacing. **(TR-p. 25, 27, Burlington Exhibit 7)(R.P.053,055)** Further, it was Mr. Dawson's expert opinion that those existing pools spacing on 640-acre well spacing were analogous to the "deep gas" formations in the San Juan Basin **(TR-p.28-29)(R.P.056,057)** because "[i]n general, I'm finding the same rocks, correlatable units, similar

lithologies, with the one exception of having evaporites that aren't really here, and they are only in the Akah member of the Paradox formations. The remainder of the members seems to be fairly continuous right out into the San Juan Basin." **(TR-p.29)(R.P.057)** Finally, when asked "[d]o you see sufficient continuity of the reservoir-quality reservoirs in the Pennsylvanian to give us a reasonable probability that you'll find that same reservoir at various points within the section?", Mr. Dawson replied "[y]es, sir, even though our well control is extremely sparse, it's not that difficult to correlate key zones, key intervals, such as Barker Creek, right out into the Basin and around the Basin." **(TR-p.29)(R.P.057)**

In addition, Burlington's expert petroleum engineer, Mr. Chip Lane, testified that in the Barker Dome-Paradox Gas Pool he had "examples of interference that we actually do see between wells at are on 640-acre spacing. So I feel comfortable and confident that we can and do draining 640-acres in some of these Pennsylvanian members." **(TR-p.46)(R.P.074)**. Mr. Lane had calculated drainage areas of 785 acres per well in the Barker Dome-Paradox Gas Pool and estimated such a well would produce 22 billion cubic feet of gas. **(TR-49-51)(R.P.077-077a).** Based upon those calculations, Mr. Lane estimated the "deep gas" in the Pennsylvanian formations of the San Juan Basin could be expected to also drain 640-acres. **(TR-p.51)(R.P.78a)** Mr. Lane also testified that based upon decline curve analysis, reservoir pressure data, volumetric

calculations and the various reservoir parameters and characteristics of the Pennsylvanian formations, it was not economically feasible to explore for deep gas production in the San Juan Basin unless spacing was based on 640-acres per well. **(TR-65)(R.P.092)**. Amoco presented a conflicting position.

On the basis of this evidence, and after due consideration, the Commission then exercised its knowledge and expertise in interpreting the conflicting evidence, ultimately adopting Burlington's recommendation. **Order R-10815 Findings (7)(8)(9)(R.P.260-261)**. The Commission did so even though another conclusion might have been reached. It is clear, therefore, that the Commission's decision to change general Rule 104 was done so on the basis of substantial evidence, and was not done arbitrarily or capriciously. Appellants arguments to the contrary must be disregarded.

III. CONCLUSION

As the foregoing shows, all of Appellants' arguments come up desperately short. Under the Federal and State Constitutions, as well as applicable statutes, Appellants were not entitled to actual notice of the Commission's rulemaking with regard to Rule 104. Further, the Commission's decision to change Rule 104 was not arbitrary and capricious, and was supported by substantial evidence. As such, Appellants' argument should be rejected, and the Stay on Commission Order R-10815 should be lifted.

In addition, Burlington requests that the Court award it attorneys fees and costs associated with this matter, and such further relief as the Court deems appropriate.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Burlington's supplements to the record proper was hand delivered this 7th day of November, 1997 to the office of:

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STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et. al.,	)	
Appellants,	)	
vs.	)	**Cause No. CV-97-572-3**
Burlington Resources Oil & Gas Company, a corporation, and The New Mexico Oil Conservation Commission,	)	
Appellees	)	

APPELLANTS' TRIAL BRIEF

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "Appellants"), hereby submit their trial brief, as follows:

I.

PRELIMINARY STATEMENT

For forty-seven years the oil and gas industry has relied upon a New Mexico Oil Conservation Division ("Division") Rule requiring that wildcat wells in the San Juan Basin be drilled on 160-acre spacing units. In a rapid-fire process of only slightly more than three months from application to order, Burlington Resources Oil and Gas Company ("Burlington") obtained Order R-10815 changing that spacing requirement to 640-acres. Burlington's application to obtain the spacing change was noticed to some affected working interest owners, but not to a single one of the plaintiffs, though they number more than sixty, and are extremely and uniquely well known to Burlington.

The impact of this spacing change on the appellants was direct and immediate. Less than a week after the order issued, on June 11, 1997, Burlington was back at the Oil Conservation Division ("Division") with an application to force pool the Appellants' acreage -- comprising over 60% of the ownership -- into a 640 proration unit for a wildcat deep Pennsylvanian formation well to be drilled by Burlington in Section 9 of Township 31 North, Range 10 West.

Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) is controlling here on the notice issue. Appellees' attempts to distinguish Uhden as an adjudicatory proceeding and the instant case as rule making are simply unavailing. Under Uhden since Burlington knew the identity and whereabouts of the appellants and knew beforehand the immediate adverse effect the outcome of the spacing rule change would have on the Appellants' real property interests, Burlington had a responsibility to give the Appellants' actual notice of its application and of the Commission proceedings in Case 11745. The Commission's publication notice is clearly deficient under the New Mexico Oil and Gas Act, Oil Conservation Division Rules and Uhden. Since Burlington failed to give the Appellants personal service of its application in Commission Case 11745, Order R-10815 is void as to the Appellants.

The Commission's factual findings supporting a change of this long-established spacing rule must be based upon and supported by substantial evidence, e.g. sound technical, geologic, geophysical, reservoir engineering and economic data indicating that San Juan Basin deep gas wells can efficiently and economically drain 640 acres. Burlington did not present any evidence to the Commission that a deep gas well in the San Juan Basin will efficiently and economically drain 640 acres. The fact is, no such wells currently exists. Lacking information as to drainage qualities of a formation, the

default rule for wildcat wells has historically been 160-acres.

II.

ARGUMENT AND AUTHORITIES

POINT ONE

THE DUE PROCESS GUARANTEES OF ARTICLE II, SECTION 18 OF THE NEW MEXICO CONSTITUTION AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION GUARANTEE THAT A PARTY WHOSE PROPERTY RIGHTS ARE THREATENED BY STATE ACTION IS ENTITLED TO NOTICE AND A FAIR HEARING

A. THE UHDEN CASE MANDATES THAT THE PLAINTIFFS SHOULD HAVE RECEIVED ACTUAL NOTICE OF COMMISSION CASE 11745

The on-point holding of the New Mexico Supreme Court in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) is controlling in requiring that the appellants should have been provided actual notice of and an opportunity to be heard in Case 11745 in order to afford them the due process protection guaranteed by Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution. In essence, the basic Constitutional standards for adequacy of notice concerning changes to a Division spacing rule change was set out in Uhden as follows:

> In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), the United States Supreme Court stated that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314, 70 S. Ct. at 657. The Court also said that "but when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Id. at 315. Significantly, the Court refused to sanction notice by publication to those whose identity and whereabouts were ascertainable from sources at hand.

Uhden, supra 112 N.M. at 530 (emphasis added). See also Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992)(At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend.)

Appellees argue that the publication notice the Commission provided of Case 11745 is all the notice the appellants were due. See Commission's SOI at pp. 4-5, Burlington's SOI at p. 16. They are wrong. Since Burlington knew the appellants names and addresses, it had an obligation to provide them actual notice of Case 11745. In Uhden, the New Mexico Supreme Court, discussing the Oklahoma case Cravens v. Corporation Commission, 613 P.2d 442 (Okla. 1980), cert. denied, 450 U.S. 964, 101 S. Ct. 1479, 67 L. Ed. 2d 613 (1981), squarely addressed this situation as follows:

> [In Cravens,] An application was made for an increase in well spacing to the state commission. Although the applicants knew the identity and whereabouts of a well operator whose interests would be affected by a change in spacing, they made no attempt to provide actual notice. **The applicant complied with the relevant statute and rule, which prescribed notice by publication of a spacing proceeding. The court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements.** Id. at 644.
>
> * * *
>
> In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result. Thus, the Commission Order Nos. R-7588 and No. R-7588-A are hereby **void** as to Uhden.

Uhden, supra 112 N.M. at 531 (emphasis added). Union Texas Petroleum v. Corporation Commission, 651 P.2d 652 (Okla. 1981), cert. denied, 459 U.S. 837, 103 S. Ct. 82, 74 L. Ed. 2d 78 (1982), and Louthan v. Amoco Production Co., 652 P.2d 308 (Okla. Ct. App. 1982), all as cited with approval in Uhden supra 112 N.M. at 530.

The instant facts are indistinguishable from those before the Supreme Court in Uhden. Just as with Amoco and Ms. Uhden, it is undisputed that Burlington knew the names and addresses of each and every one of the appellants prior to filing its application in Case 11745. It is further undisputed that Burlington had concrete plans to drill its Scott Well No. 24 in Section 9 Township 31 North, Range 10W, San Juan County, New Mexico prior to filing its application in Case 11745. Prior to filing its application in Case 11745 Burlington knew that it would immediately commence proceedings to compulsory pool the Appellants' leasehold acreage in said Section 9 as soon it obtained the Commission's Order changing the deep wildcat gas spacing rule to 640 acres.

