

Signature

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

IN THE MATTER OF THE APPLICATION OF
RICHARDSON OPERATING COMPANY TO
ESTABLISH A SPECIAL "INFILL WELL" AREA
WITHIN THE BASIN-FRUITLAND COAL GAS
POOL AS PROVIDED BY RULE 4 OF
THE SPECIAL RULES FOR THIS POOL,
SAN JUAN COUNTY, NEW MEXICO.

03 JAN 33 AM 10:00

OIL CONSERVATION DIV

OIL CONSERVATION COMMISSION CASE NO.
12734 (De Novo), ORDER R-11775-B.
(Request for de novo review by the Secretary of the
Energy, Minerals and Natural Resources Department)

RICHARDSON OPERATING COMPANY'S MOTION FOR CLARIFICATION OF
THE SECRETARY'S JANUARY 29th ORDER

I. INTRODUCTION

Richardson Operating Company ("Richardson") faces a hearing in seven days. That hearing was requested by San Juan Coal Company ("San Juan"), and ordered to be held by the Secretary of the Energy, Minerals, and Natural Resources Department. By statute, the "public hearing" is to determine whether the "public interest" has been contravened by the Oil Conservation Commission's Infill Order. Yet, despite her requests that the parties fully brief the issues, the Secretary has failed to provide any guidance regarding what is meant by "public interest" or the standards by which "public interest" will be determined. The Secretary's failure to rule on these dispositive issues effectively prevents Richardson from preparing for the hearing, and implicates Richardson's due process rights.

II. PROCEDURAL HISTORY AND THE SECRETARY'S JANUARY 29th RULING

By letter dated January 13, 2003, the parties were asked to brief: (1) what is meant by the public interest?; and (2) what are the standards for determining the public interest? The parties were also asked to argue the public interest at stake in this matter. As a practical matter, San Juan had months to prepare their arguments. Under the required timeline, and because Richardson was responding to San Juan's arguments, Richardson had four days to prepare their arguments. Two of those four days fell on a weekend.

The Secretary has ordered a hearing pursuant to NMSA 1978, Section 70-2-26 be held beginning at 9:00 a.m. on February 10, 2003. The Order is silent on the issues the Secretary asked the parties to brief. More specifically, the Order does not address what is meant by "public interest" or even outline the standards for determining that undefined concept. Thus, the Order, in sum and substance, directs the parties to appear for a "public hearing" but is completely silent on the issues, and standards for determining the issues that will be considered.

Under these circumstances, Richardson is unable to prepare for the hearing. San Juan has previously stated that it has two days of additional testimony to offer. In fact, San Juan also intends to present additional testimony on related issues to the Oil Conservation Commission in May.¹ Richardson is afforded an extremely short time to prepare, and, again, has no guidance on what to prepare for.

III. THE "PUBLIC INTEREST" CONCEPT IS, AND REMAINS, VAGUE; AS A RESULT, RICHARDSON IS UNABLE TO PREPARE FOR THE HEARING.

All parties agree that the Section 70-2-26 is vague. This vagueness problem, however, is compounded by the Secretary's failure to rule on the issues briefed.

¹ Statements of San Juan Coal Company's Counsel at the January 15, 2003, Pre-Hearing conference on the Oil Conservation Commission hearing on amendments to the Special Pool Rules and Regulations for the Basin-Fruitland Coal Gas Pool to be heard in May 2003.

While Richardson is sensitive to the time constraints imposed by Section 70-2-26,² the Secretary's obligation to assure that the hearing meets standards of fundamental fairness and protects Richardson's property rights is in no way diminished. The Secretary maintained discretion in granting the hearing, and now the Secretary must maintain and protect due process rights. Due process cannot be assured, and therefore protected, if the Secretary does not rule on what is meant by public interest and what standards will guide this determination. The Secretary's failure to rule on these dispositive issues effectively prevents Richardson from preparing for the hearing and permits San Juan to decide these matters for the Secretary.

In order to prepare for the hearing, and defend favorable decisions at four different administrative levels, Richardson must know at a minimum: (1) what will the Secretary consider at the public hearing?; (2) how does the Secretary define public interest?; (3) what standards will apply?; (4) will the Secretary consider only economics as proposed by San Juan? or will the Secretary consider enforcement of prior-existing leases?; (5) will the Secretary consider the inarguable need to develop all minerals?; and (6) will the Secretary weigh San Juan's required compliance with MSHA and other safety regulations? If so, what safety regulations? Additionally, Richardson needs to know what the Secretary considers to be properly within her jurisdiction and expertise. Does that jurisdiction extend to federal lands? Mine safety? Fracture length and impact on MSHA regulations and mine safety? In short, until these questions are answered, or until the hearing procedure is refined, Richardson cannot prepare.]

Due process is violated if the issues to be addressed, and the standards to be employed in determining those issues, are not set forth with some clarity. *In re Ronald A.*, 110 N.M. 454,

² The statute as originally drafted was to allow the Secretary to compare an Oil Conservation Commission Order with her own Statewide Energy Plan. Subsequent amendments make the Secretary's task more difficult, but do not relieve the Secretary of her duty to assure the hearing meets constitutional standards.

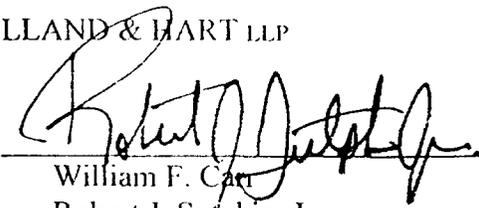
455, 797 P.2d 243, 244 (1990). Unless, and until, these questions are answered, the Secretary's Order, and indeed the whole proceeding, violates constitutionally protected rights. *Id.*; *see, e.g.,* 2 Am Jur 2d, Administrative Law § 285 (stating general rule that party to an administrative hearing must have adequate notice of the facts and law to be considered) (collecting cases). The process is rendered, arbitrary, capricious, and unreasonable.

IV. CONCLUSION

Richardson's ability to prepare is made impossible by the Secretary's decision to hold a hearing without answering the very questions she asked the parties to brief. While Richardson appreciates that the timeframes set by statute are short, as it stands, Richardson cannot prepare. Moreover, Richardson cannot respond to the schedule proposed in the January 30, 2003 Pre-Hearing Order.

Respectfully submitted,

HOLLAND & HART LLP

By: 

William F. Carr

Robert J. Sutphin, Jr.

Post Office Box 2208

Santa Fe, New Mexico 87504-2208

505 988-4421

KELLAHIN & KELLAHIN

By: 

W. Thomas Kellahin

117 North Guadalupe

Santa Fe, New Mexico 87504-2265

Fax No. 505 982-2047

CERTIFICATE OF SERVICE

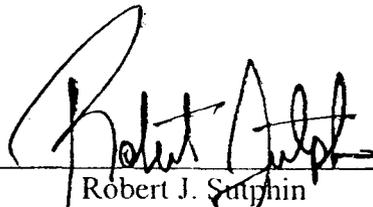
I certify that on February 3, 2003 I served a copy of the foregoing document to the following by

U.S. Mail, postage prepaid
Hand Delivery
Fax

James Bruce, Esq.
Post Office Box 1056
Santa Fe, NM 87504

Larry P. Ausherman, Esq.
Modrall, Sperling, Roehl and Sisk P.A.
Post Office Box 2168
Albuquerque, NM 87103-2168

Charles E. Roybal, Esq.
BHP Minerals
300 W. Arrington, #200
Farmington, NM 87401


Robert J. Sutphin