IN THE SUPREME COURT
STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs.

No. 25,061/25,062
(consolidated)

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

Defendants-Appellants.

REPLY BRIEF OF THE NEW MEXICO OIL CONSERVATION COMMISSION
Defendant-Appellant

Civil Appeal from the District Court for the Eleventh Judicial District
San Juan County
The Honorable Byron Caton, District Judge

SUPREME COURT OF NEW MEXICO
FILED
JUN 30 1998
Kathleen Jo Gibson

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 AUTHORITIES

NEW MEXICO RULES

RULES FROM OTHER JURISDICTIONS

ARGUMENT

Point I
THE COMMISSION'S ADOPTION OF A RULE AMENDMENT DID NOT VIOLATE THE PLAINTIFFS' CONSTITUTIONAL RIGHTS

The Plaintiffs continue to confuse administrative hearings and orders that adjudicate individual property rights with administrative hearings and orders that adopt, amend or repeal rules. For the former, property interest owners are entitled to notice by personal service in accord with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); for rule making, public notice is sufficient. *See* NMSA 1978, § 10-15-1(D) (1974); NMSA 1978, § 70-2-23 (1935); and 19 NMAC 15.N.1204. The Plaintiffs appealed the Oil Conservation Commission's ("Commission") amendment to 19 NMAC 15.C.104 to the District Court. The Supreme Court recognized that 19 NMAC 15.C.104 (formerly OCD Rule 104) is a statewide rule of general applicability when it distinguished it from the limited spacing order at issue in *Uhden v. Oil Conservation Commission*, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991):

> 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) [19 NMAC 15.C.104(B)(2)(a) and 104(C)]. These are rules of general application, and are not based upon engineering and geological conditions in a particular reservoir.

When the Commission adopted the amendments to 19 NMAC 15.C.104, the Commission was not, by the clear language of *Uhden,* adjudicating individual property rights; rather the Commission was engaged in rule making for which the Plaintiffs as well as everyone else had public notice of both hearings at which the rule amendment was considered. (R.P. 294-302)

1. Any interested person can propose a rule enactment, amendment or repeal.

Plaintiffs make much of the fact that the rule amendment was initiated by a private entity, Defendant Burlington Oil & Gas Co. So what is the importance of this? Nothing. Anyone is allowed to initiate a rule making proceeding as is the New Mexico Oil Conservation Division and the Commission itself. Rule initiatives are not limited to administrative bodies. 19 NMAC 15.N.1203 states, in part:

> The Division upon its own motion, the Attorney General on behalf of the State, and any operator or producer, or any other person having a property interest may institute proceedings for a hearing [on an order, rule or regulation sought].

2. The Oil Conservation Division's compulsory pooling order is the impact about which the Plaintiffs complain, not the Commission's rule amendment.

The Plaintiffs, on page 7 of their Answer Brief, state that, "The impact of the spacing change [the rule amendment] on the plaintiffs was immediate." However, the Plaintiffs fail to state what this immediate impact of the rule amendment was to them. They continue only to explain that after the adoption of the rule amendment, Burlington filed another application with the Oil Conservation Division seeking compulsory pooling that included property interests owned by the Plaintiffs. The Plaintiffs do not deny that they were given notice by personal service of that compulsory pooling application and hearing. The compulsory pooling hearing was an adjudicatory hearing that adjudicated individual property rights. It was the compulsory pooling order entered by the Oil Conservation Division based on this compulsory pooling hearing that forced the Plaintiffs to make an election to participate in a well; this election was the impact that the Plaintiffs have tried to avoid all along. As their interests had been pooled, the

Plaintiffs now had to decide to participate in the well by paying their share of the drilling costs or opt not to participate and bear a penalty on any ultimate production, *i.e.*, Plaintiffs would not receive any income from a successful well until the penalty was satisfied. Being penalized for not paying their share in a well is hardly equivalent to having property rights forfeited as claimed on page 8 of the Answer Brief.

But, instead of making the choice to participate in the well or not, the Plaintiffs chose to file an appeal of the earlier Commission's rule amendment and requested a stay to toll the time in which the Plaintiffs had to make their decision. (R.P. 1-4) With luck, the success of the well would be known before the stay was lifted. Then the Plaintiffs would participate only if the well was successful and run no risk of sharing the expenses of a dry hole. And that is what this case is really about. The Plaintiffs have used the appeal to the District Court of the Commission's rule amendment to get a free ride down the well. Their purpose was to get around having to make a choice that could cost them money in a risky well. The stay granted by the District Court relieved the Plaintiffs from making this financial decision prior to knowing whether the well was a dry hole. (R.P. 384) It appears the Plaintiffs appealed the Commission's rule amendment for timing purposes to get a stay and avoid an election, even though it was the Oil Conservation Division's compulsory pooling order that had the impact on the Plaintiffs, not the amendment to 19 NMAC 15.C.104.

3. The Oklahoma cases cited by Plaintiffs involve adjudications, not rule making, as well as rules different from those of the Commission.

The Plaintiffs cite several recent Oklahoma cases that involve orders issued by the Oklahoma Corporation Commission; however, the Plaintiffs fail to explain that the Oklahoma

Corporation Commission has a specific rule regarding spacing orders when the area in question contains an existing well. Oklahoma Corporation Commission Rule 8(d)(3), in effect at the time relevant to the cited case *Anson Corp. v. Hill*, 841 P.2d 583 (Okla. 1992), states, in part:

> For increased well density applications, notice of hearing shall also be served by regular mail upon the operator of each adjoining or cornering tract of land or drilling and spacing unit **where a well is currently producing from the same formation....**If the applicant is the operator of a well for which notice is required under this rule, he shall also serve each working interest owner is such well by regular mail.

(Emphasis added.)

In *Anson* the applicant for a change in spacing for an area with an existing well filed an affidavit claiming to have notified all those entitled to notice by mail in compliance with Rule 8(d)(3). When the spacing change was challenged by interest owners who claimed they had not been given the required notice, the Oklahoma Corporation Commission found the applicant had not complied with the notice rule and the commission vacated its earlier order. *Union Texas Petroleum v. Corporation Commission*, 651 P.2d 652 (Okla. 1981), *cert. denied*, 459 U.S. 837 (1982) also involved a spacing unit with existing wells, and the applicant's failure to comply with Rule 8(d)(3). Of course, pursuant to *Mullane* and *Cravens v. Corporation Commission*, 613 P.2d 442 (Okla. 1980), *cert. denied* 450 U. S. 964, such personal notice was constitutionally required irrespective of a rule because the persons affected were limited in number and identifiable, and there was an existing well in the area affected.

James Energy Corp. v. HCG Energy Corp., 847 P.2d 333 (Okla. 1992) is a forced or compulsory pooling case and is not relevant to this case as the Plaintiffs chose to appeal a rule amendment rather than the Oil Conservation Division's compulsory pooling order. 19 NMAC

15.N.1207(A)(1) requires that applicants for compulsory pooling orders provide notice of the application and hearing by service by mail to interest owners in the area proposed to be pooled; the Plaintiffs do not deny that they received such notice of the compulsory pooling application and hearing.

All of the Oklahoma cases cited involve affected interest owners that are limited in number and identifiable and areas on which completed wells existed. The areas involved are specific pools, as in *Uhden.* The cases involved spacing changes to areas with existing wells, as in *Uhden.* The amendment to 19 NMAC 15.C.104 that is the subject of this appeal sets the spacing for over 5,000,000 acres with an estimated 300,000 working interest and royalty owners of record in a formation that contains no existing wells. (R.P. 305-308) Personal notice of an amendment to a statewide rule of general applicability is not possible. The Supreme Court recognized such situations in which public notice was appropriate in *Mullane*: "This Court has not hesitated to approve of resort to publication...where it is not reasonably possible or practicable to give more adequate warning." 339 U.S. at 314.

Point II
Amendment Is Supported by Substantial Evidence Is Not Arbitrary or Capricious and Is in Accordance with Applicable Laws

There is not a specific statutory standard of review for an appeal of a Commission's rule. NMSA 1978 § 70-2-25(B) addresses appeals of the Commission's actions in general and states, in part:

> The commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission.

The Court of Appeals recently held that a party challenging a rule adopted by an administrative agency has the burden of establishing the invalidity of the rule. *New Mexico Mining Ass'n v. New Mexico Mining Comm'n*, 1996-NMCA-098, 942 P.2d 741. However, even if the standard of review for a Commission's adoption of a rule is the general provision set forth in Rule 1-074(Q) NMRA 1998, there is substantial evidence based on review of the whole record to support the Commission's decision to adopt the rule amendment.

19 NMAC 15.C.104 was enacted pursuant to NMSA 1978, § 70-2-12(B)(10) that authorizes the Commission to adopt rules to "...fix the spacing of wells...." Spacing rules are necessary to prevent waste, and the prevention of waste of the state's natural gas and oil resources is the foremost duty of the Commission. *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 373 P.2d 809 (1962). The Commission hearing to consider the proposed amendment to 19 NMAC 15.C.104 included evidence from a petroleum geologist (direct examination begins at S.R.P. 99) , a reservoir engineer (direct examination begins at S.R.P. 131) and a petroleum landman (direct examination begins at S.R.P. 157) All three of the witnesses qualified as experts to give evidence to the Commission. These witnesses provided the technical, geologic, geophysical, reservoir engineering and economic evidence that the Answer Brief claims does not exist. The specific references to this evidence in the Commission's hearing transcript are contained in the Commission's Brief in Chief and will not be repeated in this Reply Brief.[1]

The Commission received a number of letters from oil and gas interest owners and corporations supporting the change in spacing from 160 acres to 640 acres. (R.P. 41, 43, 45, 47,

---

The Supplemental Record Proper contains a copy of the Commission' transcript from the March 19, 1997 hearing and begins at S.R.P. 92. Pages 2 through 5 of the original transcript have for some reason been omitted from the Supplemental Record Proper.

62, 65) Pamela Staley, a petroleum engineer with Amoco Production Co., was the only person to testify in opposition to the rule amendment. (S.R.P. 183) The Commission Chairman's questioning of Ms. Staley went directly to the issue of avoiding waste. (S.R.P. 209 to 213) She seemed to agree with the Chairman that a waste situation is more likely to arise if the spacing for wells is too small rather than too large. (S.R.P. 210) As the Chairman stated, "You can't undrill a well." (S.R.P. 210) However, in the event the spacing proves to be to large to adequately drain an area, the spacing can always be reduced. (S.R.P. 212)

Conclusion

The Commission urges this Court to reverse the District Court order that neither affirmed nor vacated the Commission's rule amendment as required by NMSA 1978, § 70-2-25(B) (1935). The Commission asks that the Court affirm the Commission's amendment to 19 NMAC 15.C.104 as it was supported by substantial evidence and adopted after the required notice and hearing.

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 **Reply Brief** was mailed to the following counsel of record on the 30th day of June, 1998:

W. Thomas Kellahin
Post Office Box 2265
Santa Fe, New Mexico 87505

J.E. Gallegos
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505

Marilyn S. Hebert

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs. No. 25061

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant-Appellant

vs. No. 25062

BURLINGTON RESOURCES OIL & GAS COMPANY,
a corporation,

Defendant-Appellant CONSOLIDATED

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
The Honorable Byron Caton, District Judge

APPELLEES' ANSWER BRIEF

J. E. Gallegos
Gallegos Law Firm P.C.
460 St. Michael's Drive
Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. SUPREME COURT CASES:

NEW MEXICO CASES:

CASES FROM OTHER JURISDICTIONS:

NEW MEXICO STATUTES:

RULES CITED:

OTHER AUTHORITIES

SUMMARY OF THE PROCEEDINGS

A. Nature of the Case

The plaintiffs below were sixty-one co-owners of the mineral rights in a federal oil and gas lease. They are appellees here but for simplicity will be referred to as "plaintiffs." Burlington Resources Oil and Gas Company was the applicant to the New Mexico Oil Conservation Commission for the Order in question. The appellants will be referred to as "Burlington" and "Commission" where applicable.

This case involves the review of a drilling unit acreage spacing order issued by the Commission in its Case 11745 for San Juan Basin wildcat deep gas wells, Order No. R-10815. R.P. 80-87. Plaintiffs were not given notice of the proceeding and asserted, and the district court held, that the Order was entered in violation of statutory and constitutional due process notice requirements, and thus is void as to the plaintiffs. R.P. 387-391. In addition, on this appeal plaintiffs raise the issue that entry of this Order by the Commission was arbitrary, capricious, an abuse of discretion and without substantial justification in that it was not supported by substantial evidence, and should be set aside entirely.

Pursuant to Rule 12-213 (B) NMRA 1998, plaintiffs are obliged to supplement the deficient Summary of Proceedings portions of appellants' Briefs in Chief. See Appellees Motion and Memorandum Brief to Strike Appellants' Briefs in Chief filed herein.

B. Summary of Facts and Course of Proceedings

1. Jointly the sixty-one plaintiffs are owners of about 86% of the working interest[1] in, inter alia, formations below the base of the Dakota formation located in Township 31 North, Range 10 West, San Juan County, New Mexico under United States Oil and Gas Lease SF 078389 and SF 078389-A, covering 2,480 acres, more or less, including Section 9. in that township. See R.P. 99-104, 143-148, 242-249 and 280-287 for Burlington's own lists of the plaintiffs' names, addresses and San Juan Basin deep gas working interests. Of particular significance here that ownership included 86% of the working interest in the deep Pennsylvanian formation in the east half and southwest quarter of Section 9 in that township and range. Id.

2. The 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 (quantity of surface acres to be dedicated to each well) of gas wells in the San Juan Basin. Section 70-2-12(10), NMSA 1978.

3. Since December 1, 1950, NMOCD Rule 104.B.(2)(a) has specified that wildcat gas wells in San Juan County be located on a designated drilling tract consisting of 160 contiguous surface acres. R.P. 35-36.

4. As early as June of 1996, Burlington had made unsuccessful overtures to plaintiffs to purchase or otherwise obtain their working interest rights for a proposed Pennsylvanian formation wildcat well in Section 9, T31N, R10W. R.P. 203-207.

---

[1] A "working interest owner" is the holder of the rights to explore for and produce hydrocarbons from the property covered by a lease. It is a cost-bearing interest in that it is responsible for expenses of exploration drilling and production. 8 Williams and Meyers, Oil and Gas Law: Manuel of Terms, 746-747, 1225 (1996).

5. Burlington pays royalty to the plaintiffs every month in connection with shallower production on their above-described federal lease. In addition, Burlington and the plaintiffs have been in litigation over that royalty continually since 1992. R.P. 133-134, 388-390, 436.

6. On February 26, 1997 Burlington had documented the location and costs for two Pennsylvanian formation wildcat gas wells it intended to drill, one of which was to be drilled in the northwest quarter of said Section 9, a section in which plaintiffs owned the majority interest. R.P. 210-13, 291.

7. On February 27, 1997 Burlington filed its application in Commission Case 11745 seeking to amend Division Rule 104 and to adopt New Rules 104.B(2)(b) and 104.C(3)(b) to establish 640-acre spacing for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico. The Pennsylvanian formation is a deep geologic strata below the Dakota formation. See Burlington's Application in Commission Case 11745, R.P. 35-38.

8. Burlington provided notice of its application by certified mail to over two hundred operators of wells and to a "random" list of hundreds of working interest owners in the San Juan Basin. R.P. 109. It is not disputed: (1) Burlington did not send personal notice to even one of the sixty-one plaintiffs of its Application in Commission Case 11745, and (2) Burlington knew the plaintiffs' names and addresses and has in place a computerized mail-merge capability to mail to each one of the plaintiffs. R.P. 290.

9. On March 19, 1997, the Commission held a public hearing on Burlington's application. Having no notice the plaintiffs did not attend. The evidence was that not a

single well has been successfully completed and produced in the San Juan Basin deep gas formations in order to develop knowledge of deep formation drainage patterns. Tr. 59-60.[2] Burlington presented no geological or geophysical evidence to the Commission establishing that for the San Juan Basin 640 acres is a spacing unit that will be efficiently and economically drained by one well in the Pennsylvanian or any deep formation. Tr. 102-104. Burlington's geologic and engineering drainage data was based solely upon three fields that are not located within the San Juan Basin. Tr. 100.

10. On June 5, 1997, the Commission entered its Order No. R-10815 granting Burlington's application and holding, inter alia, that Division Rule 104 should be modified to provide for 640-acre gas spacing units for deep gas formations in the San Juan Basin. R.P. 80-87, 427-431.

11. Less than a week after the Commission issued Order No. 10815, on June 11, 1997, Burlington filed its application with the New Mexico Oil Conservation Division ("OCD") seeking statutory compulsory pooling of the plaintiffs' working interest in the 640 acres of Section 9 for Burlington's proposed Scott No. 24 well to be a test of the deep Pennsylvanian formation. Burlington's Compulsory Pooling Application, R.P. 275-288, see also Exhibit "A" thereto, wherein Burlington lists the plaintiffs' names, addresses and deep gas working interest ownership in Sec. 9. R.P. 280-288.

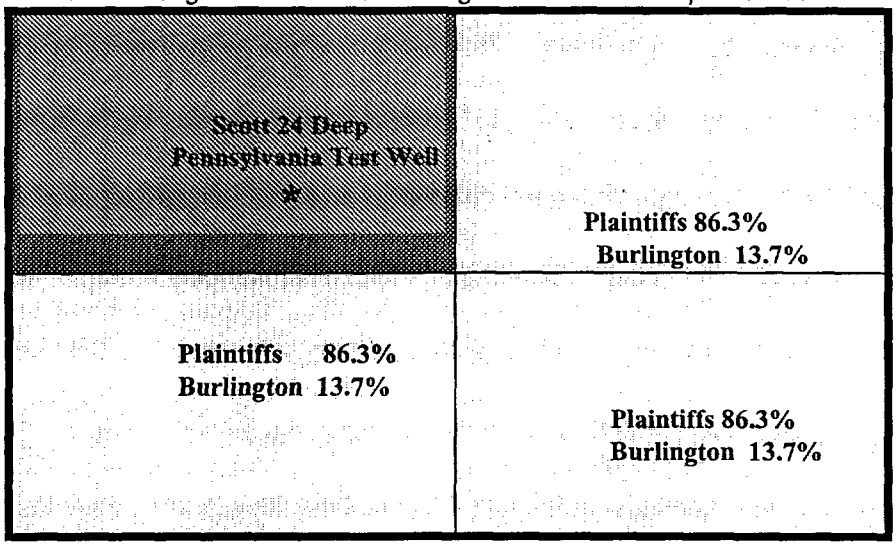
12. The Scott Well was to be sited as a wildcat well in the northwest quarter of Section 9, controlled by Burlington and in which the plaintiffs own no interest. Relying

---

[2] The Record Proper before this Court does not include a copy of the complete Commission hearing transcript in Case 11745 as did the one before the District Court. In this Brief, plaintiffs will cite to the relevant pages of this transcript as "Tr. __."

on Order No. R-10815, the object of Burlington's forced pooling application was to force the entirety of the 640 acres of Section 9 to be dedicated to the wildcat well. R.P. 93-94, 168, 275-288.

Working Interest Ownership in Section 9-T31N-R10W, San Juan County, New Mexico
640 Acreage dedication for Burlington's Scott 24 Deep Test Well



R.P. 93.

13. Under the Commission's new spacing order, Order R-10815, the plaintiffs' working interest in the three quarter sections of Section 9 could be compulsorily pooled with the northwest quarter to form a 640 acre spacing unit. This would result in the plaintiffs being forced to pay for approximately 65% of the high risk wildcat Scott Well, estimated to cost $2,316,973 for completion, while Burlington would pay only slightly over 10%. R.P. 93-94.

14. On June 24, 1997, having learned of the Burlington application after the hearing, the plaintiffs timely filed their Application for Rehearing of Commission Order No. R-10815 with the Commission pursuant to Section 70-2-25 (A), NMSA 1978 and NMOCD Rule 1222 in order to have an opportunity to be heard, present evidence and

cross examine Burlington's witnesses concerning Burlington's proposed changes to Division Rule 104. R.P. 89-118. Burlington filed a brief in opposition to plaintiffs' request for rehearing. R.P. 120-129. Pursuant to Section 70-2-25 (A), NMSA 1978 the plaintiffs' Application for Rehearing was deemed denied on July 4, 1997 when the Commission failed to act on it within 10 days.

15. Plaintiffs took a timely appeal of the Commission order to the Eleventh Judicial District Court for San Juan County by filing their Verified Petition for Review of Order No. R-10815 with the District Court on July 18, 1997. R.P. 164.

16. On September 12, 1997, the OCD entered its Order No. 11808 compulsory pooling the plaintiffs' working interest in Section 9 for Burlington's Scott No. 24 well. R.P. 352.

17. On September 15, 1997, the District Court denied motions to dismiss filed by Burlington and the Commission and a motion to strike filed by Burlington, and granted plaintiffs' Motion to Stay the effect of Commission Order No-10815 as to the plaintiffs' pending appeal. R.P. 164, 349-351.

18. On December 17, 1997, the Honorable Byron Caton, District Judge for the Eleventh Judicial District Court heard oral argument from counsel. Judge Caton ruled from the bench, inter alia, that Burlington's failure to provide plaintiffs with personal notice of the spacing change case deprived them of their Constitutional right to due process and that Order R-10815 was void as to only the plaintiffs' interests in the San Juan Basin. See Order Enforcing the Stay of New Mexico Oil Conservation Commission Order No. R-10815 Pending Appeal. R.P. 384-386.

19. On January 27, 1998, Judge Caton entered his Opinion and Final Judgment. RP 387-391. Burlington and the Commission appeal.

II.

INTRODUCTION

For forty-seven years the New Mexico oil and gas industry worked with the Commission rule specifying that wildcat wells in the San Juan Basin be drilled on 160-acre spacing units. In rapid-fire sequence over slightly more than three months from application to order, Burlington obtained Order R-10815 changing that spacing requirement to 640-acres for deep formations. Burlington gave notice of its application to obtain the spacing change to some affected working interest owners, but not to a single one of the plaintiffs, though they number more than sixty, are extremely and uniquely well known to Burlington and Burlington knew their property rights were to be directly and materially impacted by the change.

Before it filed the application Burlington had made its plans to drill a well in Section 9., knew that plaintiffs owned the majority working interest in that section and that their ownership would be materially affected by the spacing change. At that time Burlington was in a lawsuit with plaintiffs over royalty payments related to productive formations on the same acreage.

The impact of the spacing change on the plaintiffs was immediate. Less than a week after the spacing order issued, on June 11, 1997, Burlington was at the OCD with an application to force pool the plaintiffs' acreage -- comprising almost 65% of the ownership -- into a 640 acre proration unit for a wildcat deep Pennsylvanian formation well to be drilled by Burlington in Section 9. Under Section 70-2-17 NMSA 1978, when

two or more separately owned tracts of land are within a spacing unit, should the owners not agree to pool their interests the OCD is authorized to force the joinder in the drilling of a well by parties who have not agreed. But for the change in spacing from 160 to 640 acres, Burlington would not have had the right to request, nor the OCD the statutory authority to compel, the pooling of the plaintiffs' property rights for Burlington's Scott No. 24 wildcat well. Being force pooled meant the plaintiffs faced the Hobson's choice of either paying out over $1 million for Burlington to drill a high risk wildcat well or forfeit their property rights by electing to go "non-consent." A "non-consent" interest owner is subjected to loss of all rights to income should there be production and sale of hydrocarbons from the well until the parties paying the expenses have recovered from gas sales three times the non-consent party's or parties' share of expense under a 200% penalty as sought by Burlington and granted by the OCD. The plaintiffs did not agree to participate in the risky well and were force pooled by order of the OCD.