Based on these facts, and under the unequivocal holding of the New Mexico Supreme Court in Uhden, the Appellants were deprived of their property without due process of law, in contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution. Commission Order No. 10815 is **void** as to the Appellants.

B. CASE 11745 WAS AN ADJUDICATION OF THE APPELLANTS' PROPERTY RIGHTS IN THE SAN JUAN BASIN THUS ENTITLING THEM TO ACTUAL NOTICE OF AND AN OPPORTUNITY TO BE HEARD IN CASE 11745

In every pleading before this court, appellees' desperately attempt to justify their failure to provide the appellants with actual notice of Case 11745 on the feckless grounds that this was a "rulemaking" proceeding, as contrasted with the adjudicatory

proceeding in Uhden[1], and therefore the appellants were entitled to publication notice only. Appellees' rulemaking vs. adjudication "distinction" is absolutely without merit for at least two reasons. First, **not one** relevant New Mexico statute nor NMOCD rule concerning Commission or Division hearing notice requirements makes a distinction between rulemaking vs. adjudicatory proceedings. Rather, NMSA 1878 Section 70-2-23 of the Act, entitled "Hearings on Rules, Regulations and Orders; Notice; Emergency Rules" provides as follows:

> Except as provided for herein, **before any rule, regulation or order**, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the division. The division shall first give **reasonable notice** of such hearing (in no case less than ten days, except in an emergency) and at any such hearing **any person having an interest in the subject matter of the hearing shall be entitled to be heard.**

NMSA 1878 Section 70-2-23 (emphasis added.) Section 70-2-23 makes no distinction between rulemaking and adjudicatory hearings. Rather, it requires that any persons having an interest in the subject matter of **any** Division or Commission hearing shall: (1) receive reasonable notice, and (2) be entitled to be heard. In addition to Section 70-2-23 , the relevant Division notice rules make **no distinction**, and indeed does not even mention, disparate notice procedures for rulemaking vs. adjudicatory proceedings. See discussion of Division notice Rule 1207(A)(11) at part (C) infra.

The second reason that appellees' strained rulemaking vs. adjudication arguments are without merit is the fact that Case 11745 was in fact an adjudication of the appellants property rights. A brief review of the Supreme Court's landmark decision

[1] Indeed, Burlington advances the unsupported and truly ridiculous argument that the appellants were not entitled to any due process protection under either the Federal and New Mexico Constitution. See e.g. Burlington's SOI at P. 13(". . .it is hornbook law that persons affected by rulemakings are not entitled to any due process protection. ")

on this issue in Bi-Metallic Investment Co. v. State Board of Equalization 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915) so instructs.

In writing the unanimous opinion for the court, Justice Holmes states at the outset the critical foundational premise for the court's holding that the Denver property owners were not entitled to notice and hearing as follows: ". . .it must be assumed that the property owners in the county **all stand alike**. The question then is whether all individuals have a constitutional right to be heard before a matter can be decided in which **all are equally concerned**" Id. 239 U.S. 441, 444; 36 S. Ct. 141, 142; 60 L. Ed. 372, 375 (emphasis added.) The Court held that no individual notice was required.

It is this basic premise, i.e. that all affected parties are affected identically, that fundamentally distinguishes the instant facts from those before the court in Bi-Metallic. Indeed Justice Holmes expressly recognized that in the very different situation where, as here, a relatively small number of persons are exceptionally affected by state action, these individuals have a due process right to notice and a hearing. In distinguishing the court's prior decision in Londoner v. Denver 210 U.S. 373; 28 S. Ct. 708; 52 L. Ed. 1103 (1908) Justice Holmes stated as follows:

> In Londoner v. Denver, 210 U.S. 373, 385, a local board had to determine 'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. **A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing.**

Id. 239 U.S. 441, 445; 36 S. Ct. 141, 142; 60 L. Ed. 372, 375 (emphasis added).

