STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Appellants,

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

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

Appellees.

SCHEDULING ORDER

The Court directs that the appeal taken from the New Mexico Oil Conservation Commission Order R-10815 by the plaintiffs shall generally follow the procedure of Rule 1-074 NMRA 1997 on the schedule and terms hereby ordered.

1. Statement of Appellate Issues.

The appellant's Statement of Appellate Issues was served and mailed for filing on October 2, 1997. The appellee's response shall be served on or before October 27, 1997 and sent for filing at that time and may consist of up to fourteen (14) pages of argument.

2. Record on Appeal.

The parties shall jointly compile and agree upon the record and appeal and file it with the Court. All statements, briefs or other filings citing the record shall make appropriate references to the record on appeal.

3. Briefs.

The appellants may serve and send to be filed a brief not exceeding thirty-five (35) pages by October 30, 1997. The appellees may serve and send for filing response briefs not exceeding thirty-five (35) pages by November 7, 1997. The appellants may serve and send for filing a reply brief not exceeding fifteen (15) pages on November 17, 1997. The form of briefs shall generally adhere to the format prescribed by SCRA 1986, Rule 12-213 (1995 Supp.).

4. Oral Argument.

The matter will be heard on oral argument in the San Juan County Courthouse, Aztec, New Mexico at 3:00 P.M. 1 o'clock Dec. 17, 1997.

I tacked on

ORIGINAL SIGNED BY
BYRON CATON

Honorable Byron Caton, District Judge

APPROVED AND AGREED:

Jason E. Doughty

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

Attorney for Plaintiffs

Telephonically Approved 10/22/97
Marilyn Hebert
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

Attorney for New Mexico Oil Conservation Commission

Telephonically Approved 10/22/97
W. Thomas Kellahin
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504

Attorney for Burlington Resources Oil and Gas Company

COPIES MAILED
TO COUNSEL
OF RECORD
11/25/97

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Appellants,

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

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

Appellees.

TITLE PAGE AND STIPULATIONS TO THE COMPLETE RECORD IN OIL CONSERVATION COMMISSION DOCKET NO. 11745

The parties to this proceeding hereby stipulate that the attached documents numbered 001 through 327 constitute the complete record on appeal taken by the New Mexico Oil Conservation Commission in its Docket No. 11745 upon which Order R-10815 was issued. This document also constitutes the title page of the record pursuant to Rule 1-074H. (1) NMRA 1997.

The parties further stipulate that on the issue of lack of notice, the Court may consider the evidence provided in plaintiffs' Affidavit Introducing Supplemental Evidence Concerning Identification of Appellants and Communications to Them From Burlington identified as documents PLF 001 through PLF 005 and Burlington Resources Oil and Gas Company's Supplements to Record Proper identified as documents DEF 001 through DEF 017.

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Plaintiffs

APPROVED:

Telephonically Approved 10/22/97
Marilyn Hebert
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505

Attorney for New Mexico Oil Conservation Commission

Telephonically Approved 10/22/97
W. Thomas Kellahin
Kellahin & Kellahin
P.O. Box 2265
Santa Fe, New Mexico 87504

Attorney for Burlington Resources Oil and Gas Company

97-170.01.STIPREC1.

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

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

Appellants Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "appellants") move this Court to enforce its Order entered October 2, 1997 staying the effect and operation of New Mexico Oil Conservation Commission ("Commission") Order No. R-10815 pending review thereof, and in support of this Motion state:

1. On June 5, 1997 the Commission, upon application by Burlington Resources Oil and Gas Company ("Burlington"), entered Order No. R-10815 which, inter alia, changed the long-standing spacing unit for deep wildcat gas wells in the San Juan Basin from 160 acres to 640 acres (the "Spacing Order").

2. Armed with Order No. R-10815, on June 11, 1997, Burlington immediately filed an application with the New Mexico Oil Conservation Division ("Division") seeking inter alia, an order compulsory pooling the appellants' working interest in the deep Pennsylvanian formation underlying Section 9, T31N-R10W, San Juan County, New Mexico on a 640-acres spacing and proration unit for Burlington's proposed Scott Well No. 24. This case was numbered Case No. 11808.

3. On July 18, 1997, appellants perfected a timely appeal of the Spacing Order, Order No. R-10815, by filing their Verified Petition for Review of Commission Order No. R-10815 with this court and simultaneously filed a Motion to Stay Commission Order No. R-10815 as to appellants pending appeal thereof pursuant to NMSA 1978 § 70-2-25(C).

4. On September 12, 1997, the Division issued its order No. R-10877 granting Burlington's application for compulsory pooling of Section 9, T31N-R10W for Burlington's proposed Scott well on a 640-acre spacing and proration unit. The appellants' operating rights were ostensibly pooled by said Order No. R-10877 (the "Pooling Order").

5. At a hearing on all pending motions held before this Court on September 15, 1997, the Court denied motions to dismiss filed by the Commission and Burlington and a motion to strike filed by Burlington, and granted appellants' Motion to Stay the effect of the Spacing Order as to the appellants pending appeal thereof. On October 2, 1997, this Court entered its written Order to this effect. See Order attached hereto as Exhibit "A".

6. Pursuant to this court's order, Commission Order No. R-10815, the Spacing Order, is stayed as to the appellants pending their judicial appeal. As such, the amended 640-acre spacing rule is of no force and effect as to the appellants. The Division has no authority to compulsory pool the GLA-66 Owners' leasehold operating rights acreage in Section 9-T31N, R10W, San Juan County, New Mexico for Burlington's proposed Scott Well No. 24 on 640-acre spacing.

7. Appellants have filed with the Oil Conservation a de novo appeal of the Pooling Order, which is presently pending.

8. Notwithstanding this court's clear and unambiguous ruling and Order that 640-acre spacing does not apply to the appellants pending appeal, Burlington is proceeding as though there is no stay of the Spacing Order.

10. On October 20, 1997, Burlington sent to all appellants its "Notification of Election" letter for its proposed Scott Well No. 24. An example of this letter is attached hereto as Exhibit "B". Burlington proposes to drill its Scott well on a 640-acre spacing and proration unit in Section 9, T31N, R10W, San Juan County, New Mexico. Burlington's Notification of Election requires that within 30 days from receipt of the letter, the appellants must elect to either pay their share of the estimated $2,316,973 well costs or, alternatively, do nothing and lose their ownership through the imposition of the statutory risk penalty until 300% of the cost of drilling, completing and operating the Scott Well is recovered from the plaintiffs' share of production therefrom.

11. This Court has unambiguously ruled that Order No. R-10815, which provides for 640-acre spacing and proration units, is stayed as to the appellants

pending this appeal. As such, Burlington has no right nor authority to demand that the appellants either contribute to its proposed Scott well based on the Spacing Order or suffer 300% of the well costs being deducted from their share of production.

12. Burlington's "Notification of Election" letter contemptuously defies this Court's Order, and continues the same course of oppressive practice that has forced appellants to file this appeal in the first place.

13. New Mexico courts have the inherent power to award sanctions, including attorney fees, when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons. See State ex rel. N.M. State Highway & Transp. Dep't v. Baca, 116 N.M. 751, 754. 867 P.2d 421, 424 (Ct. App. 1993), cert. granted, 116 N.M. 801, 867 P.2d 1183 (1994)("a New Mexico court may award attorney fees when . . . a party shows bad faith by disrupting litigation or hampering enforcement of court orders, or when it is necessary to vindicate judicial authority and make the prevailing party whole for expenses caused by an opponent's obstinacy under circumstances in which the opponent's behavior is characterized by bad faith or vexatious oppression.") Burlington's oppressive treatment of the appellants and absolute and intentional defiance of this Court's Order warrant that sanctions, to include appellants' attorney's fees and costs incurred in this Motion, be charged against Burlington.

14. Due to the 30-day election period provided for in Burlington's Notice of Election, appellants request that a hearing on this Motion be had on an expedited basis.

15. Concurrence in this Motion was sought from Burlington's counsel, but no response was received. Due to the nature of this Motion, however, Burlington is presumed to oppose same.

WHEREFORE, for the foregoing reasons, Appellants respectfully request that this court enforce its Order entered October 2, 1997 which stayed New Mexico Oil Conservation Commission Order No. R-10815 as to the appellants pending review thereof, by entering a supplemental Order to the effect that:

A. Division Order No. R-10877, which compulsory pooled the appellants' operating rights for Burlington's Scott Well No. 24 on 640-acre spacing, is stayed as to the appellants pending their appeal of the Commission 640-acre spacing order No. R-10815 before this court and any conduct by Burlington to the contrary is contemptuous;

B. Burlington's "Notification of Election" letter of October 20, 1997 is of no force and effect as to the appellants; and

C. Appellants are allowed to recover their fees and costs incurred in this Motion from Burlington, and have such further relief as is proper.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Appellant's 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 to be served via facsimile on this 28th day of October, 1997 to the following counsel of record:

Marilyn S. Hebert
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

John Bemis, Esq.
Burlington Resources
P.O. Box 4289
Farmington, New Mexico 87499

Jason E. Doughty

92-170.COMISC/GLA665.DOC

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

OCT 2 2 03 PM '97

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.	

ORDER DENYING MOTIONS TO DISMISS AND TO STRIKE AND STAYING COMMISSION ORDER 4-10815 AS TO PLAINTIFFS

THIS MATTER came before the Court on September 15, 1997 for hearing on all pending motions with the plaintiffs appearing by their attorney, J.E. Gallegos, the defendant New Mexico Oil Conservation Commission ("Commission") by its attorney Marilyn S. Hebert and defendant 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.

1. Plaintiffs have correctly followed the provisions of Section 70-7-25B. NMSA 1978 in bringing this case from the executive branch of government to the Courts for judicial review. Once the case is within the jurisdiction of the Court, NMRA 1997 Rule 1-074 provides meritorious procedures for the disposition of the appeal.

Under the circumstances there is little, if any, difference between what the Court has been provided by plaintiffs through its Verified Petition for Review and what would be filed as a Notice of Appeal. Should there be anything further to be provided the Court under the Rule 1-074 procedures, the plaintiffs shall make such filing. Accordingly, the defendants' motions to dismiss and Burlington's motion to strike are denied.

2. The decision in Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991) is controlling regarding plaintiffs' motion to stay Commission Order R-10815 pending appeal. Knowing of its plan to pool the interests of the plaintiffs for a wildcat well on 640-acre spacing and knowing the identities and whereabouts of the plaintiffs, Burlington's failure to provide notice to them of the spacing case proceeding underlying Order R-10815 was a denial of due process under the United States and New Mexico constitution. That spacing change case was not an exercise of general rule making by the Commission but rather resulted from an application by Burlington seeking a particular decision and order of the Commission and Burlington had the burden to notify the plaintiffs of its application as parties whose property could be affected. The plaintiffs' motion to stay is granted.

3. This Order staying Commission Order R-10815 applies only to the plaintiffs in this proceeding and is granted without requirement of bond. The Court expedites hearing of the appeal in this matter setting trial on October 7, 1997. The stay of Commission Order R-10815 shall remain in effect through that date, until further order of the Court.

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

APPROVED:

Telephonically approved on September 22, 1997

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

Attorney for New Mexico Oil Conservation Commission

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

Attorney for Burlington Resources Oil and Gas Company

COPIES MAILED Gallegos
TO COUNSEL Hebert
Kellahin
10-2-97

30-039-06411

BURLINGTON RESOURCES

SAN JUAN DIVISION

October 20, 1997

Certified Mail-Return Receipt Requested

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

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

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

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

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

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

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

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

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

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

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

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

Yours very truly,

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

JRS:dg
c:dawn/R10877_1.doc

Enclosures: Order R-10877
AFE for subject well

cc: Director NMOCD-Santa Fe

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

8

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

Plaintiffs,

v. CV 97-572-3

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

Defendants.

STATEMENT OF APPELLATE ISSUES
OF THE NEW MEXICO OIL CONSERVATION COMMISSION

COMES NOW the New Mexico Oil Conservation Commission ("Commission") and pursuant to Rule 1-074 (L) NMRA 1997 responds as follows to the Plaintiffs' Statement of Appellate Issues:

STATEMENT OF ISSUES

The Commission agrees that the two issues set forth in the Plaintiffs' Statement of Appellate Issues are the issues on which the Plaintiffs based their Request for Rehearing to the

Commission, and therefore these are the only issues that can be reviewed on appeal pursuant to NMSA 1978, § 70-2-25(B). The issues are: 1) whether the Commission's amendment to Oil Conservation Division (OCD) Rule 104 was adopted after the required notice; and 2) whether the amendment is supported by sufficient evidence and not arbitrary, capricious or an abuse of discretion.

SUMMARY OF PROCEEDINGS

The Commission disagrees with the Plaintiffs' characterization of the "Nature of the Case" in their Summary of Proceedings as a "review of a spacing order." At issue in the case before this Court is an amendment to a rule adopted by the Commission on June 5, 1997, and effective on its day of publication, June 30, 1997, pursuant to NMSA 1978, § 14-4-5. The amendment to OCD Rule 104 changed the spacing unit for deep gas formations in the San Juan Basin from 160 acres to 640 acres. R.P. 258 - 265. The amendment was adopted at a Commission hearing pursuant to the Commission's statutory rulemaking power set forth in NMSA 1978, §§ 70-2-11 and 70-2-12 after the required public notice was provided.

Also, the Plaintiffs have included a paragraph, ¶10, in their "Summary of Facts and Course of Proceedings" that reveals that the Plaintiffs' complaint is not with the Commission's rulemaking, but rather the Plaintiffs' complaint is in regard to the effect of the compulsory pooling order entered by OCD, not the Commission, on September 12, 1997. The Plaintiffs, and others who are not parties to this case before the Court, have made a *de novo* appeal of the OCD's compulsory pooling order to the Commission pursuant to NMSA 1978, § 70-2-13. The Commission will hear this compulsory pooling case in early 1998. The Commission's decision in the compulsory pooling case can then be appealed to district court pursuant to NMSA 1978, §

70-2-25, just as this case has been. This compulsory pooling order is not relevant to whether the Commission's amendment to OCD Rule 104 is valid.

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

After the required public notice was provided, Case No. 11745 was heard by the Commission on March 19, 1997. On June 5, 1997, the Commission entered Order No. R-10815 ("Order") in Case No. 11745 that amended Rule 104 as requested in the Application. R.P. 258 - 265.

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

ARGUMENT

Point I
The Commission Provided the Notice Required to Amend an OCD Rule

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

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

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

NMSA 1978, § 70-2-23 states, in part:

> Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the division [OCD]. The division shall first give reasonable notice of such hearing (in no case less than ten days, except in an emergency) and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard.[1]

---

[1] NMSA 1978, § 70-2-6(B) states:

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

OCD Rule 1204 states:

> Notice of each hearing before the Commission and before a Division Examiner shall be by publication once in accordance with the requirements of Chapter 14, Article 11, N.M.S.A. 1978, in a 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 OCD Rule 104 both as to the Commission hearing on the rule changes on March 19, 1997, and the June 5, 1997 Commission meeting at which the amendments to the rule were adopted. *See* Burlington's Supplements to R.P., Affidavit of Florene Davidson.

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

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

come up, but which have not been listed in the preceding subsections of OCD Rule 1207. OCD Rule 1207 (A)(11) is not the rule that governs the Commission's rulemaking.

Point II
The Commission's Action Was Rulemaking Not Adjudication

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

The Plaintiffs cite to *Uhden v. New Mexico Oil Conservation Commission*, 112 N.M. 528, 817 P.2d 721 (1991) to support their contention that the Commission's adoption of amendments to OCD Rule 1204 was 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 rule increasing the spacing for that pool in 1986. From the temporary approval in 1984 through the final rule 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 rule since no compulsory pooling was needed in regard to Ms. Uhden. The fact that Amoco mistakenly overpaid royalties and then demanded a substantial sum from her as repayments undoubtedly affected the Court's view of the effect of the spacing rule on Ms. Uhden. The effect of basing the royalty owner's payment on twice the acreage resulted in a reduction by half. There can be no question that Ms. Uhden suffered a substantial and immediate adverse economic effect.[2]

---

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

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

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

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

The Oil and Gas Act, NMSA 1978, §§ 70-2-1-38 et seq. was enacted in 1935. It was not until the *Uhden* decision in 1991 that the Commission's rulemaking was ever considered adjudicatory as to individual ownership interests. It would be ironic that while interest ownerships have become ever more fragmented during the past 50 years, the notice required by *Uhden* has changed from publication to personal service. The Commission believes that the *Uhden* decision must be limited to the very specific and somewhat unique facts of that case and not extended so as to negate the Commission's ability to perform its statutory duties.

Point III
The Commission's Order Is Supported by Substantial Evidence

The standard of review of the Commission's order amending Rule 104 is whether there is substantial evidence in the record to support the order. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 87 N.M. 286, 532 P.2d 582 (1975). ("substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion); *Grace*

v. Oil Conservation Comm'n, 87 N.M. 205, 531 P.2d 939 (1975). 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 hearing on March 19, 1997, included the testimony of a geologist and a reservoir engineer, both of whom the Commission accepted as expert witnesses. Contrary to the Plaintiffs' contention that the only justification for the rule amendment was economics, there was technical evidence presented to the Commission that supported the increase in spacing from 160 acres to 640 acres.

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

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

As set forth above, the Commission's order amending the OCD Rule 104 is supported by substantial evidence. The Plaintiffs do not like and may not agree with the evidence in the record, but that is not sufficient reason for this Court to set aside the determination of the Commission. The case law in New Mexico illustrates that the courts of the state historically have given great deference to the Commission's decisions on the issues of fact which necessarily involve a great deal of expertise in the areas of petroleum engineering and geology. As the Supreme Court stated in *Fasken v. Oil Conservation 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 OCD Rule 104. A review of the record reveals that the Commission's decision to amend OCD Rule 104 to change the spacing from 160 acres to 640 acres is supported by substantial evidence. The Order of the Commission should be affirmed.

Respectfully submitted,

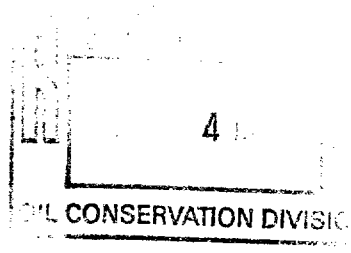
Marilyn S. Hebert
Special Assistant Attorney General
New Mexico Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87505
(505) 827-1364

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the New Mexico Oil Conservation Commission's Brief was mailed to all counsel of record on the 24th day of October, 1997.

Marilyn S. Hebert

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT



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

vs. No. CV-97-572-3

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

APPELLEE-BURLINGTON RESOURCES OIL & GAS COMPANY'S STATEMENT OF APPELLATE ISSUES

Appellee, Burlington Resources Oil & Gas Company (Burlington") pursuant to Rule 1-074 NMRA 1997 submits its response to Appellants' Statement of Appellate issues.

I.
STATEMENT OF APPELLATE ISSUES

1. Appellants were not entitled to actual notice of the Commission's rule making modifying Division Rule 104.

   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. Appellants were not statutorily entitled to actual notice.

2. Order R-10815 is supported by substantial evidence and is not arbitrary or capricious

II.

SUMMARY OF THE PROCEEDINGS

Burlington objects to Appellants' Summary of Proceedings as incomplete, disputed and argumentative. Therefore, in accordance with Rule 1-074, Burlington sets forth the following:

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 want this Court to invalidate as to them the Commission's decision in Case 11745. These same Plaintiffs are also involved in another Oil Conservation Division (Case 11809) in which Burlington sought a pooling order to involuntarily commit their interests in Section

9 for the drilling of the Scott Well No. 24, pursuant to the compulsory pooling statute. Section 70-2-17.C NMSA (1979).

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, has 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 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]

---

[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 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.

Burlington's compulsory pooling in Division Case 11809:

On July 10, 1997, and in another matter, the New Mexico Oil Conservation Division[5] held an adjudication hearing in Division Case 11809 in which Burlington sought an order from the Division in accordance with Section 70-2-17.C NMSA to pool certain uncommitted interest owners in Section 9, T31N, R10W including the interests of the Plaintiffs in order to form a 640-acre unit for the Scott Well No 24.

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**)

---

[5] The Commission consists of a three member panel composed of the Director of the Oil Conservation Division, a designee of the Commissioner of Public Lands, and a designee of the Secretary of the Energy Minerals and Natural Resources Department. The Division is a fully staffed governmental agency, which among its duties conducts Examiner Hearings to adjudicate disputes among parties subject to its jurisdiction. An order entered by the Division in such a case is "appealable" de-novo" to the Commission.

(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 in the State of New Mexico. **(Affidavit of Florene Davidson)**.

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

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

(8) On June 5, 1997, the New Mexico Oil Conservation Commission ("Commission") issued Order R-10815 in Commission Case 11745, which established 640

acre spacing, modifying the existing rule for general application to "deep gas" wells drilled below the base of the Dakota formation within an area covering some 9,000 square miles within the San Juan Basin of New Mexico. **(Order R-10815).**

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

(10) Burlington and other operators in the San Juan Basin have commenced operations to drill "deep gas" wells within the San Juan Basin including a proposal to 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, 1997, the New Mexico Oil Conservation Division ("Division") held an adjudication hearing on the application of Burlington in Case 11809 seeking to pool the interests of the 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)**.

III.

ARGUMENTS AND AUTHORITIES

Plaintiffs are asking this 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 and that the record of that proceeding does not contain substantial evidence to support the Commission's decision. The Plaintiffs are wrong on both counts.

Plaintiffs claim that the Commission should reopen Case 11745 so they "can supplement the record which already negates an increase in size of the subject spacing unit".[6] Plaintiffs' claim makes no sense. They petition this Court to void Order R-10815, claiming the records lacks substantial evidence to support the Commission's decision, and yet they want to "supplement" the record which they claim is already deficient. This sounds like a waste of time until one recognizes what the Plaintiffs really want. Plaintiffs want the Court to require the Commission to reopen this case so they can ask the Commission to require Burlington to "produce all of the geological and geophysical data on which it bases its drilling locations".[7] What Plaintiffs really want is to get, free of cost, Burlington's confidential and proprietary geological and geophysical data so that the Plaintiffs can evaluate all of their "deep gas" properties in

---

[6] Plaintiffs' Application for Rehearing at page 9.

[7] See Plaintiffs Application for Rehearing before the Commission at page 9.

Section 9 and elsewhere in the San Juan Basin. The Oil Conservation Division has already denied Plaintiffs' attempt to do so.[8]

Plaintiffs are not asking to participate in a rule making case for all deep gas well spacing units in the San Juan Basin. They do not want to challenge this general rule for the San Juan Basin. They want to "negate an increase in size of **the subject spacing unit**".[9] (emphasis added) They admit that they are only interested in Section 9. The establishment of a specific proration unit and the pooling of the interests in that unit are the subject of a compulsory pooling case and not this rule making case. Thus, Plaintiffs are attempting to appeal a rule making case in order to adjudicate their interests in a compulsory pooling case and to determine rules for a pool which has not yet been created or "discovered." The establishment of general well spacing for the "deep gas" wells in the San Juan Basin is an example of rule making for which actual notice is not required. **Uhden v. Oil Conservation Commission,** 112 N.M. 528, 817 P.2d 721 (1991).

Burlington planned the proposed Scott Well No. 24 as a deep gas test, to be located in NW/4 of Section 9. The Plaintiffs are in a unique situation in Section 9. They have no interest in the NW/4 but do have a 86.3% interest in each of the remaining 160 tracts in Section 9.[10] Plaintiffs want Burlington to be forced to drill the Scott Well No. 24 and dedicate 160 acres (being the NW/4) to that well. Then, after the results of the well are known, Plaintiffs will claim either that all of Section 9 must now be dedicated

---

[8] See Division Order R-11809 Finding (11)

[9] See Conclusions in Plaintiff's Application for Rehearing at page 9.

[10] Section 9 consists of four 160-acre tracts being the NW/4, NE/4, SW/4 and SE/4

to the well because they are subject to drainage or, in the alternative, they will want to drill their own well in a portion of Section 9 in which they will have a 86.3% interest in order to drain gas from the Scott Well No. 24. Such an opportunity for gamesmanship is wasteful and would result in abuses which the Commission sought to prevent. **Order R-10815 Finding (9).**

POINT I: PLAINTIFFS WERE NOT ENTITLED TO ACTUAL NOTICE OF THE COMMISSION'S RULEMAKING MODIFYING DIVISION RULE 104

Plaintiffs' contention that they should have been provided actual notice of the proceeding in Commission Case 11745 is so completely wrong it is almost difficult to decide how to begin addressing it. 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. As demonstrated below, because the action at issue in this case was unquestionably a rulemaking, neither the Commission nor Burlington had any obligation to provide Plaintiffs with any notice under the federal and state constitutions.

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

The proceeding in which the Commission changed the Division Rule 104 well-spacing rule was without question a rulemaking. One need go no further than **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 stark 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.** 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. As the Commission provides in Order No. R-10815:

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

(Emphasis added.) Indeed, although purporting to deny the fact, Plaintiffs are forced to acknowledge that the proceeding below was a rulemaking. **See** Plaintiffs' Response Brief at 19 ("However, in its Order No. 10815, the Commission **changed** the long established

Rule 104 . . . .") (emphasis in original). Under the criteria set forth in **Uhden**, therefore, there is simply no question that the proceeding below was a rulemaking.

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

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

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

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

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

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

Further, the New Mexico Supreme Court itself has relied on **Bi-Metallic** in coming to precisely the same conclusion with regard 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 Supreme Court rejected the due process claims of a non-Indian affected by the resolution, 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**. at 688, 652 P.2d at 238 (emphasis added).

Because of this fundamental difference between rulemakings and adjudications, Plaintiffs' reliance on **Mullane v. Central Hanover Bank & Trust Co.**, 339 U. S. 306, 70 S. Ct. 652 (1950) is simply misguided. **Mullane** involved action that was clearly an adjudication and not a rulemaking. Indeed, the United States Supreme Court itself has subsequently made clear that "[t]he due process standards of **Mullane** apply to **an 'adjudication'** that is 'to be accorded finality.'" **Texaco, Inc. v. Short**, 454 U.S. 516, 535, 102 S. Ct. 781, 795 (1982) (emphasis added).

Consequently, notwithstanding Plaintiff's mistaken assurances that it is "a distinction without a difference," whether the Commission's action was a rulemaking makes all the difference in the world in this case. Because it is was a rulemaking and not

an adjudication, under both the Federal and State Constitutions Plaintiffs simply were not entitled to any constitutional due process protections, actual notice or otherwise, from either the Commission or from Burlington.

C. Plaintiffs Were Not Statutorily Entitled to Actual Notice.

In this case, the Commission's notices plainly complied with the applicable statutes. Plaintiffs' argument to the contrary come up short. As noted by the Commission, the statutes that do apply to this matter are the notice provisions of the Oil and Gas Act and the Open Meetings Act. Specifically Section 70-2-23 of the Oil and Gas Act provides that before any rule shall be made or changed, the Commission shall hold a hearing and "shall first give reasonable notice of such hearing..." Similarly, Section 10-15-1(D) of the Open Meetings Act provides that any meeting at which the adoption of a rule is discussed "shall be held only after reasonable notice to their public". Neither of these statutes provide for the actual notice insisted on by Plaintiffs; 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 clearly reasonable for this rulemaking. As the Supreme Court indicated in **Bi-Metallic**, it is simply unreasonable in a modern society to require that a governmental agency ensure

that every single person who could possibly be affected by a general rulemaking be notified personally before promulgating the rule. **See** 239 U.S. at 445, 36 S. Ct. at 142.

POINT II: ORDER R-10815 IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT ARBITRARY OR CAPRICIOUS

Decisions of the Commission are prima facie valid, **Grace v. Oil Conservation Commission**, 87 N.M. 205, 531 P.2d 939 (1975), and it is not a reviewing court's function to substitute its opinion for that of the Commission. **Public Service Company of New Mexico v. New Mexico Environmental Improvement Board**, 89 N.M. 223 (1976). Further, reviewing courts are to give special weight and credence to the experience, technical competence and specialized knowledge of the Commission. **Rutter & Wilbanks Corporation v. Oil Conservation Comm'n**, 87 NM 286, 532 P.2d 582 (1975). When reviewing an agency's action for substantial evidence, the evidence is to be viewed in a light most favorable to upholding the agency determination, and the agency decision is to be upheld if the evidence in the record demonstrates the reasonableness of the decision. **Santa Fe Exploration Company vs. Oil Conservation Commission**, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). Similarly, a court may only find that an agency has ruled arbitrarily or capriciously when the ruling is the result of an unconsidered choice of conduct, and **not** the result of the "winnowing and sifting" process. **Id.** at 115, 835 P.2d at 8311. Applying these standards of review to the present case, it is clear that the Commission's decision should be upheld.

The Commission made clear that it was concerned with the problem that the existing Rule 104 provided for 160-acre spacing units, and unless changed, would cause "the economic loss caused by the drilling of unnecessary wells" **Order R-10815 Finding (9)(j).** This is a real problem. In order to arrive at that decision, the Commission and Burlington sent notices to the operators in the San Juan Basin who would have the necessary experience, knowledge and information on that topic. At the hearing two arguments were advanced, one by Burlington to provide for 640-acre spacing units before any exploratory "deep gas" wells were drilled and produced; (**TR-p. 77**) and one advanced by Amoco to provide for temporarily 640-acre spacing for a limited area (approximately 9 sections) until a deep gas well was drilled and produced at which time the Division would determine appropriate well spacing size. (**TR-p. 104-106**).

Contrary to Appellant's statement, the "legal test" is in fact driven by economic factors. Section 70-2-17.B NMSA 1978 states:

> The division may establish a proration unit for each pool, such being the area that can be efficiently and **economically** drained and developed by one well, and in so doing the division **shall** consider the **economic loss** caused by the drilling of unnecessary wells,..." (emphasis added).

As far as the Commission could practically determine from the available evidence, the existing 160-acre spacing rule required the drilling of 4 wells in a section, each estimated to cost more than $ 2.3 million dollars, in order to explore for "deep gas" in a section. The Commission was persuaded that unless this rule was changed, exploration of the deep gas under this rule will cause the drilling of unnecessary wells. **Order R-10815 Finding (9)(j).** The Commission was persuaded there was no need to

spend an additional $7,500,000 in a section to explore for "deep gas" production until it was first determined that one well costing more than $2,300,000 is inadequate.

The Commission rejected Amoco's proposal and adopted Burlington's proposal because it decided that it would prevent waste and protect correlative rights to fix deep gas well spacing at 640-acres per well **before** any actual production was established and did so based upon the available data. **Order R-10815.**

Burlington's geologic expert, Mr. Mike Dawson, using a subsurface stratigraphic well log cross section map, testified that the geology of the deep formations in the San Juan Basin "are probably very similar" to those being produced in the Baker Creek-Barker Dome and Alkali Gulch areas where the Commission has adopted 640-acre well spacing. (TR-p. 25, 27) Burlington Exhibit 7) It was his expert opinion that those existing pools spacing on 640-acre well spacing were analogous to the "deep gas" formations in the San Juan Basin **(TR-p.28-29)**, because "In general, I'm finding the same rocks, correlatable units, similar lithologies...." "The remainder of the members seems to be fairly continuous right out into the San Juan Basin." **(TR-p.29)** When asked "Do you see sufficient continuity of the reservoir-quality reservoirs in the Pennsylvanian to give us a reasonable probability that you'll find that same reservoir at various points within the section?" **(TR-p.29)** Mr. Dawson said "yes, sir, even though our well control is extremely sparse, it's not that difficult to correlate key zones, key intervals, such as Barker Creek, right out into the Basin and around the Basin"

Burlington's expert petroleum engineer, Mr. Chip Lane, testified that in the Barker Dome-Paradox Gas Pool he had "examples of interference that we actually do see between wells at are on 640-acre spacing. So I feel comfortable and confident that we can and do draining 640-acres in some of these Pennsylvanian members." (TR-46, Burlington Exhibit 8). Mr. Lane had calculated drainage areas of 785 acres per well in the Barker Dome-Paradox Gas Pool and estimated such a well would produce 22 billion cubic feet of gas. **(TR-49-51).** Based upon those calculations, Mr. Lane estimated the "deep gas" in the Pennsylvanian formations of the San Juan Basin could be expected to also drain 640-acres. **(TR-p.51)** Mr. Lane also testified that based upon decline curve analysis, reservoir pressure data, volumetric calculations and the various reservoir parameters and characteristics of the Pennsylvanian formations, it was not economically feasible to explore for deep gas production in the San Juan Basin unless spacing was based on 640-acres per well. (TR-p. 47-65, Burlington Exhibit 10).