This Court has ruled on the issues on this appeal in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991). The Uhden case is controlling and was so regarded by the District Court.

Since Burlington knew (a) the ownership, the identity and the whereabouts of plaintiffs and (b) the material adverse effect the outcome of the spacing rule change would have on the plaintiffs' real property interests, Burlington had an obligation to give the plaintiffs' actual notice of its application and of the Commission proceedings in Case 11745. 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.") Id. (emphasis added.)

In addition, the Commission's factual findings supporting a change of this long-established spacing requirement 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 exist. On this appeal plaintiffs contend that not only should the challenged order be struck down as to them on due process grounds but it should be set aside in its entirety because the Commission's findings were not supported by substantial evidence.

III.

ARGUMENT AND AUTHORITIES

POINT ONE

THE DUE PROCESS PROVISIONS 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 simple issue on appeal is what level of notice should plaintiffs have been given by Burlington to afford them the due process protection guaranteed by Article II,

Section 18 of the New Mexico Constitution and the fourteenth amendment to the United States Constitution.

Under the facts unique to these plaintiffs, the holding of the New Mexico Supreme Court in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991) is controlling in requiring that Burlington should have provided the plaintiffs with personal notice of and an opportunity to be heard in Case 11745 in order to afford them constitutionally guaranteed due process protection.

The Commission argues that the publication notice the Commission provided of Case 11745 is all the notice the plaintiffs were due. See Commission's Brief at 14-16. Burlington advances the truly untenable argument that the plaintiffs were not entitled to **any** due process protection. Burlington's Brief at 9 and 14.[3] Appellants attempt to justify Burlington's failure to provide the plaintiffs with actual notice of Case 11745 on the grounds that this was a "rulemaking" proceeding, as contrasted with the adjudicatory proceeding in Uhden, and therefore the plaintiffs were not entitled to any due process protection. See Burlington's Brief in Chief at 9-14, Commission's Brief in Chief at 2-16.

Also the Appellants argue that it was the OCD's compulsory pooling order, Order No. R-10877, which involuntarily pooled the plaintiffs' acreage in Section 9 for Burlington's Scott No. 24 well on 640-acre spacing, and not the spacing order appealed herein, that has adversely impacted the plaintiffs' property rights. See Commission's

---

[3] Burlington relies for authority on the statement that "...it is hornbook law that persons affected by rule-makings are not entitled to any due process protection." Burlington's Brief in Chief at 9 and 14. Plaintiffs are not sure which "hornbook" counsel for Burlington is consulting, but suggest reference to the United States and New Mexico Constitutions as well as the voluminous body of common law which hold clearly to the contrary.

Brief in Chief at 9 ("The Plaintiffs are simply protesting the wrong order of the Commission.") Likewise, Burlington claims "the most that Appellees can do is allege that the Commission's rulemaking has somehow had an "impact" on their ownership interests." See Burlington's Brief in Chief at 24.

The Uhden case refutes those arguments and every other rationalization attempted by Burlington and the Commission and is four-square on point in governing this case.

1. A Private Party Application

In Uhden the proceeding before the Commission for a well spacing change was brought by Amoco for relief it sought. Burlington (then Meridian Oil Inc.) intervened. The proceeding was not instigated by the Commission on its motion nor by the industry as a whole. 112 N.M. 529.

In this case, Burlington applied for specific relief to suit its objectives. Case 11745 which it initiated was not a result of the Commission on its own motion nor the industry seeing a need to change the existing requirement. R.P. 33-38.

2. Decision Based on Hearing and Evidence

In Uhden the spacing increase from 160 acres to 320 acres for the Fruitland Gas Pool in northwestern New Mexico was not the result of the Commission perceiving a need but was the result of Amoco presenting witnesses and evidence at an adjudicatory hearing. 112 N.M. 530.

The same is true as the alleged justification for the order granting a spacing change in this case but with Burlington as the applicant. R.P. 41-48, 54-55, 62-65, 163.

3. An Affected Property Interest Not Notified

Uhden's oil and gas interests were in the area covered by Amoco's application, Uhden's identify and whereabouts were known to Amoco and Uhden's property rights were to be affected by the spacing change, 112 N.M. 529.

The same is true in this case. R.P. 89-91. Before filing its application, Burlington had specifically targeted the 640 acres of Section 9 for its Pennsylvanian exploratory well, though it asked for the spacing change to apply to the entire San Juan Basin. R.P. 89-94. (One might suspicion that the breath of the application was deliberately designed with the goal of circumventing the Uhden case, while slipping the application past plaintiffs who Burlington from experience could assume would surely protest if notified).

4. The "Rulemaking" Argument

In Uhden Burlington was a party appellee by intervention and unsuccessfully advanced this same "rulemaking vs. adjudication" argument in order to justify the failure to provide Uhden with personal notice. In its appellate brief, Burlington argued:

> "[U]hden mischaracterizes the nature of the Commission hearings. The two hearings about which she complains did not determine property rights but, instead, were **rule making proceedings** in which 320-acre spacing rules were adopted for a gas pool. Neither case involved a taking of property and, therefore, **Uhden was not entitled to personal notice of these hearings.**"

See Answer Brief of Defendant-Appellee Amoco Production Company and Intervenor-Appellee Meridian Oil, Inc. in Uhden (emphasis added.) This Court may take judicial notice of its own records. Chavez v. U-Haul of New Mexico, Inc., 1997-NMSC-051, ¶ 10, n. 4, 947 P.2d 122, 125 n. 4.

This Court answered Burlington's argument, as follows:

> "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."

Uhden, 112 N.M. at 531.

5. The "Pooling Order" Argument

In Uhden the spacing change per se did not diminish Uhden's royalty share, it was the pooling of her interest from a 160 acre well unit to 320 acres that did so. But this Court easily understood that "without the subject spacing orders, Amoco could never have pooled leases to form 320 acre well units. . . . Thus, it was the spacing order, and not the pooling clause which harmed Uhden." 112 N.M. 530.

In this case the ink was barely dry on the spacing order when Burlington was at the OCD with an application to pool plaintiffs' Section 9 ownership for Burlington's well on a 640 acre unit. R.P. 80-87, 163-164, 273-288. Without the spacing order, plaintiffs could not have been pooled and Burlington was free to drill the well on 160 acres in the northwest quarter using its acreage and at its expense.

This Court has set out in Uhden a basic constitutional standard for adequate notice in Commission action on an application, viz:

> 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.) Administrative proceedings must conform to the fundamental principles of justice and requirements of due process of law. Matter of Protest of Miller, 88 N.M. 492, 542 P.2d 1182 (Ct. App. 1975) cert. denied, 89 N.M. 5, 546 P.2d 70 (1975).

This Court was persuaded in Uhden by cases from Oklahoma, a fellow oil and gas producing state, and particularly the decision in Cravens v. Corporation Commission, 613 P.2d 442 (Okla. 1980) cert. denied, 450 U.S. 964 (1981). That was a spacing case in which the names and addresses of affected parties were known but they were noticed only by publication. The Oklahoma court held constitutional due process requirements were not satisfied.

Since this Court's decision in Uhden in 1991 the line of instructive Oklahoma cases has enlarged. James Energy Company v. HCG Energy Corporation, 847 P.2d 333 (Okla. 1992) involved a collateral attack on an Oklahoma Corporation Commission pooling order entered a year earlier. Because the applicant for the order "knew or should have known" interest owners, or their heirs, in the target acreage but did not

give them personal notice the trial court held and the Oklahoma Supreme Court affirmed that the order was void as to those persons. A spacing order was at issue in Anson Corporation v. Hill, 841 P.2d 583 (Okla. 1992) where an applicant to the Corporation Commission asked to drill an additional well on a 320 acre unit. In 1982 the application was granted; in 1983 the well was drilled. In 1986 interest owners who had not received personal notice persuaded the Corporation Commission to vacate the 1982 order. The Oklahoma Supreme Court followed the Union Texas Petroleum v. Corporation Commission case relied on in Uhden, 112 N.M. 531. Because the aggrieved parties did not receive personal notice and have an opportunity to be heard" . . . the Commission's attempt to exercise jurisdiction over the respondents was ineffective and a nullity insofar as it affected the respondents' interest." 841 P.2d 586.

B. THE ALLEGED NOTICE BURDEN ON COMMISSION RULE MAKING

Burlington resorts to the old "parade of horribles" argument. It goes like this. The spacing order here covers 9,000 square miles, there are hundreds of thousands of royalty or overriding royalty owners, there are 39,240 working interest owners, it would take a year to verify ownership, etc. Burlington's Brief at 6. (It was, after all, Burlington who by design fashioned the application so broadly when its objectives were really wells in two sections). The Commission advances the admonishment that "Uhden should not be extended so as to negate the Commission's ability to perform its statutory duties including that of adopting statewide rules of general applicability." Commission's Brief, at 12.

Those arguments are interesting but have nothing to do with this case. This case is not one of the Commission undertaking the fashioning of rules of general

application without exceptional affect on any individual or group of individuals. Equally disingenuous is the Burlington notion that thousands of working interest owners were entitled to personal notice.

What this case is about is Burlington obtaining Order R-10815 modifying the Rule 104 wildcat well spacing requirement from 160 acres to 640 acres as a necessary and intended condition precedent to Burlington's initiation of compulsory pooling of plaintiffs' interest in Section 9. As Commission Rule 104 existed prior to entry of Order R-10815 on June 5, 1998, the plaintiffs working interest in the east half and southwest quarter of Section 9 could not have been forced into the well unit for Burlington's Scott No. 24 well in the northwest quarter of that section. The constitutionally required notice is nothing more, nor less, than,

> [I]f 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. Uhden, 112 N.M. 528.

No obstacle to Commission general rule making can possibly be read into the Uhden Rule. Nor does the Uhden Rule require an applicant in Burlington's position to give notice to a cast of thousands. But indeed when an applicant in Burlington's position knows, even before a spacing application is filed, that the objective of the spacing change is to be able to pool certain oil and gas working interests owned by certain, known persons then it must afford them due process. Interests "materially affected by a state proceeding" are entitled ". . . to actual notice of the proceedings." Uhden, 112 N.M. 529.

The rule of the Uhden case as followed by the District Court in this case, is nothing more than the Oil and Gas Act specifies:

> 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.**

Section 70-2-23 NMSA 1978 (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.

The rhetorical hand-wringing of the Commission and Burlington is misplaced. The District Court's enforcement of the Uhden Rule does not infringe on the authority of the Commission or impose any additional burden whatsoever. The rule simply requires that a party who files an application before the Commission who knows there are owners who have an interest in the subject matter of the proceeding must notify those parties. The only burden on Burlington is this case would have been to mail notice of its application to even just one of the sixty-one plaintiffs as it did to hundreds of others who were not in the sights of its gun aimed at conscripting their property rights for a $2-3 million high risk well in Section 9. If it had done only that, we would not be here.

POINT TWO

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

A well spacing unit by law is defined as the "area that can be efficiently and economically drained and developed by one well . . ." Section 70-2-17(B), NMSA 1978 (Emphasis added). For almost fifty years, Division Rule 104 has provided that a 160 acre spacing unit is the rule for wildcat gas well spacing for San Juan, Rio Arriba and Sandoval Counties, New Mexico.

To support a change in the rule Burlington, as the applicant in Case 11745, had the burden of proving (a) that the hydrocarbon under a spacing unit of 160-acres will not economically and efficiently be drained and by one well (b) that another other size proration unit well economically and efficiently be drained. Section 70-2-17(B.) NMSA 1978. See Uhden, 12 N.M. at 530 ("Additionally, 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." citing Phillips Petroleum Co. v. Corporation Commission, 461 P.2d 597, 599 (Okla. 1969)).

The Commission's factual findings supporting a change of the Rule 104 spacing requirements 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. Uhden, supra 12 N.M. at 530.

To say the least, substantial scientific data would be necessary to support a 400% change in spacing size for such a sizable geographic area covering so many formations. Burlington could not and did not present any evidence, technical or otherwise, to the Commission 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. Tr. pp. 59-60.

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. 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. Tr. 102-104, R.P. 108-116. 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 100, R.P. 127. R.P. 94-96, 112-

115, 150-154. This is akin to 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. 103, 114, 835 P.2d 819 (1992) (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 inapplicable 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).

IV.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's ruling that Commission Order No. R-10815 is void as to the plaintiffs given the failure of Burlington 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 should be set aside in its entirety as being unsupported by substantial evidence and as arbitrary and capricious, and an abuse of discretion by the Commission.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By _____
J.E. GALLEGOS
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505
(505) 983-6686
Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing pleading was served on this 12th day of June, 1998 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

_____
J.E. Gallegos

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs.

No. 25,061/25,062
(consolidated)

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

Defendants-Appellants.

BRIEF-IN-CHIEF OF THE NEW MEXICO OIL CONSERVATION COMMISSION Defendant-Appellant

---

Civil Appeal from the District Court for the Eleventh Judicial District
San Juan County
The Honorable Byron Caton, District Judge

SUPREME COURT OF NEW MEXICO
FILED
APR 30 1998

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

Proceedings before the Commission

On February 25, 1997, Defendant Burlington Resources Oil & Gas Company ("Burlington") filed an application with the New Mexico Oil Conservation Commission ("Commission") to amend 19 NMAC 15.C.104, a statewide rule of general applicability. (R.P. 0034-0038) The proposed amendment changed the spacing unit from 160 to 640 acres for natural gas production below the base of the Dakota Formation in San Juan, Rio Arriba, Sandoval and McKinley Counties.

After the required public notice was provided, the Commission held a public hearing on the proposed amendment on March 19, 1997. On June 5, 1997, at a public meeting the Commission adopted the amendment to 19 NMAC 15.C.104 in its Order No. R-10815 ("Order"). (R.P. 80-87)

On June 24, 1997, the Plaintiffs, owners of various real property interests, filed their Application for Rehearing with the Commission pursuant to NMSA 1978, § 70-2-25(A) (1935, as amended through 1981). (R.P. 89-116) 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.

Proceedings in the District Court

The Plaintiffs appealed the Commission's Order to the District Court on July 18, 1997.

The Plaintiffs named the Commission and Burlington as Defendants.

The parties filed briefs on the issues on appeal, and the District Court heard oral argument on December 17, 1997. The District Court entered its Opinion and Final Judgment ("Judgment") on January 27, 1998, which held that the Commission's Order was 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 [19 NMAC 15.C.104] is of no force and effect as to their property interests in the San Juan Basin." (R.P. 387-391)

POINT I

THE COMMISSION AMENDED A STATEWIDE RULE

The Oil and Gas Act, NMSA 1978, §§ 70-2-1 through 70-2-38 (1935, as amended through 1998) confers on the 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 of these powers 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 have 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).

NMSA 1978, § 14-4-2(C) (1967, as amended in 1969) of the State Rules Act defines a "rule," in part, as follows:

> ...any rule, regulation, order, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule or to affect persons not members or employees of such issuing agency. An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule nor shall it constitute specific adoption thereof by the agency.

Attached to this brief as Exhibit A is a copy of a portion of 19 NMAC 15.C.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 19 NMAC 15.C.104, subsections A through C, as amended in 1997.[1] The structure of the rule itself is illustrative of the fact the 19 NMAC 15.C.104 is a statewide rule of general applicability. The first three subsections of 19 NMAC 15.C.104 are arranged as follows:

104. WELL SPACING: ACREAGE REQUIREMENTS FOR DRILLING TRACTS

---

[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).

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
(2) San Juan, Rio Arriba, Sandoval, and McKinley Counties
(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 19 NMAC 15.C.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 19 NMAC 15.C. 104(B)(2) and (C)(3) is approximately 9,000 square miles of surface area and contains over 5,000,000 acres. (R.P. 305-308)

It is in this context that the amendment to 19 NMAC 15.C.104 must be considered *vis a vis* the decision in *Uhden v. Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). The district court stated in its Judgment: "The decision in *Uhden v. New Mexico Oil Conservation Commission* [cite] is controlling on this appeal." (R.P. 387-391) There are many

factors that distinguish *Uhden* from this case. 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[2] [19 NMAC 15.C.104], that the Supreme Court in *Uhden* specifically characterized as a statewide rule of general applicability.

In contrast, the Commission in *Uhden* was asked to change a spacing order for a particular reservoir of limited size. The Commission, by Order No. R-7588 attached hereto as Exhibit "C," changed a spacing order in the Cedar Hills-Fruitland Base Coal Gas Pool, a pool that consists of approximately 10,000 acres. *See* Exhibit "C" to this Brief, finding number 8. However, in this case, the Commission changed a statewide rule of general applicability that affects property in four counties of the state that includes over 5,000,000 acres. (R.P. 305-308)

In *Uhden*, Amoco Production Company ("Amoco") applied to the Commission to increase a spacing order for 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**

---

[2] Laws of 1995, chapter 110 provided for a New Mexico Administrative Code. The format and style for the Code was established by the Records Center. The format for the rules adopted by the Oil Conservation Commission changed from "OCD Rule ___" to "19 NMAC 15___."

> **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 19 NMAC 15.C.104, is not a statewide rule of general application.[3] In the language of NMSA 1978, § 14-4-2(C), the *Uhden* Court considered the pool spacing order as "...[a]n order ... issued ... in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts ...."

The Plaintiffs challenge the Commission's Order that amended 19 NMAC 15.C.104(B) and (C), a rule of general applicability as recognized by the Court in *Uhden*. The area covered by the amended rule contains approximately 9,000 square miles of surface area. The amended rule 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. (R.P. 305-308)

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 19 NMAC 15.C.104. (R.P. 306) 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

---

[3] Although Order No. R-7888 refers to "special pool rules," these are not "rules" as defined by NMSA 1978, § 14-4-2(C).

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) (1974, as amended through 1997) and NMSA 1978, § 70-2-23 (1935, as amended through 1977). 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 19 NMAC 15.C.104(B)(2) and 19 NMAC 15.C. 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 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. 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 in over 5,000,000 acres as does the amendment to 19 NMAC 15.C.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. 92) The Commission's amendments to 19 NMAC 15.C.104 did not accomplish compulsory pooling. A separate and distinct application in compliance with 19 NMAC 15.N. 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. 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 19 NMAC 15.C.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; no hearing on a compulsory pooling application was held before the Division or the Commission. 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.[4]

In contrast, what have the Plaintiffs in this case before the Court suffered? There has 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 19 NMAC 15.N.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. (R.P. 92)

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*. 19 NMAC 15.C.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 19 NMAC 15.C.104. (R.P. 305-308) If the spacing order change in *Uhden* involving an existing defined pool cannot be distinguished from the Commission's rules in general, then

---

[4] 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.

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. (R.P. 306) 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 in its rulemaking 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 on hundreds of thousands of interest owners will be 100% effective?

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 no doubt become more numerous during the past 60 years, the notice required for rulemaking could change from publication to personal service. The Commission believes that the *Uhden* decision is limited to the very specific and somewhat unique facts of that case, the most important of which is the fact that the Commission in Order No. R-7588 in *Uhden* did not amend a general rule of statewide applicability. *Uhden* should not be extended so as to negate the Commission's ability to perform its statutory duties including that of adopting statewide rules of general applicability. The Commission in *Uhden* did not amend a statewide rule of general applicability.

POINT II

THE COMMISSION PROVIDED THE NOTICE REQUIRED TO AMEND A 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.[5]

---

[5] 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

19 NMAC 15.N.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 newspaper of general circulation in the county, or each of the 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 19 NMAC 15.C.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. (R.P. 294-302)

The Plaintiffs simply misstate the notice requirements by alleging that 19 NMAC 15.N. 1207(A)(11) is applicable to Commission rulemaking. 19 NMAC 15.N.1207 is entitled "Additional Notice Requirements." As the title suggests, these rules are for cases other than rule hearings covered by 19 NMAC 15.N.1204 set forth above; 19 NMAC 15.N.1204 together with NMSA 1978, § 70-2-23 and the Open Meetings Act govern the notice required when the Commission engages in rulemaking.

19 NMAC 15.N.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, 19

> matter may be held before the commission if the division director, in his discretion, determines that the commission shall hear the matter.

NMAC 15.N.1207(A)(11) is the catchall "additional notice requirement." It applies to "...cases of applications not listed above...." 19 NMAC 15.N.1207(A)(11) is for specific applications that may come up, but which have not been listed in the preceding subsections of 19 NMAC 15.N. 1207. 19 NMAC 15.N.1207 (A)(11) is not the rule that governs the Commission's rulemaking.

The District Court found that the Commission provided notice by publication and by mail to parties requesting to be on its mailing list. (R.P. 389) The District Court's Judgment implicitly held that the Commission's amendment to 19 NMAC 15.C.104 was effective to everyone except the Plaintiffs by stating that the Commission's Order "... is void as to only the appellants [Plaintiffs] and the 640-acre spacing provided for therein and in the amended New Mexico Oil Conservation Division Rule 104 [19 NMAC 15.C.104] is of no force and effect as to their property interests in the San Juan Basin." (R.P. 391)

In *Rivas v. Board of Cosmetologists*, 101 NM 592, 594, 686 P.2d 934, 936 (1984) the Supreme Court stated:

> Due process generally requires that affected parties receive reasonable notice. *Bell Telephone Co. v. FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, 95 S.Ct. 2620, 45 L.Ed. 684 (1975); *Mobil Oil Corp v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973). Case law suggest that "the minimum protections upon which administrative action may be based, [are] according to interested parties a simple notice and right to comment." *Mobil Oil*, 483 F.2d at 1253.

The Commission supplied its notice by publication of both the March 19, 1997 hearing and the June 5, 1997 hearing and by mailing to those who had requested to be on its mailing list. The Commission held two public hearings at which interested parties were able to comment on the proposed amendment prior to its adoption. That is the notice required by due process, statute

and rule; that is the notice that was given for this rulemaking.

POINT III

THE COMMISSION'S ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The standard of review of the Commission's order amending 19 NMAC 15.C.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 Ass'n v. New Mexico Mining Comm'n*, 1996-NMCA-098, 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)[6] He used three other fields, the Alkali Gulch, Barker Dome and Ute Dome, as analogous fields to the San Juan Basin. (Tr. 23) He explained in detail why these three fields were appropriate to use as analogue fields. (Tr. 25-29) The key zones and key intervals of the fields correlated with each other. (Tr. 29) 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, 46) 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) 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) He concluded that a well in the Pennsylvanian is capable of draining 640 acres. (Tr. 46) 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)

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. Miss. Mineral and Royalty Owners Ass'n*, 258 So. 2d 767 (Miss. 1971). The Mississippi

---

[6] References to the transcript are to the transcript of proceedings before the Commission on March 19, 1997.

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 19 NMAC 15.C.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 Commission*, 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 19 NMAC 15.C.104. A review of the record reveals that the Commission's decision to amend 19 NMAC 15.C.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-in-Chief** was mailed to all counsel of record on the 30th day of April, 1998.