In contrast to the taxpayers in Bi-Metallic, the appellants and other working interest owners in the San Juan Basin do not "all stand alike" concerning the effect of the spacing rule change. Rather, just as with the taxpayers in Londoner v. Denver, the

appellants are uniquely and exceptionally affected thereby and thus have a right to notice and an adjudicatory hearing. See Bi-Metallic supra, 239 U.S. 441, 445; 36 S. Ct. 141, 142; 60 L. Ed. 372, 375. Indeed this court has already correctly recognized that the appellants were uniquely affected by the spacing rule change and, as such, has ruled that the proceedings in Case 11745 were in fact "adjudicatory" as to the appellants.[2]

Since Case 11745 was in effect an adjudication of the appellants' property rights, the appellees' cannot distinguish their obligations to the appellants from those of Amoco in the Uhden case. Under Uhden, the appellants had a constitutional **right**, under both the Federal and New Mexico constitutions, to receive notice and an opportunity to be heard in Case 11745. The appellees' rulemaking vs. adjudication arguments are inapposite and must be disregarded.

C. THE PLAINTIFFS WERE ALSO ENTITLED TO ACTUAL NOTICE OF COMMISSION CASE 11745 PURSUANT TO DIVISION RULES

The Division is empowered pursuant to NMSA 1978 Section 70-2-7 of the New Mexico Oil and Gas Act (the "Act") to "prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the Oil and Gas Act." Id. Included among the Division's rules prescribed under the Act relate to the requisite notice procedures for hearings before Division and Commission. Specifically, these Division "notice" rules include Rule 1204, which requires mere publication notice, and Division Rule 1207(A) which provides additional due process protection by mandating additional notice procedures for certain Division and/or Commission proceedings. Rule 1207(A)(11), the

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[2] See Order Denying Motions to Dismiss and to Strike and Staying Commission Order R-10815 as to Plaintiffs at ¶2.

applicable "catch-all" subdivision of Rule 1207(A), requires that the **applicant** give additional notice to affected parties as follows:

> 1207.A. Each applicant for hearing before the Division or Commission shall give additional notice as set forth below:
>
> * * *
>
> (11) In cases of applications not listed above, the **outcome of which <u>may</u> affect a property interest of other individuals or entities**:
>
> (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested).

Division Rule 1207(A)(11)(emphasis added).

Rule 1207(A)(11) unambiguously mandates that Burlington, the "applicant" in Case 11745, was required to provide the appellants with "**<u>actual notice</u>**" of its application in Case 11745 if it merely believed that their property interests **<u>may</u>** be affected by the outcome thereof. There is no question that Burlington **<u>knew beyond doubt</u>** that the Appellants' property interests in Section 9 **<u>would</u>** be affected by the outcome of Case 11745 if its application were granted by the Commission. Indeed, Burlington's own documents prove that on February 20, 1997, a week before it served its notice to all "interested parties" of its application in this case on February 27, 1997, and **<u>a month before the Commission hearing</u>** held on March 19, 1997, Burlington had already prepared its detailed authority for expenditure itemizing the projected costs for its proposed Scott well which plainly indicates that Section 9 was the chosen location.[3]

Given these facts it is be beyond doubt that pursuant to Division Rule

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[3] In its Statement of Appellate Issues, Burlington misrepresents the facts by stating: "On April 23, 1997, Burlington selected Section 9 as the location for the Scott Well No. 24. . .", thus deceptively leading this court to believe that the location for the Scott Well was selected **<u>after</u>** the Commission hearing in Case 11745. <u>See</u> Burlington's SOI at p. 10. As Burlington's February 20, 1997 AFE for the Scott well makes clear, this is absolutely false.

1207(A)(11), Burlington, as the applicant in Case 11745, was obligated to provide the appellants with actual notice of its application and of the Commission proceedings. This clear obligation notwithstanding, and despite the fact that Burlington provided notice by certified mail to several hundred parties of its Application in Commission Case 11745[4], it is undisputed that: (1) Burlington did not send personal notice to the Appellants of its Application in Commission Case 11745; and (2) Burlington knew the Appellants' names and addresses and has in place a computerized mail-merge capability to send mail to the Appellants.

POINT TWO

COMMISSION ORDERS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR THAT ARE ARBITRARY, CAPRICIOUS CONSTITUTE AN ABUSE OF DISCRETION AND MUST BE SET ASIDE

A spacing unit by law is defined as the "area that can be efficiently and economically drained and developed by one well . . ." (Emphasis added) NMSA 1978 Section 70-2-17(B). Since December 1, 1950, Division Rule 104 has provided that a 160 acre spacing unit is the default rule for deep wildcat gas well spacing for San Juan, Rio Arriba and Sandoval Counties, New Mexico. Thus, to support a change in the rule an applicant would have to prove (a) that 160-acres will not economically and efficiently be drained and (b) that some other size proration unit was indicated.