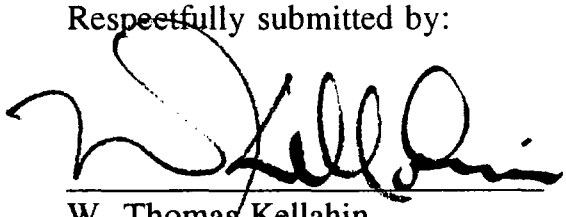
A petroleum engineer for Amoco also testified in support of 640-acre spacing for the "deep gas" in the San Juan Basin. **(TR-p.96)** but argued there was not enough data to fix well spacing for the entire San Juan Basin. **(TR-p.97).** Instead, she argued for temporary 640-acre spacing for specific limited areas with the final spacing size fixed **after** the well was drilled and producing. **(TR-p. 104, Amoco Exhibit 4)**. The Commission adopted Burlington's recommendation and denied Amoco's proposal. **Order R-10815 Findings (7)(8)(9).**

Apparently, Plaintiffs also want to advance the "Amoco argument" and expect the Commission to wait until a "deep gas" well has been produced for a sufficient period of time to confirm drainage of more than 160-acres, and until then, there will not be "substantial evidence" to support the change from 160-acre spacing to 640-acre spacing. It is hard to imagine that the Plaintiffs, who are not operators in New Mexico can add anything to the Commission's decision making process when Amoco, one of the largest operators in the San Juan Basin with significant knowledge, experience and numerous experts, failed to do so.

CONCLUSION

Denial of the Plaintiff's complaint is warranted in this case because the Plaintiffs have failed to demonstrate that they are entitled to actual notice in a rule making case. A review of the record before the Commission demonstrates that this Court can correctly conclude there is substantial evidence to support the Commission's order.

Respectfully submitted by:



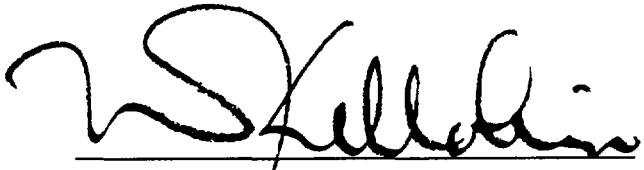
W. Thomas Kellahin
KELLAHIN & KELLAHIN
P.O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285
John Bemis, Esq.
P. O. Box 4289
Farmington, New Mexico 87499
(505) 599-4054
ATTORNEYS FOR BURLINGTON RESOURCES OIL & GAS COMPANY

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Burlington's Statement of Appellate Issues was hand delivered this 27 day of October, 1997 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

431884

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

APPELLANTS' STATEMENT OF APPELLATE ISSUES

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

I.
STATEMENT OF APPELLATE ISSUES

1. Does Burlington's failure to give the Appellants actual notice of its application and/or of the Commission proceedings in Commission Case No. 11745 amount to a violation of the Appellants' right to procedural due process as guaranteed by Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution?

2. Is Commission Order No. R-10815 arbitrary, capricious and constitute an abuse of discretion in that the change in Division Rule 104 is not supported by substantial evidence?

II.
SUMMARY OF THE PROCEEDINGS

A. Nature of the Case

1. This case involves the review of a spacing order for San Juan Basin deep gas well spacing issued by the Commission, being Commission Order No. R-10815 Record pp. 48-55. Appellants assert that the Order was entered in violation of statutory and constitutional (due process) notice requirements, and thus is void as to the Appellants. In addition, Appellants assert 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.

B. Summary of Facts and Course of Proceedings

2. Each of the Appellants are the holders of working interests 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 480 acres in Section 9. Appellants are the owners of over 80% of the working interest in the deep Pennsylvanian formation in the east half and southwest quarter of said Section 9. See Record pp. 277-282 for a list of Appellants.

3. Appellee Burlington Resources Oil and Gas Company ("Burlington") is a cotenant working interest owner along with the Appellants 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 under United States Oil and Gas Lease SF 078389 and SF 078389-A.

4. 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. On February 27, 1997 Burlington filed its application in Commission Case 11745 seeking to amend Division Rules 104.B(2)(a) and 104.C(3)(a) and to adopt New Rules 104.B(2)(b) and 104.C(3)(b) for the establishment of 640-acre spacing, including well location requirements, for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico. See Burlington's Application in Commission Case 11745, Record pp. 2-6.

7. Burlington provided notice by certified mail to several hundred parties of its Application in Commission Case 11745. See Record at pp. 163-217. However, it is undisputed that: (1) Burlington did not send personal notice to the Appellants of its Application in Commission Case 11745; and (2) Burlington knew the Appellants' names and addresses and has in place a computerized mail-merge capability to send mail to the Appellants.

8. On March 19, 1997, the Commission held a public hearing concerning Burlington's application. At this hearing, representatives from Burlington informed the Commission that they had notified almost 200 operators in the San Juan Basin and sent additional notices "at random" to affected working interest owners. See Hearing Transcript at p. 10, Record at p. 38.

9. On June 5, 1997, the Commission entered its Order No. R-10815 finding, inter alia, that Division Rule 104 should be modified on a permanent basis to provide for 640-acre gas spacing units for deep gas formations in the San Juan Basin. Record pp. 258-265.

10. On June 11, 1997, six days after the Commission issued Order No. 10815, Burlington filed its application with the Oil Conservation Division seeking compulsory pooling of the Appellants' working interest in Section 9 for its proposed Scott Well No. 24. On September 12, 1997, the Division entered its Order No. 11808 compulsory pooling the plaintiffs' working interest in Section 9 for Burlington's Scott Well.

12. On June 24, 1997, the Appellants timely filed their Application for Rehearing of Commission Order No-10815 with the Commission pursuant to NMSA 1978 §70-2-25 (A) 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. See Record pp. 266-294. Burlington filed a brief in opposition to Appellants' Application for Rehearing on July 1, 1997. Record pp. 297-307. Appellants' filed their Reply Brief to Burlington's Opposition Brief on July 2, 1997. Record pp. 308-327. Pursuant to NMSA 1978 §70-2-25 (A), the Appellants' Application for Rehearing was considered denied on July 4, 1997 when the Commission failed to act on the Appellants' Application within 10 days.

13. Appellants filed a timely appeal of this matter pursuant to NMSA 1978 §70-2-25 (B) by filing their Verified Petition for Review of NMOCC Administrative Order No. R-10815 with this Court on July 18, 1997.

14. On September 15, 1997, this Court denied motions to dismiss filed by Appellees and a motion to strike filed by Burlington, and granted Appellants' Motion to Stay the effect of Commission Rule No-10815 as to the Appellants pending appeal.

III.
ARGUMENT AND AUTHORITIES

POINT ONE: THE PLAINTIFFS WERE ENTITLED TO ACTUAL NOTICE OF COMMISSION CASE 11745 PURSUANT TO CONTROLLING NEW MEXICO STATUTES AND DIVISION RULES

Burlington cannot cite to one New Mexico statute, Division or Commission Rule, nor New Mexico case that sanctions its use of "random notice" to inform interested working interest owners, such as the Appellants, of its application before the Commission in Case 11745.

Pursuant to NMSA 1878 Section 70-2-23 of the New Mexico Oil and Gas Act, entitled "Hearings on Rules, Regulations and Orders; Notice; Emergency Rules":

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

NMSA 1878 Section 70-2-23 (emphasis added.) Burlington's use of "random notice" falls far short of the "reasonable notice" requirement of Section 70-2-23 which mandates that "any person having an interest in the subject matter shall be entitled to be heard."

Division Rule 1207 mandates procedures in specific Division and/or Commission proceedings, none of which exactly fits a requested modification of well spacing requirements in Case 11745. Division Rule 1207(11), however, the applicable "catch-all" provision, provides as follows:

> (11) In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities:
>
> (a) Actual notice shall be given to such individuals or entities by certified

mail (return receipt requested).

There can be no doubt that the Appellants" property interests have been directly and immediately affected by Case No. 11745 and the resulting Order No. R-10815. Further, there can be no doubt that Burlington was well aware of the immediate adverse impact Order No. 10815 would have on the Appellants before it filed its application in Case 11745. A mere **six days** after the Commission issued Order No. R-10815, Burlington filed its Application in Division Case No. 11808 requesting an order from the OCD compulsorily pooling the Appellants' majority working interests in Section 9 for Burlington's proposed $2,316,973 Scott Well No. 24 Deep Pennsylvanian test well. A cynic might conclude that Burlington intentionally and systematically failed to provide actual notice to the Appellants' in order to keep them from opposing Burlington's Application. Regardless, Burlington's "random notice" is severely deficient and violative of the reasonable notice requirements of NMSA 1878 Section 70-2-23 and the actual notice requirements of Division Rule 1207(11).

POINT TWO: THE UHDEN CASE MANDATES THAT THE PLAINTIFFS SHOULD HAVE RECEIVED ACTUAL NOTICE OF COMMISSION CASE 11745

The on-point holding of the New Mexico Supreme Court in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) squarely addresses the issue of what notice an interested party to a spacing rule change should be given in order to afford them the due process protection guaranteed by Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution. In essence, the basic Constitutional standards for adequacy of notice concerning changes to a Division spacing rule change was set out in Uhden as follows:

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct.

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

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

A significant factor upon which the Supreme Court focused in reaching its holding Uhden that Mrs. Uhden's due process rights were violated was the fact that Amoco knew Mrs. Uhden's name and address, yet failed to provide her with actual notice of its application to the NMOCD for a spacing rule change. As the New Mexico Supreme Court held:

> In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, **we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.** Thus, the Commission Order Nos. R-7588 and No. R-7588-A are hereby **void** as to Uhden.

Uhden, supra 112 N.M. at 531 (emphasis added). See also 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)(on an application for an increase in well spacing to the state

commission, court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements. Id. at 644.); Union Texas Petroleum v. Corporation Commission, 651 P.2d 652 (Okla. 1981), cert. denied, 459 U.S. 837, 103 S. Ct. 82, 74 L. Ed. 2d 78 (1982), and Louthan v. Amoco Production Co., 652 P.2d 308 (Okla. Ct. App. 1982), all as cited with approval in Uhden supra 112 N.M. at 530.

The instant facts are indistinguishable from those before the Supreme Court in Uhden. It is beyond doubt that Burlington knew the names and addresses of each and every one of the Appellants prior to filing its application in Case 11745. Further, it is beyond doubt that Burlington knew that as soon as it obtained the Commission's Order changing the spacing rules, it would immediately begin proceedings to compulsory pool the Appellants' leasehold acreage.

In its briefing before the Commission Burlington predictably went to great lengths to distinguish its responsibilities in the instant case from those of the operator in Uhden. Burlington's effort in this regard was to frame Commission Case 11745 as basin-wide "rulemaking", which Burlington rationalizes somehow reduces its obligation to provide notice to affected parties to mere "random notice". See Burlington's Opposition Brief to Appellants' Application for Rehearing at p. 4, Record at p. 301.

The general, broad scope of Burlington's application in Case 11745, and the resulting Order No. 10815, cannot be viewed in a vacuum. The fact is, this spacing case was really about compulsory pooling the interests of a narrow and defined set of working interest owners, to include the Appellants. The increase in spacing to 640 acres was a necessary condition precedent to Burlington initiating compulsory pooling proceedings

against the Appellants' acreage. But for the increase in the spacing rule, Burlington never could have sought to force pool the Appellants' acreage for its Scott Well on 640-acre spacing.

Regardless, Burlington's strained rulemaking vs. adjudication arguments amount to a distinction without a difference and should be disregarded. As noted in Uhden supra, the Supreme Court in Mullane supra held 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." See Uhden, supra 112 N.M. at 530)(citing Mullane supra 339 U.S. at 314, 70 S. Ct. at 657) (emphasis added.) Under the unequivocal holding of the New Mexico Supreme Court in Uhden, the Appellants were deprived of their property without due process of law, in contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution. Commission Order No. 10815 is **void** as to the Appellants.

POINT THREE: THE COMMISSION'S ORDER R-10815 IS ARBITRARY, CAPRICIOUS AND CONSTITUTES AN ABUSE OF DISCRETION IN THAT THE CHANGE IN DIVISION RULE 104 IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A spacing unit by law is defined as the "area that can be efficiently and economically drained and developed by one well . . ." NMSA 1978 Section 70-2-17(B).

Since December 1, 1950, Division Rule 104 has provided for 160 acre deep wildcat gas well spacing for San Juan, Rio Arriba and Sandoval Counties, New Mexico. A spacing rule, such as Division Rule 104, can be modified only upon substantial evidence showing a change of conditions, or change in knowledge of conditions, arising since the prior

spacing rule was instituted. Phillips Petroleum Co. v. Corporation Commission, 461 P.2d 597, 599 (Okla. 1969) Thus, in the instant case, the Commission's factual findings supporting a change of this long-established spacing rule should have been based upon and supported by substantial evidence, e.g. sound technical, geologic, geophysical, reservoir engineering and economic data relevant to the San Juan Basin indicating that a deep gas well effeciently and economically drains 640 acres, not 160 acres or some other area.

Substantial evidence is **relevant** evidence that a reasonable mind would accept as sufficient to support a conclusion. Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819 (1992). The "evidence" presented by Burlington and relied upon by the Commission in its findings of fact amounted to irrelevant geological and engineering data from fields not even located within the San Juan Basin[1], and testimony concerning Burlington's desire to spread the operating and economic risk of its Pennsylvanian test wells out to other working interest owners. See Appellants' Application for Rehearing at ¶¶ 13-15, Record at pp 272-274. The Commission completely failed to take into account testimony submitted by Amoco, which was directly relevant to the technical geological and economic aspects of developing San Juan Basin deep formations, and which directly contradicted the evidence put on by Burlington. See Id. at ¶ 14, Record at p. 273-274.

Had it supported its application, Burlington could and would have presented

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

technical information concerning deep San Juan Basin deep formations that would have been directly relevant to the Commission's inquiry in Case 11745, e.g. proper spacing for deep wildcat gas wells.[2] However, despite the direct relevance, Burlington failed to provide any of its technical data and/or information relevant to its technical studies of the San Juan Basin deep formations. Rather, Burlington's counsel represented to the Commission that:

> The science is that they are developing 3-D seismic information, trying to identify where in the Basin that they will target for development. That's a process that's just ongoing. We don't have recommendations to you on specific locations, we're not that far along. Transcript at p. 9, Record at p. 37.

That statement was misleading to the Commissioners and patently untrue. Indeed, on February 21, 1997, nearly a month prior to the Commission's hearing of Case 11745, Burlington had filed its Notice of Staking and Application for Permit to Drill for its Marcotte Well No. 2 with the Bureau of Land Management indicating the exact location for this well.

The logical inference as to why Burlington did not reveal their 3-D seismic data to make their case before the Commission is simply that the data will not support 640 acre spacing. Amoco Production Company's engineer, Ms. Pamela Staley testified before the Commission that Amoco's 3-D seismic information covering Burlington's "analogy fields" indicated blanket type accumulations, which are significantly geologically different from the defined, discrete "algal mound" structures in the deep San Juan Basin formations. The algal mounds, or so-called "pinnacles", visible on 3-D seismic "show to be on much smaller spacing" and that deep San Juan Gas wells could be economically developed on

[2] Burlington's "Deep Penn" Team, along with a cohort team from its joint venture partner, Conoco, has been actively studying the prospect of a Deep Pennsylvanian play in the San Juan Basin for at least two and one-half years. Transcript at p. 13, Record at p. 41.

160-acre spacing. Hearing Transcript at p. 102, Record at p. 129. Indeed, Ms. Staley testified that based on their limited 3-D seismic data of the San Juan Basin, Amoco would be willing to drill a Deep Pennsylvanian well on 160 acres. See Hearing Transcript at p. 114, Record at p. 141.

Burlington's true motivation in seeking 640 acre spacing was driven by economic factors, not science. That is not the legal test under Section 70-2-17(B) supra. As described above, Burlington wants permanent Basin-wide 640 acre spacing so that working interest owners in adjoining tracts, such as the Appellants in Section 9, Township 31 North, Range 10 West, will be forced through compulsory pooling to bear the risks, and costs of Burlington's Deep Pennsylvanian exploration program. As Mr. James R. J. Strickler, Senior Staff Landman for Burlington, testified: "And so that's why we're here, is to seek permanent 640-acre spacing, to spread the risk." See Hearing Transcript at p. 76, Record at p. 103. Indeed, as Amoco's counsel astutely noted at the hearing, "if the only objective was to spread risk for development of oil and gas, in fact, you could develop everything in New Mexico on 640-acre spacing. . ." Hearing Transcript at p. 107, Record at p. 134.

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

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

IV. RELIEF SOUGHT

For the foregoing reasons,

A. Appellants seek a ruling that Commission Order No. R-10815 is void as to the Appellants for failure to provide notice;

B. Appellants seek a ruling that Commission Order No. R-10815 is void as to all parties as being unsupported by substantial evidence; and an arbitrary, capricious, and an abuse of discretion by the Commission;

C. Cost of suit and such further relief as this Court deems just and proper.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Appellants' Statement of Appellate Issues to be served on this second day of October, 1997 to the following counsel of record:

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

VIA HAND DELIVERY
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

Jason E. Doughty

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

OCT 2· 2 65 PM '97

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.	)	

ORDER DENYING MOTIONS TO DISMISS AND TO STRIKE AND STAYING COMMISSION ORDER 4-10815 AS TO PLAINTIFFS

THIS MATTER came before the Court on September 15, 1997 for hearing on all pending motions with the plaintiffs appearing by their attorney, J.E. Gallegos, the defendant New Mexico Oil Conservation Commission ("Commission") by its attorney Marilyn S. Hebert and defendant 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.

1. Plaintiffs have correctly followed the provisions of Section 70-7-25B. NMSA 1978 in bringing this case from the executive branch of government to the Courts for judicial review. Once the case is within the jurisdiction of the Court, NMRA 1997 Rule 1-074 provides meritorious procedures for the disposition of the appeal.

Under the circumstances there is little, if any, difference between what the Court has been provided by plaintiffs through its Verified Petition for Review and what would be filed as a Notice of Appeal. Should there be anything further to be provided the Court under the Rule 1-074 procedures, the plaintiffs shall make such filing. Accordingly, the defendants' motions to dismiss and Burlington's motion to strike are denied.

2. The decision in Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 817 P.2d 721 (1991) is controlling regarding plaintiffs' motion to stay Commission Order R-10815 pending appeal. Knowing of its plan to pool the interests of the plaintiffs for a wildcat well on 640-acre spacing and knowing the identities and whereabouts of the plaintiffs, Burlington's failure to provide notice to them of the spacing case proceeding underlying Order R-10815 was a denial of due process under the United States and New Mexico constitution. That spacing change case was not an exercise of general rule making by the Commission but rather resulted from an application by Burlington seeking a particular decision and order of the Commission and Burlington had the burden to notify the plaintiffs of its application as parties whose property could be affected. The plaintiffs' motion to stay is granted.

3. This Order staying Commission Order R-10815 applies only to the plaintiffs in this proceeding and is granted without requirement of bond. The Court expedites hearing of the appeal in this matter setting trial on October 7, 1997. The stay of Commission Order R-10815 shall remain in effect through that date, until further order of the Court.

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

APPROVED:

Telephonically approved on September 22, 1997

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

Attorney for New Mexico Oil Conservation Commission

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

Attorney for Burlington Resources Oil and Gas Company

COPIES MAILED TO: Gallegos Hebert Kellahin
DATE: 10-2-97

October 2, 1997
Litigation Update

New Information Boldfaced

Johnson et al. v. Burlington Resources Oil & Gas Co., No. CV 97-572-3, Eleventh Judicial District, County of San Juan —

Lyn appeared at a September 15 hearing on the Commission's Motion to Dismiss and Burlington's Motion to Strike. Both motions were denied. The Judge requested briefs and set October 7 in Aztec for oral argument.

10/2 unscheduled conference call initiated by judge Caton. judge vacated Oct. 7 hearing. Instructed parties to comply w/ Rule 74. Plaintiffs filed Statement of Appellate Issues Oct. 2. Our Statement is due Oct. 31 (really Nov 1, but that's a Sat.) Then judge will set briefing schedule & oral argument

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

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

vs. No. CV 97-572-3

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

RECORD ON APPEAL
Title Page

The following are the attorneys of record in this case:

W. Thomas Kellahin
Post Office Box 2265
Santa Fe, NM 87504
(505) 982-4285

Attorney for Burlington Resources
Oil & Gas Company

G.E. Gallegos
460 St. Michael's Drive
Building 300
Santa Fe, NM 87505
(505) 983-6686
Attorney for Timothy B. Johnson,
Trustee for Ralph A. Bard, Jr. et al.

Respectfully submitted,

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

(505) 827-1364

Certificate of Service

I, Marilyn S. Hebert, hereby certify that a copy of the above-titled pleading was mailed to all counsel of record on the 23rd day of September, 1997.

Marilyn S. Hebert

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

FILED
DISTRICT COURT
SAN JUAN COUNTY,
NM
SEP 9 3 39 PM '97

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

Plaintiffs,

vs

CV-97-572-3

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

ORDER VACATING SETTING

This matter coming before the Court upon the motion of Burlington Resources Oil & Gas Company to reschedule the motion hearing currently scheduled for 11:00 am, Thursday, September 11, 1997 and good cause appearing,

IT IS ORDERED THAT the hearing scheduled for September 11, 1997 at 11:00 am for all pending motions is hereby [redacted] moved to September 15, 1997, at 10:30 A.M.

Byron Caton, District Judge

Respectfully submitted by:

By: _____
W. Thomas Kellahin, Esq.
counsel for Burlington

COPIES MAILED
TO COUNSEL
OF RECORD
9/9/97

Burlington Resources
Hefner
Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

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

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

Defendants.

PLAINTIFF'S REPLY BRIEF TO THE RESPONSE OF BURLINGTON RESOURCES OIL AND GAS COMPANY TO PLAINTIFFS' MOTION TO STAY

Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter "plaintiffs"), by and through their undersigned counsel, hereby submit their Plaintiffs' Reply Brief to the Response of Burlington Resources Oil & Gas Company to Plaintiffs' Motion to Stay.

I.

PRELIMINARY STATEMENT

In Plaintiffs' Motion to Stay New Mexico Oil Conservation Commission Order No. R-10815 Pending Appeal and Motion for Expedited Hearing, and in its supporting brief, plaintiffs abundantly established why a stay of Order No. R-10815 "as to the plaintiffs pending review thereof. . .", id., at p. 4, is appropriate and demanded by the inequities of Burlington's actions. Plaintiffs have established, by competent proof,[1]

[1] See, e.g., the facts of the Verified Petition for Review of New Mexico Oil Conservation Commission Administrative Order, No. R-10815.

each requisite to this Court's staying the effect of Order No. R-10815 pending the resolution of plaintiffs' appeal on the merits. Plaintiffs have shown that, e.g., the balance of the equities tips heavily in plaintiffs' favor, that they have neither delayed bringing suit nor been guilty of any misconduct, and that they likely will succeed on the merits. (See Plaintiffs' Memorandum Brief in Support of Their Motion to Stay New Mexico Oil Conservation Commission Order No. R-10815 Pending Appeal and for Expedited Hearing, at pp. 6-15.)

Burlington's Response[2] says nothing about plaintiffs' request that this Court expedite the hearing on plaintiffs' appeal. Plaintiffs respectfully submit that the lack of any opposition should be taken as Burlington's assent, and that this Court should thus expedite the hearing on plaintiffs' appeal.

As to plaintiffs' requested stay, Burlington takes principal exception with the scope of plaintiffs' loss if Order No. R-10815 remains extant as to plaintiffs. Burlington asserts that plaintiffs "will not suffer irreparable harm." (See Burlington's Response, at p. 2.) Except for a wandering and ineffectual stab at the question of whether plaintiffs are likely to succeed on the merits of the appeal,[3] Burlington confines itself to hypothesizing why plaintiffs' injury is "not irreparable."[4]

Burlington shows no legitimate reason why the effect of Order No. R-10815 should not be stayed as to plaintiffs' interests during this appeal. Significantly,

---

[2] The full title of this pleading is the Response of Burlington Resources Oil & Gas Company to Plaintiffs' Motion to Stay, which will be cited as "Burlington's Response."

[3] See generally Burlington Resources Oil & Gas Company's Memorandum Brief in Support of its Motion to Dismiss and Motion to Strike and its Response to Plaintiffs' Motion to Stay ("Burlington's Brief"), at p. 15.

[4] It is problematic whether "irreparable injury" is part of the standard applicable to plaintiffs' request for a stay. Wilcox v. Timberon Protective Ass'n, 111 N.M. 478, 485-486 (Ct. App. 1990) does not list "irreparable injury" among its equitable factors.

staying the Order expanding the spacing will not impede Burlington from drilling the Scott 24 well on 160 acres, just as every operator has done on wildcat wells in the San Juan Basin for fifty years. To the extent that Burlington reaches for some "facts" to support its theories, they are either frankly unsupported or rest on the Affidavit of James R. J. Strickler ("Strickler Affidavit") which is inadmissible, speculative, and lacking in foundation.

Accordingly, this Court should grant plaintiffs' motion, and enjoin the application of New Mexico Oil Conservation Commission Order No. R-10815 pending the resolution of the merits of plaintiffs' appeal.

II.

ARGUMENT AND AUTHORITIES

POINT ONE

THE STRICKLER AFFIDAVIT CONTAINS INADMISSIBLE EVIDENCE AND SHOULD BE DISREGARDED

It is a basic proposition that the testimony of a witness, to be competent and admissible, must be based upon first-hand knowledge. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." SCRA 1986, 11-602; see also State v. Martinez, 104 N.M. 584, 587, 725 P.2d 263, 266 (Ct. App.), cert. denied, 104 N.M. 460, 722 P.2d 1182 (1986.) Therefore, a witness may not express his views on another's subjective intent or thoughts. See Energy Oils, Inc. v. Montana Power Co., 626 F.2d 731, 737 (9th Cir. 1980) (trial court erred "by permitting a witness to express the subjective intent of the parties" to a contract.)

A witness may offer an opinion, as a lay or expert[5] witness, only under narrow circumstances. A lay witness's chance to offer any opinion is limited to those that are both "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." SCRA 1986, 11-701. Absent a sufficient basis on which to form an opinion, the opinion testimony must be excluded. State v. Luna, 93 N.M. 773, 780, 606 P.2d 183, 190 (1980.) Personal knowledge is, as with the testimony of any witness other than an expert, still a fundamental requirement for admission of lay opinion testimony. Estrada v. Cauron, 93 N.M. 283, 285, 599 P.2d 1080, 1082 (Ct. App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979.) The Rule's "rationally based" requirement dictates that the opinion be one that a normal person might form from observation of the facts. State v. Luna, 92 N.M. 680, 684-685, 594 P.2d 340, 344-345 (Ct. App. 1979.)

The Strickler Affidavit violates these rules. Mr. Strickler, without stating his asserted qualifications as a legal authority, contends that Order R-10815 was issued "in accordance with [the Commission's] statutory authority set forth in Section 70-2-11. . . ". (Strickler Affidavit, ¶ C(1).) Such efforts to add unnecessary gloss to the few "facts" the affiant recounts are clearly improper; Mr. Strickler is neither qualified to so opine nor is the testimony admissible. Cf. Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969) (expert testimony regarding legal significance of documents is inadmissible.)[6]

---

[5] An expert's opinion is admissible only "[i]f scientific, technical or other specialized knowledge will assist the trier of fact . . ." and if the witness is "qualified as an expert by knowledge, skill, experience, training or education . . .". SCRA 1986, 11-702. The Strickler Affidavit makes no effort to qualify Mr. Strickler as a putative expert.

[6] Mr. Strickler also discusses the mailing of AFEs, some alleged "notice" of Burlington's efforts to establish 640-acres spacing within Section 9, and Burlington's efforts to purchase plaintiffs' interests. (Strickler Affidavit, ¶¶ 5-9.) Plainly, the best evidence of these documents described in the affidavit would be the documents themselves.

However, these failings pale when compared to the affiant's "opinion" testimony. With no factual foundation, qualification of the witness, or pretense of being anything other than an exercise in crystal ball gazing, the affiant launches into "my opinion[s]." (See Strickler Affidavit, at pp. 3-4.) Each and every one of these purported opinions are without foundation,[7] pure speculation, or concern the legal effect[8] of documents, statutes or Commission Orders. Each "opinion" is inadmissible, and is therefore entitled to no weight in the Court's consideration of plaintiffs' motion to stay.

Two of Mr. Strickler's "opinions" are nevertheless noteworthy. His allegation that "Burlington has provided these parties with a more than adequate period in which to make their own analysis . . ." (see ¶ D(1), at p. 3) betrays Burlington's motives in pushing through its application for changed deep gas spacing. Burlington was plainly tired of keeping up the facade of fairly dealing with plaintiffs and decided that confiscation, in lieu of acquisition, was the preferred route. Likewise, the punitive and inequitable aspect of Burlington's conduct shines through ¶ D(2) -- plaintiffs "are upset that they are having to defend a pooling case involving but a single section . . . . " Setting aside the improper speculation about plaintiffs' subjective feelings, the plain

---

Mr. Strickler also fails to provide any facts as foundation for various sweeping assertions, or to explain how he allegedly has "knowledge" of such matters. (See, e.g., ¶ C(2) -- "Burlington and other operators . . . have commenced operations. . . ".) Nothing is presented that would suggest that Mr. Strickler knows of other operators' plans and/or operations. Nor does Mr. Strickler even identify who are these other operators.

[7] For example nothing in part D(4) of the affidavit reveals the source of such "information," how the affiant learned of it, or how he assertedly has personal knowledge of these allegations masquerading (unsuccessfully) as "facts."

[8] The allegations about plaintiffs' asserted lack of irreparable harm each involve the legal ramifications of statutes, contracts and Commission Orders. The affiant cannot testify about such matters. See Loeb, supra; see also Safeco Ins. Co. v. Ellinghouse, 725 P.2d 217, 224 (Mont. 1986.)

implication is that there will be more pooling cases, bit-by-bit, until plaintiffs are driven away.

POINT TWO

BURLINGTON PRESENTS NO BASIS FOR NOT STAYING ORDER NO. R-10815 AS TO PLAINTIFFS

Burlington's effort to toss out some legal authorities to dissuade the Court from granting the stay is a bust. None are controlling; all are distinguishable.[9] Burlington does not even try to explain how any of its thoughts might be germane to the grant or denial of the requested relief.