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]

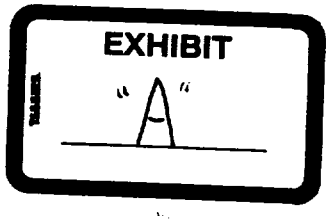
102.C. When filing a permit to drill in any quarter-quarter section containing an existing well or wells, the applicant shall concurrently file a plat or other acceptable document locating and identifying such well(s) and a statement that the operator(s) of such well(s) have been furnished a copy of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

Energy, Minerals & Natural Resources Department
Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505

2. Agency Account Code

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.(
	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
FILED WITH

EXHIBIT
B

STATE RECORDS CENTER
1997 JUN 16 AM 9:30

(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

1997 JUN 16 AM 9:30

(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]

1997 JUN 16 AM 9:30

(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

Energy, Minerals & Natural Resources Department
Oil Conservation Division
2040 South Pacheco
Santa Fe, New Mexico 87505

2. Agency Account Code

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.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 — Date Signed: 6/16/97

SRC-95-04

1997 JUN 19 AM 9:30
STATE RECORDS CENTER

STATE RECORDS CENTER
1997 JUN 16 AM 9:30

(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

ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

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

CASE NO. 8014
Order No. R-7588

APPLICATION OF AMOCO PRODUCTION COMPANY FOR POOL CREATION AND SPECIAL POOL RULES, SAN JUAN COUNTY, NEW MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This cause came on for hearing at 8 a.m. on January 18, 1984, at Santa Fe, New Mexico, before Examiner Michael E. Stogner.

NOW, on this 9th day of July, 1984, the Division Director, having considered the testimony, the record, and the recommendations of the Examiner, and being fully advised in the premises,

FINDS:

(1) That due public notice having been given as required by law, the Division has jurisdiction of this cause and the subject matter thereof.

(2) That the applicant, Amoco Production Company, seeks an order creating a new gas pool, the vertical limits to be the Basal Coal Zone of the Fruitland formation, with special pool rules including a provision for well location and a provision for 320-acre spacing, San Juan County, New Mexico.

(3) That the applicant is the owner and operator of the Cahn Gas Com Well No. 1, located 1030 feet from the North line and 1600 feet from the West line of Section 33, Township 32 North, Range 10 West, NMPM, San Juan County, New Mexico.

(4) That although said Cahn Gas Com Well No. 1 is located within the Mount Nebo-Fruitland Pool (created by Division Order No. R-4690, dated December 6, 1973, as amended by Division Order Nos. R-5843 and R-7046, dated November 2, 1978, and August 6, 1982, respectively), the

EXHIBIT "C"

geological evidence presented at the hearing demonstrates that said well, which is producing from an open hole interval from 2795 feet to 2812 feet, has discovered a separate common source of supply within the Basal Coal member of the Fruitland formation and should be designated the Cedar Hill-Fruitland Basal Coal Pool.

(5) That the well log for the discovery well, as described above, does not fully penetrate the Basal Coal member of the Fruitland formation and as such should not be used as the type log for the proposed pool.

(6) That the vertical limits of said proposed pool should then be based upon the Basal Coal member of the Fruitland formation from approximately 2838 feet to 2878 feet as found on the type log from the applicant's Schneider Gas Com "B" Well No. 1 located 1110 feet from the South line and 1185 feet from the West line of Section 28, Township 32 North, Range 10 West, NMPM, San Juan County, New Mexico.

(7) That the well log from said Schneider Gas Com "B" Well No. 1 penetrates the entire Basal Coal member of the Fruitland formation and said well is approximately 2200 feet north of the discovery well, as described in Finding Paragraph No. (3) above.

(8) That the horizontal limits of said proposed pool should be as follows:

TOWNSHIP 31 NORTH, RANGE 10 WEST, NMPM
Sections 3 through 6: All

TOWNSHIP 32 NORTH, RANGE 10 WEST, NMPM
Sections 19 through 22: All
Sections 27 through 34: All

comprising 10,240 acres, more or less, all in San Juan County, New Mexico.

(9) That the currently available information indicates that one well in the proposed pool should be capable of effectively and efficiently draining 320 acres.

(10) That in order to prevent the economic loss caused by the drilling of unnecessary wells, to encourage the orderly development of the proposed pool, and to otherwise prevent waste and protect correlative rights, the Cedar Hill-Fruitland Basal Coal Pool should be created with Temporary Special Rules

and Regulations providing for 320-acre spacing units comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the United States Public Land Surveys.

(11) That the Temporary Special Rules and Regulations should provide for limited well locations in order to assure orderly development of the pool and to protect correlative rights.

(12) That said Temporary Special Rules and Regulations should be effective February 1, 1984, and should also be established for a two-year period in order to allow the operators in the Cedar Hill-Fruitland Basal Coal Pool to gather reservoir information to establish whether the temporary rules should be made permanent.

(13) That special provisions for a non-standard gas well location should be made for any well drilling to or completed in the Basal Coal member of the Fruitland formation within the proposed Cedar Hill-Fruitland Basal Coal Pool or within one mile of said pool on or before February 1, 1984, that does not comply with any special well location requirements promulgated in this order.

(14) That the vertical limits of the Mount Nebo-Fruitland Pool should be redefined to include the Fruitland formation with the exception of the Basal Coal member as designated on the type log of said Amoco Production Company's Schneider Gas Com "B" Well No. 1, as described in Finding Paragraph No. (6) above.

(15) That this case should be reopened at an examiner hearing in February, 1986, at which time the operators in the subject pool should be prepared to appear and show cause why the Cedar Hill-Fruitland Basal Coal Pool should not be developed on 160-acre spacing units.

IT IS THEREFORE ORDERED:

(1) That effective February 1, 1984, a new pool in San Juan County, New Mexico, classified as a gas pool for production from the Basal Coal member of the Fruitland formation, is hereby created and designated the Cedar Hill-Fruitland Basal Coal Pool, with the vertical limits comprising the Basal Coal member of the Fruitland formation as found from approximately 2795 feet to 2878 feet on the type log of the Amoco Production Company Schneider Gas Com "B" Well No. 1,

located 1110 feet from the South line and 1185 feet from the West line of Section 28, Township 32 North, Range 10 West, NMPM, San Juan County, New Mexico; and horizontal limits consisting of the following described area:

TOWNSHIP 31 NORTH, RANGE 10 WEST, NMPM
Sections 3 through 6: All

TOWNSHIP 32 NORTH, RANGE 10 WEST, NMPM
Sections 19 through 22: All
Sections 27 through 34: All

comprised of 10,240 acres, more or less, all in San Juan County, New Mexico.

(2) That Temporary Special Rules and Regulations for the Cedar Hill-Fruitland Basal Coal Pool are hereby promulgated as follows:

SPECIAL RULES AND REGULATIONS FOR THE
CEDAR HILL-FRUITLAND BASAL COAL POOL
SAN JUAN COUNTY, NEW MEXICO

RULE 1. Each well completed or recompleted in the Cedar Hill-Fruitland Basal Coal Pool or in the Basal Coal member of the Fruitland formation within one mile of the Cedar Hill-Fruitland Basal Coal Pool, and not nearer to or within the limits of another designated Fruitland Basal Coal Pool shall be spaced, drilled, operated, and prorated in accordance with the Special Rules and Regulations hereinafter set forth.

RULE 2. Each well shall be located on a standard unit containing 320 acres, more or less, comprising any two contiguous quarter sections of a single governmental section, being a legal subdivision of the United States Public Land Surveys.

RULE 3. Non-standard spacing or proration units shall be authorized only after notice and hearing.

RULE 4. The first well drilled or recompleted on every standard or non-standard unit in the Cedar Hill-Fruitland Basal Coal Pool shall be located in the NE/4 or SW/4 of a single governmental section 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.

RULE 5. The Division Director may grant an exception to the requirements of Rule 4 without notice and hearing when an application has been filed for an unorthodox location necessitated by topographical conditions or the recompletion of a well previously drilled to another horizon. All operators offsetting the proration unit shall be notified of the application by registered or certified mail, and the application shall state that such notice has been furnished. The Director may approve the application upon receipt of written waivers from all operators offsetting the proration unit or if no objection to the unorthodox location has been entered within 20 days after the Director has received the application.

RULE 6. That any subsequent well drilled or recompleted in an existing Cedar Hill-Fruitland Basal Coal standard or non-standard unit shall be authorized only after notice and hearing.

IT IS FURTHER ORDERED:

(3) That an exception is hereby granted to the Special Rules and Regulations for the Cedar Hill-Fruitland Basal Coal Pool to permit Amoco Production Company to locate its Cahn Gas Com Well No. 1, located 1030 feet from the North line and 1600 feet from the West line of Section 33, Township 32 North, Range 10 West, NMPM, San Juan County, New Mexico, at an unorthodox gas well location in the NW/4 of said Section 33.

(4) That any well drilling to or completed in the Basal Coal member of the Fruitland formation within the Cedar Hill-Fruitland Basal Coal Pool or within one mile of said pool either on or before August 1, 1984, that will not comply with the well location requirements of Rule 4 is hereby granted an exception to the requirements of said rule. The operator of any such well shall notify the Aztec District Office of the Division, in writing, of the name and location of any such well on or before November 1, 1984.

(5) That the vertical limits of the Mount Nebo-Fruitland Pool (created by Division Order No. R-4690, dated December 6, 1973, as amended by Division Order Nos. R-5843 and R-7046, dated November 2, 1978, and August 6, 1982, respectively) are hereby redefined to include the Fruitland formation with the exception of the Basal Coal member as designated on the type log of the Amoco Production Company Schneider Gas Com "B" Well No. 1, as described in Ordering Paragraph No. (1) above.

(6) That this case shall be reopened at an examiner hearing in February, 1986, at which time the operators in the subject pool may appear and show cause why the Cedar Hill-Fruitland Basal Coal Pool should not be developed on 160-acre spacing and proration units.

(7) That jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year herein-above designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

JOE D. RAMEY
Director

S E A L

fd/

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

June 18, 1998

NOS. 25,061/25,062

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

Plaintiffs-Appellees,

vs.

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

Defendants-Appellants.

ORDER

WHEREAS, this matter came on for consideration upon appellees' motion to strike the briefs in chief and appellants' responses thereto, and the Court having considered said pleadings and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion to strike the briefs in chief hereby is DENIED.

ATTEST: A TRUE COPY

Kathleen J. Gibson

Clerk of the Supreme Court of the State of New Mexico

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs.

No. 25,061/25,062
(consolidated)

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

Defendants-Appellants.

SUPREME COURT OF NEW MEXICO
FILED
JUN 17 1998
Kathleen Jo Gibson

RESPONSE TO MOTION TO STRIKE

Defendants-Appellants New Mexico Oil Conservation Commission ("Commission") pursuant to Rule 12-309(E) NMRA 1998 responds to the Plaintiffs-Appellees' Motion to Strike Appellants' Briefs in Chief as follows:

1. The issue of this appeal is a legal issue and the facts of the case are part of the summary of proceedings set forth in the Commission's brief in chief.

2. As required by Rule 12-213(A)(3) NMRA 1998, the Commission's brief in chief contains a summary of the facts relevant to the issues presented for review of the District Court order that held that a Commission rule amendment was void as to only the Plaintiffs-Appellees.

3. The Plaintiffs-Appellees' appeal to the District Court was an appeal of an administrative rulemaking; the facts relevant to that appeal are contained in the record on appeal

from the Commission pursuant to Rule 1-074(H) NMRA 1998.

4. The facts relevant to the Commission's appeal of the District Court order are set forth in the brief in chief and are minimal as the appeal is based on the legal issue of the District Court order that exempts the Plaintiffs-Appellees from a valid statewide rule of general applicability.

5. The Plaintiffs-Appellees' strategy has been to divert attention from the Commission's rule amendment even though that is what the Plaintiffs-Appellees chose to appeal to the District Court pursuant to NMSA 1978, § 70-2-25 (B) (1935) and Rule 1-074 NMRA 1998. The Plaintiffs-Appellees attempt to focus the Court on relationships among the Plaintiffs and Defendants-Appellees Burlington Oil & Gas Co. ("Burlington") maintaining that Burlington owed the Plaintiffs something akin to a fiduciary duty; these issues are not relevant as to the validity of the Commission's rule amendment to the Plaintiffs-Appellees.

6. The Plaintiffs-Appellees' 13-page Memorandum Brief in Support of Their Motion to Strike Appellants' Briefs in Chief exceeds the issues presented in their Motion to Strike, and the memorandum contains the Plaintiffs-Appellees' argument that should be in their reply brief. In this manner the Plaintiffs-Appellees will have presented their argument twice to the Court and may circumvent the page limitation of Rule 12-213 NMRA 1998 for a reply brief.

WHEREFORE, the Commission request that the Court deny the Plaintiffs-Appellees' Motion to Strike.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
2040 South Pacheco
Santa Fe, NM 87505

(505) 827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the New Mexico Oil Conservation Commission's **Response to Motion to Strike** was mailed to all counsel of record on the 17th day of June, 1998.

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs.

No. 25,061/25,062
(consolidated)

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

Defendants-Appellants.

SUPREME COURT OF NEW MEXICO
FILED
JUN 17 1998
Kathleen Jo Gibson

MEMORANDUM IN SUPPORT OF THE COMMISSION'S RESPONSE TO MOTION TO STRIKE

Plaintiffs-Appellees' Motion to Strike claims that the New Mexico Oil Conservation Commission's ("Commission") brief in chief does not comply with Rule 12-213 NMRA 1998 because the brief fails to include certain facts that the Plaintiffs-Appellees claim are relevant to this appeal. The Commission included the facts relevant to the adoption of a rule amendment and the Plaintiffs-Appellees' appeal of that rule amendment adoption pursuant to Rule 1-074 NMRA 1998 and NMSA 1978, § 70-2-25(B)(1935) to the District Court. Additionally, the brief is sufficient so far as the appeal of the District Court's order which neither affirmed nor vacated the Commission's order adopting a rule amendment.

After the required public notice and hearing, on June 5, 1997, the Commission adopted an amendment to 19 NMAC 15.C.104. The Plaintiffs-Appellees filed a petition for review of the

Commission's order adopting the rule amendment with the District Court pursuant to NMSA 1978, § 70-2-25(B).[1] NMSA 1978, § 70-2-25(B) states, in part: "The Commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission." The subject of the District Court's review is the Commission's action, not the actions of private entities, in adopting the rule amendment.

The Plaintiffs-Appellees attempt to change this appeal of a Commission rule to a claim of the violation of their procedural due process rights. That is not the appeal before this Court pursuant to Rule 1-074 NMRA 1998 and NMSA 1978, § 70-2-25(B). The Plaintiffs-Appellees' argument apparently is that because of past relationships between the Plaintiffs-Appellees and Burlington Oil & Gas Company ("Burlington"), somehow Burlington owed Plaintiffs-Appellees a fiduciary duty to give the Plaintiffs-Appellees notice of the Commission's proposed rule amendment. Plaintiffs-Appellees claim that because Burlington did not provide them with such notice, the Commission's amendment to 19 NMAC 15.C 104 is not effective as to the Plaintiffs-Appellees. Accepting this argument on an appeal of an administrative rule amendment leads to the absurd result that the validity of the Commission's rules depend on the adequacy of notice provided by private entities to other private entities. The notice required for the Commission to enact valid rules is the notice required by statute, *i.e.*, public notice pursuant to NMSA 1978, § 10-15-1(D) (1974 as amended through 1997), NMSA 1978, § 70-2-23 (1935), and 19 NMAC 15.N.1204.

---

[1] The District Court later determined that the review was brought pursuant to NMSA 1978, § 70-2-25(B) and Rule 1-074 NMRA 1998. (R.P. 158)

The Plaintiffs-Appellees could have filed a complaint in district court against Burlington based on the relationship among the Plaintiffs-Appellees and Burlington alleging breach of fiduciary duty if Plaintiffs-Appellees did not want to be forced to choose to participate by paying their share of expenses in Burlington's gas well or be penalized. But, instead, the Plaintiffs-Appellees chose to file a review of the Commission's rule amendment under NMSA 1978, § 70-2-25(B). Now the Plaintiffs-Appellees complain that the appellate review is of the Commission's action, rather than a review of the Plaintiffs-Appellees' alleged violation of constitutional due process at the hands of Burlington. This was the path the Plaintiffs-Appellees chose.

It may be that the Plaintiffs-Appellees do not understand the nature of this administrative appeal. In fact, when the Plaintiffs-Appellees filed their appeal in the district court, they failed to do so in compliance with Rule 1-074. (R.P. SRP1, SRP 3 Petitioners-Appellees' Verified Complaint)

The appeal of the Commission's order to the district court is not a *de novo* hearing; it is an appeal on the record. The oral arguments before the District Court were not evidentiary hearings. The "facts" that the Plaintiffs-Appellees claim were omitted from the briefs in chief are not pertinent as to whether the rule adopted by the Commission in its order is a valid statewide rule of general applicability. Nor are these "facts" relevant to the question of whether the District Court can hold that the Commission's rule amendment is "...void as to only the appellants [Plaintiffs-Appellees]...." (R.P. 391) instead of complying with NMSA 1978, § 70-2-25(B) that states, in part: "The court shall determine the issues of fact and of law and **shall enter its order either affirming or vacating the order of the commission."** (Emphasis added.) The

District Court order affirms the Commission's rule amendment, but exempts the Plaintiffs-Appellees from the rule. This is not an order affirming or vacating the Commission's order; this District Court order creates something new, and that is not a result contemplated by either NMSA 1978, § 70-2-25(B) or Rule 1-074(Q) NMRA 1998.

It is this order that the Commission appealed to the Supreme Court. How can a statewide rule of general applicability be valid as to some people but not others? The rule is either valid as to all or as to none. The district court did not comply with NMSA 1978, § 70-2-25(B); it neither affirmed nor vacated the Commission's order. This is a legal issue. In appeals that involve legal issues, a summary of the facts is not necessary. *State ex rel. Garcia v. Martinez*, 80 N.M. 659, 459 P.2d 458 (1969); *New Jersey Zinc Co. v. Local Int'l Mine, Mill & Smelter Workers*, 57 N.M. 617, 261 P.2d 648 (1953); *Bernal v. Nieto*, 1997-NMAC-067, 123 N.M. 621.

The importance of this case is the Commission's ability to adopt rules "...to make and enforce rules...." to prevent waste of the state's oil and gas resources. NMSA 1978, § 70-2-11 (1935). The legislature specifically authorized the Commission to adopt rules providing for the spacing of wells. *See* NMSA 1978, § 70-2-12(B)(10) (1978). The validity of the Commission's rule cannot be dependent on subjective relationships between operators such as Burlington and royalty and other interest owners such as the Plaintiffs-Appellees. It is simply not relevant what prior communications there may have been between Burlington and the Plaintiffs-Appellees in considering whether a Commission rule is effective as to the Plaintiffs-Appellees, Burlington and all others.

The Commission's brief in chief sets forth both the procedural and factual summary, to

the extent necessary, to define the matters appealed to the Court. *Huckins v. Ritter*, 99 N.M. 560, 661 P.2d 52 (1983).

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General
2040 South Pacheco
Santa Fe, NM 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the New Mexico Oil Conservation Commission's **Memorandum in Support of the Commission's Response to Motion to Strike** was mailed to all counsel of record on the 17th day of June, 1998.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOTICE

CAUSE NO. 25,061/25,062

DISTRICT COURT
San Juan
(CV 97-572-3)

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

Plaintiffs-Appellees,

vs.

NEW MEXICO OIL CONSERVATION COMMISSION,

Defendant-Appellant.

You are hereby notified that the **Supplemental Record Proper** was filed in the above-entitled cause on **June 16, 1998.**

c: J. E. Gallegos

W. Thomas Kellahin

Marilyn S. Hebert, Special Assistant Attorney General

IN THE SUPREME COURT
STATE OF NEW MEXICO

BURLINGTON RESOURCES OIL & GAS COMPANY, AND OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,
Defendants/Appellants

vs.

No. 25,061/25,062
(consolidated)

TIMOTHY B. JOHNSON, TRUSTEE FOR RALPH A. BARD, JR.TRUSTEE U/A/D FEBRUARY 12, 1983; ET. AL.
Plaintiffs/Appellees

APPELLANT BURLINGTON RESOURCES OIL & GAS COMPANY'S RESPONSE TO APPELLEES' MOTION TO STRIKE APPELLANTS' BRIEFS

Appellant, Burlington Resources Oil & Gas Company (Burlington"), pursuant to Rule 12-309.E of the New Mexico Rules of Appellate Procedure, and in response to Appellees, Timothy B. Johnson, Trustee's, et al ("Plaintiffs"), Motion to Strike Appellants' Briefs in Chief, requests that the Court deny this motion for the following reasons:

In an effort to misdirect the Court's attention from the fundamental legal issue of the notification required when an agency engages in administrative rule-making, Plaintiffs have moved the Court to strike the briefs-in-chief of both the Commission and Burlington. In doing so, Plaintiffs submit a memorandum which contains arguments and allegations of fact extraneous to this basic issue and which exceeds the issues presented on appeal.

Contrary to the contentions of the Plaintiff, Burlington, in addition to articulating the legal arguments and facts necessary for the Court to address this "rulemaking notice" issue, also informed the Court of Plaintiffs' position--a position described in the District Court Opinion written by the Plaintiffs and attached to the Notice of Appeal and the Docketing Statements filed and referenced in the Briefs-in-Chief.

Burlington and the Commission desire that the Court focus its attention on the notification required when the Commission engages in rule-making. The Plaintiffs desire to posture this case as some type of special adjudication which would require actual notice only to them and not to the thousands of other property owners in the San Juan Basin.

A review the Docketing Statements filed by Burlington and the Commission with the attached District Court Opinion and the two Brief's in Chief demonstrate that there is no merit to the Plaintiffs' motion.

BACKGROUND

1. In its Docketing Statement filed on March 26, 1998, Burlington informed the Court, among other things, that:

(a) This appeal involves the notice required when the New Mexico Oil Conservation Commission ("Commission") engages in "rule-making" for well spacing of general application for certain types of wells in the San Juan Basin of New Mexico.

(b) On March 19, 1997, the Commission held a public hearing in this case (Case 11745) to consider establishing 640-acre spacing for "deep gas" wells in the San Juan Basin and thereafter issued Order R-10815 which amended the Division's General Rules to provide that future "deep gas" wells be dedicated to 640-acre spacing units.

(c) By April 23, 1997, Burlingtion had selected Section 9, T31N, R10W, NMPM as one of several sections for the location of a "deep gas" well and, if approved by the Commission and if productive, to be dedicated to a 640-acre spacing unit consisting of all of Section 9 to its proposed Scott Well No. 24.

(d) During this period, Burlington attempted to negotiate with the interest owners in Section 9, including the Plaintiffs, for their voluntary participation in this well. However, by June 12, 1997, it was apparent that the Plaintiffs were unwilling to voluntarily participate in this well and

Burlington filed a compulsory pooling case with the New Mexico Oil Conservation Division (Case 11809) asking the Division to determine if and how the interest owners in Section 9 would be afforded participation in this well.

(e) After the Plaintiffs were served with actual notice of the compulsory pooling case (OCD Case 11808), they filed an application with the Commission seeking to set aside the Commission's decision (Case 11745) in the rule-making case alleging they were entitled to actual notice of this other proceeding.