A spacing rule, such as Division Rule 104, can be modified only upon a showing of substantial evidence indicating a change of conditions, or change in knowledge of conditions, arising since the prior spacing rule was instituted. Phillips Petroleum Co. v. Corporation Commission, 461 P.2d 597, 599 (Okla. 1969). Thus, the Commission's

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[4] See Record at pp. 163-217.

factual findings supporting a change of this long-established spacing rule must be based upon and supported by substantial evidence, e.g. a change in knowledge or conditions evidenced by technical, geologic, geophysical, reservoir engineering and economic data indicating that San Juan Basin deep gas formations, some 20 different formations below the base of the Dakota formation in an area covering approximately 9,000 square miles (5,760,000 acres), cannot be efficiently and economically drained by one well on a 160 acre spacing unit.

To say the least, substantial scientific data would be necessary to support a 400% change in spacing size for huge geographic area covering so many formations. However, the facts clearly show that Burlington did not present any evidence, technical or otherwise, to the Commission proving that based upon a change in conditions, or change in the knowledge of conditions, it is now known that a deep gas well in the San Juan Basin will "efficiently and economically" drain 640 acres, and not 160 acres or some other area. No such knowledge currently exists. There are no commercial deep gas wells in the San Juan Basin from which to determine a real drainage patterns and/or whether or not such a well can be economically developed on 160, 640 or some other spacing unit. Record at p. 35.

The "evidence" presented by Burlington and relied upon by the Commission in its findings of fact were from fields not even located within the San Juan Basin and which involve fundamentally distinguishable geologic and engineering factors.[5] This is akin to

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[5] Burlington's geologic and engineering drainage data was extrapolated from three "analogy fields," the Barker Dome, Ute Dome and Alkali Gulch, that are not located within the San Juan Basin. These "analogy" fields are located on the Four Corners platform across the hog-back fault system from the San Juan Basin and involve fundamentally distinguishable geologic and engineering factors. Transcript at pp. 102-104, Record at p. 129-131. Indeed, comparison of the analogy fields' geology to that of the San Juan Basin was generously described by Amoco's engineer as a "very, very long stretch." Id. at p. 100, Record at p. 127.

taking data from offshore Louisiana or the North Sea and extrapolating it to the San Juan Basin deep gas formations.

At the hearing of Case 11745, a petroleum engineer witness from Amoco Production Company emphasized this complete lack of data concerning the San Juan Basin deep formations and cautioned against such a premature and widespread change in spacing based upon Burlington's "analogy fields", as follows:

Direct Examination of Pamela Staley, Petroleum Engineer for Amoco Production.

> A. ". . . We do feel its very, very premature to space such a large area on so little data. You know, I think the Applicant made the point that we really don't have any significant data whatsoever in the Basin proper to consider. I think we need to move cautiously in establishing a widespread rule, and that extrapolation from three pools or three fields that are actually over the hump and outside the Basin, I think, is a very, very long stretch into the Basin. While it may be the only data we have, I don't think that that tells us we need different spacing; I think it tells us we need more data."

Transcript at p. 101, Record at p. 128.

Until such time as either a change in conditions, or change in the knowledge of conditions of the San Juan Basin deep formations provides substantial evidence that 160 acres is not the proper spacing, then no change in the Rule 104 160-acre default spacing is justified.

In determining whether there is substantial evidence to support an administrative agency decision, the court is required to review the **whole record**. Santa Fe Exploration Co. v. Oil Conservation Comm'n 114 N.M. at 114 (emphasis added); see also Rule 1-074 NMRA 1997 ("The district court may reverse the decision of the agency if. . .(2) based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence"). In light of the whole record, it is clear that the Commission's factual findings supporting its Order No. R-10815 changing deep wildcat

gas well spacing from 160 to 640 acres are premised upon erroneous and irrelevant technical and economic evidence. As such the Commission's issuance of Order No. R-10815 is arbitrary, capricious, not supported by substantial evidence and without substantial justification. See Santa Fe Exploration Co. v. Oil Conservation Comm'n 114 N.M. at 115("Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis". . .An abuse of discretion is established if . . .the order or decision is not supported by the findings, or the findings are not supported by the evidence")(citations omitted).

III.

CONCLUSION

For the foregoing reasons, Commission Order No. R-10815 is void as to the Appellants given the failure of Burlington and the Commission to provide them with actual notice of Burlington's application and of the Commission's proceedings in Case 11745. In addition, Commission Order No. R-10815 is void as to all parties as being unsupported by substantial evidence; and an arbitrary, capricious, and an abuse of discretion by the Commission.

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