A. ORDER NO. R-10815 DOES NOT HAVE THE PRESUMPTION OF ACCURACY THAT BURLINGTON ATTRIBUTES TO IT

Burlington asserts that a reviewing court gives "special weight and credence to the experience, technical competence and specialized knowledge of the Commission." (Burlington's Brief, at p. 15; citing Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1985).) What the court was addressing in Rutter & Wilbanks was, however, factual determinations -- i.e., "substantial evidence" -- of any agency. On that point, the value of Rutter & Wilbanks has been undercut by the New Mexico Supreme Court's adoption of "whole record review," see Duke City Lumber Co. v. New Mexico Environmental Improvement Board, 101 N.M. 291, 681 P.2d 717, 720 (1984), in lieu of affording much deference to the

[9] At least one is question-begging. Burlington asserts that "[t]he Commission's Orders are prima facie valid," citing Grace v. Oil Conservation Commission, 87 N.M. 205, 531 P.2d 939 (1975). (See Burlington's Brief, at p. 15.) Plaintiffs cannot find where Grace says any such thing. Moreover, whether or not the order is really valid as to plaintiffs will be decided on this appeal. In truth, an order issued without notice is void. See Boyce v. Corporation Commission of Oklahoma, 744 P.2d 985, 988 (Okla. 1987) (order entered upon application of applicant that failed to give actual notice to affected mineral owner was void as to that owner.)

factual findings. Compare Rutter & Wilbanks, 532 P.2d at 586 (old standard was merely whether "administrative body could reasonably make the findings.")

Furthermore, no such deference applies when an agency fails to consider the pertinent facts, or fails to bring its alleged expertise to bear on the problem. Cf. Morningstar Water Users Ass'n v. New Mexico Public Utilities Commission, 920 N.M. 579, 583, 904 P.2d, 28, 32 (1995) (some deference called for when agency decides issues of fact that "concern matters in which the agency has specialized expertise.") And little or no deference is justified when the issue for review is one of law. Id. (courts are not bound by agency's interpretation of law); Cabral v. Caspar Building Systems, Inc., 920 P.2d 268, 269-270 (Wyo. 1996.) Courts are much more qualified to determine legal points than are any administrative agency. Morningstar, 904 P.2d at 32 ("it is the function of the courts to interpret the law.")

That is where Burlington's theory collapses. The Verified Petition challenges the rank lack of notice to plaintiffs. Whether an agency violated someone's constitutional due process rights is a legal issue for which the court "will not defer to the Commission's expertise." Kennecott Corporation v. Industrial Commission of Utah, 740 P.2d 305, 307 (Ut. Ct. App. 1987.) Likewise, the issue of the adequacy of notice is a legal issue calling for no deference to the agency. Traylor Brothers, Inc. v. Overton, 736 P.2d 1048, 1050 (Ut. Ct. App. 1987.) Contrary to Burlington's argument, the principal issue herein -- notice and due process -- is one for which this Court should show absolutely no deference to the agency.

Burlington also offers some thoughts on staying orders because of their 'invalidity.' (Burlington's Brief, p. 15.) Burlington's omnibus citation to five sections of Am.Jur.2d covers portions of Am.Jur.2d that deal with the issue of enjoining an "invalid"

statute. See, e.g., 42 Am.Jur.2d Injunctions, § 187, p. 957. It is not surprising that the mere alleged invalidity of a statute is, by itself, not adequate to enjoin the prospective operation of a statute. The statute might never even be applied against the complaining party, and courts are not in the business of rendering advisory opinions on the validity of a statute. Only after there is a conviction is the issue of the invalidity of the statute ripe for review. See Tobe v. City of Santa Ana, 40 Cal. Rptr.2d 402, 892 P.2d 1145, 1153 (Cal. 1995.) When the statute (or Order) is applied to the complainant there are no longer the problems associated with determining, in the abstract, the alleged invalidity of the statute or order as addressed by the Am.Jur. paragraphs.

Here, the attack is not merely on the invalidity of the Order, in the abstract. It is an attack on the application of the Order to plaintiffs. Thus, Burlington's concerns and authorities are inapposite.

B. BURLINGTON HAS NOT SHOWN HOW IT WILL SUFFER HARM SHOULD PLAINTIFFS' MOTION FOR STAY BE GRANTED

Pretending to be privy to all plans of all operators and ignoring fifty years of history under the 160 acre rule, but without offering any support for its claims, Burlington baldly alleges that

> "a stay will preclude Burlington and other operators in the entire San Juan Basin from continuing with operations already commenced to drill deep gas wells in the San Juan Basin on Sections other than Section 9 in which Plaintiffs have an interest."
>
> * * *
>
> "[t]he granting of a stay of this Commission order will immediately halt all 'deep gas' drilling in the San Juan Basin and result in the loss of millions of dollars."

(See Burlington's Brief, at p. 16; emphasis in original.) As was made clear in plaintiffs' motion for stay, plaintiffs' requested stay of Commission Order No. R-10815 would be applicable **only** as to plaintiffs' interests in Section 9, Township 31 North, Range 10 West ("Section 9"). Plaintiffs have no interest in the northwest quarter of Section 9 that is 160 acres controlled by Burlington on which the Scott 24 is permitted to be drilled. Plaintiffs are thus at a complete loss to understand, and Burlington does not bother to explain, how this requested narrow stay might "immediately halt all 'deep gas' drilling in the entire San Juan Basin and result in the loss of millions of dollars." No such far-reaching effects are threatened here. A stay will not prevent Burlington or other operators from going forward with their plans to drill and simply drilling on 160 spacing units instead of 640 acres. Indeed, drilling will be expedited because much less likelihood for communitization of acreage (either by agreement or force of statute) arises when the drilling acreage is smaller.

An engineer for Amoco Production Company testified that, based upon Amoco's three-dimensional seismic information of the San Juan Basin, they were prepared to drill an expensive and risky Deep Pennsylvanian test well on 160 acres spacing:

> Examination of Ms. Pamela Staley, Petroleum Engineer for Amoco Production Company by Mr. Kellahin, attorney for Burlington:
>
> Q. Do you have the funds available to participate in a well drilled by Burlington on 640 acres?
>
> A. For the appropriate well and the appropriate project, yes, I think we could make funds available.
>
> Q. You wouldn't propose to do this on 160 acres, would you?
>
> A. Yes.

Q. On 160 acres? You're prepared to commit funds on 160 acres to have the initial well drilled?

A. I think that's why we're here today.

(See Hearing Transcript of Commission Case 11745, attached as Exhibit "C" to Plaintiffs' Petition for Review, at p. 114.) Ms. Staley further testified that in her opinion wells could be "very profitably" developed on 160 acre spacing. Id at p. 102.

Burlington's assertion that it will not commence drilling the Scott Well in Section 9 until the Division decides Case No. 11808 is not credible. (See Burlington's Brief, at pp. 15-16.) Burlington has already obtained a permit to drill the well. See Exhibit "A" attached. Burlington can drill that well whenever it wants. It has brought in from Ozona, Texas a huge drilling rig at significant cost to drill a deep test in adjoining Section 8. That Burlington will not immediately move the rig to Section 9 to start the Scott 24 test is beyond belief. Thus, Burlington can make one statement to this Court to hopefully defeat plaintiffs' motion, but then can change its plans. One need only look to Burlington's activities regarding the Marcotte Well No. 2 in the adjacent Section 8, Township 31 North, Range 10 West ("Section 8") to belie Burlington's assertions. See June 3, 1997 news article in the Farmington paper attached as Exhibit "B."

Burlington filed its application for compulsory pooling of certain working and mineral interest owners in Section 8 (Division Case 11809) for its Marcotte No. 2 Well on June 11, 1997, one day prior to filing its application for compulsory pooling in Division Case 11808, which involved plaintiffs' interests in Section 9. The Division hearing of both cases, consolidated for taking evidence, was held on July 10-11, 1997. However, without bothering to obtain the requested compulsory pooling order from the Division -- indeed, even prior to the Division compulsory pooling hearing -- Burlington

had plunged forward with the drilling of its expensive and risky Marcotte No. 2 well on June 25, 1997. Burlington will do what it wants, when it wants, and will not be deterred by any stay.[10]

Despite Burlington's claims to the contrary, as with its Marcotte well, Burlington is going to drill the Scott Well, with or without plaintiffs' consent or contribution, and with or without a Division compulsory pooling order. Granting plaintiffs' motion for stay of Order No. R-10815 as to the plaintiffs is of no practical consequence in Burlington's drilling program for the Scott Well. The Scott Well can still be drilled by Burlington as planned in the NW/4 of Section 9, where plaintiffs have no interest, on 160 acre spacing.

C. PLAINTIFFS WILL BE HARMED IF THEIR MOTION FOR STAY IS DENIED

The equities weigh heavily in favor of plaintiffs in requesting that this Court stay Order No. R-10815, pending resolution of the merits of this appeal. See Wilcox v. Timberon Protective Ass'n, 111 N.M. 478, 485-486, 806 P.2d 1068 (Ct. App. 1990) (court must "balance any existing equities and hardship.") Obtaining the Commission's Order No. R-10815 modifying the Rule 104 wildcat well spacing requirements from 160 acres to 640 acres was a necessary condition precedent to Burlington's agenda to confiscate that which they could not acquire by agreement, i.e., to compulsory pool plaintiffs' working interests in Section 9. Burlington's failure to give adequate notice

[10] Burlington follows up its "point" regarding the idea that it will not commence drilling a well in Section 9 "until such time as the Division enters a decision in that case" (Burlington's Brief, pp. 15-16) with the theory that, upon a ruling adverse to plaintiffs in that case, plaintiffs could "seek an order from the Division staying that decision . . .". According to Burlington, this shows the lack of irreparable harm to plaintiffs. Nonsense. All that Burlington suggests is that plaintiffs go away and battle with Burlington later. Deferring the dispute only serves to further harm plaintiffs. Furthermore, plaintiffs can be assured that Burlington will fight any request for a stay of any order issued in the compulsory pooling case, so the suggestion that plaintiffs "wait things out" is disingenuous at best.

denied plaintiffs their constitutional and statutory right to be heard, cross examine Burlington's witnesses, and present evidence concerning this spacing change at the public Commission hearing. See, e.g., Forest Oil Corp. v. Corporation Commission of Oklahoma, 807 P.2d 774, 783 (Okla. 1990) (statutory notice by publication does not meet constitutional due process requirements when "there are holders of mineral interests whose identities are known or could be ascertained with due diligence"); Boyce v. Corporation Commission of Oklahoma, 744 P.2d 985, 988 (Okla. 1987.)

Order No. R-10815 is the linchpin of Burlington's confiscatory strategy to assail other working interest owners. If the effect of Order No. R-10815 is not temporarily stayed as to plaintiffs, they could wrongly be forced to pay **over 60%** of Burlington's extremely risky test well, estimated to cost $2,316,973 for completion of the Scott 24, to which Burlington itself assigns only a 10% chance of success, while Burlington gets away with paying only slightly over **14%.** Alternatively, and due to a total black-out of information[11] by Burlington, plaintiffs will have no real choice but to elect to be "non-consent" and forfeit their ownership through the imposition of the statutory risk penalty, until 300% of the cost of drilling, completing and operating the Scott Well is recovered from plaintiffs' share of production therefrom.

If Order No. R-10815 is not stayed pending appeal, plaintiffs will be severely prejudiced, as Burlington has demonstrated -- and actions speak louder than words -- that it intends to soon drill this well. If the Order is stayed, however, Burlington

[11] Burlington has taken every possible step to railroad through its application to force pool plaintiffs' interests. Burlington wants to expedite the hearing in that case, while opposing plaintiffs' and other parties' requests for continuance. Apparently, Burlington thinks also that having less of a record made in that case can only benefit it. Burlington has opposed various requests for the production of documents and even moved to quash subpoenas to keep its employees from testifying before the Division. Naturally, after all is over, Burlington will again assert on the next appeal that the woeful record resulting from its efforts is all that can be considered on appeal.

can (and will) drill its well on its acreage without burdening plaintiffs.[12] On balance, the potential loss and the equities are all on plaintiffs' side, thus dictating that plaintiffs' motion should be granted.

III.

CONCLUSION

For the reasons discussed above, in Plaintiffs' Motion to Stay New Mexico Oil Conservation Commission Order No. R-10815 Pending Appeal and Motion for Expedited Hearing, and in its supporting brief, plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983 respectfully request that this Court grant plaintiffs' motion.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Plaintiffs

[12] Plaintiffs should not have to post any bond or other security. Burlington is the wrongdoer here. But for Burlington's failure to give plaintiffs genuine notice of Commission Case 11745, this appeal would not be pending. Requiring the plaintiffs, the innocent parties, to provide security for Burlington against loss or damage due to the staying or suspension of the Commission's Order would confer an inordinate and undeserved benefit upon Burlington, at the expense of undeserved burden being foisted upon plaintiffs. Indeed, Burlington has demonstrated that it intends to forge ahead with its drilling program anyway, so the protection of a bond is not needed.

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Plaintiffs' Reply Brief to the Response of Burlington Resources Oil and Gas Company to Plaintiffs' Motion to Stay to be mailed on this 4th day of September, 1997 to the following counsel of record:

Marilyn S. Hebert
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

John Bemis, Esq.
Burlington Resources
P.O. Box 4289
Farmington, New Mexico 87499

J.E. Gallegos

Burlington rig begins deep test

WAYNE LEUFOLD
BUSINESS EDITOR

JUN 3 0 1997

What's down there?

No one knows.

In an effort to find out, Burlington Resources Oil and Gas last week spudded a well about eight miles north of Aztec, a well that will be drilled much deeper than normal wells in the San Juan Basin.

Parker Drilling Rig No. 218, brought in from Ozona, Texas, will drill a 14,200-foot exploratory wildcat well to see what's in the Pennsylvanian age formation. Oil and gas production in the basin ranges from 1,500 to 8,000 feet for the normal horizons.

A well this deep hasn't been drilled in the San Juan Basin since 1984, when Phillips Petroleum's San Juan 30-6 Unit 112Y, targeted for the Pennsylvanian, delivered noncommercial amounts of natural gas.

"We're hoping for a lot of promising results, but it's very, very early in the process," said Mark Ellis, vice president of the San Juan Division of Houston-based Burlington Resources. "We'll just keep our fingers crossed. It's a 60-day test, so we'll have to wait and see."

The well, the Burlington No. 2 Marcotte, is being drilled in an area of gas production from Cretaceous Fruitland, Pictured Cliffs, Chacra, Mesa Verde, Graneros and Dakota formations in the Basin/Blanco field.

The nearest production from Pennsylvanian zones, a Burlington release said, is about 23 miles to the west-northwest in the Barker Dome field. That is a paradox gas pool straddling the New Mexico-Colorado border.

Six wells drilled to the Pennsylvanian in the basin before Phillips' attempt also resulted in dry holes. But, people who have been in the business here since the second oil and gas boom, the 1950s, say success in drilling to the Penn could spark the area's next energy boom.

"The probability is it would be gas," Ellis said. "The question is, will it be gas in commercial quantities? We can't determine that off seismic, so that's why we're drilling a well."

Burlington and Conoco Inc. are the main partners in the test well. The companies own a significant acreage portion in the basin.

The Burlington release said where support for such wells can be obtained, the companies may drill other wildcats into the deep Penn.

In January, Burlington announced it would drill two test wells to the deep Penn this year.

EXHIBIT B

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

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

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

Defendants.

PLAINTIFFS' ANSWER BRIEF IN RESPONSE TO THE MOTION TO STRIKE OF BURLINGTON RESOURCES OIL & GAS COMPANY

Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter "plaintiffs"), by and through their undersigned counsel, hereby submit their Plaintiffs' Answer Brief in Response to the Motion to Strike of Burlington Resources Oil & Gas Company, as follows:

I.

PRELIMINARY STATEMENT

The Motion to Strike of Burlington Resources Oil & Gas Company wants this Court to eviscerate plaintiffs' Verified Petition for Review of New Mexico Oil Conservation Commission Administrative Order No. R-10815 ("Verified Petition"). Burlington is undoubtedly wary of facing the uncontrovertable allegations of the Verified Petition that, inter alia, Burlington consciously avoided giving plaintiffs notice of Burlington's application in Case No. 11745 to amend the Oil Conservation Division's spacing rules for deep gas formations in the San Juan Basin, which proceeding culminated in the issuance of Order No. R-10815 that is challenged by plaintiffs'

Verified Petition. After all, given (a) the intimate knowledge that Burlington had of plaintiffs' ownership interests in the San Juan Basin, (b) the history of litigation between plaintiffs and Burlington, and (c) Burlington's unsuccessful efforts to buy plaintiffs' interests, one might reasonably infer that the failure to notify plaintiffs of Burlington's application, coupled with Burlington's application (filed immediately after the issuance of Order R-10815) for compulsory pooling of plaintiffs' interests is an undisguised effort to destroy plaintiffs' interests -- and undertaken without notice to plaintiffs.

Burlington has shown no justification for striking any allegations of plaintiffs' Verified Petition. Burlington's motion to strike must therefore be denied, in its entirety.

II.

BURLINGTON PRESENTS NO VALID BASES FOR STRIKING ANY PART OF PLAINTIFFS' PETITION

A. THE STANDARD ON A MOTION TO STRIKE

NMRA 1997, Rule 1-012F, if applicable, would allow the Court to strike from the Verified Petition "any redundant, immaterial, impertinent or scandalous matter." Motions to strike are, however, not favored and are only infrequently granted. See Roberts v. Sparks, 99 N.M. 152, 154, 655 P.2d 539, 541 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982); Forschner Group, Inc. v. B-Line A.G., 943 F. Supp. 287, 291 (S.D.N.Y. 1996); Maryland Staffing Services, Inc. v. Manpower, Inc., 936 F. Supp. 1494, 1508 (E.D. Wis. 1996.) The party moving to strike a portion of a pleading must therefore show that the allegedly "redundant, immaterial, impertinent or scandalous matter," see Rule 1-012F, is prejudicial to the movant. Roberts, 99 N.M. at

154; Forschner Group, Inc., 943 F. Supp. at 291; Maryland Staffing Services, Inc., 936 F. Supp. at 1508.

Burlington has not claimed -- let alone established -- any prejudice to it from the allegations of the Verified Petition that Burlington requests be stricken other than the prejudice inherent in any judicial review. Assuming arguendo some lack of merit to plaintiffs' allegations, as Burlington suggests, that can be decided when the case is determined on the merits, rather than to order the allegations stricken now on the basis of Burlington's misguided arguments.

B. REVIEW IS NOT RESTRICTED AS BURLINGTON CONTENDS

Burlington would have this Court strike the allegations of plaintiffs' Verified Petition concerning, e.g., the history of litigation between plaintiffs and Burlington for several decades (Verified Petition, ¶¶ 7, 17), Burlington's efforts to acquire plaintiffs' interests at low-ball prices (id., ¶ 8), Burlington's failure to give plaintiffs' notice of Burlington's application to change spacing rules in the San Juan Basin (id., ¶¶ 14-16, 23), and the explanation for Burlington's wish that its OCD application could proceed without possible objection by plaintiffs (id., ¶¶ 22, 23, 26). All of those allegations are manifestly relevant to plaintiffs' claim that Order R-10815 is void as to plaintiffs and their interests because of the lack of due process. Additionally, Burlington wants stricken plaintiffs' entire second claim for relief that asserts that Order R-10815 is arbitrary, capricious and without the support of substantial evidence.

According to Burlington, "[a]n appeal of a Commission order to the District Court is based solely upon the record established at the Commission hearing,"[1] for

[1] See Burlington Resources Oil & Gas Company's Memorandum Brief in Support of its Motion to Dismiss and Motion to Strike and its Response to Plaintiffs' Motion to Stay, served August 21, 1997, at p. 4.

which proposition Burlington inaccurately cites NMSA 1978, Section 70-2-25B, and NMRA 1997, 1-074H. For several reasons, Burlington is wrong, and its authorities do not remotely support Burlington's requested relief.

1. To the extent that Section 70-2-25B restricts review, plaintiffs have complied with the statute

Section 70-2-25B states, in relevant part, that the petition to the district court for review

> "shall state briefly the nature of the proceedings before the commission and shall set forth the order or decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing.

NMSA 1978, Section 70-2-25B (emphasis added.) The statutory limitation is therefore not that review is "based solely upon the record established at the . . . hearing"; instead, the limitation of the statute is expressly that the applicant cannot exceed the scope of the application for rehearing.

Plaintiffs applied to the Commission for rehearing. Plaintiffs' application for rehearing contains the same grounds, facts and assertions as contained in plaintiffs' Verified Petition. See a copy of that pleading attached as Exhibit "A".

2. The facts and assertions of plaintiffs' Verified Petition are part of the record

Burlington cites also to NMRA 1997, 1-074H, which provides that,

> "within thirty (30) days after the filing of the notice of appeal with the agency . . . , the agency shall file with the clerk of the district court the record on appeal taken in the proceedings."

NMRA 1997, 1-074H. There is neither any express or implied limitation that, as Burlington contends, the review must be limited to "the record on appeal."

Moreover, the facts and assertions in plaintiffs' Verified Petition are part of "the record on appeal." See NMRA 1997, 1-074H. The Rule advanced by Burlington expressly defines "the record on appeal" to include

> "a copy of all papers and pleadings filed in the proceedings in the agency."

NMRA 1997, 1-074(2.) Plaintiffs filed in the agency an application for rehearing containing the same issues and matters now presented to this Court as the basis for finding Order No. R-10815 void as to plaintiffs and their interests. That application is, therefore, already part of "the record on appeal" and is subject to this Court's consideration.

3. The record for this Court's review includes "extra material" necessary to evaluate procedural or constitutional errors

A district court may reverse an agency action on any one of four grounds:

> "(1) the agency acted fraudulently, arbitrarily or capriciously;
>
> (2) based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;
>
> (3) the action of the agency was outside the scope of authority of the agency; or
>
> (4) the action of the agency was otherwise not in accordance with law."

NMRA 1997, 1-074Q. Rutter & Wilbanks Corp. v. Oil Conservation Commission, 87 N.M. 286, 532 P.2d 582 (1975). The instance in which review would ordinarily be limited to only the record established at the Commission hearing" is on a "substantial evidence" ground. A claim of fraudulent conduct, or that the agency exceeded its

authority or violated some law -- such as a violation of constitutionally-required due process from a failure to give adequate notice -- would not and could not depend only upon the record made in front of the agency. To limit review to that record would be to strip the appellant of the means needed to show the very grounds for review. That the Commission acted without proper notice to plaintiffs presents precisely such an example. (See Verified Petition, first claim for relief.)

Due process precludes the deprivation of life, liberty or property interests without notice and an opportunity to defend oneself. Santa Fe Exploration Co. v. Oil Conservation Commission, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992.) Constitutionally-adequate notice is that which, "under all the circumstances," is reasonably calculated to inform interested parties and give them a chance to appear. Uhden v. New Mexico Oil Conservation Commission, 112 N.M. 528, 530, 917 P.2d 721 (1991) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)); see also Forest Oil Corp. v. Corporation Commission of Oklahoma, 807 P.2d 774, 783 (Okla. 1990) (statutory notice by publication does not meet constitutional requirements of due process when "there are holders of mineral interests whose identities are known or could be ascertained with due diligence"); Boyce v. Corporation Commission of Oklahoma, 744 P.2d 985, 988 (Okla. 1987) (order entered without actual notice to mineral owner is void if applicant "could have given actual notice but failed to do so"; citing Mullane.)

One could never challenge the failure of notice and opportunity to be heard under Burlington's supposed "rule" because one would be restricted to Burlington's idea of "the record," without an opportunity to show the reviewing court that the claimant actually has protectible interests (e.g., property interests) or that "the

circumstances" see Uhden, supra, required that notice had to have been given to the claimant. The very reason that the record would be devoid of such information is that the claimant had no opportunity to develop that record in front of the agency. Cf. Louisiana Ass'n of Independent Producers and Royalty Owners v. F.E.R.C., 958 F.2d 1101, 1115 (D.C. Cir. 1992) (logical corollary to review based upon administrative record is that interested parties had actual chance to 'introduce adverse evidence and criticize evidence introduced by others.') Burlington's approach sets up to a classic "catch 22" -- no notice, no participation in the hearing, no opportunity to develop record, and, sorry, no appeal because there is nothing in the record.

Burlington is, of course, wrong. Uhden, supra (permitting appeal of agency action based upon contention of inadequate notice.) Even though the New Mexico Administrative Procedures Act is not controlling for this appeal, "the NMAPA has been used by New Mexico Courts as a general guideline for the resolution of administrative law questions." Groendyke Transport, Inc. v. New Mexico State Corporation Commission, 101 N.M. 470, 684 P.2d 1135, 1141 (1984) (emphasis in original.) The NMAPA allows the admission of additional evidence on appeal when procedural irregularities precluded that information from otherwise being part of the record. Id.; see also NMSA 1978, Section 12-8-21. Accordingly, a court properly considers evidence outside the record "[w]hen the petition [for review] involves allegations of procedural irregularities or appearance of fairness, or raises constitutional questions." Responsible Urban Growth Group v. Kent, 868 P.2d 861, 866 (Wash. 1994) (en banc; emphasis added) (trial court correctly considered evidence outside the record to resolve issues of procedural irregularities and due process violations.) Plaintiffs' Verified Petition's first claim for relief presents such procedural issues of

constitutional dimensions which can only be resolved by consideration of "extra" matters, to the extent that plaintiffs' facts might not already be part of the record. See also Traylor Brothers, Inc. v. Overton, 736 P.2d 1048, 1050 (Ut. Ct. App. 1987) (to resolve issue of alleged lack of adequate notice, court reviewed evidence that the complainant had been unable to introduce at the agency's hearing.)

The breadth of Burlington's requested relief further shows the lack of merit in defendant's position. Burlington wants this Court to also strike every allegation of plaintiffs' second claim for relief which asserts that Order R-10815 is "arbitrary, capricious, [and] not supported by substantial evidence. . . ". (Verified Petition, ¶ 38, at p. 14.) That claim is one that does rest upon the "record on appeal." That review is based upon the whole record which includes the facts of plaintiffs' Verified Petition, as set forth in plaintiffs' petition for rehearing filed with the agency. See Duke City Lumber Co. v. New Mexico Environmental Improvement Board, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984) (adopting standard of review of entire record for decisions of agencies.) "Whole record review" means consideration of the entire record before the agency. Trujillo v. Employment Sec. Dep't, 105 N.M. 467, 470, 734 P.2d 245, 248 (Ct. App. 1987.) There is no conceivable reason for striking all of this claim, a step that would naturally preclude any "substantial evidence" challenge. Thus, according to Burlington's erroneous approach,[2] there would be no claim that anyone could ever present on appeal.

---

[2] Compare Grace v. Oil Conservation Commission of New Mexico, 87 N.M. 205, 531 P.2d 939, 941 (1985), a case that is featured prominently in Burlington's briefing. After noting that the grounds for rehearing "defined and limited the issues which could be reviewed on appeal to the district court," id., the New Mexico Supreme Court discussed the appellant's "substantial evidence" challenge. If Burlington was correct, the Court would not have reached the merits of that issue. In this case, plaintiffs petitioned for rehearing on the same grounds as set forth in the Verified Petition. No more is required.

The allegations that Burlington wants stricken are relevant to plaintiffs' claims and to plaintiffs' motion to stay the effect of Order R-10815. Review of agency action is not expressly limited, as Burlington asserts, under either NMRA 1978, Section 70-2-25B or NMRA 1997, 1-074H.

III.

CONCLUSION

For the reasons discussed above, plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al. respectfully request that this Court deny the Motion to Strike of Burlington Resources Oil & Gas Company, in its entirety.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Plaintiffs' Answer Brief in Response to the Motion to Strike of Burlington Resources Oil & Gas Company to be mailed on this 4th day of September, 1997 to the following counsel of record:

Marilyn S. Hebert
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

John Bemis, Esq.
Burlington Resources
P.O. Box 4289
Farmington, New Mexico 87499

J.E. Gallegos

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

CASE NO. 11745

RE: ORDER OF THE NEW MEXICO OIL CONSERVATION COMMISSION GRANTING THE 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.

APPLICATION FOR REHEARING

Pursuant to 19 NMAC § 15.1222, movants Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983 et al. (all movants are identified on Exhibit A hereto along with their working interest ownership in Burlington's proposed 640 acre spacing unit located in Section 9-T31N, R10W, San Juan County, New Mexico, and are hereinafter collectively referred to as "Movants"), by their undersigned attorneys, respectfully request a rehearing of the referenced New Mexico Oil Conservation Commission ("Commission") Order and would show as grounds the following:

1. The Movants are the owners of working interests in, inter alia, formations below the base of the Dakota formation located in Section 9-T31N, R10W, San Juan County, New Mexico under United States Oil and Gas Lease SF 078389 and SF 078389-A and are thus directly affected by Commission Order No. R-10815 entered on June 5, 1997 in this proceeding.

2. Since as long ago as November 20, 1996, Burlington Resources Oil & Gas Co. ("Burlington") has been targeting Section 9-T31N, R10W, San Juan County, New Mexico for a test of the Deep Pennsylvanian formation. See November 20, 1996

EXHIBIT A

letter from James Strickler of Burlington to Mr. Watson LaForce, Jr., attached hereto as Exhibit B. Movants are the owners of over 85% of the working interest in that formation in the E/2 and SW/4 of Section 9.

3. Coincidentally, Burlington and the Movants have been engaged in nearly constant controversy and litigation since at least the 1970's concerning this acreage. This most recent litigation between these parties, styled W. Watson LaForce et al. v. Meridian Oil Inc.,et al., San Juan No. CV-92-645-3, commenced in late 1992 and continues to date.

4. By various communications with the Movants beginning in November, 1996, Burlington sought to purchase or farmout the Movants' deep gas working interest rights in Section 9-T31N-R10W, San Juan County. However, given the extremely unfavorable terms offered by Burlington, the Movants refused such offers. When these attempts failed, Burlington tendered a proposed AFE and Joint Operating Agreement for their proposed $2,316,973 Deep Pennsylvanian Test well located in Section 9-T31N-R10W, San Juan County, the Scott No. 24 on similarly highly unfavorable terms. (e.g. a 400% nonconsent penalty, when the New Mexico Compulsory Pooling Statute Section 70-2-17 (C) NMSA 1978 limits such penalty to not more than 200%.)

5. At no time did Burlington's communications advise the Movants of its plans to make an application to the Commission for the purpose of changing the spacing rules from 160 to 640-acres for wildcat gas wells below the base of the Dakota formation in San Juan County, New Mexico.

6. It was not until May 16, 1997 that one of the Movants, Mr. Watson LaForce, Jr., by happenstance learned of Burlington's Application and of the Commission proceedings in Case No. 11745. Since that time the Movants have

undertaken an independent investigation and learned the following facts concerning Burlington's efforts to change the deep gas wildcat spacing:

A. On February 27, 1997, Burlington ostensibly issued notice to "All interested parties entitled to notice" of its application to amend Division Rules 104.B(2)(a) and 104.C(3)(a) and to adopt New Rules 104.B(2)(b) and 104.C(3)(b) for the establishment of 640-acre spacing, including well location requirements, for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico.

B. Burlington did not send a copy of its Notice of Hearing or Application to any of the Movants. However, working interest owners in the same acreage in which the Applicants hold working interests did receive actual notice from Burlington. This is evidenced by the "Deep Gas - 640 Spacing Owner List" attached to Burlington's Application which lists the parties to whom Burlington provided notice, attached to Burlington's Application. The Movants reside outside the State of New Mexico, a fact known to Burlington, and thus could not and would not receive actual notice by publication.