2. As set forth in its Brief in Chief, Burlington informed the Court, among other things, that:

(a) this appeal involves the notice required when the New Mexico Oil Conservation Commission ("Commission") engages in "rule-making" for well spacing of general application for certain types of wells in the San Juan Basin of New Mexico;

(b) on March 19, 1997, the Commission held a public hearing in this case (Case 11745) to consider establishing 640-acre spacing for "deep gas" wells in the San Juan Basin and thereafter issued Order R-10815 which amended the Division's General Rules to provide that future "deep gas" wells be dedicated to 640-acre spacing units;

(c) the Plaintiffs owned oil and gas mineral interest in the San Juan Basin and claimed to be "uniquely and exceptionally affected" by the

Commission's rule making decision in Case 11745; **See Burlington Brief in Chief Page 23. Also see District Court decision.**

(d) while the Plaintiffs were mineral interest owners known to Burlington, they were not benefiting from current production nor were they subject to having to pay for the costs of any well. They had not yet leased their interests and were not subject to any voluntary agreement to dedicate their acreage to a "deep gas" spacing unit. They were not then and are not now subject to any compulsory pooling order involuntarily committing their interests to any 640-acre spacing unit. The terms and conditions of their participation, if any, in this type of well still remain to be decided in the future; **See Burlington Brief in Chief pages 9 and 25. Also see District Court decision.**

(e) subsequent to the entry by the Division of an order in compulsory pooling case 11808, Burlington decided not to drill the Scott Well No. 24 and at its request, the Commission vacated Order R-10877 entered in Case 11808; **See Burlington Brief in Chief page 25.**

3. As set forth the District Court opinion attached as Exhibit A to Burlington's Docketing Statement, an opinion prepared by the Plaintiffs, the District Court agreed that the Commission was engaged in "rule-making" and not "adjudicating" when it adopted Order R-10815 which established 640-acre spacing units for any deep gas wells in the San Juan Basin **but then** found that because Burlington knew of these Plaintiffs, had been

dealing with them in an effort to form a voluntary 640-acre unit for the Scott Well No. 24, and had not provided them with actual notice of the rule making case, the Commission's 640-acre rule-making order did not apply to these Plaintiffs. **See District Court decision.**

4. In its Brief in Chief, Burlington took exception with the District Court's decision and succinctly summarized the facts relevant to the issue of whether the Plaintiffs were entitled to actual notice of the Commission's rule-making order. In compliance with Rule 12-213.A, Burlington has submitted a Brief in Chief which included:

(a) a brief statement of the nature of the case;

(b) the disposition in the District Court describing that decision;

(c) the issues Burlington desires to raise to the Supreme Court;

(d) a summary of the facts relevant to the issues raised by Burlington; and

(e) arguments and citations to the record proper and authorities in support of its arguments as to these issues.

Appellate Rules

Rule 12-213.B provides an opportunity to Plaintiffs to include in its Answer Brief a summary of proceedings if they deem those provided by the Commission and by Burlington to be insufficient.

Plaintiffs' Motion to Strike

Instead of filing an Answer Brief to argue how they are entitled to such special and unique notice treatment, Plaintiffs have asked the Court to take the unusual and extraordinary measure of striking the Briefs in Chief filed by the Commission and by Burlington.

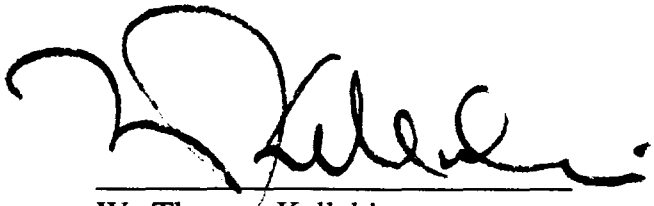
Plaintiff's Motion Should Be Denied

A review the Docketing Statements filed by Burlington and the Commission with the attached District Court Opinion and the two Brief's in Chief reflect that both the Commission and Burlington have made known to the Court the facts relevant to the issues on appeal and did so in an objective and fair manner. If Plaintiffs desire to discuss the facts from their perspective, then that is the purpose of the Answer Brief which affords them the opportunity to advance their position on the issues raised by Burlington and the Commission in this appeal. The Rules of Appellate Procedure provide an opportunity to the Plaintiffs to make their own summary of the proceedings and their own arguments within the context of their Answer Brief.

Because the Plaintiffs were the appellants in this case at the District Court level, they were entitled to identify the issues and present the facts relevant to the issues being reviewed. However, now that the Commission and Burlington are the appellants to the Supreme Court, the Plaintiffs take

exception to how Burlington and the Commission have identified the issues for review and what relevant facts they have relied upon in support of those issues. The appropriate procedure for the Plaintiffs is to prepare and file their Answer Brief. There is nothing wrong with the Briefs filed by the Commission and by Burlington to justify the novel notion of having the Court strike these Briefs.

Respectfully submitted by:



W. Thomas Kellahin

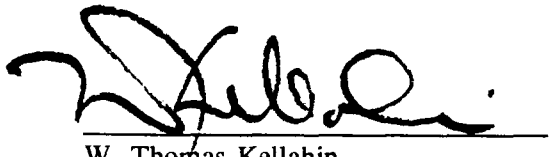
KELLAHIN & KELLAHIN
P.O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
ATTORNEYS FOR BURLINGTON
RESOURCES OIL & GAS COMPANY

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 15 day of June, 1998 to the office of:

Gene Gallegos, Esq.
Gallegos Law Firm
460 St. Michael's Drive, Bldg 300
Santa Fe, New Mexico 87505

Marilyn S. Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505



W. Thomas Kellahin

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TIMOTHY B. JOHNSON, ET AL.,

Plaintiff-Appellee,

vs. No. D-1116-CV-0009700572

BURLINGTON RESOURCES OIL & GAS COMPANY, ET AL.,

Defendant-Appellant.

RECORD FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JUDGE BYRON CATON

TRANSCRIPT OF THE SUPPLEMENTAL RECORD PROPER

APPEARANCES IN DISTRICT COURT:

JASON E. DOUGHTY
GALLEGOS LAW FIRM, P.C.
460 ST MICHAEL'S DRIVE, BLDG 300
SANTA FE NM 87505

MARILYN S. HEBERT
SPECIAL ASSISTANT ATTORNEY GENERAL
2040 SOUTH PACHECO
SANTA FE NM 87505

W.THOMAS KELLAHIN
KELLAHIN & KELLAHIN
PO BOX 2265
SANTA FE NM 87504

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

FILED
DISTRICT COURT
SAN JUAN COUNTY
N.M.

'98 JUN 11 A11:40

TIMOTHY B. JOHNSON, ET AL.,

Plaintiff-Appellee,

vs.

No. D-1116-CV-0009700572

BURLINGTON RESOURCES OIL & GAS COMPANY, ET AL.,

Defendant-Appellant.

CLERK'S CERTIFICATE OF SATISFACTORY ARRANGEMENTS

I, Gregory T. Ireland, Clerk of the District Court for the Eleventh Judicial District, within and for the County of San Juan, do hereby certify that the foregoing pages numbered SRP-1 to SRP-310 contain a full and true copy of the record in the above case, as requested in the Order for Record on Appeal.

I further certify that the costs of preparing said transcript are as folows:

Cost of copies:	$108.85
Clerk's Certificate:	$ 1.50
Cost for tape logs:	$-0-
Cost for Postage:	$ 7.45
Total Clerk's costs:	$117.80

The foregoing costs were paid by: W.THOMAS KELLAHIN

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court in Aztec, New Mexico, this 11th day of June, 1998.

GREGORY T. IRELAND
CLERK OF THE DISTRICT COURT

By: Patricia Chavez
Deputy

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs. **No. 25061**

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant-Appellant,

vs. **No. 25062**

BURLINGTON RESOURCES OIL & GAS COMPANY,
a corporation,

Defendant-Appellant, **CONSOLIDATED**

APPELLEES' MOTION TO STRIKE APPELLANTS' BRIEFS IN CHIEF

Appellees Timothy B. Johnson, Trustee for the Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "appellees") respectfully move this Court for its Order striking the Briefs in Chief filed in this case by Appellants Burlington Resources Oil & Gas Company ("Burlington") and the New Mexico Oil and Gas Commission ("Commission"), collectively ("appellants"), in their entirety. In support of their Motion, Appellees would show the Court the following:

1. The appellate rules mandate that appellants are to provide the Court with an organized, accurate statement of material facts necessary to consider the issues raised on appeal without reference to extraneous matters. See Rule 12-213(A)(3),

NMRA 1988 ("Rule 12-213").

2. Appellants have violated both the letter and the spirit of Rule 12-213(A)(3). They fail to point out material evidence bearing directly on the issues they raise on appeal. Appellants have chosen to submit deficient, one-sided Briefs in Chief instead of fairly framing the issues on appeal, thereby doing a great disservice to both this Court and the appellees.

3. In addition, appellants attempt to divert the Court's attention from the operative circumstances of this appeal by focusing exclusively on the large acreage and number of potential San Juan Basin interest owners that might in the abstract be affected by the spacing change Commission Order set aside by the trial court, instead of addressing the narrow and uniquely situated group of sixty-one appellee oil and gas working interest owners who were immediately affected by the Order in question.

4. These "facts", which are supported by only self-serving affidavits from Burlington employees, are extraneous and irrelevant to the relatively narrow issue on appeal, i.e., whether the appellees' right to procedural due process was violated, given their unique circumstances with Burlington. The constitutional due process issue on appeal before this Court is not properly framed using the hypothetical facts and extraneous generalizations advanced by the appellants. Rather, it must be reviewed based upon the facts unique to this appeal and to these appellees, which the Appellants utterly fail to present to this Court.

5. In accordance with Rule 12-309 (C), Counsel for appellees sought the concurrence of Burlington's counsel in this Motion but his telephone calls were not

returned. Counsel presumes that given the nature of this Motion, however, that Burlington's counsel would oppose the filing of same. After consultation, counsel for the Commission has stated her objection to this Motion.

WHEREFORE, for the foregoing reasons as well as those set forth in appellees' supporting Memorandum Brief filed simultaneously herewith, appellees Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al. respectfully request that this Court strike or disregard the Briefs in Chief filed by appellants Burlington Resources Oil & Gas Company and the New Mexico Oil Conservation Commission in their entirety.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing pleading to be served on this 5th day of June, 1998 to the following counsel of record:

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

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

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

J.E. Gallegos

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

Plaintiffs-Appellees,

vs. No. 25061

THE NEW MEXICO OIL CONSERVATION COMMISSION

Defendant-Appellant,

vs. No. 25062

BURLINGTON RESOURCES OIL & GAS COMPANY,
a corporation,

Defendant-Appellant, CONSOLIDATED

APPELLEES' MEMORANDUM BRIEF IN SUPPORT OF THEIR MOTION TO STRIKE APPELLANTS' BRIEFS IN CHIEF

Appellees Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "appellees") hereby tender their Memorandum Brief in Support of their Motion to Strike the Briefs in Chief filed in this case by Appellants Burlington Resources Oil & Gas Company ("Burlington") and the New Mexico Oil and Gas Commission ("Commission"), collectively ("appellants"), in their entirety.

I.

PRELIMINARY STATEMENT

This Court's consideration of the facts material to this appeal and the factual determinations made by the trial court should begin with a balanced presentation of the factual record in the appellants' briefs in chief. Hartman v. Texaco, Inc., 123 N.M. 220, 227, 937 P.2d 979, 986, cert. denied, 123 N.M. 83, 934 P.2d 277 (1997).

The appellate rules mandate that appellants are to provide the Court with an organized, accurate statement of the material facts necessary to consider the issues raised on appeal without reference to extraneous matters. See Rule 12-213(A)(3), NMRA 1998 ("Rule 12-213") (brief in chief of the appellant ". . .shall include a summary of the facts relevant to the issues presented for review,"); see also Hartman v. Texaco, Inc., supra 123 N.M. at 227 (". . .appellate rules are designed, among other things, to obtain briefs that provide this Court with an organized, accurate statement of the material necessary to consider the issues raised on appeal without reference to extraneous matters." citing Allen v. Williams, 77 N.M. 189, 190, 420 P.2d 774, 775 (1996)).

The primary purposes of Rule 12-213's requirements are to fully apprise the reviewing court of the fact-finder's view of the facts and its disposition of the issues, and to help the court decide the issues on appeal. Martinez v. Southwest Landfills, Inc., 115 N.M. 181, 184, 848 P.2d 1108, 1111 (Ct. App. 1993). A one-sided statement of the facts is of no help to the Court. See, Hartman v. Texaco, supra 123 N.M. at 227.(citing Martinez v. Southwest Landfills, Inc., supra, 115 N.M. 181, 184, 848 P.2d 1108, 1111;

Perfetti v. McGhan Medical, 99 N.M. 645, 654, 662 P.2d 646, 655 (Ct. App. 1983)). Rather, a party is required to point out all relevant evidence bearing on a proposition. Luxton v. Luxton, 98 N.M. 276, 648 P.2d 315 (1982).

Appellants have violated both the letter and the spirit of Rule 12-213(A)(3). They utterly fail to point out material evidence bearing directly on the issues they raise on appeal. Fairly read, Burlington's "Factual Summary" is nothing more than a one-sided recitation of extraneous and inapposite argumentation that had absolutely no bearing upon the District Court's rulings in this case.

Appellant Commission does not even bother to provide the Court with a summary of the facts relevant to the issues presented for review, despite the express requirements of Rule 12-213. This Court has already had occasion to admonish counsel for the Commission "to read and follow the appellate rules to avoid future violations." Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 108, 835 P.2d 819 (1992) (citing Fenner v. Fenner, 106 N.M. 36, 41-42, 738 P.2d 908, 913-14 (Ct. App.), cert. denied, 106 N.M. 7, 738 P.2d 125 (1987)). Obviously, the Court's advice has fallen on deaf ears.

Rule 12-312 NMRA 1998, "Failure to comply with rules", provides in pertinent part as follows concerning an appellant's failure to submit briefs in the form required by the New Mexico Rules of Appellate Procedure:

> A. Appellant's failure to file. If an appellant fails to file a docketing statement or a brief in chief as provided by these rules, such failure may be deemed sufficient grounds for dismissal of the appeal by the appellate court.
>
> * * *
>
> D. Other sanctions. For any failure to comply with these rules or any order of the court, the appellate court may, on motion by appellant or

> appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Paragraphs A and B of this rule, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

See Id.

The supreme court fully expects compliance with its rules of procedure and it will not hesitate to impose the sanctions provided for in former Rule 31, N.M.R. App. P. (Civ.) (see now this rule). United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981). Appellants have negligently or consciously chosen to disregard the appellate rules by submitting deficient, one-sided Briefs in Chief instead of fairly framing the issues on appeal.

II.

ARGUMENT AND AUTHORITIES

POINT ONE

APPELLANTS' BRIEFS IN CHIEF FAIL TO STATE MATERIAL FACTS NECESSARY FOR THIS COURT'S CONSIDERATION OF THE ISSUES ON APPEAL

This appeal is from the trial court's overturn of an administrative order issued by the Commission upon application by Burlington which changed the spacing unit for San Juan Basin wildcat wells for deep formations from 160 to 640 acres. Immediately after obtaining this spacing change, Burlington initiated proceedings to compulsory pool the appellees' acreage into a 640-acre spacing unit for one of its proposed initial deep gas test wells, the Scott Well No. 24. But for the change in spacing, Burlington could not have pooled the appellees' acreage for its Scott Well.

Although it provided actual notice to over three hundred other parties, Burlington failed to provide a single one of the appellees with notice of its application or of the Commission hearing in this case, even though it knew their names and whereabouts and knew all the while of its plans to compulsory pool their acreage should the requested change in spacing be granted. As a consequence, appellees asserted on appeal to the District Court that the Order was entered in violation of statutory and constitutional due process notice requirements, and thus is void as to the appellees. The District Court agreed, and issued its Opinion and Final Judgment in favor of appellees. Appellants have appealed that judgment. In addition to the constitutional infirmity of the Commission action, appellees assert that entry of this Order by the Commission was arbitrary, capricious, an abuse of discretion and without justification in that it was not supported by substantial evidence. The District Court made no decision on this point.

A. APPELLANTS FAIL TO BRING TO THE COURT'S ATTENTION MATERIAL FACTS NECESSARY FOR REVIEW

In presenting the facts and issues on appeal for the reviewing court, appellants are required to abandon the role of advocate for facts that were argued below and rejected, and assume the role of advocate for the law. See Martinez supra 115 N.M. at 185.

Strikingly absent in the appellants' Briefs in Chief is any discussion of the long-standing and adversarial relationship between Burlington and the appellees. Indeed, the appellants' briefs are strategically designed to lead this Court away from the operative facts and to the erroneous conclusion that the appellees names and

whereabouts were no more familiar to Burlington, and that the appellees are no differently affected by the spacing change, than the hundreds of thousands of unknown interest owners in the entire San Juan Basin. See e.g. Commission's Brief at pp. 6-7, 9, 11-12; Burlington's Brief at pp. 6-7, 9.

As the appellants well know, the original appeal was brought by a very narrow and well defined set of some sixty-one interest owners whose names, addresses and San Juan Basin deep gas ownership interests have been extraordinarily well known to Burlington for years[1], who have been uniquely affected by the deep wildcat gas well spacing change requested by Burlington in Commission Case 11745 (the "spacing change"), and whose acreage was indisputably the immediate objective of the spacing change, being Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico ("Section 9").

Burlington knew beyond 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. Burlington had attempted to obtain the appellees' acreage for its deep gas test wells in one fashion or another commencing as early as June 18, 1996. See RP pp. 203-207. 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 **a month before the Commission**

[1] Burlington does not dispute that it knows, and has known for years, the appellees names and whereabouts. See Burlington's mailing list indicating the appellees names, addresses and deep oil and gas rights ownership. RP at pp. 99-104. 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. See RP at p.290. There is also the fact that Burlington and the appellants have been embroiled in contentious litigation since late 1992 and that these owners are not disposed to sit by quietly while Burlington invades their ownership rights. See RP at p.180.

hearing held on March 19, 1997, Burlington had already prepared its detailed Authority for Expenditure itemizing the projected costs for one of its initial deep gas test wells, the Scott Well No. 24, on a 640 acre spacing unit embracing appellees' property in Section 9. See RP 210, 213, and 291.

A mere six days after the Commission issued the decision in question here, Order No. 10815, changing deep gas well spacing from 160 to 640 acres, Burlington filed its application with the Commission seeking the compulsory pooling of the appellees' working interest rights in Section 9 to form a 640 acre drilling unit for its proposed Scott Well No. 24.

Had Burlington desired to give the appellees personal notice of its application and the Commission hearing that it knew far in advance would have a substantial and immediate impact upon their New Mexico property interests, it could have easily done so. Not one of the appellees received personal notice from Burlington, while approximately three hundred other parties did. [2]

This Court would never be aware of these and other material facts if it were to rely solely upon the appellants' Briefs in Chief. It was principally upon these "forgotten" facts that the District Court focused in ruling that this Court's decision in Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991) is controlling of this appeal, and that the appellees' constitutional due process rights were violated, as reflected by the Court's Opinion and Final Judgment, which provides in pertinent part as follows:

[2] The appellees reside outside the State of New Mexico, a fact known to Burlington, and thus could not and would not receive notice by publication.

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.

* * *

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 and fair dealing to provide personal notice to the appellants of the spacing case proceeding underlying Order No. R-10815.

See Opinion and Final Judgment, RP 387-391.

B. APPELLANTS FAIL TO BRING TO THE COURT'S ATTENTION MATERIAL FACTS NECESSARY FOR A FULL RECORD REVIEW OF WHETHER THE COMMISSION'S ORDER NO. R-10815 IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Apart from the constitutional issue, in this appeal the Court is asked by appellees to review the whole record to determine whether the Commission's spacing change order, Order No. R-10815, should also fall because it is not supported by substantial evidence. See AA Oilfield Serv. v. New Mexico State Corp. Comm'n, 118 N.M. 273, 881 P.2d 18 (1994) (citing Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 101 N.M. 291, 294, 681 P.2d 717, 720 (1984)).

In conducting this whole record review, the court should be able to rely entirely upon the appellant's brief-in-chief in canvassing all the evidence bearing on a finding or

a decision, favorable or unfavorable, and in deciding whether there is substantial evidence to support the result. Martinez, supra 115 N.M. at 185. Rule 12-213 contemplates that the canvas and determination be made on the basis of appellant's presentation in the brief-in-chief. Id. The appellees should likewise be able to rely on the brief-in-chief in arguing whether, on balance, the finding or decision is supported by substantial evidence. Id. Neither the appellees nor the reviewing court should have to supplement the appellants' presentation of the evidence. Id.

As an example of the appellants' self-interested selective memory of material facts purportedly supporting the spacing change, Burlington erroneously informs this Court that "Amoco Production Company also testified in favor of adopting a 640-acre spacing rule, but recommended that the rule be made temporary." Burlington's Brief in Chief at p. 5. Burlington seeks to mislead this Court. The testimony by Amoco Production Company's expert petroleum engineer witness, Pamela Staley, contradicted Burlington's purported "proof" that 640-acre spacing was necessary to efficiently and economically drain San Juan Basin deep gas formations.[3] Ms Staley testified that in her expert opinion, based upon her review of three-dimensional seismic data of the San Juan Basin deep formations, a Deep Pennsylvania well in the San Juan Basin could be economically developed on the current 160 acre spacing.[4]

The Commission likewise discusses the "evidence" put on by Burlington before the Commission, but completely fails to note the aforementioned, and equally relevant,

[3] While this testimony is found at pp. 102-114 of the Commission's Hearing Transcript, the Record Proper does not include a copy of this Transcript.
[4] See Id.

evidence put on by Amoco Production Company. See Commission's Brief in Chief at pp. 17-19. These and other purposely "omitted" facts are absolutely critical to this Court's full record review of whether the Commission's spacing order is supported by substantial evidence and should have been made known to this Court by the appellants in their Briefs in Chief.

The New Mexico Court of Appeals has recently affirmed its previously stated unwillingness to consider appeals where the appellant failed to properly set forth all evidence bearing upon an agency's findings. See Martinez v. Southwest Landfills, Inc., supra 115 N.M. at 184-186 (citing Maloof v. San Juan County Valuation Protests Bd., 114 N.M. 755, 845 P.2d 849 (Ct. App. 1992)); see also In re Estate of McKim, 111 N.M. 517, 521, 807 P.2d 215, 219 (1991); Henderson v. Henderson, 93 N.M. 405, 407, 600 P.2d 1195, 1197 (1979); Galvan v. Miller, 79 N.M. 540, 545-46, 549, 445 P.2d 961, 966-67, 970 (1968); Giovannini v. Turrietta, 76 N.M. 344, 346-47, 414 P.2d 855, 856-57 (1966); State ex rel. State Highway Comm'n v. Pelletier, 76 N.M. 555, 559, 417 P.2d 46, 48 (1966).

The Appellants have consciously failed in their obligations under Rule 12-213(A)(3),NMRA 1988 to provide this Court with all material facts necessary to allow the court to determine whether there is substantial evidence in the record to support the Commission's Order No. R-10815. As such, their one-sided Briefs in Chief should be stricken in their entirety.

POINT TWO

APPELLANTS' BRIEFS IN CHIEF ADVANCE EXTRANEOUS, IRRELEVANT AND DIVERSIONARY "FACTS" UNNECESSARY TO THIS COURT'S CONSIDERATION OF THE ISSUES ON APPEAL

As noted above, the appellate rules are designed, among other things, to obtain briefs that provide the reviewing Court with an organized, accurate statement of the material facts necessary to consider the issues raised on appeal, without reference to extraneous matters. Hartman v. Texaco, Inc., 123 N.M. 220, 937 P.2d 979 (Ct. App. 1997), cert. denied, 934 P.2d 277(citing Allen v. Williams, 77 N.M. 189, 190, 420 P.2d 774, 775 (1996))(emphasis added). Again, appellants' Briefs in Chief run afoul of the controlling rules of appellate procedure and New Mexico case law.