C. On March 19, 1997, the Commission held a public hearing concerning Burlington's application. At this hearing, representatives from Burlington informed the Commission that they had notified almost 200 operators in the San Juan Basin and sent additional notices "at random" to affected working interest owners. See Hearing Transcript Attached hereto as Exhibit "B" at 10-11.

D. On June 5, 1997, the Commission entered its Order No. R-10815 finding, inter alia, that Division Rule 104 should be modified on a permanent basis to provide for 640-acre gas spacing units for deep gas formations of the San Juan Basin.

POINT ONE: BURLINGTON'S "RANDOM NOTICE" TO AFFECTED WORKING INTEREST OWNERS OF ITS APPLICATION AND THE HEARING IS INADEQUATE

7. It is unclear why and upon what grounds Burlington based its decision to send notices to "random" affected working interest owners.[1] Nothing in the New Mexico statutes nor in the New Mexico Oil Conservation Division ("NMOCD") rules provide for, or even make reference to, such random notice procedures. In addition to

[1] The definition of "random" is purposeless or haphazard. Webster's New World Dictionary 3d. Ed (1990)

publication, NMOCD Rule 1207 provides for additional notice in specific proceedings, none of which exactly fits a requested modification of well spacing requirements. NMOCD Rule 1207(11), however, the applicable "catch-all" provision, provides as follows:

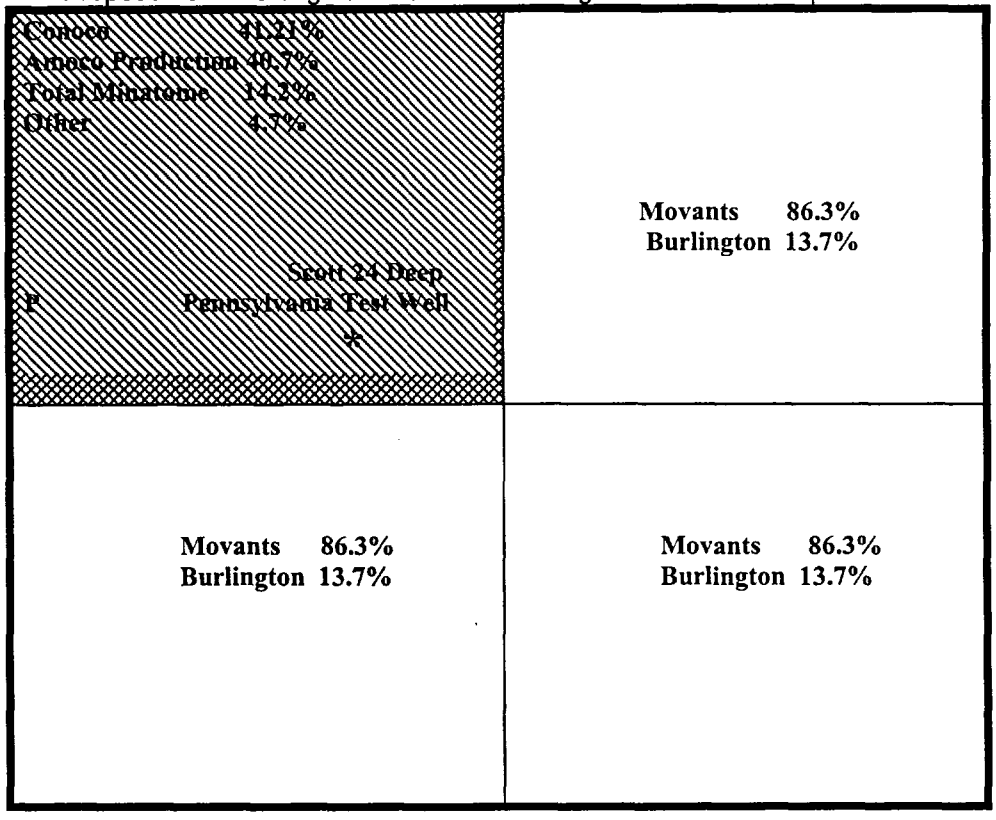
> (11) In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities:
>
> (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested).

8. 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. Further, it is clear that Burlington knew that this change in wildcat spacing rules would adversely impact the Applicants well before its application was even filed. However, **none** of the Movants listed on Exhibit A hereto were among those "randomly" selected to receive notice of the spacing change application by Burlington. Burlington's motives seem clear. If it cannot buy out or farmout out the Movant's working interest rights in Section 9-T31N, R10W, San Juan County on its own unreasonable terms, it chose to confiscate this acreage by utilizing compulsory pooling. Obtaining an order from the Commission increasing wildcat well spacing requirements from 160 acres to 640 acres is the first requisite step in this scheme. The approval of Burlington's Application by the Commission was unquestionably aided by Burlington's failure to give notice to certain working interest owners affected thereby, such as the Movants, who would have certainly opposed the Application had they had notice.

9. The best evidence of Burlington's true motive in requesting the change in spacing rules is the Application filed by Burlington on June 17, 1997 seeking

compulsory pooling for its proposed Scott Well No. 24. This well is to be located in the NW/4 of Section 9-T31N, R10W, San Juan County, New Mexico. Burlington's Application seeks to have the entirety of Section 9 dedicated to the well. As indicated below, the Movants own the majority of the working interest rights in the E/2 and SW/4 of Section 9. To the best of Movant's information and belief, and without taking into account farmout agreements entered into by Burlington with working interest owners in the NW/4, the working interest ownership in Section 9 is as follows:

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



Under the Commission's new spacing order, Order R-10815, the Movant's working interest in the three quarter sections of Section 9-T31N, R10W could be compulsorily pooled with the NE/4 section to form a 640 acre spacing unit. Indeed, this is exactly what Burlington seeks to accomplish in its Application for compulsory pooling for its

proposed Scott Well No. 24. This results in the Applicants being forced to pay **over 64.4%** of a high risk test well, estimated to cost $2,316,973 for completion of the Scott 24, to which Burlington itself assigns only a 10% chance of success, while Burlington gets away with paying only slightly over **10.3%.** Thus, if Burlington's Application for compulsory pooling is granted, the Movants will be forced to either bear the majority of Burlington's high-risk exploration program, or go non-consent and forfeit their ownership through the imposition of the statutory risk penalty.

10. Under NMOCD Rule 1207(11), and under principles of due process guaranteed by Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution, Burlington was required to provide actual notice of its Application to the Movants. Order No. R-10815 is void as to the Movants. Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991).

POINT TWO: THE COMMISSION'S ORDER R-10815 IS ARBITRARY AND CAPRICIOUS IN THAT THE CHANGE IN SPACING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

11. Since December 1, 1950, Division Rule 104 has provided for 160 acre wildcat gas well spacing for San Juan, Rio Arriba and Sandoval Counties, New Mexico.

12. Burlington's Application to change this long-established spacing rule should have been based upon and supported by sound technical, geologic, geophysical and reservoir engineering data relevant to the San Juan Basin indicating that 160 acres is not the proper spacing for formations below the Dakota. Burlington's case provided no such evidence.

13. A spacing unit is the "area that can be efficiently and economically drained and developed by one well . . ." Section 70-2-17(B), NMSA 1978. Burlington presented no geological or geophysical evidence to the Commission establishing that for the San

Juan Basin Pennsylvanian formation 640 acres is such a spacing unit. Not a single well has been successfully completed and produced in that formation in order to provide drainage knowledge. Rather, Burlington's geologic and engineering drainage data was based upon three "analogy fields," the Barker Dome, Ute Dome and Alkali Gulch, that are not located within the San Juan Basin. These "analogy" fields are located on the Four Corners platform across the hog-back fault system from the San Juan Basin and involve fundamentally distinguishable geologic and engineering factors. Transcript attached hereto as Exhibit "C" at pp. 102-104. Indeed, comparison of the analogy fields' geology to that of the San Juan Basin was generously described by Amoco's engineer as a "very, very long stretch." Id. at p. 100.

14. The probable reason that Burlington did not reveal their 3-D seismic data of the San Juan Basin to make their case before the Commission is simply that this data will not support 640 acre spacing. A representative from Amoco, the only party at the hearing voicing some opposition to Burlington's Application, testified that interpretation of Amoco's "3-D" seismic data shot in the San Juan Basin was significantly different than its seismic data in Burlington's "analogous fields," and that, in her opinion, a Deep Pennsylvania well could be economically developed on 160 acre spacing.

> Examination by Mr. Carr of Pamela W. Staley, Petroleum Engineer with Amoco Production Company:
>
> Q. When you look at the deep formations, do you see large blanket deposits, or do you agree with Mr. Lane that basically you don't have large blanket sands in the area?
>
> A. Well, Amoco, has actually -- We have shot 3-D seismic out here in the deep Basin, as well as we are the major owner in Ute Dome, on part of the Ute Dome, and so we've shot similar seismic over there.

These data sets look very different. They don't show blanket accumulations in the deep Basin. We're looking at more algal mounds in one area, and those show to be on much smaller spacing. You know, the 3-D seismic really makes the development of these much more feasible than it ever was before. We can actually see them now. We couldn't see them on 2-D.

* * *

Q. Can these algal mounds be economically developed in your opinion?

A. Very much so. In some of the analogies in other areas, not necessarily in the Paradox Basin but other algal mound features can be very, very high in production, up to 40 to 90 Bcf per well. So they can be very profitable on 160 [acres] or even less, but they're very small features at times.

Q. Have you seen more than one algal mound in 640-acre spacing units?

A. Yes, we've seen several more than that at times.

Q. When you look at the deep gas formations in the area of the analogous pools in, say, the Ute Dome area, how do they look when you compare them to the formation as you move across the Basin, based on the data that you have?

A. Based on the seismic we see, looking at those zones, they look distinctly different. We're seeing blanket-type accumulations up in the Ute Dome area. They're flat entities. We see-When we come into the deep Basin on the seismic that we have proprietary shot, we see very discrete algal mount almost pinnacles that we can see.

So the seismic looks very different, and this is one of the few looks, I'll admit that we've got out of the Basin, but it does give a good example, I think, of where there's a significant difference between the data that the Applicant is trying to stretch into the Basin.

See Transcript attached hereto as Exhibit "C" at pp. 102-103. Ms. Staley further testified that Amoco was prepared to commit funds to drill a Deep Pennsylvanian well on 160 acre spacing. Id. at 114.

15. Burlington's true motivation in seeking 640 acre spacing is driven by economic factors, not science. As described above, Burlington wants permanent

Basin-wide 640 acre spacing so that working interest owners in adjoining tracts, such as the Movants in Section 9, T31N, R10W, will be forced through compulsory pooling to bear the risks, and costs of Burlington's Deep Pennsylvanian exploration program. As Mr. James R. J. Strickler, Senior Staff Landman for Burlington, testified: "And so that's why we're here, is to seek permanent 640-acre spacing, to spread the risk." Transcript at p. 76.

16. Burlington's self-interested desire to spread out the risk and costs of its San Juan Basin deep gas exploration program, without more, does not constitute adequate grounds for the Commission to change a Basin wide spacing rule that has been in place since 1950s. As discussed above, Burlington did not come forth with technical evidence justifying this rule change. As such, the Commission's Order No. R-10815 is arbitrary, capricious, not supported by substantial evidence and without substantial justification.

CONCLUSION

For the foregoing reasons, the Movants respectfully request that the Commission set Case No. 11745 for rehearing at which time (a) Burlington must be required to produce all of the geological and geophysical data on which it bases its drilling locations, (b) Movants will be permitted to participate and to supplement the record which already negates an increase in size of the subject spacing unit and (c) the Commission should deny the application in its entirety.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

HOPE G. SIMPSON C/O SIMPSON ESTATES INC. 30 N. LASALLE, STE 1232 CHICAGO, IL 60602-2504	0.651006%
NANCY H. GERSON (FKA NANCY H. HASKENS) 1555 ASTOR ST. CHICAGO, IL 60610	0.456838%
MINNIE A. FITTING ROBERT P. FITTING P.O. BOX 2588 SIERRA VISTA, AZ 85636-2588	0.934458%
CATHERINE H. RUML P.O. BOX 297 SOUTH STRAFFORD, VT 05070-0297	0.456838%
KATHERINE I. WHITE C/O JOHN BEATY BAETY HAYNES & ASSOCIATES INC. 2 WISCONSIN CIR., STE 400 CHEVY CHASE, MD 20815-7006	1.522308%
ELIZABETH B. FARRINGTON 12 MURRAY HILL SQUARE MURRAY HILL, NJ 07974	0.164464%
MARY S. ZICK (FKA NANCY S. ZICK) 418 W. LYON FARIN GREENWICH, CT 06831	0.685295%
WALTER B. FARNHAM P.O. BOX 494 NORWOOD, CO 81423-0494	0.102790%
ROY E. BARD, JR. 508 S PARKWOOD AVE PARK RIDGE, IL 60068	0.164464%
ROBERT T. ISHAM 335 HOT SPRINGS RD. SANTA BARBARA, CA 93108	1.205033%
MARY F LOVE 4005 PINOLE VALLEY RD. PINOLE, CA 94564	0.102790%
JAMES C. BARD 7454 N. DESERT TREE DR. TUCSON, AZ 85704	0.164464%
WILLIAM P. SUTTER THREE FIRST NATL PLAZA ROOM 4300 CHICAGO, IL 60602	0.685295%

Exhibit A

EXHIBIT "A" CONT.

GEORGE S. ISHAM TRUST 1070 N. ELM TREE RD LAKE FOREST, IL 60045	1.205003%
ALBERT L. HOPKINS JR P O BOX 67 DANBURY, NH 03230-0067	0.456838%
KAY B. GUNDLACH (FKA KAY B. TOWLE) FEARINGTON POST 247 PITTSBORO, NC 27312	0.164464%
VIRGINIE W. ISHAM P O BOX 307 LAKE FORREST, IL 60045	0.602501%
ELEANOR ISHAM DUNNE 728 ROSEMARY RD. LAKE FOREST, IL 60045	1.525335%
JOHN M SIMPSON & WILLIAM SIMPSON TR U/W JAMES SIMPSON J. C/O TRUST CO OF NEW YORK ATTN: BARRY WALDORF 114 WEST 47TH STREET NEW YORK, NY 10036	3.906037%
MICHAEL SIMPSON TRUST C/O U S TRUST CO OF NEW YORK ATTN: BARRY WALDORF 114 WEST 47TH STREET NEW YORK, NY 10036	2.996042%
PATRICIA SIMPSON TRUST C/O U S TRUST CO OF NEW YORK ATTN: BARRY WALDORF 114 WEST 47TH STREET NEW YORK, NY 10036	2.996042%
JAMES F CURTIS PATRICK J HERBERT III SUCCESSOR TRUSTEE U/A/D 2-9-79 FBO JAMES F CURTIS C/O SIMPSON ESTATES 30 N LASALLE STE 1232 CHICAGO, IL 60602-504	0.651006%
GWENDOLYN S. CHABRIER PATRICK J. HERBERT III SUCCESSOR TRUSTEE U/A/D 2-9-79 FBO GWENDOLYN S. CHABRIER C/O SIMPSON ESTATES 30 N LA SALLE ST #1232 CHICAGO, IL 60602-2503	0.651006%

WILLIAM SIMPSON TRUST PATRICK J HERBERT III SUCCESSOR TRUSTEE OF THE WM SIMPSON TRUST DTD 12-17-79 30 N LASALLE STE 1232 CHICAGO, IL 60602-2504	1.953018%
HENRY P ISHAM JR DECD FIRST NATL BANK CHICAGO AGENT VW & RT ISHAM TRUSTEES UWO HENRY P ISHAM JR DECD 1400 ONE DALLAS CENTER DALLAS, TX 75201	0.602501%
CORTLANDT T. HILL TRUST 1ST TRUST NA & GAYLORD W GLARNER TRSTEE UA DTD 9/16/74 C/O COLORADO NATIONAL BANK PO BOX 17532 (CNDT 2332) DENVER, CO 80217	0.411162%
MARTHA M LATTNER TRUST JAMES E PALMER SUCCESSOR TRUSTEE U/T/A DTD 2/21/63 FBO MARTHA M LATTNER SETTLOR PO BOX 29352 SAN FRANCISCO, CA 94129-0352	1.027904%
ROBERT D. FITTING # 406 N. BIG SPRINGS #200 MIDLAND, TX 79701	0.934459%
W. WATSON LAFORCE JR PO BOX 353 MIDLAND, TX 79701	1.111146%
J. ROBERT JONES 1205 W PECAN MIDLAND, TX 79705	1.868917%
ROBERT B. FARNHAM ST MARYS POINT 16757 S. 25TH ST LAKELAND, MN 55043	0.102790%
CHARLES WELLS FARNHAM JR ST MARYS POINT 16825 S. 25TH ST LAKELAND, MN 55043	0.102790%
LOUIS W. HILL JR PO BOX 64704 ST. PAUL, MN 55164	2.466971%

RALPH A BARD JR , TRUSTEE (FKA RALPH A. BARD, JR. TRUST) U/A/D FEBRUARY 12, 1983 SUITE 2320 135 S. LA SALLE ST. CHICAGO, IL 60603-4108	1.233484%
RALPH AUSTIN BARD JR. (FKA RALPH A. BARD, JR. TRUST) TRUSTEE U/A/D 7-25-49 135 S. LA SALLE STREET SUITE 2320 CHICAGO, IL 60603-4108	8.061201%
GUY R. BRAINARD JR. TRUSTEE, OF THE GUY R. BRAINARD JR TRUST DATED 9/9/82 RR 6 BOX 281 BROKEN ARROW, OK 74014	0.251294%
RALPH U. FITTING JR, TRUST PO BOX 782 MIDLAND, TX 79702	3.737834%
SABINE ROYALTY TRUST C/O PACIFIC ENTERPRISES ABC CORPORATION ATTN: SARA WILLIAMS 3131 TURTLE CREEK BLVD. DALLAS, TX 75219	0.626723%
JUDITH SHAW TRUST U/A/D 4-14-66 THOMASVILLE RT. BOX 60-B BIRCH TREE, MO 65438	1.021342%
NANCY C. BARD LISA BARD FIELD SHARON BARD WAILES & TRAVIS BARD IND & COLLECTIVELY AS CO TRUSTEES U/C/O DTD 10-7-86 609 RICHARDS LAKE RD. FT COLLINS, CO 80524	0.164464%
ELIZABETH T. ISHAM TRUST ROBERT T. ISHAM & G.S. ISHAM & FIRST NATL BANK OF CHICAGO TRUST 8150 N. CENTRAL EXPY, STE 1211 DALLAS, TX 75206-1831	0.822323%
ROGER D. SHAW JR, TRUST U/A/D 8-27-62 THOMASVILLE RT. BOX 60-B BIRCH TREE, MO 65438	1.268039%
WILLIAM W. SHAW TRUST U/A/D 12-28-63 THOMASVILLE RT BOX 60-B BIRCH TREE, MO 65438	1.268039%

DIANE DERRY 736 HINMAN AVE #1W EVANSTON, IL 60202	0.139272%
JOAN DERRY P.O. BOX 866 TESUQUE, NM 87574	0.139272%
ANTHONY BARD BOAND BANK OF AMERICA ILLINOIS ATTN: DEAN KELLY PO BOX 2081 CHICAGO, IL 60690	0.414787%
DOROTHY M. DERRY 2648 E WORKMAN AVE., STE 211 W. COVINA, CA 91791	0.139272%
KEYES BABER PROPERTIES C/O TX COMMERCE BANK MIDLAND ACCT #50-1532-00 PO BOX 209829 HOUSTON, TX 77216	2.225319%
GEORGE A. RANNEY 17370 WEST CASEY ROAD LIBERTYVILLE, IL 60048	0.520756%
FREDERICK F. WEBSTER JR (FKA WEBSTER PROPERTIES PARTN) 945 WOODLAND DRIVE GLENVIEW, IL 60025	0.308371%
F F WEBSTER IV TRUST ESTATE (FKA WEBSTER PROPERTIES PARTN) C/O COLORADO NATL BANK P.O. BOX 17532 DENVER, CO 80217	0.308371%
JOHN I. SHAW JR TRUST U/A/D 1-2-57 THOMASVILLE RT BOX 60-B BIRCH TREE, MO 65438	1.083016%
SUSANNE SHAW TRUST U/A/D 9/11/53 THOMASVILLE RT BOX 60-B BIRCH TREE, MO 65438	1.083016%
ARCH W. SHAW II TRUST U/A/D 2/1/71 THOMASVILLE RT BOX 60-B BIRCH TREE, MO 65438	1.083016%
BRUCE P. SHAW TRUST U/A/D 6/8/72 THOMASVILLE RT BOX 60-B BIRCH TREE, MO 65438	1.083016%

NORMAN L. HAY JR., TRUSTEE OF THE NORMAN L. HAY JR GS TRUST 3208 ELDON LN WACO, TX 76710	0.832603%
EDWARD L. RYERSON JR TRUST (FKA EDWARD L. RYERSON) CAMBRIDGE TRUST CO TRUSTEE ATTN: DAVID STRACHAN 1336 MASSACHUSETTS AVE CAMBRIDGE, MA 02138-3829	0.520755%
MARGARET STUART HART NORTHERN TRUST BANK/LAKE FOREST & MARGARET STUART HART CO-TRUSTEE U/A ROBERT DOUGLAS STUART PO BOX 226270 DALLAS, TX 75222	0.774329%
ROBERT DOUGLAS STUART JR NORTHERN TRUST BANK/LAKE FOREST & ROBERT DOUGLAS STUART JR CO-TRUSTEE U/A ROBERT D. STUART PO BOX 226270 DALLAS, TX 75222	0.774329%
ANNE STUART BATCHELDER, TRUST. FIRST NATL BANK OF CHICAGO & U/A ROBERT DOUGLAS STUART ATTN: GAYLE COTTON 8150 N CENTRAL EXPY STE 1211 DALLAS, TX 75206	0.774329%
HARRIET STUART SPENCER FIRST NATL BANK OF CHICAGO & U/A ROBERT DOUGLAS STUART ATTN: GAYLE COTTON 8150 N CENTRAL EXPY, STE 1211 DALLAS, TX 75206	0.774329%

BURLINGTON RESOURCES

SAN JUAN DIVISION

November 20, 1996

W. Watson LaForce, Jr.
P.O. Box 353
Midland, TX 79701

RE: BURLINGTON RESOURCES OIL & GAS COMPANY
OFFER TO PURCHASE NON-PRODUCING INTEREST
AND/OR REQUEST TO PARTICIPATE IN DEEP TEST WELL

State and Fee Leases
T31N-R10W, NMPM
Section 3: Lots 10 thru 13, SW¼
Section 4: SE¼
Section 9: Lots 3 thru 12, N½NE¼
Section 10: Lots 1 thru 7, NW¼NW¼
Containing 1255.18 acres

DEC - 1 1996

FEDERAL LEASE SF 078389-A
T31N-R10W, NMPM
Section 11: Lots 1 thru 16
Section 12: Lots 1 thru 8 and 10 thru 15
Containing 1116.96 acres

San Juan County, New Mexico

Dear Mr. LaForce:

Sometime in the first quarter of 1997 Burlington Resources Oil & Gas Company is planning to drill a deep test well (below the currently deepest producing horizon) to evaluate the Pennsylvanian formation (approximately 14,000 feet) in a prospect that includes the referenced lands and leases that you own a working interest in. This well is very high risk (10% success probability) and very expensive (Estimated 1.2 Million dry hole cost; $1.7 Million through completion).

This well will have a proposed 640 acre spacing unit and as a working interest owner you will have the right to participate in the well for your proportionate share of your acreage within the spacing unit. The parties will enter into a mutually acceptable AAPL Form 610-1982 Operating Agreement providing for a 400% non-consent penalty and with the preferential right to purchase provision deleted.

Exhibit B

If you do not wish to participate in this well, Burlington Resources is offering to purchase your interest in the referenced lands below the Mesa Verde formation for $50.00 per net acre with you retaining a 2% overriding royalty interest in all lands purchased. According to our records you own a 1.48635% or 35.2583 net acre interest in the operating rights below the base of the Mesa Verde Formation. This would make the total offer to purchase your interest $1,762.92.

Please indicate below the option you wish to proceed with in relation to this proposed deep test well and return this letter to me in the enclosed, self-addressed, stamped envelope within 15 days of receipt.

If you have any questions, please give me a call at (970) 259-5242.

BURLINGTON RESOURCES OIL & GAS COMPANY

Walter S. Parks
Contract Landman
P.O. Box 2435
Durango, CO 81302

☐ I wish to participate for my proportionate share in any deep test well in which my acreage is included in a spacing unit. Please send me an AFE and Operating Agreement.

☐ I wish to sell my interest in the referenced leases below the base of the Mesa Verde formation to Burlington Resources for $50.00 per net acre retaining a 2% overriding royalty interest.

AGREED TO AND ACCEPTED THIS _____ DAY OF _____, 1996.

_____
W. Watson LaForce, Jr.

BURLINGTON RESOURCES

SAN JUAN DIVISION

December 2, 1996

DEC 16 1996

W. Watson LaForce, Jr.
P.O. Box 353
Midland, TX 79701

RE: **CORRECTION TO**
BURLINGTON RESOURCES OIL & GAS COMPANY
OFFER TO PURCHASE NON-PRODUCING INTEREST
AND REQUEST TO PARTICIPATE IN DEEP TEST WELL
DATED NOVEMBER 20, 1996

FEDERAL LEASE SF 078389
T31N-R10W, NMPM
Section 3: Lots 10 thru 13, SW¼
Section 4: SE¼
Section 9: Lots 3 thru 12, N½NE¼
Section 10: Lots 1 thru 7, NW¼NW¼
Containing 1255.18 acres

FEDERAL LEASE SF 078389-A
T31N-R10W, NMPM
Section 11: Lots 1 thru 16
Section 12: Lots 1 thru 8 and 10 thru 15
Containing 1116.96 acres
San Juan County, New Mexico

2372.14 Ac

Dear Mr. LaForce:

In Burlington Resource's offer letter dated November 20, 1996 the lands described above in Sections 3, 4, 9 and 10, T31N-R10W, NMPM were erroneously labeled as STATE AND FEE LANDS. These lands are under FEDERAL LEASE SF 078389 as shown above.

Please accept my apology if this error has caused you any confusion.

If you have any questions, please give me a call at (970) 259-5242.

BURLINGTON RESOURCES OIL AND GAS COMPANY

Walter S. Parks
Contract Landman
P.O. Box 2431 Durango, CO 81302

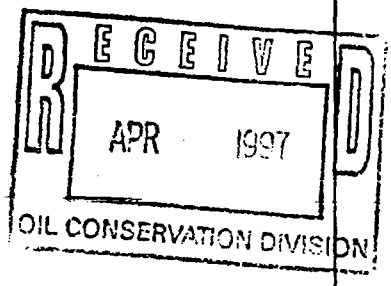
WEST DAY EXP
COOK 5770

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. 11,745
APPLICATION OF BURLINGTON RESOURCES OIL AND GAS COMPANY TO AMEND DIVISION RULES 104.B(2)(a) AND 104.C(3)(a) AND TO ADOPT NEW RULES 104 (B)(2)(b) and 104.C(3)(b) FOR THE ESTABLISHMENT OF 640-ACRE SPACING, INCLUDING WELL LOCATION REQUIREMENTS, FOR GAS PRODUCTION BELOW THE BASE OF THE DAKOTA FORMATION IN SAN JUAN, RIO ARRIBA, SANDOVAL AND McKINLEY COUNTIES, NEW MEXICO	



REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: WILLIAM J. LEMAY, CHAIRMAN
WILLIAM WEISS, COMMISSIONER
JAMI BAILEY, COMMISSIONER

March 19th, 1997
Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, WILLIAM J. LEMAY, Chairman, on Wednesday, March 19th, 1997, at the New Mexico Energy, Minerals and Natural Resources Department, Porter Hall, 2040 South Pacheco, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

are going to be more than $2 million apiece, that his estimate of gas in place on 160 acres is too small a volume to justify that magnitude of expense. He will conclude for you that without a change in the baseline rule, we simply cannot go forward.

We'll provide to your our land experts. James Strickler will testify about his efforts to try to consolidate on a voluntary basis a 640-acre working interest drillblock. He has found it is impossible to do, that without a rule change, he simply cannot get it accomplished and that in order to have the opportunity to explore for what might be significant gas reserves for the State of New Mexico, we're requesting that you change the rule.

As part of that change, we're going to describe for you and discuss what we would like to see in terms of well setbacks. We've got a number of displays to show you what has happened in the Basin for well locations and discuss with you the options for adding some flexibility in where we put the wells within a section.

We have notified almost 200 operators in the San Juan Basin. We have also sent additional notices at random to working interest owners, and to the best of our knowledge and belief there is no opposition to having the Commission change the rule and allow deep gas to be

developed on 640-acre spacing.

At the conclusion of our presentation, we would ask your permission to change the rule.

Thank you, Mr. Chairman.

CHAIRMAN LEMAY: Thank you, Mr. Kellahin.

Mr. Carr?

MR. CARR: Mr. Chairman, I will present one witness for Amoco.

Our testimony will be that changes in the rules are necessary because the current rules, in fact, are a disincentive to developing the deep gas.

The dilemma we see, however, is that we feel at this time there is inadequate data to adopt 640-acre spacing basinwide, so therein we believe is the dilemma.

And we will present a proposal which we hope will address not only the need for 640-acre spacing, at least on a temporary basis, for portions of the pool, but will also do it in a way where we can have adequate data to support that development as to go forward with hearing in a spacing unit.

CHAIRMAN LEMAY: Thank you, Mr. Carr.

Mr. Kellahin, you may proceed.

MR. KELLAHIN: Mr. Chairman, by way of response, we are aware of Amoco's suggested change. We are opposed to their change.

A. I've tried --

Q. And you've tried to do it on --

A. -- and I've failed.

Q. -- 640 acres, have you not?

A. Yes, sir.

MR. KELLAHIN: All right. We tender Mr. Strickler as an expert petroleum landman.

CHAIRMAN LEMAY: His qualifications are acceptable.

Q. (By Mr. Kellahin) Let's talk about Commissioner Bailey's question with regards to the opportunity afforded us by the utilization of the units within the Basin as a vehicle to overcome the limitations of 160-acre spacing.

As one of the first questions I asked you, am I correct in remembering that except for the Allison unit and the Rincon unit, which are undivided, all the other units in the Basin that we're aware of are divided-participation units; is that not true?

A. That is correct.

Q. So what does that mean?

A. Well, that means that if we pick a location in the 29-7 unit, for example, we will be -- the ownership of that well will be on a drillblock basis.

Q. When you mean drillblock, you default to whatever the existing spacing pattern is that the state has

Q. Were they all initially spaced on 640 spacing?

A. I believe they were.

Q. And recently the spacing in three of those has had to be reduced; is that right?

A. That's correct.

Q. And that's one of the three analogous pools that's being displayed?

A. That's correct.

Q. Let's go to Exhibit Number 2. Would you identify and review that?

A. Well, this exhibit really, I think, exemplifies our concerns. We do feel it's 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 deep Basin. While it may be the only data that we have, I don't think that that tells us we need different spacing; I think it tells us we need more data.

Q. When you talk about the analogous pools that are shown on the exhibit on the easel, in fact, that exhibit is

basically you don't have large blanket sands in the area?

A. Well, Amoco, has actually -- We have shot 3-D seismic out here in the deep Basin, as well as we are the major owner in Ute Dome, on part of Ute Dome, and so we've shot similar seismic over there.

These data sets look very different. They don't show blanket accumulations in the deep Basin. We're looking at more algal mounds in one area, and those show to be on much smaller spacing. You know, the 3-D seismic really makes the development of these much more feasible than it ever was before. We can actually see them now. We couldn't see them on 2-D.

And from what we see on our seismic, we don't believe that closeology is going to hurt you. We think that, you know, if someone snuggles up close to you, most likely they will not be able to drill into these features. Now, that doesn't mean every feature in the Basin is that way, but we already see a situation similar to what occurred in the Barker Creek area. We can already see that on our seismic.

Q. Can these algal mounds be economically developed, in your opinion?

A. Very much so. In some of the analogies in other areas, not necessarily in the Paradox Basin but other algal mound features can be very, very high in production, up to

40 to 90 BCF per well. So they can be very profitable on 160 or even less, but they're very small features at times.

Q. Have you seen more than one algal mound in 640-acre spacing units?

A. Yes, we've seen several more than that at times.

Q. When you look at the deep gas formations in the area of the analogous pools in, say, the Ute Dome area, how do they look when you compare them to the formation as you move across the Basin, based on the data that you have?

A. Based on the seismic we see, looking at those zones, they look distinctly different. We're seeing blanket-type accumulations up in the Ute Dome area. They're very flat entities. We see -- When we come into the deep Basin on the seismic that we have proprietarily shot, we see very discrete algal mound almost pinnacles that we can see.

So the seismic looks very different, and this is one of the few looks, I'll admit, that we've got out of the Basin, but it does give a good example, I think, of where there's a significant difference between the data that the Applicant is trying to stretch clear into the Basin.

Q. On the one hand, you're interested in Rule changes to enable 640-acre development; that's correct, is that not?

A. That's correct.

Q. On the other hand, you have concerns about inadequate data to justify basinwide spacing?

A. Yes.

Q. Could you refer to Amoco Exhibit Number 4 and explain to the Commission how Amoco believes that operators could be permitted to develop these deep sands on 640-acre spacing units and still assure there is sufficient on the subject reservoirs to justify these larger units?

A. Yes. You know, what we're recommending here is approval of what I would call an exploratory spacing order. And, you know, we've tried to come here, and we do not want to discourage what Burlington and others may want to do out here, because we really do want to see this Basin drilled.

On the other hand, we're thinking perhaps some type of an exploratory order where you could go in, designate your prime candidate on 640 acres, you would be able, then, to pool on that 640, and you would be able to address your concerns of offset closeology, if you would have it.

Once you had drilled that well and got some reservoir information on it, you would need to bring that data back to the Commission and show what you felt the actual spacing should be, and that would get us to the point where we would have what really looked like what we had.

have funds or plans available in which you propose to drill any of these deep gas wells in the next two years?

A. You know, Burlington is way ahead of us in that. We're just starting to take a look at our seismic features and put those ideas together. So I would say you're correct. Right now, we do not have any wells specifically on the block to drill.

But as you -- I don't know if you're privy to this or not, but with Burlington we have been talking about some rather specific type of locations to drill. So we're kind of behind Burlington in this process.

Q. Do you have the funds available to participate in a well drilled by Burlington on 640 acres?

A. For the appropriate well and the appropriate project, yes, I think we could make funds available.

Q. You wouldn't propose to do this on 160 acres, would you?

A. Yes.

Q. On 160 acres? You're prepared to commit funds on 160 acres to have the initial well drilled?

A. I think that's why we're here today.

Q. And your hypothesis is that we should drill the wells on smaller spacing and then increase the size of the spacing units if we have the data to show it later?

A. No.

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

PLAINTIFFS' MEMORANDUM BRIEF IN RESPONSE TO DEFENDANT BURLINGTON RESOURCES OIL & GAS COMPANY'S MOTION TO DISMISS

Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "Plaintiffs") hereby submit their Plaintiffs' Memorandum Brief in Response to Defendant Burlington Resources Oil & Gas Company's ("Burlington") Motion to Dismiss, as follows:

I.

INTRODUCTION

The New Mexico Oil Conservation Commission ("Commission") entered Order R-10815 changing the spacing for deep formation wildcat wells in the San Juan Basin from 160-acres to 640-acres on June 5, 1997. The plaintiffs, whose rights are vitally impacted by that order but who had received no notice of the application and proceeding on which it was based, filed a timely application for rehearing before the Commission as required

by Section 70-7-25(A) NMSA 1978. The rehearing request was deemed denied under the statute when on July 4, 1997 ten days had passed without action by the Commission.

Plaintiffs then exercised their right to appeal the Commission decision. To accomplish the appeal plaintiffs filed on July 18, 1997 a pleading labeled a "Petition for Review" referencing Section 70-7-25(B) NMSA 1978. Because what the plaintiffs filed was not labeled "Notice of Appeal," even though it contained everything plus more than required by such notice under Rule 1-074 NMRA 1997, Burlington asks the Court to dismiss this matter on the merits. Plaintiffs respond that this appeal has been properly taken, but if there is any defect in the form of their pleading, they should be freely allowed to amend as justice requires under NMRA 1997, Rule 1-015A. The various other issues raised in Burlington's Motion and Memorandum Brief are addressed in turn herein.

II.

ARGUMENT AND AUTHORITIES

POINT ONE: PLAINTIFFS' APPEAL WAS PROPERLY FILED UNDER SECTION 70-2-25(B) NMSA 1978 (REPL. PAMP. 1995)

Burlington claims that "plaintiffs have failed to follow the procedure to appeal this matter to the district court;" that this means the Petition for Review fails to state a claim for which relief can be granted. See Burlington's Brief at p. 5. Burlington reasons that the recently enacted NMRA 1997, Rule 1-074 ("Rule 74"), which generally prescribes the procedure for statutory appeals from administrative agencies, should govern the plaintiffs' appeal of Commission Order No. R-10815, and not the very specific requirements of the New Mexico Oil and Gas Act, Section 70-2-25(B) NMSA 1978 governing appeals of Commission Orders which Plaintiffs followed.

Rule 74[1] purports to "govern appeals from administrative agencies to the district courts where there is a statutory right of review to the district court, whether by appeal, right to petition for a writ of certiorari or other statutory right of review", but "does not create a right to appeal." Id at subsection (A). At the same time, Section 70-2-25(B) of the New Mexico Oil and Gas Act, which was first enacted by the New Mexico Legislature in 1935, creates a right to appeal specifying detailed procedural and substantive requirements that are necessary to perfect and litigate an appeal of a Commission order in the District Court. Section 70-2-25(B) provides as follows:

> B. Any party of record to such rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision **by filing a petition for the review** of the action of the commission within twenty days after the entry of the order following rehearing or after the refusal or [of] rehearing as the case may be. Such **petition** shall state briefly the nature of the proceedings before the commission and shall set forth the order or decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be without a jury, and the transcript of proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence. 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 shall determine the issues of fact and of law and shall enter its order either affirming or vacating the order of the commission. Appeals may be taken from the judgment or decision of the district court to the supreme court in the same manner as provided for appeals from any other final judgment entered by a district court in this state. The trial of such application for relief from action of the commission and the hearing of any appeal to the supreme court from the action of the district court shall be expedited to the fullest possible extent.

[1] Effective January 1, 1996 pursuant to an order of the Supreme Court dated November 15, 1995.

* * *

> D. The applicable rules of practice and procedure in civil cases for the courts of this state shall govern the proceedings for review and any appeal therefrom to the supreme court of the state **to the extent such rules are consistent with provisions of the Oil and Gas Act [this article].**

Id. (emphasis added).

Despite the perceived confusion, a review of the relevant case law indicated to plaintiffs that Section 70-2-25(B) of the New Mexico Oil and Gas Act governs the Plaintiffs' appeal in this matter. Where the legislature has established statutory steps for perfecting an appeal from an administrative proceeding, compliance with such requirements is jurisdictional. See Jueng v. New Mexico Dep't of Labor, 121 N.M. 237; 910 P.2d 313 (1996); Garbagni v. Metropolitan Investments, Inc., 110 N.M. 436, 439, 796 P.2d 1132, 1135 (Ct. App.), cert. denied, 110 N.M. 330, 795 P.2d 1022 (1990) (citing In re Application of Angel Fire Corp.; In re Application No. 0436-A Into 3841, 101 N.M. 579, 686 P.2d 269 (Ct. App. 1984); Angel Fire Corp. v. C.S. Cattle Co., 96 N.M. 651, 652, 634 P.2d 202, 203 (1981). As the Supreme Court noted in Angel Fire Corp. v. C.S. Cattle Co, supra,

> The judiciary determines rules of procedure for cases **within** the judicial system, Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976) cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936), pursuant to its authority under the separation of powers doctrine, N.M. Const., Art. III, § 1. However, the statute here establishes an **administrative procedure** for taking a case or controversy **out of the administrative framework** into the judicial system for review. Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. **The courts have no authority to alter the statutory scheme, cumbersome as it may be.** (Emphasis added).

Id 96 N.M. at 652 (emphasis added). See also Sanchez v. Bradbury & Stam Constr. 109 N.M. 47, 781 P.2d 319 (Ct. App. 1989) (accord, citing Angel Fire Corp., supra 96 N.M. at 652, 634 P.2d at 203.); Jueng v. New Mexico Dep't of Labor, 121 N.M. 237; 910 P.2d 313 (1996) ("we recognize that jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with"); El Dorado Utils. v. Galisteo Domestic Water Users Ass'n, 120 N.M. 165, 899 P.2d 608(Ct. App. 1995) ("Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme, cumbersome as it may be.")

As the Supreme Court recognized in Jueng v. New Mexico Dep't of Labor, supra, a decision filed after Rule 74 went into effect on January 1, 1996, Angel Fire Corp., supra is still good law. As with the statute under review by the Supreme Court in Angel Fire Corp., supra, Section 70-2-25 (B) of the New Mexico Oil and Gas Act establishes a detailed administrative procedure for taking a case or controversy out of the NMOCC administrative framework and into the judicial system for review. The courts have no authority to alter the statutory scheme set forth therein. An appeal is perfected only after an appellant has performed all required of him by the statute creating the right to transfer jurisdiction of a cause to a court. See e.g. Lea County State Bank v. McCaskey Register Co., 49 P.2d 577, 39 N.M. 454 (1935).

POINT TWO: ALTERNATIVELY, PLAINTIFFS HAVE SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF RULE 74

Assuming, arguendo, that Rule 74 does govern the taking of this appeal, Plaintiffs' Petition for Review more than substantially complies with the requirements of

Rule 74; indeed, it goes far beyond the minimal contents called for and neither the Commission nor Burlington cannot contend to the contrary. The requirements for an appeal under Rule 74 are as follows:

> C. Filing appeal. When provided or permitted by law, an aggrieved party may appeal a final decision or order of an agency by:
>
> (1) filing with the clerk of the district court a notice of appeal with proof of service; and
> (2) promptly filing with the agency a copy of the notice of appeal which has been endorsed by the clerk of the district court.
>
> D. Content of the notice of appeal. The notice of appeal shall specify:
> (1) each party taking the appeal;
> (2) each party against whom the appeal is taken;
> (3) the name and address of appellate counsel if different from the person filing the notice of appeal; and
> (4) any other information required by the law providing for the appeal to the district court.
>
> A copy of the order or decision of the agency appealed from, showing the date of the order or decision, shall be attached to the notice of appeal filed in the district court.

Plaintiffs' Petition for Review, timely filed under both the rule and the statute on July 18, 1997, sets forth in detail the parties, their counsel of plaintiffs, relevant facts and applicable legal theories concerning the Plaintiffs' appeal and attaches the entire record of the Commission proceedings as an exhibit. Further, Plaintiffs fulfilled the service requirements of subsection (F) of Rule 74.

Thus, in practical effect, the Plaintiffs complied with the requirements of Rule 74, save for styling their pleading as a "Petition for Review" rather than a "Notice of Appeal." If it is substance rather than labels that count, the rule was satisfied.

Should this court believe that Rule 74 calls for some pleading requirement that is missing, as a matter of substance over form and in the interest of advancing the

ultimate resolution of this appeal on the merits, the Plaintiffs should be allowed to amend or conform their pleadings filed heretofore and continue their appeal under Rule 74. To do otherwise would contravene the often stated policy of our Supreme Court favoring appeals to be determined on the merits and not dismissed on procedural technicalities[2]. see Trujillo v. Serrano, 117 N.M. 273, 276, 871 P.2d 369, 372 (1994)

> The New Mexico Constitution mandates that "an aggrieved party shall have an absolute right to one appeal." N.M. Const. art. VI, @ 2. The courts must ensure that the procedural rules expedite rather than hinder this right. Govich v. North Am. Sys., Inc., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). Behind every evaluation of judicial procedure is the recollection that our modern system evolved in response to the convoluted procedures of the courts of England in which the substantive issues of a case could be lost in a labyrinth of procedural rules.
>
> * * *
>
> As we have previously stated, "it is the policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits, where it can be done without impeding or confusing administration or perpetrating injustice." Jaritas Live Stock Co. v. Spriggs, 42 N.M. 14, 16, 74 P.2d 722, 722-23 (1937); see also Govich, 112 N.M. at 230, 814 P.2d at 98; Lowe v. Bloom, 110 N.M. 555, 555, 798 P.2d 156, 156 (1990); James v. Brumlop, 94 N.M. 291, 293, 609 P.2d 1247, 1249 (Ct. App.), cert. denied, 94 N.M. "[T]his court has consistently followed a policy of construing rules liberally, 'to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice.'" 90 N.M. at 305, 563 P.2d at 99: (quoting Jaritas Live Stock Tours Co. v. Spriggs, 42 N.M. 14, 16, 74 P.2d 722, 722-23 (1937)). See also In re Application No. 0436-A, 101 N.M. at 581, 686 P.2d at 271: "Where, as here, there are two possible interpretations relating to the right to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored."

See also Jueng v. New Mexico Dep't of Labor, 121 N.M. 237; 910 P.2d 313 (1996) ("we

---

[2] Indeed, as succinctly stated by one New Mexico Supreme Court Justice, "To distinguish between a statute conferring a right of appeal and one that describes how the appeal may be taken, holding that the latter may be ruled invalid because the Court has preemptive power to promulgate rules of procedure, is unnecessary and counterproductive hair-splitting." See Maples v. State, 110 N.M. 34, 41-42, 791 P.2d 788 (1990)(Montgomery, J. dissenting).

reiterate that procedural rules are applied to facilitate this right [to an appeal] rather than hinder it. Accordingly, rather than dismiss an appeal on a technicality, "it is the policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits."' Id. (quoting Jaritas Live Stock v. Spriggs, 42 N.M. 14, 16, 74 P.2d 722, 722-23 (1937)); accord Govich v. North Am. Sys. Inc., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991)). See also Trujillo v. Hilton of Santa Fe, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993).("Where . . . there are two possible interpretations relating to the right to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored.") See also Flower v. Wiley, 95 N.M. 476, 623 P.2d 990 (1981)(Supreme Court will construe its rules liberally so that causes on appeal may be determined on the merits, citing Montgomery v. Cook, 76 N.M. 199, 413 P.2d 477 (1966)); accord Hester v. Hester, 100 N.M. 773, 679 P.2d 1338, cert. denied, 101 NM 11, 677 P.2d 624 (Ct. App. 1984); Danzer v. Professional Insurors, Inc. 101 N.M. 178, 679 P.2d 1276 (1984); P.V. v. L.W., 93 N.M. 577, 603 P.2d 316 (Ct. App. 1980) ("technical" judicial rules in trial and appellate procedure should not affect merits of trial and appeal, nor deprive client of rights to which he is entitled).

POINT THREE: PLAINTIFFS HAVE STANDING TO APPEAL COMMISSION ORDER NO. R-10815 TO THIS COURT

The plaintiffs are the owners of the working interest in the deep formations underlying a 2,480 acre federal lease (SF 78389). The very purpose of Burlington seeking the change in the wildcat spacing rule to 640 acre was to incorporate 480 acres of plaintiffs' lease into one of the two deep formation test wells that are presently

underway. Yet, Burlington disingenuously claims that "Plaintiffs have no standing to appeal because they are not adversely affected by Order R-10815." Burlington's Brief at p. 10. This argument is unavailing for a number of reasons.

First, Section 70-2-25(B.) NMSA 1978 provides in relevant part as follows:

> B. Any party of record to such rehearing proceeding **dissatisfied** with the disposition of the application for rehearing may appeal therefrom to the district court

Id. (emphasis added). The Plaintiffs were dissatisfied with the disposition of their Application for Rehearing filed with the Commission and, as such, they properly and timely filed their Petition for Review with this Court. Quite simply, that is all that is required to pursue an appeal of a Commission Order to the District Court pursuant to the express terms of Section 70-2-25(B.). See Key v. Chrysler Motors Corp., 121 N.M. 764, 918 P.2d 350 (1996)(in determining whether plaintiff has standing to sue under statute or whether statute provides plaintiff with cause of action, court must look to legislature's intent as expressed in statute).

More importantly, there can be no doubt that the Plaintiffs' property and economic interests have been immediately and adversely affected by Commission Case No. 11745 and the resulting Order No. R-10815. But for obtaining its requested spacing increase in Commission Order No. 10815, Burlington could not have initiated compulsory pooling proceedings against the Plaintiffs in Division Case 11808. Indeed, a mere **six days** after the Commission entered Order No. 10815, which changed deep gas well spacing from 160 acres to 640 acres, Burlington was at the Division with its Application No. 11808 requesting an order from the Division compulsorily pooling the Plaintiff's majority working interests (480 acres out of 640 acres) in Section 9, T31N,

R10W, San Juan County, New Mexico for Burlington's proposed $2,316,973 Scott No. 24 Deep Pennsylvanian test well.[3] Should Burlington obtain a favorable ruling from the Division, the Plaintiffs would be forced to either pay for over 64% of Burlington's expensive Scott 24 test well or forfeit their interests until Burlington recovers three times their share of the costs of drilling, equipping and operating the well. Thus, there can be no doubt that the Plaintiffs' have standing to appeal Order No. R-10815. See De Vargas Sav. & Loan Ass'n v. Campbell, 87 N.M. 469, 472, 535 P.2d 1320 (1975)("...to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise.")

POINT FOUR: PLAINTIFFS HAVE EXHAUSTED ALL ADMINISTRATIVE REMEDIES AVAILABLE TO THEM IN APPEALING COMMISSION CASE 11745

Burlington lifts from the Commission's Motion to Dismiss the ridiculous claim that the Plaintiffs have failed to exhaust their administrative remedies under the Oil and Gas Act (Act) NMSA 1978, Sections 70-2-1 through 70-2-38. Burlington's Brief at p. 13.

Burlington longs to deflect the focus away from the infirmity of Order R-10815 and the obvious unconstitutional "random notice" that underlies it. The ploy is to say that the plaintiffs' real gripe lies with Burlington's compulsory pooling case, New Mexico Oil Conservation Division ("Division") Case 11808 currently pending before the Division, and not Commission Case 11745 and the resulting Order No. R-10815 actually being appealed here. Based upon this flawed premise, Burlington skirts entirely any

[3] Testimony elicited from Burlington's witnesses at the hearing in Division Case 11808 revealed that on February 21, 1997, nearly a month prior to the Commission's hearing of Case 11745, that Burlington had filed its Notice of Staking and Application for Permit to Drill for its Scott Well with the Bureau of Land Management indicating the location for this well.

discussion of the Plaintiffs' very real, legitimate and justiciable claims in the present appeal in favor of an inapposite discussion of the various administrative remedies available to the Plaintiffs should they receive an unfavorable ruling in the Division Case 11808, a completely separate proceeding.[4]

As Burlington is well aware, the issues on appeal before this Court are: (1) whether the "random" notice procedures employed by Burlington satisfy the relevant statutory notice requirements of the New Mexico Oil and Gas Act and the Division rules; (2) whether the "random" notice procedures employed by Burlington adequately afforded the Plaintiffs their Constitutional right to procedural due process as guaranteed by Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution; and (3) whether Commission Order No. R-10815 is arbitrary, capricious and/or constitutes an abuse of discretion in that the change in Division Rule 104 not supported by substantial evidence. See Plaintiffs' Application for Rehearing and Petition for Review. All of these issues create a ripe and justiciable controversy among the Plaintiffs, the Commission and Burlington that is well within this Court's jurisdiction to resolve. Indeed, the reversible error here is remarkably apparent and the issue of notice controlled by Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991)(Supreme Court held that defective notice procedures of a Division spacing rule change violated parties right to procedural due

[4] This is not to say that Burlington's compulsory pooling application and the Division proceedings in Division Case 11808 are completely irrelevant here. But for the change in Division Rule 104 from 160 acres to 640 acres for San Juan Basin wildcat gas well spacing obtained by Burlington from the Commission in Commission Case 11745 pursuant to the resulting Commission Order No. R-10815 appealed herein, Burlington would have no basis to bring its Division compulsory pooling case, No. 11808. The fact that Burlington knew full well the immediate effect Commission Order No. R-10815 would have on the Plaintiffs property rights, vis-à-vis its application for compulsory pooling in Division Case 11808, requires that Burlington should have provided actual notice to the Plaintiffs of Commission Case 11745, appealed herein.

process); Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975)(Commission Orders must be based upon substantial evidence.)

Pursuant to Section 70-2-25 (A) NMSA 1978 and 19 NMAC Section 15.1222, the Plaintiffs exhausted all administrative remedies available to them in pursuing a Rehearing with the Commission. The Commission chose to do nothing, thus making an appeal to this Court the only other remedy available to the Plaintiffs.

POINT FIVE: THE PLAINTIFFS WERE ENTITLED TO ACTUAL NOTICE FROM BURLINGTON OF COMMISSION CASE 11745 PURSUANT TO CONTROLLING NEW MEXICO STATUTES, DIVISION RULES, AND NEW MEXICO CASE LAW PRECEDENT

A. Section 70-2-23 NMSA 1878 and NMOCD Rule 1207(11) Mandate that the Plaintiffs Should Have Received Actual Notice of Burlington's Application in Case 11745

Burlington cannot cite to one New Mexico statute, Division or Commission Rule, New Mexico case legal treatise, or article that sanctions its use of "random notice" to inform affected working interest owners, such as the Plaintiffs, of its application before the Commission in Case 11745. There are none. When one takes even a passing glance at the applicable New Mexico statutes, Division and Commission rules, it is obvious that Burlington's use of "random notice" falls far short of the mark.

For instance, pursuant to NMSA 1878 Section 70-2-23 of the New Mexico Oil and Gas Act, entitled "Hearings on Rules, Regulations and Orders; Notice; Emergency Rules":

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

entitled to be heard.

NMSA 1878 Section 70-2-23 (emphasis added.)

Burlington's use of "random notice" falls far short of the "reasonable notice" requirement of Section 70-2-23 which mandates that "any person having an interest in the subject matter shall be entitled to be heard."

In addition to publication notice, Division Rule 1207 mandates additional notice procedures in specific Division and/or Commission proceedings, none of which exactly fits a requested modification of well spacing requirements in Case 11745. Division Rule 1207(11), however, the applicable "catch-all" provision, provides as follows:

> (11) In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities:
>
> (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested).

As discussed above, there is no question that the Plaintiffs' property interests have been directly and immediately affected by Case No. 11745 and the resulting Order No. 10815, a fact known to Burlington **prior** to filing its application in this case.

B. The Basin-Wide Rule Approach and Random Notice is a Sham or Device to Avoid Notice Requirements.

Unable to find support in any statute, rule or regulation for its feckless "random notice" procedure, Burlington advances the rationalization that: "It is logical and reasonable that they [the Plaintiffs] are not entitled to notice. It would be impossible to identify, locate and provide actual notice to 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." Burlington's Brief at p. 9.

This Court can take judicial notice of W. Watson LaForce, Jr., et al. v. El Paso Natural Gas Company and Meridian Oil Inc. (now Burlington), CV 92-645-3 pending before it. Burlington has been litigating for five years in that case against the very same plaintiffs here. Burlington pays overriding royalties every month to each of the sixty-one plaintiffs mailing to them a check and remittance statement. Yet Burlington's "random notice" did not hit a single one of these owners! Had Burlington's personnel decided who would be notified by throwing darts the law of probabilities suggests at least a few of plaintiffs would have been selected. Indeed, given the long standing disputes between plaintiffs and Burlington, given that plaintiffs' lease was geologically selected for one of the two test wells, can anyone really believe that the failure to notify plaintiffs was the result of "random" selection?

Apparently, according to Burlington's strange rationalization, since it may not know the identity and addresses of **all** parties who might be affected by its application in Case 11745, it is therefore excused from providing actual notice to the very narrow and well defined group of sixty-one plaintiffs who it knew beyond doubt would be directly and immediately affected by Case 11745. Burlington's "logic," to put it mildly, is illogical and directly contrary to New Mexico case law.[5]

Notice that Burlington does not argue that it failed to send actual notice of the compulsory pooling application in Case 11745 to any of the individual Plaintiffs because it did not know who they were or where they were. Burlington knew all along the exact

---

[5] See Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) See also In re Miller, 88 N.M. 492, 496, 542 P.2d 1182, 1188 (Ct. App. 1975) (citations omitted), rev'd on other grounds, 89 N.M. 547, 555 P.2d 142 (1976)("Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law.. . . A litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty. ..")

names and addresses of each and every one of the Plaintiffs well before it filed its Application in Case 11745.

It is obvious that the "**basin-wide**" rule change sought and obtained by Burlington in Case No. 11745 was merely a ruse employed by Burlington to facilitate its narrowly-tailored Deep Pennsylvanian exploration program. Burlington's drilling target is not the entire Basin but rather is narrowly focused on approximately nine sections or less in T31N, R10W, San Juan County. The immediate impact of the change in Rule 104 is not nearly so broad, and is pointed directly at the Plaintiffs.

C. The Uhden Case Mandates that the Plaintiffs Were Entitled to Actual Notice from Burlington

It is no surprise that Burlington runs away from the on-point holding of the New Mexico Supreme Court in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991). Indeed, Burlington elevates form over substance argument to new levels in trying to distinguish its responsibilities in the instant case from that of Amoco in Uhden. It cannot. Boiled down to the essentials, Burlington's strained rulemaking vs. adjudication arguments amount to a distinction without a difference and should be disregarded. Burlington's counsel fails to point to one relevant New Mexico statute or NMOCD rule concerning NMOCC or NMOCD hearing notice requirements that makes a distinction between rulemaking vs. adjudication proceedings.[6] The reason is simple. **There are none**.

Burlington's "rulemaking vs. adjudication" rantings notwithstanding, the simple

[6] While such distinctions are made in the New Mexico Administrative Procedures Act, OCD/OCC proceedings are not subject to the requirements of the NMAPA. See Mayer v. Public Employees Retirement Bd., 81 N.M. 64, 436 P.2d 40 (Ct. App. 1970)(only those agencies as are specifically placed by law under the Administrative Procedures Act are subject to its provisions.)

issue under consideration here is what level of notice should the Plaintiffs have been given by Burlington to afford them the due process protection as guaranteed by Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution. In essence, the basic Constitutional standards for adequate notice was set out in Uhden as follows:

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

Uhden, supra 112 N.M. at 530 (emphasis added). See also Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992)(At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend.) The United States Supreme Court unambiguously held in Mullane supra that these minimum due process notice standards apply to **any proceeding**, not just to adjudicatory proceedings as Burlington suggests.

The most significant factor upon which the Supreme Court focused in reaching its holding in Uhden was the fact that Amoco knew Mrs. Uhden's name and address, yet failed to provide her with actual notice of its application to the NMOCD for a spacing rule change. Sounds familiar. As the New Mexico Supreme Court held:

> In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, **we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.** Thus, the Commission Order Nos. R-7588 and No. R-7588-A are hereby **void** as to Uhden.

Uhden, supra 112 N.M. at 531 (emphasis added). See also 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)(on an application for an increase in well spacing to the state commission, court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements. Id. at 644.); Union Texas Petroleum v. Corporation Commission, 651 P.2d 652 (Okla. 1981), cert. denied, 459 U.S. 837, 103 S. Ct. 82, 74 L. Ed. 2d 78 (1982), and Louthan v. Amoco Production Co., 652 P.2d 308 (Okla. Ct. App. 1982), all as cited with approval in Uhden supra 112 N.M. at 530.

Try as Burlington might, the instant facts are indistinguishable from those before the Supreme Court in Uhden. As discussed above, it is beyond doubt that Burlington knew the names and addresses of each and every one of the plaintiffs. It is beyond doubt that Burlington knew that as soon as it obtained the Commission's Order changing the spacing rules, it would immediately begin proceedings to compulsory pool the plaintiff's leasehold acreage. It is beyond doubt that before it sought the spacing change, Burlington had determined to drill one of the wells on the plaintiffs' acreage. Plaintiffs were deprived of their property without due process of law, in contravention of

Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution. Commission Order No. 10815 is **void** as to the Plaintiffs.

POINT SIX: PLAINTIFFS' PETITION FOR REVIEW IS PROPERLY BASED ON THE RECORD BEFORE THE COMMISSION

Burlington grossly misleads this court by claiming that "An Appeal of a Commission order to the District Court is based solely upon the record established at the Commission Hearing. **NMSA Sec. 70-2-25 (B) (Repl. Pamp. 1995) and Rule 1-074.H NMRA (1977)"** Burlington's Brief at p. 4. (emphasis in the original). It is suggested that Burlington's counsel try to be more accurate when purporting to quote the requirements of a relevant statute. What NMSA 1978 Sec. 70-2-25 (B) actually requires is that "questions reviewed on appeal shall be only questions presented to the commission by the **application for rehearing**." Id. (emphasis added.) Plaintiffs' Application for Rehearing **is** part of the record on appeal, and Plaintiffs' Petition for Review filed in this action is limited to the issues presented to the Commission in Plaintiffs' Application for Rehearing. The reason that Plaintiffs' Petition for Review contains over 320 pages of exhibits, with which Burlington apparently takes issue, is because Plaintiffs attached the entire record of Case 11745 to aid the Court in its analysis.

POINT SEVEN: COMMISSION ORDER NO. 10815 SHOULD HAVE BEEN BASED UPON SUBSTANTIAL EVIDENCE

Burlington's argument on this point, as best we can understand it, is that the change in NMOCD spacing Rule 104 is "rule making" and thus somehow need not be supported by substantial evidence. Assuming, arguendo, that the Commission Case

11745 was engaged in rulemaking instead of an adjudication, which plaintiffs deny[7], Burlington provides no authority for its notion that the substantial evidence standard does not apply to Commission rule making nor does it inform the Court exactly what it considers the proper standard of review.

Plaintiffs agree that the Commission is empowered to establish general rules on spacing and other matters in order to carry out the purposes of the New Mexico Oil & Gas Act. See Section 70-2-11 NMSA 1978. Indeed, this is just what the Commission did in 1950 when it established NMOCD Rule 104. However, in its Order No. 10815, the Commission **changed** the long established Rule 104 upon application by a private party, ostensibly based upon various allegedly relevant geologic, engineering and other representations from Burlington, so that Burlington could initiate its Deep Pennsylvanian exploration program. See e.g. Commission Order No. R-10815 at ¶ (5)(a) "deep gas wells drain more than 160-acres; and (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." As such, Burlington's argument that a change in Rule 104 should be made "without regard to the particular geologic and petroleum engineering properties of each of these formations" directly contradicts the evidentiary show put on by Burlington at the hearing to obtain the decision.