As has been their strategy from the beginning, appellants continue their quest to divert the Court's attention from the narrow focus and unique circumstances of this appeal. Their approach, carried over from prior briefing, is to emphasize the vast acreage and number of potential San Juan Basin interest owners that might in the abstract be affected by the spacing change appealed herein, instead of focusing on the narrow and uniquely situated group of appellees who were immediately affected thereby. Burlington Brief, p. 6. The Commission's Brief in Chief recites similar such extraneous matter. See Commission's Brief in Chief at pp. 6-7, 9, 11-12.

As the district court found, these "facts" are extraneous and irrelevant to the relatively narrow issue on appeal, i.e., whether the appellees' right to procedural due process was violated, given their unique circumstances as discussed above. The district court had no problem in distinguishing, and in granting relief based upon, the

appellees circumstances, in ruling that the spacing order was void only as to these appellees:

> 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.

See Exhibit A hereto, (emphasis added).

The constitutional due process issue on appeal before this Court should not be framed using the hypothetical facts and extraneous generalizations advanced by the appellants. Rather, as the District Court understood, it must be reviewed based upon the facts unique to this appeal and to these appellees.

III.

CONCLUSION

For the foregoing reasons, appellees Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al. respectfully request that this Court strike or disregard the Briefs in Chief filed by appellants Burlington Resources Oil & Gas Company and the New Mexico Oil Conservation Commission in their entirety.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing pleading to be served on this 5th day of June, 1998 to the following counsel of record:

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

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

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

J.E. Gallegos

RECEIVED
APR 28 1998
OIL CONSERVATION DIVISION

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

vs. No. 25061

THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO,
Defendant-Appellant

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

vs. No. 25062

BURLINGTON RESOURCES OIL & GAS
COMPANY, a corporation,
Defendant-Appellant

APPELLANT-BURLINGTON RESOURCES OIL & GAS COMPANY'S

BRIEF IN CHIEF

APPEAL FROM THE DISTRICT COURT FOR
THE ELEVENTH JUDICIAL DISTRICT
SAN JUAN COUNTY
HONORABLE BYRON CATON, PRESIDING

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Jurisdictions: Page

Other Authorities:

I.

SUMMARY OF PROCEEDINGS

A. NATURE OF THE CASE

This is an appeal of a district court decision which held "void as to only appellants [Plaintiffs] and...is of no force and effect as to their [Plaintiffs] property interest in San Juan Basin" a well spacing order of the New Mexico Oil Conservation Commission ("Commission") amending a statewide rule of general application in the San Juan Basin.

Proceedings before the Commission:

In order to prevent waste of New Mexico's natural resources, the New Mexico Oil and Gas Act enumerates the powers of the Commission including the power to establish general rules to "fix the spacing of wells" in order to carry out the purposes of the Act. **NMSA 1978, Section 70-2-12(10).** These General Rules for "statewide application" govern when no special pool rules exits. **See 19 NMAC 15.A-Rule 11.**

On February 25, 1997, Defendant, Burlington Resources Oil & Gas Company ("Burlington") filed an application with the Commission requesting the Commission establish a new rule for well spacing for general application for certain types of wells within the San Juan Basin of New Mexico. This case was docketed as Case 11745. On March 19, 1997, the Commission held a public

hearing on this request. At another public meeting on June 5, 1997, the Commission adopted Order R-10815 to be applied prospectively for future wells to be drilled below the base of the Dakota formation within an area covering some 5,600,000 acres in the San Juan Basin.

The Plaintiffs own oil and gas minerals interests in the San Juan Basin. On June 24, 1997, they filed an "Application for Rehearing" with the Commission contending that they were entitled to actual notice of the Commission's rule making hearing and additionally claimed that the order was not supported by substantial evidence. This application was deemed denied when the Commission did not grant Plaintiffs request within ten days.

Proceedings in the District Court:

On July 18, 1997, the Plaintiffs appealed the Commission's order to the District Court naming the Commission and Burlington as defendants.

The parties filed briefs and supplemental affidavits with the District Court which heard oral arguments on December 17, 1997.

On January 27, 1998, the District Court entered its Opinion and Final Judgment which held that the failure to provide Plaintiffs with actual notice of the Commission's rule making deprived Plaintiffs of their right to due process and ordered that this rule was void only as to these Plaintiffs. As a result of this ruling, the District Court did not address Plaintiffs' substantial evidence claim.

On February 23, 1998, Burlington filed its Notice of Appeal which is docketed as Supreme Court Case 25062 and on February 24, 1998, the Commission filed its Notice of Appeal which is docketed as Supreme Court Case 25061. Pursuant to NMSA 1978, Section 70-2-25(B), the appeal is directly to the Supreme Court. On April 9, 1998, pursuant to NMRA 1997, Rule 12.202.F(2), the Supreme Court granted the stipulated motion to consolidate these two appeals.

B. FACTUAL SUMMARY

On February 25, 1997, Burlington filed an application with the New Mexico Oil Conservation Commission docketed as Case 11745 requesting that the Commission establish a new rule[1] for well spacing for general application[2] to future "deep gas" wells to be drilled below the base of the Dakota formation[3] within an area covering some 5,600,000 acres within the San Juan Basin of New Mexico.[4]

On March 19, 1997, the Commission held a public hearing in this case and received testimony that in the last 50 years less than a couple of dozen deep gas wells had been drilled in the San Juan Basin subject to the existing 160-acre well

---

[1] The subject of this application involved a change to "Division General Rule 104" **19 NMAC 15.C.104**

[2] The Division General Rules are for statewide application and apply in the absence of the adoption of special rules for a particular pool. General Rule 104, among other things, deals with the acreage requirements for oil and gas wells in New Mexico and is subdivided into three sections: one for Southeastern New Mexico, one for the San Juan Basin, and one for the balance of the state.

[3] These wells are drilled to depths of greater than 10,000 feet. See TR-p.42 (RP-p. 070).

[4] Record Proper is abbreviated "RP" RP-p. 292, see Affidavit of Alan Alexander

spacing rule;[5] that no producing deep gas well had yet been completed in the San Juan Basin;[6] that new deep gas wells could not be economically drilled to this depth under the limitations of the 160-acre spacing rule[7] and that the Commission should adopt 640-acre spacing for future gas wells at this depth in order to encourage this type of exploration.[8]

In addition, Burlington's expert petroleum engineer testified that deep gas wells drain 640-acres in areas adjacent to but outside the San Juan Basin.[9] Based upon calculations, Mr. Lane estimated the "deep gas" in the Pennsylvanian formations of the San Juan Basin could be expected to also drain 640-acres.[10] 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.[11] Amoco Production Company also testified in favor of adopting a 640-acre spacing rule, but recommended that the rule be made

---

[5] Commission transcript is abbreviated "TR" TR-p. 21 (RP-p. 049) Burlington Exhibit 6 (TR-p. 27 (RP-p. 049)

[6] TR-p. 59-60 (RP-p. 086-087)

[7] TR-p. 46 (RP-p. 074).

[8] TR-p. 46 (RP-p. 074) and TR-p. 58 (RP-p. 085).

[9] TR-p.46(R.P.074)

[10] TR-p.51 (RP-p. 78a)

[11] TR-p.65 (R.P.092)

temporary.[12] There was no party who appeared in opposition to the adoption of this rule.[13]

On the basis of the evidence presented, and after due consideration, the Commission then exercised its knowledge and expertise in interpreting the evidence and ultimately adopted Burlington's recommendation.[14]

On February 27, 1997 and prior to the Commission hearing, the Oil Conservation Division sent notice of this case by regular mail to all parties on the Division's general mailing list for hearings which included some 267 operators and interested parties.[15] Also, on March 5, 1997, the Division caused publication of notice of this hearing in four different newspapers including The Daily Times of Farmington, New Mexico, a newspaper which is of general circulation in the San Juan Basin.[16] In addition, Burlington sent notices of this hearing to the operators in the San Juan Basin 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.[17]

---

[12] TR-p.96 (R.P. 123)
[13] TR-p.4 (R.P.032)
[14] RP-p. 260-261 (Order R-10815, Findings (7)(8)(9).
[15] RP-p. 292, See Affidavit of Florene Davidson
[16] RP-p. 292, See Affidavit of Florene Davidson
[17] RP-p.292, See Affidavit of Alan Alexander

On June 5, 1997, the Commission issued Order R-10815 in Case 11745, which established 640 acre spacing by modifying the existing rule for general application to "deep gas" wells drilled below the base of the Dakota formation within the San Juan Basin.[18]

Order R-10815 covers an area contain approximately 5,600,000 acres (9,000 square miles) of surface area.[19] Based upon the public records in the applicable counties, there are an average of 39,240 working interest owners records and 305,460 royalty/overriding royalty owner records that would have to be verified in order to obtain a suitable list for actual notice purposes.[20] It would be necessary for Burlington to hire at least 161 contract land brokers for one year at an estimated cost of $15,300,000.00 to verify the working and royalty ownership for the area covered by this rule. As of October 1, 1997, Burlington had checked some 500,000 acres (781 sections) involving some 3,405 working interest owner records (including those of the plaintiffs) which took seven contract land brokers some 24 months to compile.[21] It is currently impossible to find and employ 161 contract land brokers at the same time in the physical plants of each county clerk. In the event the entire San Juan Basin could be searched for

[18] RP-p.258-265 (Order R-10815).
[19] RP-p. 292, See Affidavit of James L. Strickler
[20] RP-p. 292, See Affidavit of James L. Strickler
[21] RP-p. 292, See Affidavit of James Strickler

ownership in a one year time frame, the results of such a search would be obsolete because of the changes of ownership that would occur before the ownership check could be completed.[22]

Order R-10815 became effective on June 30, 1997, the day of its publication in the New Mexico Register. On June 24, 1997, the Appellants filed with the Commission an application for rehearing of Case 11745.[23]

II.

ARGUMENTS AND AUTHORITIES

APPELLANTS WERE NOT ENTITLED TO ACTUAL NOTICE OF THE COMMISSION'S RULE-MAKING CHANGING DIVISION GENERAL RULE 104

The Plaintiffs contended that they should have been provided actual notice of the proceedings in Commission Case 11745. They asked the District Court to invalidate **only as to them** portions of one of the General Rules and Regulations adopted by the Commission on the grounds that they were not provided with actual notice of the hearing which resulted in this rule change. (emphasis added).

---

[22] RP-p. 292, See Affidavit of James Strickler.
[23] RP-p. 292, See Affidavit of Florene Davidson

The District Court erroneously granted Plaintiffs request by basing this decision upon a misinterpretation of **Uhden v. New Mexico Oil Conservation Commission**, 112, N.M. 528, 817 P.2d 721 (1991).

In **Uhden,** as a result of that adjudication, the Commission amended the special rules and regulations specifically adopted for that proven productive reservoir. The Commission made a change which affected the existing 160-acre proration unit from which Mrs. Uhden was currently receiving royalty income at the time from her lessee, Amoco, who had failed to provide Mrs. Uhden with notice of that hearing. Mrs. Uhden's share of current income from the Amoco well on her unit was reduced by one-half when the Commission increased the size of the spacing units in this pool to 320-acre without actual notice to her.

By stark contrast, in the subject case (Case 11745), the Commission's change of a general well spacing rule is the exact opposite of the adjudicatory order at issue in **Uhden**. In Case 11745, the Commission dealt with the adoption of a prospective rule **prior to any production being established**. The rule changed well spacing for general application in a vast undeveloped area covering some 5,600,000 acres with thousands of owners and hundreds of operators. It involved an interval containing at least twenty (20) different formations below the base of the Dakota formation in the San Juan Basin, which, except for a few

isolated and scattered wells, were **not** being produced and which had **not yet** been proven productive.[24] Under the criteria set forth in **Uhden**, there is simply no question that the proceeding in Case 11745 was an example of the Commission engaging in the legislative function of rule making for which actual notice is not required.

The facts involved in this case could not be more different than those in **Uhden.** For example, in this case, as of the effective date of the Commission order,[25] the Plaintiffs were not benefiting from current production nor were they subject to having to pay for the costs of any well. They were mineral interest owners who had not yet leased their interests and were not subject to any voluntary agreements to dedicate their acreage to a spacing unit. They were not then and are not now subject to any compulsory pooling order involuntarily committing their interest into any 640-acre spacing unit.[26] The terms and conditions of their participation, if any, in this type of well still remain to be decided in the future.

It is well-settled law, under both the New Mexico and federal Constitutions, that Plaintiffs simply have no due process right to notice of the Commission's general rule-making. Such a right could only be statutory. Finally, under

---

[24] RP-p. 292, See Affidavit of James R. J. Strickler
[25] June 30, 1997
[26] Compulsory pooling order R-10877 entered in Case 11808 has been vacated at the request of Burlington

applicable statutes and regulations, Appellants were entitled only to publication notice, which they were indisputably given.[27]

A. THE COMMISSION'S AMENDMENT OF DIVISION GENERAL RULE 104 WAS RULE-MAKING

The distinctions between adjudications and legislative actions ("rule-making")--and the level of constitutional protection afforded these two different agency actions--are basic principles in the American system of government. Because the action at issue in this case was a rule-making, neither the Commission nor Burlington had any obligation to provide Plaintiffs with any notice under the federal and state constitutions.

The **Uhden** decision controls this case. Unfortunately for Plaintiffs, however, **Uhden** does not control in the way they had hoped. Instead, **Uhden** clearly shows that the Commission's action in changing Division General Rule 104 was a rule-making and not an adjudication. In **Uhden**, the New Mexico Supreme Court determined that an order increasing the well spacing acreage for specific 160-acre spacing units in the Cedar Hills Fruitland Coal-Gas Pool was an

[27] NMSA 1978, Section 10-15-1(D); NMSA 1978, Section 70-2-23; NMSA 1978, Section 70-2-6(B); OCD Rule 1204

adjudication and not a rule-making. 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.

Plaintiffs cannot deny that unlike the narrow adjudication of a small number of interests in **Uhden**, the Commission's change of Division General Rule 104 affects millions of acres, hundreds of thousands of owners and hundreds of operators in the San Juan Basin.

In addition, state statutes distinguishing between rule-makings and adjudications indicate that the type of agency action at issue here was a rule-making. For example, under the New Mexico Administrative Procedures Act,[28] 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)(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 agency after a trial type hearing but does not include a mere rule-making proceeding." **Id.** Sec 12-8-2(B). For an example of an adjudication see **Zamora v. Village of Ruidoso Downs**, 120 N.M. 778, 907 P.2d 182 (1995), in which the New Mexico Supreme

[28] 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 rule-making.

Court held that a municipal board of trustees was acting in a "quasi-judicial capacity which required actual notice to the terminated employee when it terminated 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 rule-making.

Like New Mexico, Oklahoma requires actual notice **only** in cases where the change in well spacing involves pools with actual producing wells. In **Cravens v. Corporation Commission**, 613 P.2d 442 (Okla. 1980) a party had drilled and completed a producing gas well located on a 80-acre drillsite lease. Unknown to the owner of the producing lease, an offsetting owner filed an application with the Corporation Commission to include this well in a 160-acre unit which was approved by the Commission. The Oklahoma Supreme Court held that the order was void for lack of actual notice to the owner of the producing well whose rights to due process were violated. Similarly, in **Louthan v. Amoco**, 652 P.2d 308 (Okla. 1982) the Oklahoma Supreme Court voided a spacing order in which a spacing unit was established which included a producing well because the affected parties were easily ascertainable and had not been notified.

The **Uhden** case and the Oklahoma cases have established the general rule that personal notice is required where a well is producing on the proposed spacing unit. This makes sense because where there are existing wells on the proposed spacing unit, the owner of the tract upon which the well is located will be in an adversarial relationship with the parties owning adjoining tracts attempting to include their tracts so that they can share in production revenues without sharing in the risks of drilling the well.

By contrast, where there are no wells on the proposed spacing units, the owners will not be in an adversarial relationship and the adoption of general spacing rules is a legislative and not adjudicatory process. The fact that the Legislature has delegated to the Commission the power to establishing well spacing, does not alter the fundamental legislative character of the rule-making proceedings.

B. UNDER BOTH THE FEDERAL AND NEW MEXICO CONSTITUTIONS, PERSONS AFFECTED BY RULE-MAKING ARE NOT ENTITLED TO ANY DUE PROCESS PROTECTION

Having established that the Commission's action in this case was a rule-making, the Court must consider the importance of that fact. In this regard, **Uhden** makes the distinction between rule-making vs. adjudication proceedings when the Court discussed at length and in detail the fact that, "**[f]irst, this was an adjudicatory and not a rule-making 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 rule-makings 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 rule-making 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 rule-makings, 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).

Further, because of this fundamental difference between rule-makings and adjudications, Plaintiffs' cannot rely on **Mullane v. Central Hanover Bank & Trust Co.**, 339 U. S. 306 (1950). **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 protection. **Id** at 314, 70 S. Ct at 657. The Supreme Court has subsequently made clear that the protection afforded by **Mullane** are applicable only to adjudications, and not to rule-makings:

> 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 (1982). Thus, when the **Uhden** court relied on **Mullane**, and on several Oklahoma state court decisions dealing with producing well-spacing adjudications, it was plainly doing so from their analysis of the due process in adjudicatory actions and not for rule-makings. **See** 112 N.M. at 530, 817 P.2d at 723 ("First, this was an adjudicatory and not a rule-making proceeding.").

It is clear from **Mullane** and **Bi-Metallic**, therefore, that rule-making actions such as the Commission's action in this case simply do not implicate the due process protection 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 right is statutory only.**" **Id** (citing **Bi-Metallic**) (emphasis added).

C. PLAINTIFFS 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 Plaintiffs in this action would have to be 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 to come from the Commission, and not from Burlington. In this case, the Commission's publication notices plainly complied with the applicable statutes.

Plaintiffs were not entitled to actual notice under Division General Rule 1207.[29] 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). Nor does Rule 1207(A)(11), which deals with "cases of applications not listed above," and which requires actual notice, apply to the Plaintiffs.

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 catch all "applications", contemplated by Rule

[29] 19 NMAC 15.N.1207

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 notice rule which provides for the type of notice to be given in various kinds of applications seeking adjudications before the Commission and then have a catch all provision that requires actual notice for every other kind of application including general rule-makings. Rule 1207(A)(11), therefore, cannot sensibly be interpreted as applicable to the rule-making 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:

> "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 rule-making for the Commission which is set forth in the [Oil and Gas] Act at NMSA 1978 Sec 70-2-23 (1995) and the Open Meetings Act, NMSA 1979 Sec 10-15-1(D)(1997)"[30]

[30] RP-p. 309, See Commission's Statement of Appellate Issues

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 rule-making proceeding at issue in this case.

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.[31] 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 rule-making. 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 rule-making be notified personally before promulgating the rule. **See** 239 U.S. at 445, 36 S. Ct. at 142.

[31]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 Plaintiffs did not take an action until June 24, 1997.

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 rule-making, 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 rule-making. As the New Mexico Supreme Court stated in **Livingston**, "requiring the [agency] to re-adopt 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 the complaint that Appellants were entitled to receive actual notice of the rule-making that resulted in the modification of that rule.

D. ORDER R-10815 CANNOT BE AN ADJUDICATION AS TO THESE PLAINTIFFS BUT RULE-MAKING AS TO ALL OTHER PROPERTY OWNERS.

Plaintiffs know full well that persons affected by rule-makings are not entitled to any constitutional due process notice protection. Realizing how fatal the rule-making versus adjudication distinction will ultimately be to their case, Plaintiffs scrambled before the District Court to argue that the Commission's decision must have been an adjudication by alleging that they are "uniquely and exceptionally affected" by that decision. [32] Plaintiffs 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 rule-making simply because they are the only persons complaining about it. Indeed, Plaintiffs must admit that other San Juan Basin owners are also affected in the same way that the Plaintiffs are affected by the Commission's decision to change Rule 104.

The reason for this failure is clear. Although purporting to deny the fact that the Commission's action was a rule-making, Plaintiffs are nevertheless forced to acknowledge that "in its Order No. 10815, the Commission **changed** the **long**

[32] Plaintiffs' District Court Response Brief at 19.

established rule 104..."(emphasis added)[33]. It is difficult to understand how the "change" of a "long established" rule of general application could be anything **but** a rule-making. Plaintiffs' argument is clearly a bad bluff, and must be rejected. The changing of Division General Rule 104 by the Commission was a rule-making, and not an adjudication.

The most that Plaintiffs can do is allege that the Commission's rule-making has somehow had an "impact" on their ownership interests. Such an allegation, however, is clearly insufficient as a matter of constitutional law. Indeed, in reaching the conclusion that agency rule-makings implicate no due process protection, 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 rule-making, under both the Federal and New Mexico Constitutions, Plaintiffs quite simply were not entitled to any constitutional due process protection, actual notice or otherwise, from either the Commission or from Burlington. Plaintiffs' arguments to the contrary are wrong.

---

[33] See Plaintiffs District Court Response Brief at 19.

The District Court erroneously held that "Burlington breached its duty of good faith by failing to provide personal notice to the appellants [Plaintiffs] of the spacing case proceeding underlying Order No. R-10815." This also is simply wrong. Burlington's knowledge of the Plaintiffs does not afford the Plaintiffs any special privilege nor entitle them to actual notice any more than the tens of thousands of parties owning an interest in oil and gas minerals in the entire San Juan Basin every time the Commission wants to adopt a change in the General Rules. **Livingston v. Ewing**, 98 N.M. 685, 652 P.2d 235 (1982). Just because a search of the Burlington records would have disclosed the identity of these Plaintiffs does not mean they are entitled to special treatment. In fact, a search of Burlington's records would have disclosed hundreds of property owners who may be affected in the same way these Plaintiffs contend they were affected. Even if the Plaintiffs had signed leases to Burlington for their interests in the "deep gas". Burlington had no duty to Plaintiffs to inform them of this proposed rule-making. It was only after the Commission entered Order R-10815 and after Burlington commenced a compulsory pooling action against these Plaintiffs did they claim that they were in a unique circumstance which required that they receive notice of the rule making case.[34]

---

[34] Subsequent to the entry of the Order R-10815 in Case 11745, on July 10, 1997, and in a different proceeding, the New Mexico Oil Conservation Division held an adjudicatory hearing in Case 11809 in which Burlington sought (after actual notice to the Plaintiffs) an order in accordance with Section 70-2-17(C) NMSA 1978 to pool the interests of the Plaintiffs and others to form a 640-acre spacing unit for the Scott Well No 24. in Section 9, T31N, R10W, NMPM. Since then, Burlington decided not to drill the Scott Well and at its

A requirement that the Commission must give actual notice to owners in Plaintiff's position would simply preclude the Commission from ever changing any of its General Rules and thereby prevent the Commission from fulfilling its statutory mandate to provide and manage an oil and gas conservation system for the State of New Mexico.

Burlington asks this Court to reverse the District Court decision to invalidate **only as to these plaintiffs** portions of one of the General Rules and Regulations adopted by the Commission on the grounds that they were not entitled to actual notice of the hearing which resulted in this rule change.

III.

CONCLUSION

This is not the **Uhden Case**. In that case, the Commission was adjudicating an application by Amoco to change the spacing for **established and producing** coal-gas wells which were subject to the Special Rules and Regulations adopted specifically for and limited to the Cedar Hills Coal-Gas Pool.[35]

---

request, the Commission has vacated Order R-10877 entered in Case 11808.