As stated in plaintiff's Application for Rehearing, the Commission's Order No. R-

[7] See Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995)(New Mexico courts have stated that an administrative body acts in a "quasi-judicial" capacity when it is "required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." (citing Dugger v. City of Santa Fe, 114 N.M. 47, 50, 834 P.2d 424, 427 (Ct. App.) (quoting Black's Law Dictionary 1121 (5th ed. 1979)), cert. quashed, 113 N.M. 744, 832 P.2d 1223 (1992)). In case 11745, the Commission exercised discretion, investigated facts, held hearings and drew conclusions therefrom as a basis for their Order No. R-10815 and, as such, was acting in at least a quasi-judicial capacity,

10815 **should** have been based upon, and supported by, substantial evidence, whether geologic, geophysical or otherwise. Id. at ¶¶ 12-16. See also Oilfield Serv. v. New Mexico State Corp. Comm'n, 118 N.M. 273, 881 P.2d 18 (1994). Substantial evidence is **relevant** evidence that a reasonable mind would accept as sufficient to support a conclusion. Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). The "evidence" presented by Burlington amounted to irrelevant geological and engineering data from fields not even located within the San Juan Basin, and testimony concerning Burlington's desire to spread the operating and economic risk of its Pennsylvanian test wells out to other working interest owners. See Plaintiff's Application for Rehearing at ¶¶ 13-15. Indeed, testimony submitted by Amoco, which was directly on-point, contradicted the evidence put on by Burlington. See Plaintiff's Application for Rehearing at ¶ 14. The evidence presented by Burlington and Amoco at the hearing, without more, does not constitute substantial evidence supporting a change in Rule 104. As such, the Commission's Order R-10815 is arbitrary, capricious, not supported by substantial evidence and without substantial justification.

III.

CONCLUSION

For the foregoing reasons, Burlington has not met its burden under NMRA 1997, Rule 1-012(B)(6) to have the Plaintiffs' Petition dismissed. As such, Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., respectfully request that the Commission's Motion to Dismiss be denied in its entirety.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of Plaintiffs' Memorandum Brief in Response to Defendant Burlington Resources Oil and Gas Company's Motion to Dismiss to be mailed on this 4th day of September, 1997 to the following counsel of record:

Marilyn S. Hebert
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

John Bemis, Esq.
Burlington Resources
P.O. Box 4289
Farmington, New Mexico 87499

_____ for
J.E. Gallegos

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT
DIVISION III

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 HEARING

NOTICE IS HEREBY GIVEN that the above cause of action will be called for hearing before District Judge Byron Caton, at District Court, 103 South Oliver, Aztec, New Mexico, for the time, date and purpose indicated:

DATE: September 11, 1997

TIME: 11:00 A.M. LENGTH OF TRIAL: 1 Hour

NATURE OF HEARING: All Pending Motions

Other Comments: *The District Court complies with the Americans with Disabilities Act. It is counsel's or a pro se party's obligation to notify the clerk of the Court at least five (5) days before any hearing of the anticipated attendance of a disabled person so that appropriate accommodations can be made. The Court must be notified as to the appropriate type of accommodation that will be necessary.*

Additionally, it is counsel's or a pro se party's obligation to notify the Clerk of the Court at least five (5) days in advance of any hearing for which a non-English language interpreter will be required.

COPIES MAILED
TO COUNSEL
OF RECORD
8/29/97

DIVISION ASSISTANT

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

PLAINTIFFS' MEMORANDUM BRIEF IN RESPONSE TO DEFENDANT NEW MEXICO OIL CONSERVATION COMMISSION'S MOTION TO DISMISS

Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., (hereinafter collectively "Plaintiffs") hereby submit their Plaintiffs' Memorandum Brief in Response to Defendants New Mexico Oil Conservation Commission's Motion to Dismiss, as follows:

I.

INTRODUCTION

The New Mexico Oil Conservation Commission ("Commission") entered Order R-10815 changing the spacing for deep formation wildcat wells in the San Juan Basin from 160-acres to 640-acres. The Plaintiffs, whose rights are vitally impacted by that order but who had received no notice of the application and proceeding on which it was based, filed a timely application for rehearing before the Commission as required by

NMSA 1978 § 70-7-25(A). The rehearing request was deemed denied under the statute when on July 4, 1997 ten days had passed without action by the Commission.

Plaintiffs then exercised their right to appeal the Commission decision. To accomplish the appeal Plaintiffs filed on July 18, 1997 a pleading labeled a "Petition for Review" referencing Section 70-7-25(B) NMSA 1978. Because what the plaintiffs filed was not labeled "Notice of Appeal," even though it contained everything plus more than required by such notice under Rule 1-074 NMRA 1997, the defendants ask the Court to dismiss this matter on the merits. Plaintiffs respond that this appeal has been properly taken, but if there is any defect in the form of their pleading, they should be freely allowed to amend as justice requires under Rule 1-015A, NMRA 1997.

II.

ARGUMENT AND AUTHORITIES

POINT ONE: PLAINTIFFS' APPEAL WAS PROPERLY FILED UNDER SECTION 70-2-25(B) NMSA 1978 (REPL. PAMP. 1995)

In its first point, the Commission claims that "plaintiffs have failed to follow the procedure to appeal this matter to the district court;" that this means the Petition for Review fails to state a claim for which relief can be granted. See Commission's Brief at p. 1. The Commission reasons that the recently enacted Rule 1-074 NMRA 1997 ("Rule 74"), which generally prescribes the procedure for statutory appeals from administrative agencies, should govern the plaintiffs' appeal of Commission Order No. R-10815, and not the very specific requirements of the New Mexico Oil and Gas Act, Section 70-2-25(B) NMSA 1978 governing appeals of Commission Orders which Plaintiffs followed.

Rule 74, effective January 1, 1996 pursuant to an order of the Supreme Court

dated November 15, 1995, purports to "govern appeals from administrative agencies to the district courts where there is a statutory right of review to the district court, whether by appeal, right to petition for a writ of certiorari or other statutory right of review", but "does not create a right to appeal." Id at subsection (A). At the same time, Section 70-2-25(B) of the New Mexico Oil and Gas Act, which was first adopted by the New Mexico Legislature in 1935, creates a right to appeal specifying procedural and substantive requirements that are necessary to perfect an appeal of a Commission order to a District Court. Section 70-2-25(B) provides as follows:

> B. Any party of record to such rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision **by filing a petition for the review** of the action of the commission within twenty days after the entry of the order following rehearing or after the refusal or [of] rehearing as the case may be. Such **petition** shall state briefly the nature of the proceedings before the commission and shall set forth the order or decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be without a jury, and the transcript of proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence. 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 shall determine the issues of fact and of law and shall enter its order either affirming or vacating the order of the commission. Appeals may be taken from the judgment or decision of the district court to the supreme court in the same manner as provided for appeals from any other final judgment entered by a district court in this state. The trial of such application for relief from action of the commission and the hearing of any appeal to the supreme court from the action of the district court shall be expedited to the fullest possible extent.
>
> * * *

> D. The applicable rules of practice and procedure in civil cases for the courts of this state shall govern the proceedings for review and any appeal therefrom to the supreme court of the state **to the extent such rules are consistent with provisions of the Oil and Gas Act [this article].**

Id. (emphasis added).

Despite the perceived confusion, a review of the relevant case law makes clear that Section 70-2-25(B) of the New Mexico Oil and Gas Act governs the Plaintiffs' appeal in this matter. Where the legislature has established statutory steps for perfecting an appeal from an administrative proceeding, compliance with such requirements is jurisdictional. See Jueng v. New Mexico Dep't of Labor, 121 N.M. 237; 910 P.2d 313 (1996); Garbagni v. Metropolitan Investments, Inc., 110 N.M. 436, 439, 796 P.2d 1132, 1135 (Ct. App.), cert. denied, 110 N.M. 330, 795 P.2d 1022 (1990) (citing In re Application of Angel Fire Corp.; In re Application No. 0436-A Into 3841, 101 N.M. 579, 686 P.2d 269 (Ct. App. 1984); Angel Fire Corp. v. C.S. Cattle Co., 96 N.M. 651, 652, 634 P.2d 202, 203 (1981). As the Supreme Court noted in Angel Fire Corp. v. C.S. Cattle Co, supra,

> The judiciary determines rules of procedure for cases within the judicial system, Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976) cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936), pursuant to its authority under the separation of powers doctrine, N.M. Const., Art. III, § 1. However, the statute here establishes an **administrative procedure** for taking a case or controversy out of the administrative framework into the judicial system for review. Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. **The courts have no authority to alter the statutory scheme, cumbersome as it may be.**

Id 96 N.M. at 652 (emphasis added). See also Sanchez v. Bradbury & Stam Constr. 109 N.M. 47, 781 P.2d 319 (Ct. App. 1989) (accord, citing Angel Fire Corp., supra 96

N.M. at 652, 634 P.2d at 203.); Jueng v. New Mexico Dep't of Labor, 121 N.M. 237; 910 P.2d 313 (1996) ("we recognize that jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with"); El Dorado Utils. v. Galisteo Domestic Water Users Ass'n, 120 N.M. 165, 899 P.2d 608(Ct. App. 1995) ("Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme, cumbersome as it may be.")

As the Supreme Court recognized in Jueng v. New Mexico Dep't of Labor, supra, a decision filed after Rule 74 went into effect on January 1, 1996, Angel Fire Corp., supra is still good law. As with the statute under review by the Supreme Court in Angel Fire Corp., supra, Section 70-2-25 (B) of the New Mexico Oil and Gas Act establishes a detailed administrative procedure for taking a case or controversy out of the NMOCC administrative framework into the judicial system for review. The courts have no authority to alter the statutory scheme set forth therein. An appeal is perfected only after an appellant has performed all required of him by the statute creating the right to transfer jurisdiction of a caluse to a court. See e.g. Lea County State Bank v. McCaskey Register Co., 49 P.2d 577, 39 N.M. 454 (1935). As such, Rule 74 is not applicable to an appeal of right based upon §70-2-25(B) of the New Mexico Oil and Gas Act.

POINT TWO: PLAINTIFFS HAVE SUBSTANTIALLY COMPLIED WITH THE REQUIREMENTS OF RULE 74

Assuming, arguendo, that Rule 74 does govern Plaintiffs' appeal, which Plaintiffs' dispute, Plaintiffs' Petition for Review more than substantially complies with the requirements of Rule 74; indeed, it goes far beyond the minimal contents called for and

no admin agency has to include the pleadings - papers

the Commission cannot contend to the contrary. The requirements for an appeal under Rule 74 are as follows:

> C. Filing appeal. When provided or permitted by law, an aggrieved party may appeal a final decision or order of an agency by:
>
> (1) filing with the clerk of the district court a notice of appeal with proof of service; and
> (2) promptly filing with the agency a copy of the notice of appeal which has been endorsed by the clerk of the district court.
>
> D. Content of the notice of appeal. The notice of appeal shall specify:
> (1) each party taking the appeal;
> (2) each party against whom the appeal is taken;
> (3) the name and address of appellate counsel if different from the person filing the notice of appeal; and
> (4) any other information required by the law providing for the appeal to the district court.
>
> A copy of the order or decision of the agency appealed from, showing the date of the order or decision, shall be attached to the notice of appeal filed in the district court.

Plaintiffs' Petition for Review, timely filed under both Rule 74 and Section §70-2-25 on July 18, 1997 sets forth in detail the relevant facts and applicable legal theories concerning the Plaintiffs' appeal and attaches the entire record of the Commission proceedings as an exhibit. Further, Plaintiffs fulfilled the service requirements of subsection (F) of Rule 74.

Thus, in practical effect, the Plaintiffs complied with the requirements of Rule 74, save for styling their pleading as a "Petition for Review" rather than a "Notice of Appeal."

Should this court believe that Rule 74 calls for some pleading requirement that is missing, as a matter of substance over form and in the interest of advancing the ultimate resolution of this appeal on the merits, the Plaintiffs should be allowed to

amend or conform their pleadings filed heretofore and continue their appeal under Rule 74. To do otherwise would contravene the often stated policy of our Supreme Court favoring appeals to be determined on the merits and not dismissed on procedural technicalities[1]. see Trujillo v. Serrano, 117 N.M. 273, 276, 871 P.2d 369, 372 (1994)

> The New Mexico Constitution mandates that "an aggrieved party shall have an absolute right to one appeal." N.M. Const. art. VI, @ 2. The courts must ensure that the procedural rules expedite rather than hinder this right. Govich v. North Am. Sys., Inc., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991). Behind every evaluation of judicial procedure is the recollection that our modern system evolved in response to the convoluted procedures of the courts of England in which the substantive issues of a case could be lost in a labyrinth of procedural rules.
>
> * * *
>
> As we have previously stated, "it is the policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits, where it can be done without impeding or confusing administration or perpetrating injustice." Jaritas Live Stock Co. v. Spriggs, 42 N.M. 14, 16, 74 P.2d 722, 722-23 (1937); see also Govich, 112 N.M. at 230, 814 P.2d at 98; Lowe v. Bloom, 110 N.M. 555, 555, 798 P.2d 156, 156 (1990); James v. Brumlop, 94 N.M. 291, 293, 609 P.2d 1247, 1249 (Ct. App.), cert. denied, 94 N.M. "[T]his court has consistently followed a policy of construing rules liberally, 'to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice.'" 90 N.M. at 305, 563 P.2d at 99: (quoting Jaritas Live Stock Tours Co. v. Spriggs, 42 N.M. 14, 16, 74 P.2d 722, 722-23 (1937)). See also In re Application No. 0436-A, 101 N.M. at 581, 686 P.2d at 271: "Where, as here, there are two possible interpretations relating to the right to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored."

See also Jueng v. New Mexico Dep't of Labor, 121 N.M. 237; 910 P.2d 313 (1996) ("we reiterate that procedural rules are applied to facilitate this right [to an appeal] rather than hinder it. Accordingly, rather than dismiss an appeal on a technicality, "it is the

---

[1] Indeed, as succinctly stated by one New Mexico Supreme Court Justice, "To distinguish between a statute conferring a right of appeal and one that describes how the appeal may be taken, holding that the latter may be ruled invalid because the Court has preemptive power to promulgate rules of procedure, is unnecessary and counterproductive hair-splitting. See Maples v. State, 110 N.M. 34, 41-42, 791 P.2d 788 (1990)(Montgomery, J. dissenting).

policy of this court to construe its rules liberally to the end that causes on appeal may be determined on the merits."' Id. (quoting Jaritas Live Stock v. Spriggs, 42 N.M. 14, 16, 74 P.2d 722, 722-23 (1937)); accord Govich v. North Am. Sys. Inc., 112 N.M. 226, 230, 814 P.2d 94, 98 (1991)). See also Trujillo v. Hilton of Santa Fe, 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993). "Where . . . there are two possible interpretations relating to the right to an appeal, that interpretation which permits a review on the merits rather than rigidly restricting appellate review should be favored." See also Flower v. Wiley, 95 N.M. 623 P.2d 990 (1981)(Supreme Court will construe its rules liberally so that causes on appeal may be determined on the merits); accord Hester v. Hester, 100 N.M. 773, 679 P.2d 1338, cert. denied, 101 NM 11, 677 P.2d 624 (Ct. App. 1984); Danzer v. Professional Insurors, Inc. 101 N.M. 178, 679 P.2d 1276 (1984); P.V. v. L.W., 93 N.M. 577, 603 P.2d 316 (Ct.App. 1980)("technical" judicial rules in trial and appellate procedure should not affect merits of trial and appeal, nor deprive client of rights to which he is entitled).

POINT THREE: PLAINTIFFS HAVE EXHAUSTED ALL ADMINISTRATIVE REMEDIES AVAILABLE TO THEM IN APPEALING COMMISSION CASE 11745

Out of left field the Commission floats as its second point the obfuscatory argument that "The Court lacks subject matter jurisdiction over this case because the Plaintiffs have failed to exhaust their administrative remedies under the Oil and Gas Act (Act) NMSA 1978, §§ 70-2-1 through 70-2-38." Commission's Brief at p. 4.

Apparently, the Commission has decided that the Plaintiffs' real gripe lies solely with Burlington's compulsory pooling case, New Mexico Oil Conservation Division ("Division") Case 11808 currently pending before the Division, and not Commission

Case 11745 and the resulting Order No. R-10815 actually being appealed here. Commission's Brief at p. 5. Based upon this flawed premise, the Commission proceeds to skirt entirely any discussion of the Plaintiffs' very real, legitimate and justiciable claims in the present appeal in favor of a rambling and completely inapposite two page diatribe concerning, inter alia, the various administrative remedies available to the Plaintiffs should they receive an unfavorable ruling in the Division Case 11808, a completely separate proceeding.[2] Id at pp. 5-7.

As the Commission is well aware, assuming it bothered to read the Plaintiffs' Application for Rehearing and Petition for Review, the issues on appeal before this Court are: (1) whether the "random" notice procedures employed by Burlington satisfy the relevant statutory notice requirements of the New Mexico Oil and Gas Act and the Division rules; (2) whether the "random" notice procedures employed by Burlington adequately afforded the Plaintiffs their Constitutional right to procedural due process as guaranteed by Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution; and (3) whether Commission Order No. R-10815 is arbitrary, capricious and/or constitutes an abuse of discretion in that the change in Division Rule 104 not supported by substantial evidence. All of these issues create a ripe and justiciable controversy among the Plaintiffs, the Commission and Burlington that is well within this Court's jurisdiction to resolve. See Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991)(Supreme Court

[2] This is not to say that Burlington's compulsory pooling application and the Division proceedings in Division Case 11808 are completely irrelevant here. But for the change in Division Rule 104 from 160 acres to 640 acres for San Juan Basin wildcat gas well spacing obtained by Burlington from the Commission in Commission Case 11745 pursuant to the resulting Commission Order No. R-10815 appealed herein, Burlington would have no right to bring its Division compulsory pooling case, No. 11808. As is discussed in the next point, the fact that Burlington knew full well the immediate effect Commission Order No. 10815 would have on the Plaintiffs property rights, vis-à-vis its application for compulsory pooling in Division Case 11808, requires that Burlington should have provided actual notice to the Plaintiffs of Commission Case 11745, appealed herein.

held that defective notice procedures of a Division spacing rule change violated parties right to procedural due process); Rutter & Wilbanks Corp. v. Oil Conservation Comm'n, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975)(Commission Orders must be based upon substantial evidence.)

Pursuant to NMSA 1978 § 70-2-25 (A) and 19 NMAC § 15.1222, the Plaintiffs exhausted all administrative remedies available to them in pursuing a Rehearing with the Commission. The Commission chose to do nothing, thus making an appeal to this Court the only other remedy available to the Plaintiffs. The Commission's inapposite "failure to exhaust administrative remedies" smoke screen should be ignored for the nonsense that it is.

POINT FOUR: NOTICE OF BURLINGTON'S APPLICATION AND OF THE COMMISSION PROCEEDINGS IN COMMISSION CASE 11745 WAS INADEQUATE

The Commission asserts that it "amended NMOCD Rule 104 after due public notice was given." Commission's Brief at p. 4. Apparently, although not mentioned in its brief, the Commission is sanctioning Burlington's use of "random notice" which Burlington employed to notice affected interest owners of its application and the Commission proceedings in Commission Case 11745.[3] Neither Burlington nor the Commission can cite to one New Mexico statute, Division or Commission Rule, nor New Mexico case that sanctions, or indeed even mentions, the use of "random notice" to inform interested parties, of an application before the Commission. There are none.

While, unfortunately for the owners of oil and gas interest owners in the State of

[3] It is likely that Burlington's "random notice" was not random at all. Not one of the Plaintiffs were among those accidentally hit by Burlington's "random notice" of Case No. 11745 while numerous of the Plaintiffs' fellow working interest owners in the same acreage did receive such notice. Had the recipients of notice been selected by throwing darts, surely a few of the Plaintiffs would have been included. They were not.

New Mexico, the Commission is apparently willing to accept "random notice" as satisfying the procedural due process guarantees of Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution, the United States and New Mexico Supreme Courts clearly are not. The on-point holding of the New Mexico Supreme Court in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) squarely addresses this issue. In essence, the basic Constitutional standards for adequacy of notice concerning a Division spacing rule change was set out in Uhden as follows:

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

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

The most significant factor upon which the Supreme Court focused in reaching its holding in Uhden that Mrs. Uhden's due process rights were violated was the fact that Amoco knew Mrs. Uhden's name and address, yet failed to provide her with actual

notice of its application to the NMOCD for a spacing rule change. As the New Mexico Supreme Court held:

> In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, **we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.** Thus, the Commission Order Nos. R-7588 and No. R-7588-A are hereby **void** as to Uhden.

Uhden, supra 112 N.M. at 531 (emphasis added). See also 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)(on an application for an increase in well spacing to the state commission, court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements. Id. at 644.); Union Texas Petroleum v. Corporation Commission, 651 P.2d 652 (Okla. 1981), cert. denied, 459 U.S. 837, 103 S. Ct. 82, 74 L. Ed. 2d 78 (1982), and Louthan v. Amoco Production Co., 652 P.2d 308 (Okla. Ct. App. 1982), all as cited with approval in Uhden supra 112 N.M. at 530.

The instant facts are indistinguishable from those before the Supreme Court in Uhden. As discussed above, it is beyond doubt that Burlington knew the names and addresses of each and every one of the plaintiffs. It is beyond doubt that Burlington knew that as soon as it obtained the Commission's Order changing the spacing rules, it would immediately begin proceedings to compulsory pool the plaintiffs' leasehold acreage. Further, it is beyond doubt that before it sought the spacing change,

Burlington had determined to drill one of the wells on the plaintiffs' acreage.

Had Burlington so desired, it could have easily sent actual notice to the Plaintiffs. It did not. As such, under the unequivocal holding of the New Mexico Supreme Court in Uhden, the plaintiffs were deprived of their property without due process of law, in contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution.

III.

CONCLUSION

At the very least, the Commission has not met its burden under Rule 1-012(B)(6) NMRA 1997 (Repl. Pamp. 1992) to have the Plaintiffs' Petition dismissed. For the foregoing reasons, Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983, et al., respectfully request that the Commission's Motion to Dismiss be denied in its entirety.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the foregoing to be served via U.S. Mail to counsel of record on this 29th day of August, 1997.

_____
JASON E. DOUGHTY

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

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

Plaintiffs,

v. **CV 97-572-3**

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

MOTION TO DISMISS OF THE NEW MEXICO OIL CONSERVATION COMMISSION

The New Mexico Oil Conservation Commission ("Commission"), by and through its undersigned attorney, moves the Court for its order dismissing this case pursuant to Rule 1-012(B)(1) and Rule 1-012(B)(6) NMRA 1997 and as grounds therefore states:

1. The Plaintiffs have brought this matter as a Petition for Review pursuant to NMSA 1978, § 70-2-25(B) (Repl. Pamp. 1995). *See* Verified Petition for Review ¶ 5.

2. Appeals from decision of the Commission are governed by Rule 1-074 NMRA 1997, which became effective January 1, 1996.

3. The procedures set forth in NMSA 1978, § 70-2-25(B) (Repl. Pamp. 1995) conflict with the rule of procedure adopted by the Supreme Court. When a statute purporting to regulate procedure conflicts with a rule of procedure adopted by the Supreme Court, the rule of procedure

prevails.

4. As the Plaintiffs' complaint, the Petition for Review, is legally insufficient, the complaint fails to state a claim for which relief can be granted based on the pleadings.

5. The Plaintiffs' attempted appeal is premature. The gravamen of the Plaintiffs' Petition is that the Oil Conservation Division (Division) of the New Mexico Energy, Minerals and Natural Resources Department and then Commission **may** grant a compulsory pooling request in a matter still pending before the Division. The Plaintiffs allege that the rule adopted by the Commission on June 5, 1997, is a "...necessary condition precedent...." to Burlington's request for compulsory pooling in an adjudicatory matter currently pending before the Division. *See* Verified Petition for Review ¶ 20.

6. The Plaintiffs' acknowledge that "...[i]f Burlington's compulsory pooling application is granted...." in the matter before the Division, the Plaintiffs' interests could be affected. *See* Petition for Review ¶ 22.

7. Should the Division grant the compulsory pooling request, the Plaintiffs then have the statutory right to appeal the matter *de novo* to the Commission. In the event the Commission grants the compulsory pooling request, the Plaintiffs are entitled to appeal the Commission's order to the District Court pursuant to Rule 1-074 NMRA 1997.

8. The Plaintiffs have not been harmed by the Commission, and there is no actual controversy between the Plaintiffs and the Commission.

9. This Court lacks subject matter jurisdiction over this appeal because there is no actual controversy between the Plaintiffs and the Commission, and the Plaintiffs have failed to exhaust their administrative remedies.

10. Pursuant to Rule 1-007.1 NMRA 1997 concurrence from opposing counsel was not

requested.

WHEREFORE, the Commission prays that this Court enter its order dismissing this case and for such other relief as is necessary.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the Motion to Dismiss was mailed to all counsel of record on the 19th day of August, 1997.

Marilyn S. Hebert

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

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

Plaintiffs,

v.

CV 97-572-3

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

Defendants.

OIL CONSERVATION COMMISSION'S MEMORANDUM BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

The New Mexico Oil Conservation Commission ("Commission") moves the Court to enter its order dismissing the Petition for Review ("Petition") pursuant to Rules 1-012(B)(1) and 1-012(B)(6) NMRA 1997 as the Court lacks subject matter jurisdiction and the Petition fails to state a claim upon which relief can be granted.

I. The Petition Fails to State a Claim for which Relief Can Be Granted

The Plaintiffs have failed to follow the procedure to appeal this matter to the district court. The Plaintiffs allege that their appeal is pursuant to NMSA 1978, § 70-2-25(B) (Repl.

Pamp. 1995). *See* Petition, ¶ 5. This section states, in part:

> B. Any party of record to such rehearing proceeding dissatisfied with the disposition of the application for rehearing may appeal therefrom to the district court of the county wherein is located any property of such party affected by the decision by filing a petition for the review of the action of the commission within twenty days after the entry of the order following rehearing or after the refusal or [of] rehearing as the case may be. Such petition shall state briefly the nature of the proceedings before the commission and shall set forth the order or the decision of the commission complained of and the grounds of invalidity thereof upon which the applicant will rely; provided, however, that the questions reviewed on appeal shall be only questions presented to the commission by the application for rehearing. Notice of such appeal shall be served upon the adverse party or parties and the commission in the manner provided for the service of summons in civil proceedings. The trial upon appeal shall be without a jury, and the transcript of proceedings before the commission, including the evidence taken in hearings by the commission, shall be received in evidence by the court in whole or in part upon offer by either party, subject to legal objections to evidence. 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.

This statute was enacted as part of the original Oil and Gas Act, Chapter 70, Article 2 NMSA, in 1935.

On November 15, 1995, the New Mexico Supreme Court adopted Rule 1-074 NMRA 1997, with an effective date of January 1, 1996. Rule 1-074 NMRA 1997 governs statutory review by the district court of administrative decisions or orders. Under the procedural scheme of the rule, an aggrieved party files a notice of appeal that starts the time running for the administrative agency to file the record on appeal. The appellant then files its statement of appellate issues within thirty days from the date of service of the notice of filing of the record on appeal. The contents of the record on appeal is set forth with great specificity in Rule 1-074(H)

NMRA 1997.

The Supreme Court has made it very clear that the New Mexico Constitution places the power to control procedural issues in the Supreme Court: "[T]he power to provide rules of pleading, practice, and procedure for the conduct of litigation in the district courts, as well as rules of appellate procedure, is lodged in this court by the Constitution of New Mexico." *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 311, 551 P.2d 1354, 1358 (1976).

The provisions of NMSA 1978, § 70-2-25 1978 (Repl. Pamp. 1995) conflict with the procedure set forth in Rule 1-074 NMRA 1997. When a statute purporting to regulate procedure conflicts with a rule of procedure adopted by the Supreme Court, the rule of procedure prevails. *Maple v. State*, 110 N.M. 34, 791 P.2d 788 (1990); *Southwest Community Health Serv. v. Smith*, 107 N.M. 196, 755 P.2d 40 (1988).

As the Supreme Court has stated, "[a] motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint." *C & H Constr. & Pav., Inc. v. Foundation Reserve Ins. Co.*, 85 N.M. 374, 376, 512 P.2d 947, 949 (1973). As the Petition is legally insufficient and not well-pleaded for an appeal pursuant to Rule 1-074 NMRA 1997, it has failed to state a claim for which relief can be granted. "A motion to dismiss a complaint for failure to state a claim upon which relief can be granted merely tests the legal sufficiency of the complaint." *McNutt v. Tribune*, 88 N.M. 162, 169 , 538 P.2d 804, 811 (Ct.App. 1975). Therefore, the Petition should be dismissed pursuant to Rule 1-012(B)(6).

II. The Court Lacks Jurisdiction over the Subject Matter of the Petition

The Court lacks subject matter jurisdiction over this case because the Plaintiffs have failed to exhaust their administrative remedies under the Oil and Gas Act (Act) NMSA 1978, §§ 70-2-1 through 70-2-38. The Plaintiffs have failed to follow the administrative process set forth in the Act.

The Commission amended NMOCD Rule 104 after due public notice was given. The Petition erroneously states that NMOCD Rule 1207 is the applicable notice provision for Commission rulemaking. *See* Petition ¶ 16. Rule 1207 sets forth the required notice that applicants for certain orders from the Commission must provide. It is not the required notice for the rulemaking for the Commission which is set forth in the Act at NMSA 1978, § 70-2-23 (Repl. Pamp. 1995) and the Open Meetings Act, NMSA 1978, § 10-15-1(D) (1997 Supp.). The Commission is required to provide public notice of its rulemaking rather than notice to anyone who may be affected by a Commission rule. NMSA 1978, § 10-15-1(D) (1997 Supp.) 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 adopted its Open Meetings Resolution on February 13, 1997. The resolution provides that notices of regular meetings will be given ten days in advance of the meeting date. For regular meetings, the resolution requires the Commission to place the notice in a newspaper of general circulation and post the notice at the Commission's street address. The

Commission must also mail copies of the written notice to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings. The amendment to NMOCD Rule 104 was duly noticed.