[35] See OCD Order R-7588 and R-7588-A.

The Commission order at issue in **Uhden** dealt with the Commission's failure to require actual notice to a **limited number of owners**[36] in an existing pool who were currently being paid their share of production from existing wells based upon special pool rules which provided for 160-acre well spacing prior to entry of an order changing the special pool rules for this pool from 160-acre well spacing to 320-acres well spacing. (emphasis added).

In contrast to **Uhden**, Commission Case 11745 involved the adoption of a prospective rule change for general application in a vast undeveloped area covering some 5,600,000 million acres with **thousands of owners and hundreds of operators** for an interval involving at least twenty (20) different formations below the base of the Dakota formation in the San Juan Basin which, except for a few isolated and scattered wells, were **not** being produced and which had **not yet** been proven productive. While such land-use rules "impact" future development, they do not constitute an "adjudication of property rights." (emphasis added).

Plaintiff's contended that they should have been provided actual notice of the proceeding in Commission Case 11745. The distinctions between adjudications and rule-making--and the level of constitutional protection afforded these two

[36] One of those overriding royalty owners was Mrs. Uhden whose royalty income check from current production from a well on her lease was reduced by 50% as a result of the Commission order.

different agency actions--are basic principles in the American system of government. Because the action at issue in this case was a rule-making, neither the Commission nor Burlington had any obligation to provide Plaintiffs with any notice under the federal and state constitutions.

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 rule-making. 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.

The **Uhden** decision controls this case. Unfortunately for Plaintiffs, however, **Uhden** does not control in the way they had hoped. Instead, **Uhden** clearly shows that the Commission's action in changing Division General Rule 104 was a rule-making and not an adjudication.

Under the federal and New Mexico Constitutions, as well as applicable statutes, Plaintiffs were not entitled to actual notice of the Commission's rule-making with regard to Division General Rule 104. Accordingly, Burlington requests that the District Court's Opinion and Judgment be reversed and an order

entered affirming Commission Order R-10815 is valid and in full force and effect as to all affected property owners in the San Juan Basin including these Plaintiffs.

Respectfully submitted by:

W. Thomas Kellahin

KELLAHIN & KELLAHIN
P.O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285

John Bemis, Esq.
Burlington Resources
P. O. Box 4289
Farmington, New Mexico 87499
(505) 599-4054
ATTORNEYS FOR BURLINGTON
RESOURCES OIL & GAS COMPANY

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Burlington's supplements to the record proper was hand delivered this 28 day of April, 1998 to the office of:

Gene Gallegos, Esq.
Gallegos Law Firm
460 St. Michael's Drive, Bldg 300
Santa Fe, New Mexico 87505

Marilyn S. Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

W. Thomas Kellahin

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NOTICE

CAUSE NOS. 25,061/25,062

DISTRICT COURT
San Juan
(CV 97-572-3)

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

Plaintiffs-Appellees,

vs.

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

Defendants-Appellants.

You are hereby notified that the **cassette tapes (6 tapes per set)** were filed in the above-entitled cause on **April 23, 1998.**

c: J. E. Gallegos

W. Thomas Kellahin

Marilyn S. Hebert

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CALENDAR NOTICE

CAUSE NO. 25,062/25,061

SAN JUAN DISTRICT COURT NO. (CV-97-572-3)

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

Plaintiffs-Appellees,

vs.

BURLINGTON RESOURCES OIL & GAS COMPANY,

Defendant-Appellant.

You are hereby notified that the RECORD PROPER was filed in the above entitled cause on **April 16, 1998,** and assigned to the **GENERAL CALENDAR on April 16, 1998.**

cc: Counsel of Record

Clerk of the District Court

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

April 9, 1998

NOS. 25,061/25,062

TIMOTHY B. JOHNSON, trustee
for Ralph A. Bard, Jr., Trust
U/A/D February 12, 19983, et al.,

Plaintiffs-Appellees,

vs.

THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO AND
BURLINGTON RESOURCES OIL & GAS COMPANY,

Defendants-Appellants.

ORDER

WHEREAS, this matter came on for consideration upon stipulated motions to consolidate these causes, and the Court having considered said motions and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motions hereby are GRANTED and the causes shall be consolidated as styled above.

ATTEST: A TRUE COPY
Kathleen J. Gibson
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT
STATE OF NEW MEXICO

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

vs. No. 25061

THE OIL CONSERVATION COMMISSION
OF THE STATE OF NEW MEXICO
Defendant/Appellant.

SUPREME COURT OF NEW MEXICO
FILED
APR - 9 1998
Kathleen Jo Gibson

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

vs. No. 25062

BURLINGTON RESOURCES OIL & GAS COMPANY
Defendant/Appellant.

STIPULATION TO CONSOLIDATE APPEALS

Pursuant to Rule 12-202.F(2) of the New Mexico Rules of Appellate Procedure, the New Mexico Oil Conservation Commission, Burlington Resources Oil & Gas Company, and Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; et. al., being all of the parties to these appeals, stipulate that these

two appeals arise from the same District Court decision, that Appellant Burlington and Appellant Commission have separately raised the same issues on appeal, and therefore these appeals are consolidated by stipulation.

Respectfully submitted.

W. THOMAS KELLAHIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
Attorney for Burlington Resources Oil & Gas Company, Defendant/Appellant

Marilyn S. Hebert, Esq.
Special Assistance Attorney General
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
Attorney for the Oil Conservation Commission, Defendant/Appellant

J. E. Gallegos, Esq.
Gallegos Law Firm
460 St. Michaels Drive #300
Santa Fe, New Mexico 87505-7602
Attorney for Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trustee U/A/D February 12, 1983, et.al., Plaintiffs/Appellees

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Stipulation was mailed to the following this 9 day of April, 1998.

Clerk of the Supreme Court
Supreme Court Building
P. O. Box 848
Santa Fe, New Mexico 87504

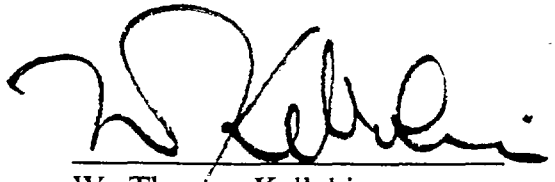
Honorable Byron Caton
District Judge
920 Municipal Drive, Suite 2
Farmington, New Mexico 87401

Marilyn S. Hebert, Esq.
Special Assistance Attorney General
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
Attorney for the Oil Conservation Commission

J. E. Gallegos, Esq.
Gallegos Law Firm
460 St. Michaels Drive #300
Santa Fe, New Mexico 87505-7602
Attorney for Plaintiffs

John Bemis, Esq.
Burlington Resources Oil & Gas Company
P. O. Box 4289
Farmington, New Mexico 87499-4289
Attorney for Burlington Resources Oil & Gas Company

Carrie Powell
103 South Oliver Drive
Aztec, New Mexico 87410
Court Monitor



W. Thomas Kellahin

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. No. D-1116-CV-0009700572

Burlington Resources Oil & Gas Company,
a corporation, and the
New Mexico Oil Conservation Commission,

Defendant-Appellant.

RECORD FROM THE DISTRICT COURT OF SAN JUAN COUNTY
JUDGE BYRON CATON

TRANSCRIPT OF THE RECORD PROPER

APPEARANCES IN DISTRICT COURT:

J.E. Gallegos
Jason E. Doughty
Gallegos Law Firm, P.C.
460 St. Michael's Drive, Bldg. 300
Santa Fe, New Mexico 87505

Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

W. Thomas Kellahin
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504

CASE: D-1116-CV-0009700572
001
JUDGE: BC1 BYRON CATON STATUS: C CL FINAL CLOSED
FILING DATE: 07-18-1997 CASE TYPE: APP CIVIL APPEALS
EVENT CATEGORY: Z

DATE	SEQ	EVENT	RECEIPT #	AMOUNT	YEARS	DAYS	LIFE	HOURS	CON CUR	FINAN ACTION	CAL	FORM
07-18-1997	01	ASM: CIVIL FILING-DIST.	8211	$82.00						1	N	
07-18-1997	02	OPN: COMPLAINT Cause Sequence: 1 Cause of Actions: ADMIN APPEAL		$0.00								
07-18-1997	03	MTN: MOTION PL'S MOTION TO STAY NM OIL CONSERVATION COMMISSION ORDER # R-10815 PENDING APPEAL AND MOTION FOR EXPEDITED HEARING-JE GALLEGOS		$0.00							N	
07-18-1997	01	PMT: CIVIL FILING - DIST RECEIVED OF: GALLEGOS	A000014178	$-82.00							N	
07-25-1997	01	RETURN OF SERVICE TO SALLY MARTINEZ 7-23-97		$0.00							N	
07-25-1997	02	RETURN OF SERVICE TO CT CORP		$0.00							N	
07-25-1997	03	RETURN OF SERVICE TO RECEPTIONIST FOR TOM UDALL 7-23-97		$0.00							N	
08-15-1997	01	MTN: TO DISMISS MOTION TO DISMISS OF THE NEW MEXICO OIL CONSERVATION COMMISSION/CERTIFICATE OF SERVICE (MOTION TO DISMISS WAS MAILED TO COUNSEL ON 8/14/97) - HEBERT		$0.00							N	
08-15-1997	02	CERTIFICATE OF SERVICE MOTION TO DISMISS OF THE NEW MEXICO OIL CONSERVATION COMMISSION/CERTIFICATE OF SERVICE (MOTION TO DISMISS WAS MAILED TO COUNSEL ON 8/14/97) - HEBERT		$0.00							N	
08-15-1997	03	VOID: ENTERED IN ERROR USED WRONG DATE		$0.00							N	
08-15-1997	04	VOID: ENTERED IN ERROR USED WRONG DATE		$0.00							N	
08-15-1997	05	TAP: MTN		$0.00							N	
08-21-1997	01	MTN: TO DISMISS MOTION TO DISMISS OF BURLINGTON RESOURCES OIL & GAS COMPANY/ CERTIFICATION OF SERVICE (FOREGOING MEMORANDUM WAS HAND DELIVERED ON 8/?/97 TO GENE GALLEGOS) - KELLAHIN		$0.00							N	

RP1
RP5
RP7
RP9
RP11
RP13
RP14

CASE: D-1116-CV-0009700572
001

JUDGE: BC1 BYRON CATON STATUS: C CL FINAL CLOSED
FILING DATE: 07-18-1997 CASE TYPE: APP CIVIL APPEALS
EVENT CATEGORY: Z

DATE	SEQ	EVENT	RECEIPT #	AMOUNT	YEARS	DAYS	LIFE	HOURS	CON CUR	FINAN ACTION	CAL	FORM
08-21-1997	02	CERTIFICATE OF SERVICE *MOTION TO DISMISS OF BURLINGTON RESOURCES OIL & GAS COMPANY/* CERTIFICATION OF SERVICE (FOREGOING MEMORANDUM WAS HAND DELIVERED ON 8/?/97 TO GENE GALLEGOS) - KELLAHIN		$0.00	RP15						N	
08-21-1997	03	MTN: MOTION MOTION TO STRIKE OF BURLING RESOURCES OIL & GAS COMPANY/ CERTIFICATION OF SERVICE (FOREGOING MEMORANDUM WAS HAND DELIVERED ON 8/BLANK/97 TO GENE GALLEGOS) - KELLAHIN		$0.00	RP16						N	
08-21-1997	04	CERTIFICATE OF SERVICE MOTION TO STRIKE OF BURLINGTON RESOURCES OIL & GAS COMPANY/ CERTIFICATION OF SERVICE (FOREGOING MEMORANDUM WAS HAND DELIVERED ON 8/BLANK/97 TO GENE GALLEGOS) - KELLAHIN		$0.00	RP17						N	
08-21-1997	05	RESPONSE RESPONSE OF BURLINGTON RESOURCE OIL & GAS COMPANY TO PLAINTIFFS' MOTION FOR STAY/CERTIFICATION OF SERVICE (FORE-GOING RESPONSE WAS HAND DELIVERED ON 8/BLANK/97 TO GENE GALLEGOS) - KELLAHIN		$0.00	RP18						N	
08-21-1997	06	CERTIFICATE OF SERVICE RESPONSE OF BURLING RESOURCES OIL & GAS COMPANY TO PLAINTIFFS' MOTION FOR STAY/CERTIFICATION OF SERVICE (FORE-GOING RESPONSE WAS HAND DELIVERD ON 8/BLANK/97 TO GENE GALLEGOS) - KELLAHIN		$0.00	RP21							
08-29-1997	01	NTC: OF HEARING		$0.00	RP27						N	
09-08-1997	01	MTN: MOTION MOTION TO RESCHEDULE MTN HEARING - THOMAS KELLAHIN		$0.00	RP28						N	
09-09-1997	01	ORD: VACATING HEARING 9-11-97 MOVED TO 9-15-97 @ 10:30		$0.00	RP30						N	
09-17-1997	01	TAP: MTN		$0.00							N	
09-24-1997	01	LRA RECORD ON APPEAL RECORD ON APPEAL, TITLE PAGE - MARILYN S. HEBERT		$0.00	RP31						N	
09-26-1997	01	MTN: MOTION JOINT MOTION FOR SCHEDULING ORDER - J.E. GALLEGOS		$0.00	RP155						N	
09-26-1997	02	VOID: ENTERED IN ERROR JOINT MTN FOR SCHEDULING ORDER ENTERED TWICE IN ERROR		$0.00							N	

CASE: D-1116-CV-0009700572
001
JUDGE: BC1 BYRON CATON STATUS: C CL FINAL CLOSED
FILING DATE: 07-18-1997 CASE TYPE: APP CIVIL APPEALS
EVENT CATEGORY: Z

DATE	SEQ	EVENT	RECEIPT #	AMOUNT	YEARS	DAYS	LIFE	HOURS	CON CUR	FINAN ACTION	CAL	FORM
10-02-1997	01	ORD: ORDER ORDER DENYING MOTIONS TO DISMISS AND TO STRIKE AND STAYING COMMISSION ORDER 4-10815 AS TO PLAINTIFFS - C		$0.00	RP 158						N	
10-03-1997	01	STATEMENT APPELLANTS' STATEMENT OF APPELLANT ISSUES - TIMOTHY JOHNSON		$0.00	RP 161						N	
10-03-1997	02	AFFIDAVIT AFFIDAVIT INTRODUCTION SUPPLEMENTAL EVIDENCE CONCERNING IDENTIFICATION OF APPELLANTS AND COMMUNICATIONS TO THEM FROM BURLINGTON		$0.00	RP 175						N	
10-06-1997	01	MISC ENTRY BURLINGTON RESOURCES OIL AND GAS COMPANY'S SUPPLEMENTS TO RECORD PROPER - KELLAHIN		$0.00	RP 292						N	
10-27-1997	01	STATEMENT STATEMENT OF APPELLATE ISSUES OF THE NM OIL CONSERVATION COMMISSION - MARILYN HEBERT		$0.00	RP 309						N	
10-27-1997	02	STATEMENT APPELLEE-BURLINGTON OIL & GAS COMPANY'S STATEMENT OF APPELLATE ISSUSES - W THOMAS KELLAHIN		$0.00	RP 321						N	
10-29-1997	01	MTN: MOTION MOTION TO ENFORCE THE STAY OF NEW MEXICO OIL CONSERVATION COMMISSION ORDER NO. R-10815 PENDING APPEAL, FOR SANCTIONS INCLUDING ATTORNEY'S FEES AND FOR EXPEDITED HEARING; GALLEGOS		$0.00	RP 343						N	
11-05-1997	01	RESPONSE BURLINGTON RESOURCES OIL & GAS COMPANY'S RESPONSE IN OPPOS. TO TIMOTHY B. JOHNSON, TRUSTEE, ET AL MOTION TO ENFORCE THE STAY OF NEW MEXICO OIL CONS. COMM. ORDER NO. R-10815; KELLAHIN		$0.00	(MISSING)						N	
11-25-1997	01	ORD: ORDER SCHEDULING ORDER		$0.00	RP 354						N	
11-26-1997	01	REQUEST APPELANT'S REQUEST FOR ENTRY OF ORDER ON ENFORCING THE STAY AND FOR FINAL HEARING OF THE APPEAL - GALLEGOS		$0.00	RP 357						N	
12-03-1997	01	STIPULATION TITLE PAGE AND STIPULATION TO THE COMPLETE RECORD IN OIL CONSERVATION COMMISSION DOCKET NO. 11745 - GALLEGOS		$0.00	RP 360						N	

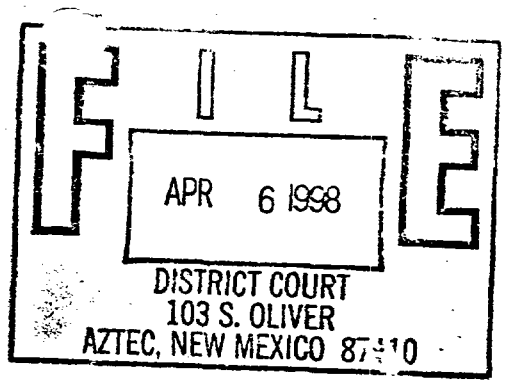
CASE: D-1116-CV-0009700572
001
JUDGE: BC1 BYRON CATON STATUS: C CL FINAL CLOSED
FILING DATE: 07-18-1997 CASE TYPE: APP CIVIL APPEALS
EVENT CATEGORY: Z

DATE	SEQ	EVENT	RECEIPT #	AMOUNT	YEARS	DAYS	LIFE	HOURS	CON CUR	FINAN ACTION	CAL	FORM
12-03-1997	02	VOID: ENTERED IN ERROR TITLE PAGE AND STIPULATIONS TO THE COMPLETE RECORD IN OIL CONSERVATION COMMISSION DOCKET NO 11745 - DOUGHTY OPPS...DUPLICATE ENTRY - PC		$0.00								
12-10-1997	01	VOID: ENTERED IN ERROR ENTERED IN WRONG CASE SHOULD BE IN CV 97-725-6 - PC		$0.00							N	
12-17-1997	01	TAP: MTN		$0.00							N	
01-23-1998	01	ORD: ORDER ORDER ENFORCING THE STAY OF NEW MEXICO OIL CONSERVATION COMMISSION ORDER NO. R-10815 PENDING APPEAL; CATON		$0.00 RP384							N	
01-27-1998	01	MISC ENTRY OPINION AND FINAL JUDGMENT - C		$0.00 RP387							N	
02-03-1998	01	MTN: MOTION MOTION FOR RECONSIDERATION OF THE NEW MEXICO OIL CONSERVATION COMMISSION - HEBERT		$0.00 RP 392							N	
02-12-1998	01	BILL OF COSTS APPELLANTS' COST BILL - DOUGHTY		$0.00 RP395							N	
02-17-1998	01	TAXATION OF COSTS TAXATION OF COSTS		$0.00 RP 398								
02-17-1998	02	NTC: NOTICE DNC-00028 issued by Patricia Chavez (6512) NTC: NOTICE		$0.00 RP 400							N	
02-17-1998	03	MISC ENTRY OIL CONSERVATION COMMISSION'S EXCEPTION TO APPELLANTS' COST BILL - HEBERT		$0.00 RP 401							N	
02-23-1998	01	NTC: OF APPEAL KELLAHIN		$0.00 RP 403							N	
02-24-1998	01	NTC: OF APPEAL HEBERT		$0.00 RP 410							N	
03-27-1998	01	DOCKETING STATEMENT		$0.00 RP 417							N	
03-30-1998	01	DOCKETING STATEMENT IN THE SUPREME COURT STATE OF NEW MEXICO, APPELLANT BURLINGTON RESOURCES OIL & GAS COMPANY'S DOCKETING STATMENT		$0.00 RP 439								

STATE OF NEW MEXICO

COUNTY OF SAN JUAN

IN THE DISTRICT COURT



Timothy B. Johnson Trustee for Ralph A. Bard, Jr. Test U/A/D February 12, 1983; George M. Bard and Timothy B. Johnson 7/25/49; Nancy C. Bard and a Committee consisting of Lisa Bard Field, Sharon Bard Wailes, and Travis Bard, Co-Trustees of the Douglas N. Bard, Trust; James C. Bard; Guy R. Brainard, Jr., Trustee of the Guy R. Brainard, Jr. Trust U/A/D September 9, 1982; Diane Derry; Dorothy M. Derry; Eleanor Isham Dunne; Charles Wells Famham, Jr.; Robert B. Famham; Walter B. Famham; Minnie A. Fitting; Nancy H. Gerson; Norman L. Hay, Jr. Trustee for the Norman L. Hay, Jr., GS-Trust under trust agreement dated July 30, 1991; Estate of Cortland T. Hill; First Trust National Association, Ancillary Personal Representative of the Estate of Louis W. Hill, Jr. deceased; Albert L Hopkins, Jr.; The First National Bank of Chicago and Harriet Stuart Spencer, Co-Trustee U.A. Robert Douglas Stuart dated August 4, 1971, as amended; The First National Bank of Chicago and Anne Stuart Batchelder, Co-Trustees U.A. Robert Douglas Stuart dated August 4, 1971, as amended; George S. Isham; Virginie W. Isham and The First National Bank of Chicago, Co-Trustees U/W Henry P. Isham Jr., Deceased; Robert T. Isham; Robert T. Isham, George S. Isham and The First National Bank of Chicago, Trustees under Trust Agreement created by Elizabeth T. Isham dated October 28, 1984; Virginie W. Isham; James E. Palmer, Successor Trustee of the Trust Agreement dated January 21, 1963 by Martha M. Lattner, Settlor; Keyes-Baber Properties, a Texas General Partnership; W. Watson LaForce Jr.; George A. Ranney; Cambridge Trust Company and T. Michael Middleton, Co-dated November 25, 1953, as amended; Catherine H. Rumi; Arch W. Shaw II, Trustee of the Arch W. Shaw II Trust U/A/D February 1, 1971; Bruce P. Shaw and Nancy S. Shaw, Trustees of the Bruce P. Shaw Trust U/A/D June 8, 1972; John I. Shaw, Jr. and John N. Curlett, Jr., Trustees of the John I. Shaw Jr. Trust U/A/D January 2, 1957; William W. Shaw, Trustee of the Judith Shaw Trust U/A/D April

14, 1966; William W. Shaw, [illegible]ee of the Roger D. Shaw, Jr. Trust U/A/D August 27, 1962; Susanne Shaw Hooe, Trustee for Susanne Shaw Trust U/A/D September 11, 1953; Robert D. Shaw, Jr. Trustee of the William W. Shaw Trust U/A/D December 28, 1963; Patrick J. Herbert, III Successor Trustee of the William Simpson Trust Dated December 17, 1979; Patrick J. Herbert, III, Successor Trustee U/A/D February 9, 1979 FBO Gwendolyn S. Chabrier; Patrick J. Herbert, III, Successor Trustee U/A/D February 9, 1979 FBO James F. Curtis; William Simpson and United States Trust Company of New York, Trustees of the Residuary Trusts created U/W of James Simpson Jr. Deceased: United States Trust Company of New York, Trustee of the Michael Simpson Trust; United States Trust Company of New York, Trustee of the Patricia Simpson Trust; Hope G. Simpson; Northern Trust Bank/Lake Forest and Margaret Stuart Hart, Co-Trustees U/A Robert Douglas Stuart, dated August 4, 1971, as amended; Northern Trust Bank/Lake Forest and Robert Douglas Stuart, Jr., Co-Trustees U/A Robert Douglas Stuart, dated August 4, 1971, as amended; William P. Sutter; Glenview State Bank and Frederick F. Webster, Jr., Co-Trustee for the Frederick F. Webster Trust No. IV.; Frederick F. Webster, Jr.; Katherine I. White; Mary S. Zick; Jr.; Anthony Bard Boand; Joan Derry; Mary F. Love; NationsBank Texas, N.A., Trustee for the Sabine Royalty Trust.,

Plaintiff-Appellee,

vs

No. D-1116-CV-0009700572

Burlington Resources Oil & Gas Company, a corporation, and the New Mexico Oil Conservation Commission,

Defendant-Appellant.