A review of the Petition makes it clear that the Plaintiffs' concern is not with the statewide rule adopted by the Commission, but rather with the compulsory pooling request currently pending before the Oil Conservation Division ("Division") on an application by Defendant Burlington Resources Oil & Gas Co. ("Burlington"). Paragraph 22 of the Petition reveals the Plaintiffs' real concern, *i.e.*, Case No. 11809 pending before the Division, not the amendment to NMOCD Rule 104. In this way, the Plaintiffs are attempting to bring a premature appeal. The Plaintiffs' fear the Division and later the Commission might approve Burlington's application in Case No. 11809. This fear may never be realized. The Division could deny the application. Even if the Division were to approve the Burlington application in Case No. 11809, the Plaintiffs would then have a statutory right to appeal that decision *de novo* to the Commission. *See* NMSA 1978, § 70-2-13 (Repl. Pamp. 1995). If the Plaintiffs still feel aggrieved by the decision of the Commission in this case, at that time the Plaintiffs can bring the appeal to this Court pursuant to Rule 1-074 NMRA 1997. As the Supreme Court stated in *Overton v. Tax Comm.*, 81 N.M. 28, 31, 462 P.2d 613,616 (1969), "...[T]here must be a real and not a theoretical question...." The Plaintiffs simply want to have two bites at the apple in district court: they want to make an appeal under the auspices of a rule adopted by the Commission as well as exercising their statutory right to appeal in Case No. 11809 which is not ripe for review. At this time there is no actual controversy between the Plaintiffs and the Commission. *Overton,*

81 N.M. at 31, 462 P.2d at 616.

The Plaintiffs must exhaust the administrative remedies prior to seeking relief in district court. *Associated Petroleum Transp., Ltd. v. Shepard*, 53 N.M. 52, 54-55, 201 P.2d 772, 774-775 (1949). Exhaustion of administrative remedies is a jurisdictional prerequisite to filing suit in district court. The district court is without jurisdiction to hear a case if the Plaintiffs elect not to pursue the administrative remedies. *Id., see also Luboyeski v. Hill*, 117 N.M. 380, 382-383, 872 P. 2d 353, 355 (1994); *Grand Lodge of Masons v. Tax & Rev. Dept.*, 106 N.M. 179, 181, 740 P.2d 1163, 1165 (Ct. App. 1987), *cert. denied*, 106 N. M. 1 /4, 740 P.2d 1158 (1987). In *Grand Lodge of Masons*, the plaintiffs, four groups of Masons representing all of the Masonic lodges in New Mexico, filed a declaratory judgment action seeking to have all Masonic lodges in the state declared exempt from taxation on the ground that the properties were used for charitable or educational purposes. The court of appeals remanded the case to the district court with instructions to dismiss the petition for lack of jurisdiction as the plaintiffs had not exhausted the statutorily required administrative procedures for protesting an assessment.

The Plaintiffs, in this case, are attempting to circumvent the statutory scheme. The Plaintiffs have not allowed the Division to make its decision on the compulsory pooling application. The Plaintiffs have not allowed the Commission to make a *de novo* review of the Division's decision, if necessary.

As stated in *Angel Fire Corp. v. C.S. Cattle Co.*, 96 N.M. 651, 652, 634 P.2d 202,203 (1981): "...[T]he statute here establishes an administrative procedure for taking a case or controversy out of the administrative framework into the judicial system for review. Jurisdiction of the matters in dispute does not lie in the court until the statutorily required administrative

procedures are fully complied with. The courts have no authority to alter the statutory scheme, cumbersome as it may be."

Conclusion

The Plaintiffs have failed to follow the procedure to bring this matter to the Court, so that their Petition is legally insufficient and must be dismissed for failure to state a claim for which relief can be granted pursuant to Rule 1-0129B)(6) NMRA 1997. The Plaintiffs have failed to exhaust the administrative remedies, and therefore the Petition must be dismissed because the Court lacks subject matter jurisdiction in this case.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Marilyn S. Hebert, hereby certify that a copy of the Oil Conservation Commission's Memorandum Brief in support of its Motion to Dismiss was mailed to all counsel of record on the 14th day of August, 1997.

Marilyn S. Hebert

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

vs CV-97-572-3

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

MOTION TO DISMISS
OF
BURLINGTON RESOURCES OIL & GAS COMPANY

Burlington Resources Oil & Gas Company ("Burlington"), moves the Court as follows:

(1) To dismiss this action for failure to comply with Rule 1-074.C and Rule 1-074.D NMRA 1997;

(2) To dismiss this action pursuant to Rule 1-012(B)(6) NMRA 1979 for failure to state a claim upon which relief can be granted because Plaintiffs were not entitled to actual notice in Commission Case 11745;

(3) To dismiss this action pursuant to Rule 1-012(B)(6) NMRA 1979 for failure to state a claim upon which relief can be granted because Plaintiffs are not adversely affected by Order R-10815;

(4) To dismiss this action pursuant to Rule 1-012(B)(6) NMRA 1979 for failure to state a claim upon which relief can be granted because Plaintiffs failed to allege the proper standard for review;

(5) To dismiss this action pursuant to Rule 1-012(B)(1) NMRA 1979 because the Court lacks jurisdiction over the subject matter for failure of the Plaintiffs to exhaust their administrative remedies.

Pursuant to Rule 1-007.1 NMRA 1997, concurrence from opposing counsel is not requested.

Defendant, Burlington Resources Oil & Gas Company's Memorandum Brief in support of this motion has been filed concurrently with this motion.

Respectfully submitted by:

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 memorandum was hand delivered this 21 day of August, 1997 to the office of:

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

_____
W. Thomas Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

vs CV-97-572-3

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

BURLINGTON RESOURCES OIL & GAS COMPANY'S MEMORANDUM BRIEF IN SUPPORT OF ITS MOTION TO DISMISS AND MOTION TO STRIKE AND ITS RESPONSE TO PLAINTIFFS' MOTION TO STAY

Burlington Resources Oil & Gas Company ("Burlington"), hereby submit its Memorandum Brief in Support of its Motion to Dismiss and Motion to Strike:

I.

SUMMARY OF PROCEEDINGS

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 authorizes the New Mexico Oil Conservation Commission ("Commission") to establish general rules on spacing and other matters in order to carry out the purposes of the Act. **Section 70-2-11 NMSA**

(1978). These General Rules for "statewide application"[1] govern when no special pool rules exist. **See 19 NMAC 15.A-Rule 11.** On June 5, 1997, the Commission entered Order R-10815 in Commission Case 11745 which is the result of such a rule making procedure.

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 in certain amendments to special pool rules.[4]

---

[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 Rules suitable for general application in the San Juan Basin and in 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 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 70-217.B NMSA (1979) for Commission authority to determine and allocate production in a specific pool.

Burlington's compulsory pooling in Division Case 11808:

On July 10, 1997, and in another matter, the New Mexico Oil Conservation Division[5] held an adjudication hearing in Division Case 11808 in which Burlington sought an order from the Division in accordance with Section 70-2-17.C NMSA for the compulsory pooling of certain uncommitted interest owners in Section 9, T31N, R10W including the interests of the Plaintiffs in order to involuntarily commit those interests to a 640-acre spacing unit. That case is still pending decision by the Division.

The Plaintiffs' Litigation:

W. W. LaForce, Jr. and other individuals and entities alleged to own oil and gas minerals interests underlying Section 9, Township 31 North, Range 10 West, NMPM, San Juan County, New Mexico, hereinafter called "Plaintiffs" now want this Court to invalidate the Commission's general rule making decision in Case 11745 so that they can circumvent attempts by Burlington in another case (Division Case 11809) to involuntarily commit their interest pursuant to the compulsory pooling statute. Section 70-2-17.C NMSA (1979).

---

[5] The Commission consists of a three member panel composed of the Director of the Oil Conservation Division, a designee of the Commissioner of Public Lands, and a designee of the Secretary of the Energy Minerals and Natural Resources Department. The Division is a fully staffed governmental agency, which among its duties conducts Examiner Hearings to adjudicate disputes among parties subject to its jurisdiction. An order entered by the Division in such a case is "appealable" de-novo" to the Commission.

II.

ARGUMENTS AND AUTHORITIES

Plaintiffs are asking this Court to invalidate portions of one of the General Rules and Regulations adopted by the Commission. But in doing so, the Plaintiffs have:

> (1) failed to comply with Rule 1-074.C and Rule 1-074.D NMRA 1997;
>
> (2) failed to state a claim upon which relief can be granted in accordance with Rule 1-012(B)(6) NMRA 1979 because Plaintiffs were not entitled to actual notice in Commission Case 11745;
>
> (3) failed to state a claim upon which relief can be granted in accordance with Rule 1-012(B)(6) NMRA 1979 because Plaintiffs are not adversely affected by Order R-10815;
>
> (4) failed to state a claim upon which relief can be granted in accordance with Rule 1-012(B)(6) NMRA 1979 because Plaintiffs failed to allege the proper standard for review;
>
> (5) failed to exhaust their administrative remedies by prematurely attempting to appeal Division Case 11809 and therefore denied the Court jurisdiction over this subject matter pursuant to Rule 1-012(B)(1) NMRA 1979.
>
> (6) failed to comply with Rule 1-012(H) NMRA 1979 by pleadings insufficient defenses and immaterial and impertinent matters

A. Appeals limited to Commission record:

> ***(6) failed to comply with Rule 1-012(H) NMRA 1979 by pleadings insufficient defenses and immaterial and impertinent matters***

An appeal of a Commission order to the District Court is based solely upon the record established at the Commission hearing. **NMSA Sec 70-2-25(B) (Repl. Pamp 1995) and Rule 1-074.H NMRA (1997)**

Instead, Plaintiffs have filed a complaint with attached exhibits in this case consisting of some 320 pages included numerous allegations, contentions, references to other litigation and other Division cases which are self serving, argumentive and outside the record in this case.

The Court should strike paragraphs 7-24, 26,27, 29-38 and Exhibits B through F of the Complaint because of the Petitioners' failure to comply with Section 70-2-25.B NMSA (1979) and Rule 1-074.H NMRA (1997).

B. Plaintiffs have failed to comply with Rules 1-074C. and D NMRA (1997):

(1) failed to comply with Rule 1-074.C and Rule 1-074.D NMRA 1997

Rule 1-074 NMRA (1997) which became effective on January 1, 1996, strictly governs the procedures for the statutory review by the District Court of administrative decisions by the Commission. In addition, Section 70-2-25 NMSA required that Petitioners' Notice of Appeal must have been filed by July 25, 1997, in order to be timely file.[6] Petitioners' failed to comply with Rule 1-074 NMRA (1979). Such an appeal is perfected:

(a) by preparing a Notice of Appeal which contains certain specified information as set forth in Rule 1-074.D; and

[6] Commission Order R-10815 was issued on June 5, 1997. Section 70-2-25.B NMSA (1979) requires any party adversely affected to file an Application for Rehearing with the Commission within twenty days of a Commission order. Plaintiffs filed an application for Rehearing on June 24, 1997, which was deemed denied ten days later.

(b) by timely filing said notice with the Clerk of the District Court with proof of service as required by Rule 1-074.C NMRA (1979) and within the time limit set forth in Section 70-2-25.B NMSA (1979).

Plaintiffs did not timely file such a Notice of Appeal in compliance with Rule 1-074 NMRA (1979). Instead, Petitioners filed a complaint in this Case which is full of argumentative recitations and references to matters outside of the record in Commission Case 11745. The Plaintiffs have failed to comply with Rule 1-074 NMSA (197) and have waived their attempt to appeal Commission Order R-10815.

C. Standard of Review:

(4) failed to state a claim upon which relief can be granted in accordance with Rule 1-012(B)(6) NMRA 1979 because Plaintiffs failed to allege the proper standard for review;

Petitioners are asking the Court to apply the wrong evidentiary standard to Case 11745. Petitioner want the substantial evidence standard of an adjudicatory proceeding applied to this rule making proceeding where the substantial evidence standard is not required. **See Uhden v. Oil Conservation Commission, 112 NM 528, 817 P.2d 721 (1991).**

Commission Case 11745 involved a rule of general application for all formations in the San Juan Basin below the base of the Dakota formation to establish a new standard sized spacing unit for some twenty (20) various formations below the base of the Dakota formation in the San Juan Basin without regard to the particular geologic and petroleum engineering properties of each of these formations.

Had Commission Case 11745 been an adjudication proceeding, then Commission's order is to be reviewed by the Court acting as an "appellate court" in which the District Court reviews the record established at the Commission hearing to determine if the Commission's order is lawful and is supported by substantial evidence in the record. For examples, see **Continental Oil Co. Oil Conversation Commission,** 70 N.M. 310, 373 P.2d 809 (1962), **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.,** 101 N.M. 291, 681 P.2d 717 (1984), **Fasken v. Oil Conservation Commission,** 87 N.M. 292, 532 P.2d 588 (1975), **Rutter & Wilbanks Corp. v. Oil Conservation Commission,** 87 N.M. 286, 532 P.2d 582 (1975), **Santa Fe Exploration v. Oil Conservation Commission,** 114 N.M. 103, 835 P.2d 819 (1992) 734 P.2d 245 (N.M. App.1987) and **Viking Petroleum v. Oil Conservation Commission,** 100 N.M. 451, 672 P.2d 280 (1983).

However, in order to have that opportunity for a "substantial evidence" review in Commission Case 11745, the Plaintiffs, in accordance with **Uhden, supra**, must demonstrate that this was an adjudication of their property rights which were adversely affected and **not** a rule making case.

In **Uhden,** supra, the New Mexico Supreme Court held that case **was not a rule making case** but was an adjudication for which Ms. Uhden must be given notice because:

(1) the order was not of general application
(2) was confined to a limited area,
(3) the persons affected were limited in number and were identifiable;
(4) the order had immediate effect on owner of producing property.

In contrast to **Uhden,** Commission Case 11745 involved the Commission's General Rules and the making of a prospective rule change for general application in a vast undeveloped area covering some 9,000 square miles with tens of 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."

D. Plaintiffs are not entitled to Notice:

> ***(2) failed to state a claim upon which relief can be granted in accordance with Rule 1-012(B)(6) NMRA 1979 because Plaintiffs were not entitled to actual notice in Commission Case 11745;***

The Plaintiffs are not entitled to actual notice of such rule making procedure. **Uhden, supra.** It is logical and reasonable to understand they are not entitled to notice. It would be impossible to identify, locate and provide actual notice to 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. 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.

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.[7] 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 spacing which affected the existing 160-acre

---

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

spacing units including the spacing unit from which Mrs. Uhden was receiving 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 Commission Case 11745, there were no existing spacing units subject to Rule 104 below the base of the Dakota formations in the entire San Juan Basin becuase there had been no commercial production established. When the Commission adopts a rule making decision, it is not an adjudication of rights or interest between parties. Thus the amendment of this general rule had no immediate effect on Plaintiff's interest in Section 9 and they were not entitled to actual notice.

D. Plaintiffs have no standing to appeal:

> ***(3) failed to state a claim upon which relief can be granted in accordance with Rule 1-012(B)(6) NMRA 1979 because Plaintiffs are not adversely affected by Order R-10815;***

Plaintiffs have no standing to appeal because they are not adversely affected by Order R-10815. Division Rule 1220 provides in part that:

> "any party to the proceedings adversely affected by the order or decision rendered by the Commission after hearing before the

Commission may apply for rehearing pursuant to and in accordance with the provisions of Rule 1222 and said Rule 1222 together with the law applicable to rehearings and appeals in matters and proceedings before the Commission shall thereafter apply."

Plaintiffs incorrectly presume that this change of a General Rule has voluntarily or involuntarily committed their interest to a spacing unit consisting of Section 9. General Rule 104 only affects the owners within the area in the same way as any other land-use regulation affects property owners within the area regulated. When and how these owners will share in any production from any well to be drilled in this or any other spacing unit will be decided either by voluntarily agreement or by a compulsory pooling case **but** not by Case 11745.

As with other General Rules which require periodic revision, Rule 104 needed to be revised. With few exceptions, the many "deep gas" formations 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 Rule 104 provided for 160-acre spacing was not suitable for "deep gas" exploration below the base of the Dakota formation.[8]

[8] It is interesting to note the following inconsistency: that both the Blanco Mesaverde Pool and the Basin Dakota Pools, which are **above** the base of the Dakota are spaced on 320-acre spacing while the "deep gas" was subject to 160-acre spacing.

The Commission decided[9] that there exists a substantial opportunity for operators in the San Juan Basin to commence more significant efforts to explore and produce the deep gas in the San Juan Basin, but the 160-acre spacing unit size for deep gas has discouraged efforts to develop the deep gas in the San Juan Basin because:

> (a) a 160-acre unit does not provide sufficient gas-in-place to economically justify the drilling of deep gas wells which currently cost in excess of two million dollars to drill and complete;
>
> (b) 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;
>
> (c) it is extremely difficult to consolidate 640-acres into a voluntary spacing unit for the drilling of wildcat and development deep gas wells;
>
> (d) future deep gas wells are estimated to costs in excess of two million dollars and the estimate ultimate recovery for deep gas wells requires the dedication of 640 acres to provide sufficient gas reserves to justify the drilling of such wells.

Such a determination was made as a matter of established conservation "policy" to encourage the development of a potential resources for the State of New Mexico[10]

---

[9] See Order R-10815

[10] See Section 70-2-6 NMSA (1979).

E. Plaintiffs have failed to exhaust their administrative remedies:

> ***(5) failed to exhaust their administrative remedies by prematurely attempting to appeal Division Case 11809 and therefore denied the Court jurisdiction over this subject matter pursuant to Rule 1-012(B)(1) NMRA 1979.***

The Plaintiffs are confusing three different types of cases:

(1) Division General Rules for well spacing[11]

(2) the establishment of special rules for well spacing, well locations and production from a specific reservoir **after** a well capable of producing hydrocarbons in paying quantities has been drilled and completed.[12]

(3) compulsory pooling to involuntarily pool uncommitted interest owners for purposes of consolidating all owners into a spacing unit.[13]

Plaintiffs are attempting to appeal the first type of case in order to avoid having their interests pooled which is the third type of case.

Plaintiffs attempted appeal is premature because the gravamen of their complaint is that the Division **may** grant at a compulsory pooling order in another case still pending before the Division which may affect their property interest in Section 9. Should that happen, the Plaintiffs then have the statutory

---

[11] Case 11745 is an example. In New Mexico, unlike Oklahoma, a well spacing hearing is a separate and distinct proceeding unrelated to compulsory pooling hearing.

[12] No such case is yet pending that is relevant in this matter because no "deep gas" well has yet been drilled which is capable of production in paying quantities.

[13] Case 11809 is an example of this type.

right to appeal the matter "de novo" to the Commission. In the event the Commission grants the compulsory pooling request, then the Plaintiffs are entitled to appeal the Commission's order to the District Court pursuant to Rule 1-074 NMRA (1997).

PLAINTIFFS' REQUEST FOR A STAY OF COMMISSION ORDER R-10815 WILL CAUSE IRREPARABLE HARM

Plaintiffs now seek a stay of Commission Order R-10815 covering the entire San Juan Basin because they are upset that they are having to defend a pooling case involving but a single section within the San Juan Basin.[14]

Burlington requests that the Court deny Plaintiffs' motion for a stay of Commission Order R-10815 because of the irreparable harm such a stay would cause.

On June 5, 1997, Commission and in accordance with its statutory authority set forth in Section 70-2-11 NMSA 1979, issued Order R-10815 in Commission Case 11745, which established a new 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.

[14] On July 10, 1997, the 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.

In accordance with this general rule, Burlington and other operators in the San Juan Basin have commenced operations to drill "deep gas" wells within sections in which the Plaintiffs do not have any interest.

The Commission's orders are prima facie valid. **Grace v. Oil Conservation Commission, 87 NM 205, 531 P.2d 939 (1975).** In addition, the 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,87 NM 286, 532 P.2d 582 (1975)** and reviews the record in a light most favorable to upholding the Commission's decision. **Santa Fe Exploration Co. v,. Oil Conservation Comm'n, 114 NM 103, 835 P.2d 819 (1992).**

The usual ground for asking for a stay of an administrative order is its "invalidity", but ordinarily a court of equity will not interfere by inunction to restrain the administrative order. Invalidity, of itself, is not sufficient to warrant the Court using its extraordinary injunctive powers to stay such an order. **42 Am Jur 2d 955-961 "Injunctions", Sections 186-190.**

Plaintiffs will not suffer irreparable harm because they are not now required nor will they be required to make any payments or elections for the well in Section 9 until after such time as the Division enters an order in Case 11809. **Section 70-2-17(C) NMSA 1979.** In addition, Burlington will not commence the well on Section 9 in which the Plaintiffs have an interest until

such time as the Division enters a decision in that case.[15] Even then, if the decision in that case is adverse to the Plaintiffs, they are entitled to seek an order from the Division staying that decision pending appeals to the Commission.[16]

Also Plaintiffs will not suffer irreparable harm should Commission Order R-10815 be invalid because the compulsory pooling of a 640-acre spacing unit will also be invalid and they will be entitled to a refund if they elect to participate.

Contrary to the allegations of the Plaintiffs, Burlington will suffer irreparable harm for which no adequate bond can be posted by Plaintiffs because a stay will preclude Burlington and other operators in the entire San Juan Basin from continuing with operations already commenced to drill deep gas wells in the San Juan Basin on Sections **other than Section 9** in which Plaintiffs have an interest.

The granting a stay of this Commission order will immediately halt all "deep gas" drilling in the San Juan Basin and result in the loss of millions of dollars.

---

[15] See Affidavit of James Stickler, attached as Exhibit A to BurlingtOn's Response to Motion for Stay.

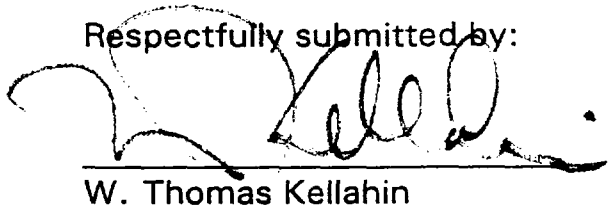
[16] See Exhibit B attached to Burlington's Response to Motion to Stay.

CONCLUSION

The Plaintiff's complaint is misdirected. They are concerned about a compulsory pooling case still pending before the Division. As a result of their anxiety over that case they have attempted to appeal the wrong case. Unfortunately for them, they have also failed to comply with the appropriate appellate rules for which they will have to ask their counsel for an explanation.

Dismissal of the Plaintiff's complaint is warranted in this case because the Plaintiffs have failed to comply with the appellate rules. However, dismissal of the Plaintiff's complaint does not deny them an opportunity at the appropriate time to have the District Court review the compulsory pooling case which is their real concern.

Respectfully submitted by:



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

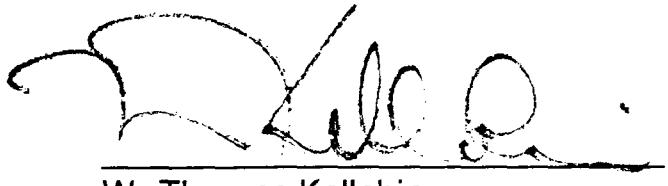
John Bemis, Esq.
Burlington Resources
P. O. Box 4289
Farmington, New Mexico 87499
(505) 599-4054

ATTORNEYS FOR BURLINGTON
RESOURCES OIL & GAS COMPANY

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing memorandum was hand delivered this 21 day of August, 1997 to the office of:

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



W. Thomas Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

vs

CV-97-572-3

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

RESPONSE OF BURLINGTON RESOURCES OIL & GAS COMPANY TO PLAINTIFFS' MOTION FOR STAY

Burlington Resources Oil & Gas Company ("Burlington"), pursuant to Rule 1-007 NMRA 1973, and in response requests that the Court deny Plaintiffs' motion for a stay and in support states:

1. On June 5, 1997, the New Mexico Oil Conservation Commission ("Commission") and in accordance with its statutory authority set forth in Section 70-2-11 NMSA 1979, issued Order R-10815 in Commission Case 11745, which established a new 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.

2. In accordance with this general rule, Burlington and other operators in the San Juan Basin have commenced operations to drill "deep gas" wells within sections in which the Plaintiffs do not have any interest.

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

4. Plaintiffs now seek a stay of Commission Order R-10815 covering the entire San Juan Basin because they are upset that they are having to defend a pooling case involving but a single section within the San Juan Basin.

4. Commission orders are prima facie valid. **Grace v. Oil Conservation Commission, 87 NM 205, 531 P.2d 939 (1975).**

5. Contrary to its allegation, Plaintiffs will not suffer irreparable harm because:

(a) Plaintiffs are not now required nor will they be required to make any payments or elections for the well in Section 9 until after such time as the Division enters an order in Case 11809. **Section 70-2-17(C) NMSA 1979.**

(b) Burlington will not commence the well on Section 9 in which the Plaintiffs have an interest until such time as the Division enters a decision in that case. **Affidavit of James Strickler attached as Exhibit A.**

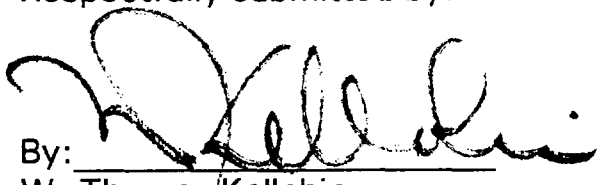
(c) Even then, if the decision in that case is adverse to the Plaintiffs, they are entitled to seek an order from the Division staying that decision pending appeals to the Commission. **See Division Memorandum 3-85 attached as Exhibit B.**

6. Contrary to the allegations of the Plaintiffs, Burlington will suffer irreparable harm for which no adequate bond can be posted by Plaintiffs because a stay will preclude Burlington and other operators in the entire San Juan Basin from continuing with operations already commenced to drill deep gas wells in the San Juan Basin on Sections **other than Section 9** in which Plaintiffs have an interest.

7. In support of its Response, the affidavit of James Strickler is attached as Exhibit "A" hereto.

Defendant, Burlington Resources Oil & Gas Company's Memorandum Brief in support of this response has been filed concurrently with this response.

Respectfully submitted by:



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 response was hand delivered this 21 day of August, 1997 to the office of:

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

W. Thomas Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

vs **CV-97-572-3**

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

AFFIDAVIT OF JAMES R. J. STRICKLER IN SUPPORT OF BURLINGTON RESOURCES OIL & GAS COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR STAY

STATE OF NEW MEXICO)
) SS
COUNTY OF SAN JUAN)

Before me, the undersigned authority, personally appeared James Strickler, who being first duly sworn, stated:

A. My name is James R. J. Strickler. I am over the age of majority and am competent to make this Affidavit.

B. I am a senior staff landman for Burlington Resources Oil & Gas, Inc. who has been responsible for contacting the interest owners involved in Section 9, T31N, R10W, San Juan County, New Mexico and other sections for the drilling of "deep gas" wells in the San Juan Basin. I am familiar with the efforts by Burlington and other companies to drill "deep gas" wells in the San Juan Basin.

EXHIBIT A

C. The following is a partial factual summary of my efforts on behalf of Burlington to consolidate the Plaintiffs' interests on a voluntary basis for Burlington's proposed deep gas well in Section 9, T31N, R10W, San Juan County, New Mexico. [1]

(1) On June 5, 1997, the New Mexico Oil Conservation Commission ("Commission") and in accordance with its statutory authority set forth in Section 70-2-11 NMSA 1979, issued Order R-10815 in Commission Case 11745, which established a new 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.

(2) In accordance with this general rule, Burlington and other operators in the San Juan Basin have commenced operations to drill "deep gas" wells within sections in which the Plaintiffs' do not have any interest.

(3) Burlington's proposed Scott Well No. 24 is 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

(4) In Section 9, Burlington has been joined by some 15 owners who collectively control approximately 35% of the working interest. The non-participating parties include the Plaintiffs and others.

(5) On June 18, 1996, more than a year ago, Burlington wrote representatives of the Plaintiffs' group (which are often referred to as the GLA-66 Group) and offered to purchase deep gas rights within the area which included Section 9, T31N, R10W. Since June, 1996, Burlington has continued its efforts to consolidate Section 9 into voluntary agreements for the drilling of a deep gas well.

(6) On November 20, 1996, Burlington advised that it intended to drill a deep gas test in 1997 and requested the voluntary consolidation of acreage to form a 640-acre unit for such a well which would include lands owned by Bard.

---

[1] communications with owners other than the Plaintiffs have been omitted.

(7) On April 29, 1997, Burlington sent a proposal to Plaintiffs to drill and complete the Scott #24 Well, which included Authority for Expenditures (AFE) and a Joint Operating Agreement (JOA) for Plaintiff's approval and execution.

(8) On June 3, 1997, Burlington advised the mineral owners/lessors of its intention to establish 640 acre spacing units in Section 9.

(9) On June 12, 1997, Burlington filed a compulsory pooling application with the Division for pooling Section 9 as a spacing unit for the Scott Well No. 24.

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

(11) Burlington's drilling department could not find a suitable deep drilling rig in the San Juan Basin. A search was initiated to locate a rig capable of drilling a 14,250 foot deep gas well. The best rig available and on a timely basis was located 700 miles away in Ozona, Texas. The rig was contracted with a two-well commitment in order to drill the Marcotte well No. 2 and a subsequent well during good weather months and drilling windows allowed by the Bureau of Land Management and to avoid any bad winter weather delays. The cost to move this rig into the San Juan Basin was $200,000.

D. In my opinion:

(1) Burlington has provided these parties with a more than adequate period in which to make their own analysis and reach their own independent decision concerning whether they want to sell, farmout or participate in this well.

(2) Plaintiff's now seek a stay of Commission Order R-10815 covering the entire San Juan Basin because they are upset that they are having to defend a pooling case involving but a single section within the San Juan Basin.

(3) Plaintiffs will not suffer irreparable harm because:

(a) Plaintiffs are not now required nor will they be required involuntarily to make any payments for the well in Section 9 regardless of the Division's entry of an order in Case 11809.

(b) Plaintiffs are not required to make an election for the well in Section 9 until after such time as the Division enters a decision in that case.

(c) Burlington will not commence the well in Section 9 in which the Plaintiffs have an interest until such time as the Division enters a decision in that case.

(d) In the event Commission Order R-10815 is invalid, then the compulsory pooling of the Plaintiffs will be invalid and they will be entitled to a refund if they elected to participate in the Scott Well No. 24 Well.

(4) Burlington will suffer irreparable harm for which no adequate bond can be posted by Plaintiffs because:

(a) A stay will preclude Burlington and other operators in the entire San Juan Basin from continuing with operations already commenced to drill deep gas wells in the San Juan Basin on Sections **other than Section 9** in which Plaintiffs do not have any interest.

(b) Burlington has already contracted for the drilling of wells pursuant to Commission Order R-10815 and has a potential financial risk of $ 1.6 million if this order is stayed.

(c) Burlington has invested some $ 7.8 million dollars in this "deep gas" drilling/exploration program which will be placed at risk if this Commission order is stayed.

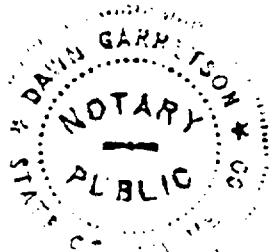
(d) Burlington has currently entered into approximately twenty (20) voluntary contracts with third party owners of deep gas rights which will be lost if this order is stayed resulting in the loss of tens of millions of dollars of potential revenues. In addition the resources cannot be explored which would result in potential revenue losses to both individual producers and the State of New Mexico.

FURTHER AFFIANT SAYETH NOT:

James R.J. Strickler

STATE OF NEW MEXICO)
)SS
COUNTY OF SAN JUAN)

SUBSCRIBED AND SWORN to before me this 20th day of August, 1997, By James R.J. Strickler.



Dawn Garretson
Notary Public

My Commission Expires:

6-17-2000

STATE OF NEW MEXICO
ENERGY AND MINERALS DEPARTMENT
OIL CONSERVATION DIVISION

50 YEARS
1935 - 1985

TONEY ANAYA
GOVERNOR

POST OFFICE BOX 2088
STATE LAND OFFICE BUILDING
SANTA FE, NEW MEXICO 87501
(505) 827-5800

No. 3-85

M E M O R A N D U M

TO: ALL ATTORNEYS PRACTICING BEFORE THE DIVISION

FROM: R. L. STAMETS, DIRECTOR

SUBJECT: APPLICATION FOR HEARING DE NOVO AND GUIDELINES FOR REQUESTS FOR STAYS OF ORDERS

The Division has recently been receiving requests for stays of orders appealed De Novo to the Commission. To assure a fair opportunity for all participants to comment on any proposed stay, The Division intends to follow the guidelines listed below:

(1) Requests for stays must be filed with the Division at least seven day prior to the last day a De Novo hearing may be sought.

(2) A copy of the request for stay must concurrently be furnished the attorney(s) for the other party(ies) in the case.

(3) The request shall be accompanied by a draft stay order.