CLERK'S CERTIFICATE OF SATISFACTORY ARRANGEMENTS

I, Gregory T. Ireland, Clerk of the District Court for the Eleventh Judicial District, within and for the County of San Juan, do hereby certify that the foregoing pages numbered 1 to 458 contain a full and true copy of the record in the above case, as requested in the Order for Record on Appeal.

I further certify that the costs of preparing said transcript are as follows:

Cost of copies:	$160.30
Clerk's Certificate:	$ 1.50
Cost for tape logs:	$
Cost for Postage:	$ 8.80
Total Clerk's costs:	$170.60

The foregoing costs were paid by: J.E. Gallegos/Jason E. Doughty

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court in Aztec, New Mexico, this 6th day of April, 1998.

GREGORY T. IRELAND
CLERK OF THE DISTRICT COURT

By: _____
Deputy

(SEAL)

SUPREME COURT OF NEW MEXICO

DOCKET NO. 25061

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

Plaintiffs-Appellees,

vs.

NEW MEXICO OIL CONSERVATION COMMISSION,

Defendant-Appellant.

Gallegos Law Firm, P.C.
J. E. Gallegos
Jason E. Doughty
460 St. Michael's Drive, Bldg. 300
Santa Fe, NM 87505-7602 983-6686

Kellahin & Kellahin
W. Thomas Kellahin
P.O. Box 2265
Santa Fe, NM 87504-2265 982-4285

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

CIVIL ~~CRIMINAL~~ APPEAL FROM DISTRICT COURT San Juan COUNTY
(CV 97-572-3)
Opinion & Final Judgment 1/27/98
Notice of Appeal 2/24/98

W. Byron Caton, DJ
JUDGE

CASH ACCOUNT FOR COSTS

CITATIONS

1998 DATE	RECEIVED FROM OR PAID TO	RECEIPTS	DISBURSEMENTS

PAGE NO.

1998 DATE		PROCEEDINGS	
March	25	Docketing Statement; c/m	jg

SUPREME COURT OF NEW MEXICO

DOCKET NO. 25062

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

Plaintiffs-Appellees,

vs.

BURLINGTON RESOURCES OIL & GAS COMPANY,

Defendant-Appellant.

Gallegos Law Firm, P.C.
J. E. Gallegos
Jason E. Doughty
460 St. Michael's Drive, Bldg. 300
Santa Fe, NM 87505-7602 983-6686

Kellahin & Kellahin
W. Thomas Kellahin
P.O. Box 2265
Santa Fe, NM 87504-2265 982-4285

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

CIVIL ~~CRIMINAL~~ APPEAL FROM DISTRICT COURT San Juan COUNTY
(CV 97-572-3)
Opinion & Final Judgment 1/27/98
Notice of Appeal 2/23/98

W. Byron Caton, DJ
JUDGE

CITATIONS

N. MEX.

PAC. 2ND

CASH ACCOUNT FOR COSTS

1998 DATE		RECEIVED FROM OR PAID TO	RECEIVED	DISBURSED
March	25	Kellahin & Kellahin (REC# 8405)	125.00	
		State Treasurer		96.00
		Suspense Fund		4.00
		Court Automation		25.00

1998 DATE		PROCEEDINGS	
March	25	Docketing Statement; c/m	jg

IN THE SUPREME COURT
STATE OF NEW MEXICO

BURLINGTON RESOURCES OIL & GAS COMPANY, AND OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,
Defendants/Appellants

vs.

No. _____

TIMOTHY B. JOHNSON, TRUSTEE FOR RALPH A. BARD, JR.TRUSTEE U/A/D FEBRUARY 12, 1983; ET. AL.
Plaintiffs/Appellees

SUPREME COURT OF NEW MEXICO
FILED
MAR 26 1998
Kathleen Jo Gibson

APPELLANT BURLINGTON RESOURCES OIL & GAS COMPANY'S DOCKETING STATEMENT

Appellant, Burlington Resources Oil & Gas Company (Burlington") pursuant to Rule 12-208 of the New Mexico Rules of Appellate Procedure, hereby submits its Docketing Statement:

I. STATEMENT OF THE NATURE OF THE PROCEEDING

This case is before the Court, pursuant to the "Oil and Gas Act" Section 70-2-25(B) NMSA 1978, on Burlington's appeal of the decision of the Honorable Byron Caton, District Judge, Eleventh Judicial District, County of San Juan, State of New Mexico which voided New Mexico Oil Conservation Commission Order R-10815 as only to the Plaintiffs/Appellees.

2. DATE OF JUDGMENT AND TIMELINESS OF APPEAL:

Final Judgment was entered by the District Court on March 12, 1997 and Burlington filed its Notice of Appeal on February 23, 1998. Copies of the Judgment and Notice of Appeal are attached hereto as Exhibit "A and "B" to this Docketing Statement.

3. STATEMENT OF THE CASE:

Nature of the Case:

Pursuant to the "Oil and Gas Act" Section 70-2-25(B) NMSA (1978), this case is before the Court on Plaintiffs' complaint which petitions for a review of Order R-10815 entered in Case 11745 on June 5, 1997 by the New Mexico Oil Conservation Commission ("the Commission"). This appeal is limited to those issues raised by the Plaintiffs in their "Application for Rehearing" filed with the Commission on June 24, 1997, which was denied by the Commission.

Parties:

Plaintiffs, Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. et al. and other individuals and entities (collectively "GLA-66 Group") own oil and gas minerals interests in the San Juan Basin including a percentage interest underlying portions of Section 9, Township 31 North, Range 10 West, NMPM, San Juan County, New Mexico. Plaintiffs appealed the Commission's decision to the District Court seeking to invalidate as to them the Commission's decision in Case 11745.

Defendant, Burlington Resources Oil & Gas Company ("Burlington") , a Delaware corporation authorized to and doing business in the State of New Mexico, is also a working interest owner in Section 9 and is a party of record in the proceedings before the Commission in Case 11745.

Defendant, The Oil Conservation Commission of the State of New Mexico ("Commission") is a statutory body created and existing under the provisions of the New Mexico Oil & Gas Act, Sections 70-2-1 through 70-2-36, NMSA (1978), laws of the State of New Mexico, as amended.

Jurisdiction:

The Eleventh Judicial District, San Juan County, New Mexico, had jurisdiction of this case pursuant to the provisions of Section 70-2-25.B NMSA (1978), because Commission Order R-10815 applies to oil and gas interests in lands located within San Juan County, New Mexico as well as McKinley and Sandoval Counties.

In Case 11745, the Commission amended General Rule 104:

In order to prevent waste of New Mexico's natural resources, the New Mexico Oil and Gas Act enumerated the powers of the New Mexico Oil Conservation Commission ("Commission") including the power to establish general rules to "fix the spacing of wells" in order to carry out the purposes of the Act. **Section 70-2-12(10) NMSA (1978).** These General Rules for "statewide application"[1] govern when no special pool rules

[1] Statewide application does not mean that all these rules are the same for all portions of New Mexico. The Commission has always adopted General

exist. **See 19 NMAC 15.A-Rule 11.** On June 5, 1997, as a result of a rule making proceeding, the Commission entered Order R-10815 in Commission Case 11745.

The Commission amended General Rule 104 in order to encourage "deep gas" well development in the San Juan Basin of New Mexico because no such development had taken place nor would take place in the future under the limitations of the prior general rule. **See Order R-10815.**

Commission Case 11745 was heard by the Commission after appropriate notice[2] at a public hearing where the Commission solicited comments and information to allow the Commission to determine how to encourage further development in the San Juan Basin. It did not involve a determination of ownership interest as would be the situation in compulsory pooling cases.[3] It did not affect the share of production any party was currently receiving as can happen with certain amendments to special pool rules.[4]

Rules suitable for general application for the San Juan Basin and for the Permian Basin, New Mexico's two major producing areas.

[2] Plaintiffs complain that the Commission failed to comply with the adjudication notice procedures set forth in Division Rule 1207 while Defendants contend that Section 70-2-23 NMSA 1979 sets forth the Commission notice requirements for a rule making proceeding.

[3] See Section 70-2-17.C NMSA (1979) for Commission authority to identify owners in a spacing or proration unit and to pool their interests as compared to the Commission authority in Section 70-2-12(10) to fix the spacing wells.

[4] See Section 70-2-17.A and Section 70-2-17.B NMSA (1979) for Commission authority to determine and allocate production in a specific pool.

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 Alan 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. (**Affidavit of 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 located one of these wells in Section 9, T31N, R10W which is a section in which the Plaintiffs have interests. **(Affidavit of James 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 Plaintiffs 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 Plaintiffs filed with the Commission an application for rehearing of Case 11745. **(Affidavit of Florene Davidson)**

(19) On July 10, 97, the New Mexico Oil Conserv. on Division ("Division") held an adjudication hearing on the application of Burlington in Case 11809 seeking to pool the interests of the Plaintiffs 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)**.

4. STATEMENT OF APPELLATE ISSUES:

Plaintiffs were not entitled to actual notice of the Commission's rule making modifying Division Rule 104 because:

A. The Commission's amendment of Rule 104 was rulemaking.

B. Under both the Federal and New Mexico Constitutions, persons affected by rulemaking are not entitled to any due process protection.

C. Plaintiffs were not statutorily entitled to actual notice.

D. Order R-10815 cannot be an adjudication as to these Plaintiffs but rulemaking as to all other property owners.

5. LIST OF AUTHORITIES BELIEVED TO SUPPORT THE CONTENTIONS OF APPELLANT BURLINGTON

Burlington asks this Court to reverse the District Court decision to invalidate **only as to these plaintiffs** portions of one of the General Rules and Regulations adopted by the Commission on the grounds that they were not entitled to actual notice of the hearing which resulted in this rule change.

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

Plaintiff's contended that they should have been provided actual notice of the proceeding in Commission Case 11745. The distinctions between adjudications and rulemaking--and the level of constitutional protection afforded these two different agency actions--are basic principles in the American system of government. Because the action at issue in this case was a rulemaking, neither the Commission nor Burlington had any obligation to provide Plaintiffs with any notice under the federal and state constitutions. **Uhden v. New Mexico Oil Conservation Commission**, 112 N.M. 528, 817 P.2d 712 (1991) to understand this fact. 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.

By contrast, the Commission's general well-spacing rule change in the present case is the exact opposite of the adjudicatory order at issue in **Uhden.** Also See **Zamora v. Village of Ruidoso Downs**, 120 N.M. 778, 907 P.2d 182 (1995).

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

The United States Supreme Court established more than eighty years ago in **Bi-Metallic Investment Co. v. State Board of Equalization**, 329 U.S. 441, 36 S. Ct. 141

(1915) that persons affected by rulemakings are not entitled to any due process protection. Also see **Uhden v. New Mexico Oil Conservation Commission**, 112 N.M. at 530, 817 P.2d at 723. **Minnesota State Board for Community Colleges v. Knight**, 465 U. S. 271, 285 S. Ct. 1058, 1066 (1984),

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 Supreme Court rejected Livingston's argument, a non-Indian affected by the resolution, 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.

Because of this fundamental difference between rulemakings and adjudications, **Mullane v. Central Hanover Bank & Trust Co.**, 339 U. S. 306, 70 S. Ct. 652 (1950) is not applicable.

C. Plaintiffs Were Not Statutorily Entitled to Actual Notice.

In this case, the Commission's notices complied with the applicable statute. The statutes that 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; 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. 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 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.

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).

D. ORDER R-10815 Cannot Be An Adjudication As To These Plaintiffs But Rulemaking As To All Other Property Owners

This is not the **Uhden Case**. In that case, Commission was adjudicating an application by Amoco to change the spacing for **established and producing** coal-gas wells which were subject to the Special Rules and Regulations adopted specifically for and limited to the Cedar Hills Coal-Gas Pool.[5] In **Uhden,** as a result of that adjudication, the Commission amended the special rules and regulations specifically adopted for that proven productive reservoir. The Commission made a change which affected the existing 160-acre proration unit from which Mrs. Uhden was receiving

[5] See OCD Order R-7588 and R-7588-A.

royalty income from her lessee, Amoco who had failed to provide Mrs. Uhden with notice of that hearing. Mrs. Uhden's share of current income from the Amoco well on her unit was reduced by one-half when the Commission increased the size of the spacing units in this pool to 320-acre without actual notice to her.

In contrast to **Uhden**, Commission Case 11745 involved the adoption of a prospective rule change for general application in a vast undeveloped area covering some 5,600,000 million acres with thousands of owners and hundreds of operators for an interval involving at least twenty (20) different formations below the base of the Dakota formation in the San Juan Basin which, except for a few isolated and scattered wells, were **not** being produced and which had **not yet** been proven productive. While such land-use rules "impact" future development, they do not constitute an "adjudication of property rights."

Burlington's knowledged of the Plaintiffs does not afford the Plaintiffs any special privilege nor entitle them to actual notice any more than the tens of thousands of parties owning an interest in oil and gas minerals in the entire San Juan Basin every time the Commission wanted to adopt a change in the General Rules. **Livingston v. Ewing**, 98 N.M. 685, 652 P.2d 235 (1982) Such a requirement would simply preclude the Commission from ever changing any of its General Rules and thereby prevent the Commission from fulfilling its statutory mandate to provide and manage an oil and gas conservation system for the State of New Mexico.

6. RECORDING OF PROCEEDINGS:

The transcript of the proceedings before the Oil Conservation Commission were transcribed and the proceedings before the District Court were recorded.

7. PRIOR APPEALS:

None.

8. APPOINTMENT OF APPELLATE COUNSEL:

Not applicable.

Respectfully submitted by:

W. Thomas Kellahin
KELLAHIN & KELLAHIN
P.O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
ATTORNEYS FOR BURLINGTON
RESOURCES OIL & GAS COMPANY

CERTIFICATION OF SERVICE

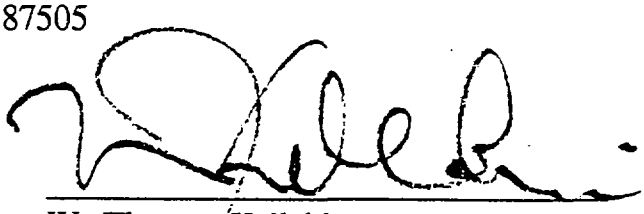
I hereby certify that a copy of the foregoing was mailed this 26th day of March, 1998 to the office of:

Honorable Byron Caton
920 Municipal Drive, Suite 2
Farmington, New Mexico 87401

Gregory T. Ireland, Clerk
District Court Administrator
103 South Oliver Drive
Aztec, New Mexico 87410

Gene Gallegos, Esq.
Gallegos Law Firm
460 St. Michael's Drive, Bldg 300
Santa Fe, New Mexico 87505

Marilyn S. Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505



W. Thomas Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

DISTRICT COURT
SAN JUAN COUNTY, NM
JAN 27 1 28 PM '98

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.	)	

EXHIBIT A

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 ME. .CO
ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN

SAN JUAN C[illegible] TY.
NM
FEB 23 10 34 AM '98

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

vs.

No. CIV 97-5725[illegible]

BURLINGTON RESOURCES OIL & GAS COMPANY AND THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,
Appellees.

NOTICE OF APPEAL

COMES NOW BURLINGTON RESOURCES OIL & GAS COMPANY, pursuant to Rule 12-201 of New Mexico Rule of Appellate Procedure and files its Notice of Appeal to the New Mexico Supreme Court of the District Court "Opinion and Final Judgment" entered herein on January 27, 1998, which is attached hereto as Exhibit A.

Respectfully submitted,

W. THOMAS KELLAHIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
Attorney for Burlington Resources Oil & Gas Company

EXHIBIT B

IN THE SUPREME COURT
STATE OF NEW MEXICO

Timothy B. Johnson Trustee for Ralph A. Bard, Jr. Test U/A/D February 12, 1983; George M. Bard and Timothy B. Johnson 7/25/49; Nancy C. Bard and a Committee consisting of Lisa Bard Field, Sharon Bard Wailes, and Travis Bard, Co-Trustees of the Douglas N. Bard, Trust; James C. Bard; Guy R. Brainard, Jr., Trustee of the Guy R. Brainard, Jr. Trust U/A/D September 9, 1982; Diane Derry; Dorothy M. Derry; Eleanor Isham Dunne; Charles Wells Famham, Jr.; Robert B. Famham; Walter B. Famham; Minnie A. Fitting; Nancy H. Gerson; Norman L. Hay, Jr. Trustee for the Norman L. Hay, Jr., GS-Trust under trust agreement dated July 30, 1991; Estate of Cortland T. Hill; First Trust National Association, Ancillary Personal Representative of the Estate of Louis W. Hill, Jr. deceased; Albert L Hopkins, Jr.; The First National Bank of Chicago and Harriet Stuart Spencer, Co-Trustees U.A. Robert Douglas Stuart dated August 4, 1971, as amended; The First National Bank of Chicago and Anne Stuart Batchelder, Co-Trustees U.A. Robert Douglas Stuart dated August 4, 1971, as amended; George S. Isham; Virginie W. Isham and The First National Bank of Chicago, Co-Trustees U/W Henry P. Isham, Jr., Deceased; Robert T. Isham; Robert T. Isham, George S. Isham and The First National Bank of Chicago, Trustees under Trust Agreement created by Elizabeth T. Isham dated October 28, 1984; Virginie W. Isham; James E. Palmer, Successor Trustee of the Trust Agreement dated January 21, 1963 by Martha M. Lattner, Settlor; Keyes-Baber Properties, a Texas General Partnership; W. Watson LaForce Jr.; George A. Ranney; Cambridge Trust Company and T. Michael Middleton, Co-dated November 25, 1953, as amended; Catherine H. Rumi; Arch W. Shaw II,

Trustee of the Arch W. Shaw II Trust U/A/D February 1, 1971; Bruce P. Shaw and Nancy S. Shaw, Trustees of the Bruce P. Shaw Trust U/A/D June 8, 1972; John I. Shaw, Jr. and John N. Curlett, Jr., Trustees of the John I. Shaw Jr. Trust U/A/D January 2, 1957; William W. Shaw, Trustee of the Judith Shaw Trust U/A/D April 14, 1966; William W. Shaw, Trustee of the Roger D. Shaw, Jr. Trust U/A/D August 27, 1962; Susanne Shaw Hooe, Trustee for Susanne Shaw Trust U/A/D September 11, 1953; Robert D. Shaw, Jr. Trustee of the William W. Shaw Trust U/A/D December 28, 1963; Patrick J. Herbert, III Successor Trustee of the William Simpson Trust Dated December 17, 1979; Patrick J. Herbert, III, Successor Trustee U/A/D February 9, 1979 FBO Gwendolyn S. Chabrier; Patrick J. Herbert, III, Successor Trustee U/A/D February 9, 1979 FBO James F. Curtis; William Simpson and United States Trust Company of New York, Trustees of the Residuary Trusts created U/W of James Simpson Jr. Deceased; United States Trust Company of New York, Trustee of the Michael Simpson Trust; United States Trust Company of New York, Trustee of the Patricia Simpson Trust; Hope G. Simpson; Northern Trust Bank/Lake Forest and Margaret Stuart Hart, Co-Trustees U/A Robert Douglas Stuart, dated August 4, 1971, as amended; Northern Trust Bank/Lake Forest and Robert Douglas Stuart, Jr., Co-Trustees U/A Robert Douglas Stuart, dated August 4, 1971, as amended; William P. Sutter; Glenview State Bank and Frederick F. Webster, Jr., Co-Trustee for the Frederick F. Webster Trust No. IV.; Frederick F. Webster, Jr.; Katherine I. White; Mary S. Zick; Jr.; Anthony Bard Boand; Joan Derry; Mary F. Love; NationsBank Texas, N.A., Trustee for the Sabine Royalty Trust.

Plaintiffs-Appellees,

vs.

No. _____

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

Defendants-Appellants.

DOCKETING STATEMENT

Defendant the New Mexico Oil Conservation Commission ("Commission") pursuant to Rule 12-208 NMRA 1998 files the following Docketing Statement:

1. Statement of the Nature of the Proceedings

This is an appeal of a district court decision that held that an order of the Commission was "...void as to only the appellants [Plaintiffs]...." The order amended a statewide rule of general applicability, 19 NMAC 15.C.104.

Proceedings before the Commission

On February 25, 1997, Defendant Burlington filed an application with the Commission to amend 19 NMAC 15.C.104. After the required public notice was provided, the proposed amendment to 19 NMAC 15.C.104 was deliberated at the Commission's public meeting on March 19, 1997, and eventually adopted at the Commission's public meeting on June 5, 1997, as Order No. R-10815 ("Order"), attached hereto as Exhibit "A."

SUPREME COURT OF NEW MEXICO
FILED
MAR 25 1998
Kathleen J. Gibson

Proceedings in the District Court

The Plaintiffs appealed the Commission's Order to the District Court on July 18, 1997. The Plaintiffs named the Commission and Burlington Resources Oil & Gas Company ("Burlington"), a corporation, as Defendants.

The parties filed their respective briefs on the issues on appeal, and the District Court heard oral argument on December 17, 1997.

2. Date of Judgment and Statement that Appeal to Supreme Court Is Timely

The District Court entered its Opinion and Final Judgment ("Judgment") on January 27, 1998. The Commission filed its Notice of Appeal on February 24, 1998. Appeal directly to the Supreme Court is provided by NMSA 1978, § 70-2-25(B) (1935, as amended through 1981). Copy of the Notice of Appeal with the Judgment attached is Exhibit "B" attached hereto.

3. Statement of the Case

19 NMAC 15.C.104 is the statewide rule of general applicability that establishes the acreage requirements for drilling tracts in New Mexico for both oil and natural gas wells. The rule amendment at issue in this case amended subsections B(2) and C(3) of 19 NMAC 15.C.104. Both subsections B and C divide the entire state into three sections as follows: 1. Lea, Chaves, Eddy and Roosevelt Counties; 2. San Juan, Rio Arriba, Sandoval, and McKinley Counties; and 3. all counties except Lea, Chaves, Eddy, Roosevelt, San Juan, Rio Arriba, Sandoval, and McKinley. The Commission amended the portion of 19 NMAC 15.C.104 that sets the minimum amount of acreage for natural gas wells in San Juan, Rio Arriba, Sandoval, and McKinley Counties. These four counties include over 5,000,000 acres of real property. There are estimated

to be over 300,000 interest owners in the area covered by the four counties.

The Commission provided the public notice required by statute and its rules to amend a rule, NMSA 1978, § 70-2-23 (1935, as amended through 1977), NMSA 1978, § 10-15-1 (1974, as amended through 1997), 19 NMAC 15.N.1204 and the Commission's Open Meetings Resolution for its public meeting on March 19, 1997, at which the proposed amendment to 19 NMAC 15.C.104 was discussed and comments were provided to the Commission on the proposed amendment. The Commission's Order amending 19 NMAC 15.C.104 is supported by substantial evidence as found in the transcripts from the Commission hearing on March 19, 1997.

The rule amendment was filed with the State Records Center pursuant to NMSA 1978, § 14-4-5 (1967, as amended through 1995) and became effective on June 30, 1997, the date of its publication in the New Mexico Register.

4. Statement of the Issues

The District Court erred in its holding that the Commission's Order, which amended 19 NMAC 15.C.104, was void as to the Plaintiffs because the Plaintiffs were not personally served with notice.

A. The Commission's Order amended a statewide rule of general applicability.

The District Court based this holding on a misinterpretation of *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991). The Commission order at issue in *Uhden* involved a "special pool rule," which is not a statewide rule of general applicability at all, but rather an order governing only a specific pool of oil or gas. "Rule," as in the term "special pool rule" as used in the oil and gas industry, does not comport with the definition of "rule" in NMSA 1978, § 14-4-2 (1967, as amended in 1969). The Supreme Court in *Uhden*

"rule" in NMSA 1978, § 14-4-2 (1967, as amended in 1969). The Supreme Court in *Uhden* made the distinction between a "special pool rule" of limited applicability and the statewide rules of general applicability citing specifically 19 NMAC 15.C.104 as such a statewide rule.

B. The District Court erred in holding that 19 NMAC 15. C. 140, as amended, is void as to Plaintiffs.

After the entry of the Commission's Order at issue in this case, Defendant Burlington filed its application for compulsory pooling with the Oil Conservation Division. There is no dispute that any order requiring compulsory pooling of the Plaintiffs' interests specifically affects the Plaintiffs' property interests. The compulsory pooling action required the Plaintiffs to be personally served with notice and an opportunity to be heard as such is a disposition of a case upon a particular matter within a limited particular area as applied to a specific set of facts. 19 NMAC 15.N.1207 The Plaintiffs were personally served with notice and given an opportunity to be heard in the compulsory pooling case. [The administrative order in this compulsory pooling case is still pending a *de novo* review by the Commission.] However, it is not the compulsory pooling case that is before the Court; rather, it is the Commission's Order that amended a statewide rule of general applicability that is before the Court.

The Commission amended a statewide rule of general applicability on June 5, 1997, when it amended 19 NMAC 15.C.104, and the only notice required by law for such rule making is notice by publication, not notice by personal service. The validity of the Commission's amendment to 19 NMAC 15.C.104 depends on whether the notice provided by the Commission complied with the applicable statutes and rules; the amendment's effectiveness is not dependent on actions taken or not taken by Defendant Burlington or any other entity.

The District Court found that the Commission provided notice by publication and by mail to parties requesting to be on its mailing list. The District Court's Judgment implicitly held that the Commission's amendment to 19 NMAC 15.C.104 was effective to everyone except the Plaintiffs by stating the Order "...is void as to only the appellants [Plaintiffs] and the 640-acre spacing provided for therein and in the amended New Mexico Oil Conservation Division Rule 104 [19 NMAC 15.C.104] is of no force and effect as to their property interest in the San Juan Basin."

5. Authorities Relied Upon and Standard of Review

Authorities Relied Upon

A. The Commission's Order amended a statewide rule of general applicability.

New Mexico Mining Ass'n v. New Mexico Mining Comm'n, 1996-NMCA-098, 122 N.M. 332 (a party challenging a rule adopted by an administrative agency has the burden of establishing the invalidity of the rule)

Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991) (19 NMAC 15.C.104 is a rule of general application. the spacing order at issue in the case was not an order of general application, but rather pertained to a limited area)

Public Service C. v. New Mexico Envtl. Improvement Bd., 89 N.M. 223, 549 P.2d 638 (Ct.App. 1983) (powers and authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent)

Harry R. Carlile Trust v. Cotton Petroleum Corp., 732 P.2d 438 (Okla. 1987) (commission's order was not of general applicability; area involved was limited and persons affected were limited in number and identifiable)

Louthan v. Amoco Prod. Co., 652 P.2d 308 (Okla.Ct.App. 1982) (interest owners entitled to notice as there was a producing well, the owners names and addresses were easily discoverable)

Cravens v. Corp. Comm'n, 613 P.2d 442 (Okla. 1980), *cert. denied*, 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981) (case involved a single 160-acre spacing unit; owner of 80-acre lease, which is part of the unit, entitled to notice)

State Oil and Gas Bd. v. Mississippi Mineral and Royalty Owners Ass'n, 258 So.2d 767 (Miss. 1971) (forty-year old spacing rules may no longer be appropriate today when production is from deeper beds at greater expense)

NMSA 1978, § 70-2-6 (1935, as amended through 1979)
NMSA 1978, § 70-2-11 (1935, as amended through 1977)
NMSA 1978, § 70-2-12(B)(10) (1978, as amended through 1996)
19 NMAC 15.C.104

B. The District Court erred in holding that 19 NMAC 15. C. 140, as amended is void as to Plaintiffs.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U. S. 306 (1950) (actual notice required when interest owners are limited in number and readily identifiable)
Livingtstone v. Ewing, 98 N.M. 685, 652 P.2d 235 (1992) (there is no fundamental right to notice and hearing before the adoption of a rule; only notice required by law is notice by publication)
Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 817 P.2d 721 (1991) (the persons entitled to actual notice were limited in number and identifiable)
State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980) (in 1967 the legislature repealed the requirement of actual notice from the State Rules Act)
Wylie Bros.Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969) (public hearing contemplated by § 12-14-6 [NMSA 1978, § 74-2-6] is not to be equated with or bound by principles of law applicable to an adjudicatory proceeding before an administrative board)
NMSA 1978, § 10-15-1 (1974, as amended through 1997)

NMSA 1978, § 70-2-7 (1935, as amended through 1987)
NMSA 1978, § 70-2-13 (1955, as amended through 1981)
NMSA 1978, § 70-2-23 (1935, as amended through 1977)
19 NMAC 15.N.1204
19 NMAC 15.N.1207

Standard of Review

The appeal of the Commission's Order is on the record established at the Commission in adopting the Order. NMSA 1978, § 70-2-25(B) states, in part: "The commission action complained of shall be prima facie valid and the burden shall be upon the party or parties seeking review to establish the invalidity of such action of the commission." As the Supreme Court stated in *Rutter & Wilbanks Corp. v. Oil Conservation Commission,* 87 N.M. 286, 287, 532 P.2d 582, 583 (1975), the review of the Commission's Order will be whether the Commission's action

is consistent with and within the scope of its statutory authority and whether the administrative orders are supported by substantial evidence. *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 835 P.2d 819 (1992) In a more recent appeal from an administrative agency, the Supreme Court decided that the review of such decisions is "...on the whole record for arbitrary or capricious action, fraud, or lack of substantial evidence. " *Zamora v. Village of Ruidoso Downs*, 120 N.M. 778, 784, 907 P.2d 182, 188 (1995)

Additionally, a party challenging a rule adopted by an administrative agency has the burden of establishing the invalidity of the rule. *New Mexico Mining Ass'n v. New Mexico Mining Comm'n,* 1996-NMCA-098, 122 N.M. 332.

6. Recordings of Proceedings

The transcript of the proceedings before the Commission were transcribed, and the proceeding before the District Court were recorded.

7. Prior Appeals

There have been no prior appeals.

8. Appointment of Appellate Counsel

There has been no such appointment.

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 hereby certify that a copy of this Docketing Statement was mailed to the following on the 25th day of March, 1998.

The Honorable Byron Caton
District Judge
103 South Oliver Drive
Aztec, New Mexico 87410

Gregory T. Ireland
District Court Clerk
103 South Oliver Drive
Aztec, New Mexico 87410

Carrie Powell
Court Tape Monitor
103 South Oliver Drive
Aztec, New Mexico 87410

W. Thomas Kellahin
Post Office Box 2265
Santa Fe, New Mexico 87504-2265

J. E. Gallegos
Jason E. Doughty
460 St. Michael's Drive
Bldg. 300
Santa Fe, New Mexico 87505

Marilyn S. Hebert

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

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

CASE NO. 11745
Order No. R-10815

APPLICATION OF BURLINGTON RESOURCES OIL & GAS COMPANY TO AMEND DIVISION RULES 104.B AND 104.C TO ESTABLISH 640-ACRE SPACING, INCLUDING WELL LOCATION REQUIREMENTS FOR GAS PRODUCTION BELOW THE BASE OF THE DAKOTA FORMATION IN SAN JUAN, SANDOVAL AND MCKINLEY COUNTIES, NEW MEXICO

ORDER OF THE COMMISSION

BY THE COMMISSION:

This cause came on for hearing at 9 o'clock a.m. on March 19, 1997, at Santa Fe, New Mexico, before the Oil Conservation Commission of New Mexico, hereinafter referred to as the "Commission".

NOW, on this 5th day of June, 1997, the Commission, a quorum being present, having considered the record and being fully advised in the premises,

FINDS THAT:

(1) Due public notice having been given as required by law, the Commission has jurisdiction of this cause and the subject matter thereof.

(2) On March 19, 1997, the Commission commenced a public hearing based upon the application of Burlington Resources Oil and Gas Company ("Burlington") to consider modifications to Division General Rule 104 which currently provides for 160-acre gas spacing and proration units in the San Juan Basin of New Mexico.

(3) Burlington seeks to allow for 640-acre proration and spacing units, including modification of well location requirements, for deep gas wells in the San Juan Basin by amending Rule 104.B(2)(a) and Rule 104.C(3)(a) and adopting a new Rule 104.B(2)(b) and Rule 104.C(3)(b).

EXHIBIT
"A"

(4) Burlington proposes that:

(a) the vertical limits of the affected area would be defined as all gas formations below the base of the Cretaceous period (below the Dakota formation); and

(b) the horizontal limits of the affected area would be defined as within the surface outcrop of the Pictured Cliffs formation.

(5) Burlington presented geologic, land and petroleum engineering evidence which demonstrated that the current 160-acre gas spacing unit size for deep gas has discouraged efforts to develop the deep gas in the San Juan Basin because:

(a) deep gas wells drain more than 160-acres;

(b) a 160-acre unit does not provide sufficient gas-in-place to economically justify the drilling and completing of deep gas wells which currently cost in excess of two million dollars to drill and complete;

(c) operators do not want to assume the risk of either (a) drilling a deep gas well on 160-acre spacing only to have the owners in the adjoining 160-acre drill another deep gas well which is not necessary in order to drain the area or (b) pooling the adjoining tracts into a 640-acre unit after the well is drilled only to have the adjoining owners avoid assuming any of the risk of drilling the deep gas well;

(d) due to the diversity of ownership, it is extremely difficult to consolidate 640-acres into a voluntary spacing unit for the drilling of wildcat and development deep gas wells;

(e) royalty interests cannot voluntarily or involuntarily pool their interests for spacing units larger than 160 acres and therefore cannot share in production from wells capable of draining 640 acres; and

(f) compulsory pooling is available only for spacing units consistent with the well spacing adopted by the Division which is currently limited to 160 acres.

(6) All parties appearing before the Commission support modifying current Rule 104 to provide for 640-acre "deep gas" spacing.

(7) Amoco Producing Company appeared in support of 640-acre deep gas spacing but requested that this modification include provision for obtaining 640-acre spacing, after notice and hearing, on a temporary basis **prior** to drilling the well and for an area not to exceed nine sections and then requiring another hearing after the well was completed in order to determine actual drainage areas and adopt "final" spacing units.

(8) Burlington opposed Amoco's request on the grounds that such a complicated procedure would lead to the drilling of unnecessary wells and would discourage deep gas drilling because the participating working interest owners would have to assume the risk of uncertain "final spacing".

(9) The Commission **finds** that Rule 104 should be modified **on a permanent basis** to provide for 640-acre gas spacing units, including modified well location requirements for the deep gas formations of the San Juan Basin for the following reasons:

(a) On December 1, 1950, the Commission revised its Rules and Regulations including amending Rule 104 to designate 160-acre gas well spacing for San Juan, Rio Arriba and Sandoval Counties, New Mexico, with well locations 990 feet to the outer boundary.

(b) Burlington has developed Barker Creek-Barker Dome and Alkali Gulch areas on 640-acre spacing and has projected similar geologic and reservoir engineering data for the deeper formations underlying the subject area of San Juan Basin.

(c) The "deep gas" reservoirs from the base of the Dakota formation to the base of the Pennsylvanian formation in the San Juan Basin have not been effectively explored because operators have generally confined exploration to the shallow, less risky Cretaceous gas reservoirs.

(d) The current rules have discouraged "deep gas" well exploration because an operator is required to risk the drilling of a deep gas well on 160-acre spacing with the "hope" that larger spacing units can be obtained after production is encountered.

(e) The Pennsylvanian-aged strata in the San Juan Basin lie much deeper than in the Baker Dome, Alkali Gulch and Ute Dome pools. As a result, anticipated pressure in reservoirs below the base of the Dakota formation are projected to be high enough to enable one well per 640 acres to efficiently drain the reservoir with adequate porosity and permeability.

(f) Drilling wells according to the current 160-acre gas spacing rules would result in economic and physical waste. The impact on the surface, including topographic, geologic and archeological concerns will also be reduced under 640-acre gas spacing rules which include well locations not closer than 1200 to the outer boundary, 130 feet to a quarter line or closer than 10 feet to any quarter-quarter line.

(g) Wells drilled to formations below the base of the Dakota formation are "high-risk" and "high-cost" ventures. Establishment of 640-acre gas spacing will encourage deep exploration by allowing the formation of 640 acre compulsory pooling units.

(h) By making this modification permanent, it will create the opportunity for operators to drill these high risk wells and obtain reservoir data from which to determine if "infill" drilling may be appropriate at some future time.

(i) The requested modification of Rule 104 should be made on a permanent basis which still affords any operator the opportunity to petition the Division to grant exceptions to General Rule 104 for the creation of individual pools with their own unique special rules and regulations when and where appropriate.

(j) The amendments of Rule 104 as set forth in Exhibit "A", will prevent the economic loss caused by the drilling of unnecessary wells, will avoid the risks associated with the drilling of an excessive number of wells, will increase the opportunity to drill for "deep gas" by the consolidation of tracts into larger spacing units and will otherwise prevent waste and protect correlative rights.

(k) The vertical limits subjected to 640 acre gas spacing should be the interval below the base of the Cretaceous period (below the Dakota formation); and the horizontal limits of the affected area should be the area within the surface outcrop of the Pictured Cliffs formation as shown on Exhibit "B".

(10) There exists a substantial opportunity for operators in the San Juan Basin to commence a significant exploration efforts to explore the deeper gas potential in the San Juan Basin and adoption of 640-acre deep gas spacing will encourage this exploration effort.

(11) The Commission further **FINDS that:**

(a) the adoption of these amendments to Rule 104 will provide a more flexible method for the timely and efficient drilling of deep gas wells while providing for the orderly and proper regulations of well locations and spacing units thereby protecting correlative rights and preventing waste;

(b) the adoption of these amendments to Rule 104 will prevent waste of valuable hydrocarbons, the drilling of unnecessary wells and the protection of the correlative rights of the owners of that production.

IT IS THEREFORE ORDERED THAT:

(1) Division Rule 104 is hereby amended to conform to the rule changes hereby adopted by the Commission and as set forth on Exhibit "A" attached hereto and made part of this order.

(2) Rule 104 as amended shall be effective on the date of its publications in the New Mexico Register.

(3) Jurisdiction of this cause is retained for the entry of such further orders as the Commission may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinafter designated.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION

JAMI BAILEY, Member

WILLIAM W. WEISS, Member

WILLIAM J. LEMAY, Chairman

S E A L

CASE NO. 11745
ORDER NO. R-10815
EXHIBIT "A"

For wildcat wells - Rule 104.B(2)

(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.

(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.

(c) Current Rules 104.B(2)(b), (c) and (d) shall be renumbered as Rule 104.B(2) (c), (d) and (e) respectively.

For Development Wells - Rule 104.C(3)

(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.

(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

(ii) 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 any quarter section line, quarter-quarter section line or subdivision inner boundary.

CASE NO. 11745 -- ORDER NO. R-10815
EXHIBIT "B"
640-Acre Deep Gas Acreage Boundary
(Pictured Cliffs Pool Outline)

TOWNSHIP	RANGE	SECTION
21 North	2 West	1 - 24, 26 - 33
21 North	3 West - 5 West	All
21 North	6 West	All
21 North	7 West	1 - 18, 23 - 25
22 North	1 West	4 - 9, 17 - 20, 30, 31
22 North	2 West - 7 West	All
22 North	8 West	1 - 30, 34 - 36
22 North	9 West	1 - 18, 23 - 25
23 North	1 West	5 - 8, 17 - 20, 29 - 32
23 North	2 West - 9 West	All
23 North	10 West	1 - 17, 21 - 26
23 North	11 West	1 - 6, 9 - 13
24 North	1 West	2 - 10, 14 - 20, 24 - 32
24 North	2 West - 14 West	All
25 North	1 West	1 - 11, 14 - 23, 24 - 35
25 North	2 West - 14 West	All
26 North	1 West - 14 West	All
27 North	1 West	7 - 10, 15 - 22, 27 - 34
27 North	2 West - 14 West	All
28 North	1 West	4 - 9, 16 - 21, 28 - 34
28 North	2 West - 14 West	All
29 North	1 West	4 - 9, 16 - 21, 28 - 34
29 North	2 West - 13 West	All
29 North	14 West	1 - 4, 8 - 17, 19 - 36
30 North	1 West	5 - 8, 17 - 20, 24 - 32
30 North	2 West - 13 West	All
30 North	14 West	1 - 4, 9 - 16, 21 - 27, 33 - 36
31 North	2 West - 12 West	All
31 North	13 West	1, 12 - 14, 21 - 36
31 North	14 West	25, 26, 34 - 36
32 North	2 West	12 - 22, 28 - 34
32 North	3 West - 11 West	All
32 North	12 West	10 - 15, 21 - 29, 31 - 36

FEB 24 | 16 PM '98

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.

NOTICE OF APPEAL

COMES NOW THE NEW MEXICO OIL CONSERVATION COMMISSION ("Commission") pursuant to Rule 12-201 NMRA 1998 and files its Notice of Appeal to the New Mexico Supreme Court against the Plaintiffs of the "Opinion and Final Judgment" entered on January 27, 1998, a copy of which is attached hereto as Exhibit A.

Respectfully submitted,

Marilyn S. Hebert
Special Assistant Attorney General

EXHIBIT
"B"

2040 South Pacheco
Santa Fe, New Mexico 87501
(505) 827-1364
Attorney for the New Mexico Oil Conservation
Commission

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of this Notice of Appeal was mailed to the following on February 23, 1998.

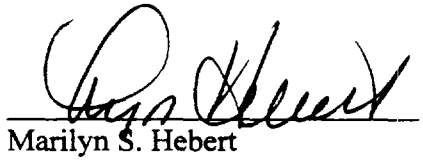
Clerk of the New Mexico Supreme Court
Post Office Box 848
Santa Fe, New Mexico 87504

The Honorable Byron Caton
District Judge
103 South Oliver Drive
Aztec, New Mexico 87410

W. Thomas Kellahin
Post Office Box 2265
Santa Fe, New Mexico 87504
Attorney for Burlington Resources Oil & Gas Company

J. E. Gallegos
Jason E. Doughty
460 St. Michael's Drive
Bldg. 300
Santa Fe, New Mexico 87505
Attorneys for the Plaintiffs

Carrie Powell
103 South Oliver Drive
Aztec, New Mexico 87410
Court Tape Monitor



Marilyn S. Hebert

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

DISTRICT COURT
SAN JUAN COUNTY, NM
JAN 27 1 28 PM '98

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.

EXHIBIT
A

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 th... ...ion 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

KELLAHIN AND KELLAHIN
ATTORNEYS AT LAW
EL PATIO BUILDING
117 NORTH GUADALUPE
POST OFFICE BOX 2265
SANTA FE, NEW MEXICO 87504-2265

TELEPHONE (505) 982-4285
TELEFAX (505) 982-2047

W. THOMAS KELLAHIN*

*NEW MEXICO BOARD OF LEGAL SPECIALIZATION RECOGNIZED SPECIALIST IN THE AREA OF NATURAL RESOURCES-OIL AND GAS LAW

JASON KELLAHIN (RETIRED 1991)

February 20, 1998

FEDERAL EXPRESS
(505) 334-6151

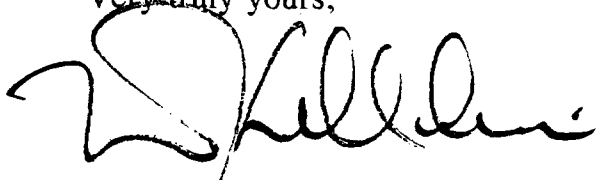
Gregory T. Ireland, Clerk
District Court Administrator
103 South Oliver Drive
Aztec, New Mexico 87410

Re: CIV 97-572-3
Timothy B. Johnson, Trustee for Ralph B. Bard, Jr. Trust Fund U/A/D February 12, 1983, et. al. -vs- Burlington Resources Oil & Gas Company and the Oil Conservation Commission of the State of New Mexico

Dear Mr. Ireland:

On behalf of Burlington Resources Oil & Gas Company, please find enclosed for filing in the referenced case our Notice of Appeal. I have enclosed an additional copy which I would appreciate you endorsing and returning to me in the enclosed stamped-addressed envelope. Please call me if you have any questions.

Very truly yours,



W. Thomas Kellahin

cc: counsel of record

STATE OF NEW MEXICO
ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN

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

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

BURLINGTON RESOURCES OIL & GAS COMPANY AND THE OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,
Appellees.

NOTICE OF APPEAL

COMES NOW BURLINGTON RESOURCES OIL & GAS COMPANY, pursuant to Rule 12-201 of New Mexico Rule of Appellate Procedure and files its Notice of Appeal to the New Mexico Supreme Court of the District Court "Opinion and Final Judgment" entered herein on January 27, 1998, which is attached hereto as Exhibit A.

Respectfully submitted,

W. THOMAS KELLAHIN, Esq.
KELLAHIN & KELLAHIN
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
Attorney for Burlington Resources Oil & Gas Company

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was mailed to the following this 20th day of February, 1998.

Clerk of the Supreme Court
Supreme Court Building
P. O. Box 848
Santa Fe, New Mexico 87504

Honorable Byron Caton
District Judge
920 Municipal Drive, Suite 2
Farmington, New Mexico 87401

Marilyn S. Hebert, Esq.
Special Assistance Attorney General
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
Attorney for the Oil Conservation Commission

J. E. Gallegos, Esq.
Gallegos Law Firm
460 St. Michaels Drive #300
Santa Fe, New Mexico 87505-7602
Attorney for Appellants

John Bemis, Esq.
Burlington Resources Oil & Gas Company
P. O. Box 4289
Farmington, New Mexico 87499-4289
Attorney for Burlington Resources Oil & Gas Company

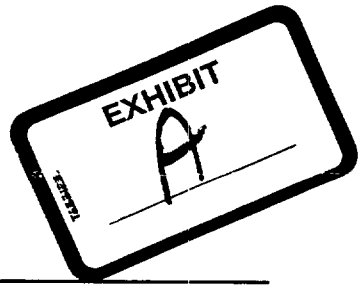
Carrie Powell
103 South Oliver Drive
Aztec, New Mexico 87410
Court Monitor

W. Thomas Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

DISTRICT
SAN JUAN COUNTY,
NM
JAN 27 1 28 PM '98

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