Notwithstanding these guidelines, the Director of the Division may grant stays under other circumstances should it prove necessary to prevent waste, to protect correlative rights, to protect fresh water, or to prevent gross negative consequences to any affected party.

September 23, 1985

EXHIBIT
B

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs,

vs CV-97-572-3

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

MOTION TO STRIKE
OF
BURLINGTON RESOURCES OIL & GAS COMPANY

Burlington Resources Oil & Gas Company ("Burlington"), moves the Court pursuant to Rule 1-10(F) NMRA 1997 to strike the following from Plaintiff's complaint:

(1) Paragraphs (7) through (24),(26)(27)(29) through (38) of the Complaint, and

(2) Exhibits B through F of the Complaint,

on the grounds that said pleadings fail to comply with Rule 1-074 NMRA 1979 and are insufficient defenses, immaterial and impertinent matter.

Pursuant to Rule 1-007.1 NMRA 1997, concurrence of opposing counsel has been requested and has been refused.

Defendant, Burlington Resources Oil & Gas Company's Memorandum Brief in support of this motion has been filed concurrently with this motion.

Respectfully submitted by:

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 memorandum was hand delivered this 21 day of August, 1997 to the office of:

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

_____
W. Thomas Kellahin

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

JUL 18 1 09 PM '97

Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D February 12, 1983; George M. Bard and Timothy B. Johnson Trustees for the Bard Family Trust U/A/D 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 Farnham, Jr.; Robert B. Farnham; Walter B. Farnham; 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-

Cause No. CV-97-572-3

Trustees of the Edward L. Ryerson, Jr. Trust dated November 25, 1953, as amended; Catherine H. Ruml; 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,	)
	)
vs.	)
	)
Burlington Resources Oil & Gas Company, a corporation, and The New Mexico Oil Conservation Commission,	)
	)
Defendants.	)

VERIFIED PETITION FOR REVIEW OF NEW MEXICO OIL CONSERVATION COMMISSION ADMINISTRATIVE ORDER NO. R-10815

The plaintiffs for their claims for relief, allege and state as follows:

IDENTIFICATION OF PARTIES

1. Each of the plaintiffs are the holders of working 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 under United States Oil and Gas Lease SF 078389 and SF 078389-A covering 2,480 acres, more or less.

2. Defendant Burlington Resources Oil and Gas Company ("Burlington") is a Delaware corporation with its principal place of business in Houston, Texas. Burlington is a wholly-owned subsidiary of Burlington Resources, Inc. ("BRI"). Burlington was known as Meridian Oil Inc. until a corporate name change effective on or about July 26, 1996. (The name "Burlington" will be used throughout this Petition to refer to Burlington Resources Oil and Gas Company following the corporate name change, and also to mean and refer to Meridian Oil Inc. before such name change, as the context

and time referenced in the specific allegations would indicate.) Burlington is also a working interest owner 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 under United States Oil and Gas Lease SF 078389 and SF 078389-A.

3. Defendant New Mexico Oil Conservation Commission ("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.

JURISDICTION AND VENUE

4. Burlington is now transacting and at the material times has transacted business within New Mexico, and has an agent for process who resides within New Mexico. The statutory agent designated for service of process by Burlington is C.T. Corporation System, 119 East Marcy, Santa Fe, in Santa Fe County New Mexico. Burlington was the applicant in Commission Case 11745 which resulted in Order No. R-10815, which the plaintiffs herein appeal.

5. The Commission issued its Order No. R-10815, attached hereto as Exhibit A, in Commission Case No. 11745 on June 5, 1997. On June 24, 1997, the plaintiffs timely filed their Application for Rehearing with the Commission pursuant to NMSA 1978 §70-2-25 (A) and NMOCD Rule 1222. Plaintiffs' Application is attached hereto as Exhibit B. Pursuant to §70-2-25 (A), the plaintiffs' Application was considered denied on July 4, 1997 when the Commission failed to act on the plaintiffs' Application within 10 days. Such failure to act by the Commission on the plaintiffs' Application is deemed a refusal thereof and a final disposition of such Application. The Plaintiffs appeal this matter pursuant to NMSA 1978 §70-2-25 (B).

6. Venue is appropriate in San Juan County in accordance with NMSA 1978, § 70-2-25(B) since the plaintiffs own property interests in San Juan County that are adversely affected by the Commission's Order R-10815.

FACTS COMMON TO ALL CLAIMS

A. Relationship Between the Plaintiffs and Burlington

7. Burlington and the Plaintiffs have been engaged in nearly constant controversy and litigation since at least the 1970's. The most recent litigation between these parties, styled W. Watson LaForce et al. v. Meridian Oil Inc., et al., San Juan County No. CV-92-645-3, commenced in late 1992 and continues to date. See Plaintiffs' Amended Complaint Attached Hereto as Exhibit C.

8. By various communications with the Plaintiffs beginning in July, 1996, Burlington sought to purchase or farmout the Plaintiffs' deep gas working interest rights in T31N-R10W, San Juan County. Given the unfavorable terms offered by Burlington, the Plaintiffs refused such offers.

9. Since about November 1996, if not earlier, Burlington has targeted Section 9-T31N, R10W, San Juan County, New Mexico for a test of the Deep Pennsylvanian formation. On November 20, 1996 James R. J. Strickler of Burlington sent a letter to the plaintiffs seeking to purchase their deep formation working interest rights, a sample copy of which is attached as Exhibit D.

10. Plaintiffs are the owners of over 80% of the working interest in the Pennsylvanian formation in the E/2 and SW/4 of said Section 9.

B. NMOCD Case No. 11745

11. Since December 1, 1950, NMOCD 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.

12. Plaintiffs are informed and believe, that Burlington in a joint venture with Conoco Inc. has spent some three years doing a geological and geophysical investigation of the deep formations of the San Juan Basin and this investigation has lead them to concentrate on attractive gas well exploratory opportunities centering in the area of the plaintiffs' lease.

13. An operator or operators who make a new discovery are desirous of and it is to their economic advantage to control as much acreage as possible in the vicinity of such discovery in order that it benefits them rather than other working interest owners.

14. Unbeknownst to the plaintiffs and not revealed by Burlington to plaintiffs, though Burlington continued to seek purchases or farmouts of plaintiffs' acreage, filed an application to change the rules for spacing of Wildcat wells in the San Juan Basin to 640 contiguous surface acres which was docketed as Case No. 11745.

15. At no time did Burlington's communications advise the Plaintiffs 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.

16. It was not until May 16, 1997 that one of the plaintiffs, Mr. Watson LaForce, Jr., by happenstance learned of Burlington's Application and of the

Commission proceedings in Commission Case No. 11745. Since that time the Plaintiffs have undertaken an independent investigation and learned the following facts concerning Burlington's efforts to change the deep gas wildcat spacing:

A. On February 27, 1997, Burlington filed its application in Commission Case 11745 to amend Division Rules 104.B(2)(a) and 104.C(3)(a) and to adopt New Rules 104.B(2)(b) and 104.C(3)(b) for the establishment of 640-acre spacing, including well location requirements, for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico. Pursuant to its Application, Burlington ostensibly issued notice to "All interested parties entitled to notice".

B. Burlington did not send a copy of its Notice of Hearing or Application to any of the plaintiffs. However, working interest owners in the same acreage in which the plaintiffs hold working interests did receive actual notice from Burlington. This is evidenced by the "Deep Gas - 640 Spacing Owner List" attached to Burlington's Application which lists the parties to whom Burlington provided notice, attached to Burlington's Application. The plaintiffs reside outside the State of New Mexico, a fact known to Burlington, and thus could not and would not receive actual notice by publication.

C. On March 19, 1997, the Commission held a public hearing concerning Burlington's application. At this hearing, representatives from Burlington informed the Commission that they had notified almost 200 operators in the San Juan Basin and sent additional notices "at random" to affected working interest owners.

D. On June 5, 1997, the Commission entered its Order No. R-10815 finding, inter alia, that Division Rule 104 should be modified on a permanent basis to provide for 640-acre gas spacing units for deep gas formations of the San Juan Basin.

14. The complete record of pleadings filed, except for Order R-10815 (Exhibit A) and plaintiffs' Application for Rehearing (Exhibit B) , the transcript of the hearing and exhibits introduced at the hearing in Case No. 11745 are attached as Exhibit E.

15. Nothing in the New Mexico statutes nor in the New Mexico Oil Conservation Division ("NMOCD") rules provide for nor reference the availability of

"random notice" procedures for hearings before the Commission.

16. NMOCD Rule 1207 mandates additional notice procedures in specific proceedings, none of which exactly fits a requested modification of well spacing requirements. NMOCD Rule 1207(11), however, the applicable "catch-all" provision, provides as follows:

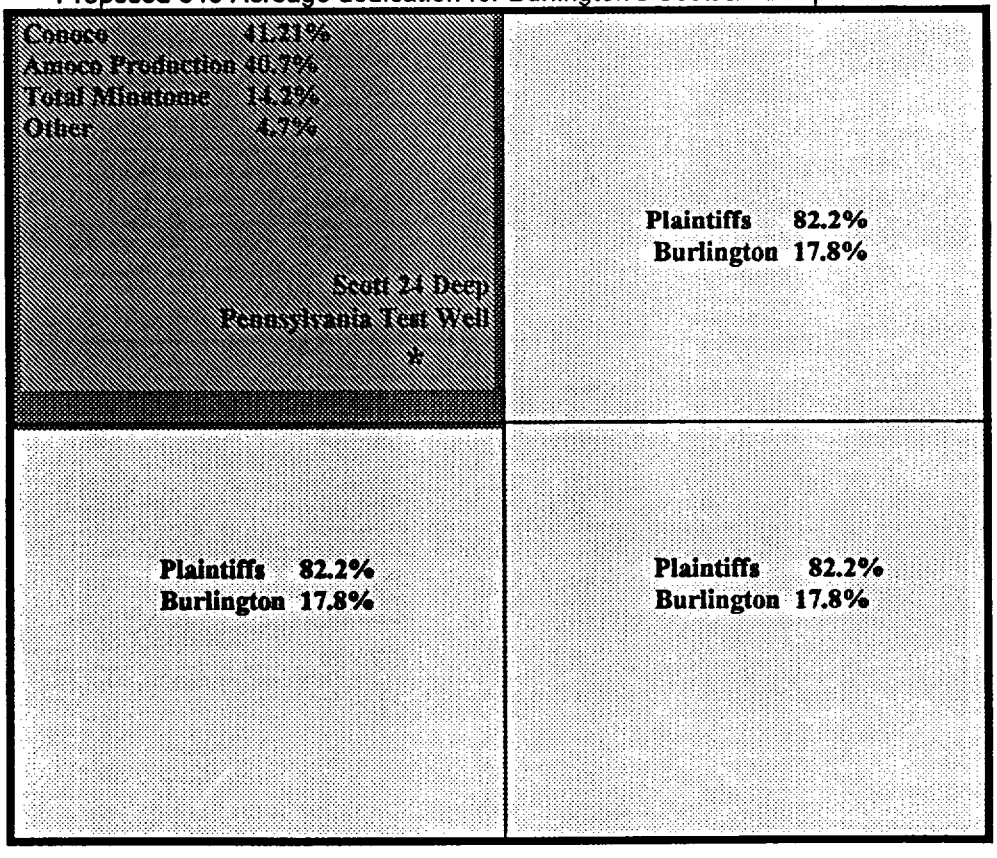
> (11) In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities:
>
> (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested).

17. Plaintiffs' 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 Plaintiffs on a monthly basis. As noted above, the plaintiffs and Burlington have been engaged in litigation since late 1992. A large portion of Burlington's discovery in that case has been directed at plaintiffs "proving up" their ownership in, inter alia, Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico. In addition, Burlington maintains a computerized database of the names and addresses of the Plaintiffs and could easily have given them actual notice of its application and of the public hearing in this case had it so desired.

18. The outcome of the Commission hearing in Case 11745, which resulted in an increase in well spacing pursuant to Order No. R-10815, resulted in a substantial and immediate adverse effect on the property interests of the Plaintiffs in Section 9, T31N-R10W, San Juan County, New Mexico.

19. On June 11, 1997, a mere **six days** after the Commission issued Order No. 10815, Burlington filed an application with the NMOCD seeking compulsory pooling for its proposed Scott Well. Burlington's application is attached hereto as Exhibit F. This case, No. 11809, is currently pending before the Division. This well is to be located in the NW/4 of Section 9-T31N, R10W, San Juan County, New Mexico. Burlington's Application seeks to have the entirety of Section 9 dedicated to the well. As indicated below, the Plaintiffs own the majority of the working interest rights in the E/2 and SW/4 of Section 9. To the best of Plaintiffs' information and belief, and without taking into account farmout agreements entered into by Burlington with working interest owners in the NW/4, the working interest ownership in Section 9 is currently as follows:

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



20. Obtaining an order 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 in NMOCD Case 11809.

21. Under the Commission's new spacing order, Order R-10815, the Plaintiffs' working interest in the three quarter sections of Section 9, Township 31 North, Range 10 West, could be compulsorily pooled with the NE/4 section to form a 640 acre spacing unit. This is what Burlington seeks to accomplish in its Application in Case No. 11808 for compulsory pooling for its proposed Scott Well No. 24.

22. If Burlington's compulsory pooling application is granted, the plaintiffs will be forced pay **over 60 %** of a high risk test well, estimated to cost $2,316,973 for completion of the Scott 24, to which Burlington itself assigns only a 10% chance of success, while Burlington gets away with paying only slightly over **14%.** Alternatively, the plaintiffs could go non-consent and forfeit their ownership through the imposition of the statutory risk penalty until 300% of the cost of drilling, completing and operating the Scott Well is recovered from the plaintiffs' share of production therefrom.

23. The approval of Burlington's Application in Case 11745 by the Commission was aided by Burlington's failure to give notice to certain working interest owners affected thereby, such as the Plaintiffs, who would have opposed the Application had they been properly been given notice.

FIRST CLAIM FOR RELIEF

ORDER R-10815 IS VOID AS TO PLAINTIFFS HAVING BEEN ENTERED IN DENIAL OF THEIR DUE PROCESS RIGHTS AND IN VIOLATION OF THE COMMISSION RULES

24. Plaintiffs reallege by reference paragraphs 1 through 23 above.

25. Article II, Section 18 of the New Mexico Constitution and the 14th Amendment to the United States Constitution guarantees to the plaintiffs that their property rights shall not be impinged without due process, which includes the right to notice and the opportunity to participate in the adjudicatory hearing in question.

26. The "**basin-wide**" rule change sought and obtained by Burlington in Case No. 11745 was merely a ruse employed by Burlington to facilitate its narrowly-tailored Deep Pennsylvanian exploration program. Burlington's drilling target is not comprised of some twenty different deep formations across the entire San Juan Basin. Plaintiffs are informed and believe that Burlington is focused on the Deep Pennsylvanian formation in a discrete region in and around Township 31 North, Range 10 West, San Juan County.

27. By first framing its application as a basin-wide rule change, however, Burlington wrongfully portrayed its notice obligations to affected working interest owners as somehow reduced to "random notice."

28. Since the plaintiffs were not provided actual notice of Burlington's Application in Commission 11745, under NMOCD Rule 1207(11), they were denied the opportunity to participate in the hearing and present evidence. The plaintiffs were denied the procedural due process guaranteed them by Article II, Section 18 of the

New Mexico Constitution and the fourteenth amendment of the United States Constitution. Commission Order No. R-10815 and the order complained against has resulted in a taking of the plaintiffs' property.

WHEREFORE, pursuant to NMSA § 70-2-25, Plaintiffs respectfully request that this Court award to it the following relief:

A. A ruling that Order No. R-10815 is void as to the Plaintiffs for the following reasons:

(a) Order No. R-10815 violates, or was entered in violation of, state and federal constitutional provisions regarding due process of law and taking of property by state action;

(b) Order No. R-10815 was entered pursuant to unlawful procedure, and;

(c) Order No. R-10815 is contrary to law.

B. Cost of suit and such further relief as this Court deems just and proper.

SECOND CLAIM FOR RELIEF

THE COMMISSION'S ORDER R-10815 IS ARBITRARY AND CAPRICIOUS IN THAT THE CHANGE IN SPACING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

29. Plaintiffs reallege by reference paragraphs 1 through 28 above, as though fully set forth herein.

30. As noted above, since December 1, 1950, Division Rule 104 has provided for 160 acre wildcat gas well spacing for San Juan, Rio Arriba and Sandoval Counties, New Mexico.

31. A spacing unit is the "area that can be efficiently and economically

drained and developed by one well . . ." Section 70-2-17(B), NMSA 1978.

32. Burlington presented no geological or geophysical evidence to the Commission establishing that for the San Juan Basin Pennsylvanian formation 640 acres is such a spacing unit.

33. In order to support a change in this long-established spacing rule evidence of sound technical, geologic, geophysical and reservoir engineering data relevant to the San Juan Basin concerning the efficient and economic drainage of a well in the Pennsylvanian formation is required. Burlington's case provided no such evidence.

34. Not a single well has been successfully completed and produced in the Deep Pennsylvanian formation in the San Juan Basin in order to provide drainage data. Burlington's geologic and engineering drainage data presented to the Commission was based upon three "analogy fields," that are not located within the San Juan Basin.

35. Upon information and belief plaintiffs allege that Burlington possesses, inter alia, three-dimensional seismic information that indicates that the features which Burlington is targeting in the Deep Pennsylvanian formation are discrete, well defined structures that in most cases have an areal coverage of less than 200 acres.

36. Upon information and belief plaintiffs allege that Burlington did not reveal its 3-D seismic data of the San Juan Basin to make their case before the Commission because this data does not support 640 acre spacing and in fact, plaintiffs are informed and believe, supports 160 acre spacing.

37. Burlington's true motivation in seeking 640 acre spacing is driven by economic factors, not science. As described above, Burlington wants permanent

Basin-wide 640 acre spacing so that working interest owners in adjoining tracts, such as the plaintiffs in Section 9, T31N, R10W, will be forced through compulsory pooling to either bear the risks, and costs of Burlington's Deep Pennsylvanian exploration program or lose their working interest through the imposition of a risk factor that requires the revenue from their share of production to reimburse Burlington at a rate of 300% for the drilling costs (i.e., three times a projected $1.8 million).

38. Burlington's self-interested desire to spread out the risk and costs of its San Juan Basin deep gas exploration program, without more, does not constitute adequate grounds for the Commission to change a Basin wide spacing rule that has been in place since 1950s, nor does it satisfy the statutory definition of an appropriate proration unit. NMSA § 70-2-17B. As such, the Commission's Order No. R-10815 is arbitrary, capricious, not supported by substantial evidence and without factual or legal justification.

WHEREFORE, pursuant to NMSA § 70-2-25, Plaintiffs respectfully request that this Court award to it the following relief:

A. A ruling that Order No. R-10815 is void for the following reasons:

(a) Order No. R-10815 is not supported by substantial evidence; and

(b) Order No. R-10815 is arbitrary, capricious, and constitutes an abuse of discretion,

B. Cost of suit and such further relief as this Court deems just and proper.

GALLEGOS LAW FIRM, P.C.

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

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF SAN JUAN)

Gail Cotton, Vice President, The First National Bank of Chicago, being first duly sworn upon her oath, deposes and states as follows:

1. That she is the Trustee of four trusts named separately as plaintiffs in the foregoing Petition.

2 That she has personal knowledge of the facts relevant to the foregoing Petition.

2. That she has read the foregoing Petition and that the allegations therein are true and correct to be best of her knowledge and belief.

Gail Cotton
GAIL COTTON

SUBSCRIBED AND SWORN TO before me this 16th day of July, 1997, by Gail Cotton, Vice President, The First National Bank of Chicago.

Charlotte A. Burtis
NOTARY PUBLIC

Seal:

My commission expires:
2-27-98

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

PLAINTIFFS' MOTION TO STAY NEW MEXICO OIL CONSERVATION COMMISSION ORDER NO. R-10815 PENDING APPEAL AND MOTION FOR EXPEDITED HEARING

Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D/ February 12, 1983, et al., (hereinafter collectively "plaintiffs") by and through their undersigned counsel and pursuant to NMSA 1978 Section 70-2-25(C) , hereby respectfully move this Court to exercise its equity jurisdiction to suspend, in whole or in part, the operation of New Mexico Oil Conservation Commission ("Commission") Order No. R-10815 pending review thereof, and in support of this Motion state:

1. Under the judicial review provisions of the New Mexico Oil and Gas Act, this Court is given the authority "in its discretion . . .[t]o stay or suspend, in whole or in part, operation of the order or decision pending review thereof. . ." NMSA 1978 Section

70-2-25(C). The statute goes on to say that the stay is to be on terms the court deems just and proper and "in accordance with the practice of courts exercising equity jurisdiction;. . ."

2. A stay will be granted if the balance of the equities favors this action and when the moving party can demonstrate a substantial likelihood of success on the merits upon appeal. See 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2904. As discussed in Plaintiffs' supporting Memorandum Brief filed simultaneously herewith, a stay of Order R-10815 should be granted by this Court since the balance of the equities overwhelmingly favors this action and the plaintiffs can demonstrate a substantial likelihood of success on the merits upon appeal.

3. Order No. R-10815, entered by the New Mexico Oil Conservation Commission on June 5, 1997, changed the long-standing spacing unit from 160 acres to 640 acres in the San Juan Basin. That order, here complained of is the critical foundation for Burlington to confiscate the plaintiffs property by obtaining a forced pooling of their interest in a 640 acre drilling unit.

4. The plaintiffs will be suffer irreparable harm if Order R-10815 is not stayed pending appeal. Burlington's compulsory pooling case, now before the New Mexico Oil Conservation Commission in Docket No. 11809, seek to force pool the plaintiffs' interest in Section 9, Township 31 North, Range 10 West, San Juan County and was heard on July 10, 1997. A decision is pending. If Burlington's compulsory pooling application is granted by the Division, the plaintiffs will be forced to pay over 60% of Burlington's proposed high risk test well, estimated to cost $2,316,973 for

completion of the Scott Well No. 24, (to which Burlington itself assigns only a 10% chance of success), while Burlington pays only slightly over 14%. Alternatively, the plaintiffs could go non-consent and lose their ownership through the imposition of the statutory risk penalty until 300% of the cost of drilling, completing and operating the Scott Well is recovered from the plaintiffs' share of production therefrom.

5. Burlington will not be substantially prejudiced if Order No R-10815 is stayed pending appeal. Burlington is going to drill the Scott Well with or without the plaintiffs' consent or contribution. Burlington can and will drill the Scott Well in the northwest quarter of Section 9 under the 160 acre rule in effect since 1950. Staying the effect of Order No R-10815 as to the plaintiffs pending appeal is of no practical consequence in Burlington's forge-ahead drilling program for this well.

6. NMSA 1978 Section 70-2-25(C) provides that as a condition to staying or suspending an order or decision, the Court:

> [m]ay require that one or more parties secure, in such form and amount as the court may deem just and proper, one or more other parties against loss or damage due to the staying or suspension of the commission's order or decision, in the event that the action of the commission shall be affirmed.

No such security is necessary or appropriate here. Burlington is the wrongdoer. Burlington will not be impeded from proceeding with the Scott Well in the 160 acres of the northwest quarter of Section 9 in which it owns of controls the majority interest. But for Burlington's purposeful failure to give the plaintiffs notice of Commission Case 11745, this appeal would not be pending and causing an inordinate and undeserved burden upon the plaintiffs.

7. Given Burlington's fast-track drilling schedule for the Scott Well as well as Burlington's pending compulsory pooling case before the New Mexico Oil Conservation Division in Docket No. 11809 , Plaintiffs request that a hearing on this Motion be had on an expedited basis.

WHEREFORE, for the foregoing reasons as well as those set forth in plaintiffs' supporting Memorandum Brief filed simultaneously herewith, plaintiffs respectfully request that this Court stay or suspend, the operation of New Mexico Oil Conservation Commission Order No. R-10815 as to the plaintiffs pending review thereof.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By _____

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

Attorneys for Plaintiffs

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

PLAINTIFFS' MEMORANDUM BRIEF IN SUPPORT OF THEIR MOTION TO STAY NEW MEXICO OIL CONSERVATION COMMISSION ORDER NO. R-10815 PENDING APPEAL AND FOR EXPEDITED HEARING

Plaintiffs Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D/ February 12, 1983, et al., (hereinafter collectively "plaintiffs"), hereby submit their Plaintiffs' Memorandum Brief in Support of Plaintiffs' Motion To Stay as follows:

I.

PRELIMINARY STATEMENT

For forty-seven years the oil and gas industry has lived with a provision that wildcat wells in the San Juan Basin were to be drilled on 160-acre spacing, or so-called proration units. In a rapid-fire process of only slightly more than three months from application to order Burlington Resources Oil and Gas Company ("Burlington")

obtained Order R-10815 changing that requirement to 640-acres. Less than a week after the order issued, on June 11, 1997, Burlington was back at the Oil Conservation Division with an application to force pool plaintiffs' acreage -- comprising over 60% of the ownership -- into a 640 proration unit for a wildcat deep Pennsylvanian formation well to be drilled by Burlington in Section 9 of Township 31 N., Range 10 West. The regulatory application to obtain the spacing change was noticed to some affected working interest owners, but not to a single one of the plaintiffs, through they number more than sixty, are extremely and uniquely well known to Burlington, and are directly affected.

Pursuant to NMSA 1978 Section 70-2-25(C), it is within this Court's discretion to exercise its equity jurisdiction to suspend, in whole or in part, the operation of the New Mexico Oil Conservation Commission ("Commission") Order No. R-10815, pending review thereof by this Court. Equity is a synonym of right and justice. Ortiz v. Lane, 92 N.M. 513, 590 P.2d 1168 (Ct. App. 1979) Fairness, justness and right dealing should dominate all commercial transactions and practices. Id. Equity requires that one should do unto others as, in equity and good conscience, he would have them do unto him if their positions were reversed. Id. As will be shown herein, Burlington's treatment of the plaintiffs in the circumstances surrounding this appeal of Commission Order No. R-10815 has been anything but just and right. Under the facts and law discussed herein, equity demands that Commission Order No. R-10815 be stayed pending the appeal thereof.

II.

STATEMENT OF REGULATORY PROCEEDING AND FACTS

The plaintiffs are the holders of over 80% of the working interest in, inter alia, formations below the base of the Dakota formation located in the east half and south west quarter of Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico under United States Oil and Gas Lease SF 078389 and SF 078389-A (hereinafter "Section 9"). The plaintiffs do not hold working interests in the northwest quarter of Section 9. Burlington is a cotenant working interest owner along with the plaintiffs in Section 9, holding approximately a 14% working interest in Section 9.

Burlington and the plaintiffs have been engaged in nearly constant controversy and litigation since at least the 1970's. The most recent litigation between these parties, is in this judicial district styled W. Watson LaForce et al. v. Meridian Oil Inc., et al., San Juan County No. CV-92-645-3, commenced in late 1992 and continues to date.

By various communications with the Plaintiffs beginning in July, 1996, Burlington sought to purchase or obtain a farmout of the Plaintiffs' deep gas working interest rights in Section 9 and other acreage. Given the "low-ball" dollar offers and other unfavorable terms tendered by Burlington, the Plaintiffs refused such offers.

When these purchase and farmout attempts failed, Burlington tendered a proposed Well Cost Estimate, Authority for Expenditure, and Joint Operating Agreement for their proposed $2,316,973 Deep Pennsylvanian test well to be located in the northwest quarter of Section 9, the Scott Well No. 24 (hereinafter the "Scott Well"), on similarly unfavorable terms. Again, given the unfavorable terms offered by

Burlington, the plaintiffs refused these offers.

Plaintiffs' identities and addresses are well known to Burlington. Burlington remits overriding royalty payments to each of the plaintiffs on a monthly basis for production from the Mesa Verde and other shallower formations. As noted above, the plaintiffs and Burlington have been engaged in litigation since late 1992 and since the summer of 1996, Burlington has been sending written solicitations to all plaintiffs attempting to acquire their interest in the deep formations one way or the other.

At no time did Burlington's communications advise the plaintiffs of its plans to make an application to the Commission for the purpose of changing the New Mexico Oil Conservation Division ("NMOCD") 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. Without such a rule change, Burlington would not be able to compulsory pool the plaintiffs' working interest ownership in Section 9 for its desired 640 acre drilling and spacing unit for the Scott Well.

It was not until May 16, 1997 that one of the plaintiffs, Mr. Watson LaForce, Jr., by happenstance learned of Burlington's Application and of the Commission proceedings in Commission Case No. 11745. Burlington had initiated that proceeding on February 27, 1997 and a hearing was held on March 19, 1997. Although, there are some sixty plaintiffs who share ownership in the deep rights under Section 9 not one of them was notified of the application and hearing. Burlington represented at the hearing before the Commission that it had sent "random" notice to affected working interest owners.

On June 5, 1997, the Commission entered its Order No. R-10815 finding, inter alia, that Division Rule 104 should be modified on a permanent basis to provide for 640-acre gas spacing units for deep gas formations of the San Juan Basin.

On the heels of the questioned order, on June 11, 1997, Burlington filed an Application in Division Case No. 11808 seeking an order from the Division compulsory pooling, inter alia, the plaintiffs' working interest in Section 9 for its Scott Well to be located in the northwest quarter of Section 9.

III.

ARGUMENT AND AUTHORITIES

Under the judicial review provisions of the New Mexico Oil and Gas Act, this Court is given the authority "in its discretion . . .[t]o stay or suspend, in whole or in part, operation of the order or decision pending review thereof. . ." NMSA 1978 Section 70-2-25(C). The statute goes on to say that the stay is to be on terms the court deems just and proper and "in accordance with the practice of courts exercising equity jurisdiction;. . ." Section 70-2-25(C) supra.

The court's discretionary authority to stay Commission Orders pursuant to NMSA 1978 Section 70-2-25(C) is similar to that found in the Federal Rules of Civil Procedure, Rule 62(C) which grants a trial court the discretion to suspend judgment during the pendency of an appeal in injunction cases. A stay will be granted if the balance of the equities favors this action and when the moving party can demonstrate a substantial likelihood of success on the merits upon appeal. See 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §2904. As discussed hereinbelow, a

stay of Order R-10815 should be granted by this Court since the balance of the equities overwhelmingly favors this action and the plaintiffs can demonstrate a substantial likelihood of success on the merits upon appeal.

POINT ONE: THE EQUITIES WEIGH HEAVILY IN FAVOR OF PLAINTIFF FOR THE EXERCISE OF THE POWER TO STAY

Looking to the standards for our courts in granting equitable relief by way of injunction, we find instruction in Cunningham v. Gross, 103 N.M. 223, 699 P.2d 1025 (1985) and Wilcox v. Timberon Protective Association, 111 N.M. 478, 806 P.2d 1068 (Ct. App. 1990). The later decision takes from Cunningham and states at 111 N.M. 485-486 the following:

> Any request for injunctive relief is directed to the sound discretion of the trial court. Cunningham v. Gross. In considering whether to grant an injunction, New Mexico courts generally will consider a number of factors and balance any existing equities and hardships. Id. The factors include: (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the delay, if any, in bringing suit; (4) plaintiff's misconduct, if any; (5) the interests of third parties; (6) the practicability of granting and enforcing the order or judgment; and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied. Id.

Plaintiffs address in turn the above-cited factors set forth in Cunningham supra that a court is to consider in determining whether or not to grant an injunction.

A. CHARACTER OF THE INTEREST TO BE PROTECTED. As noted above, the plaintiffs hold a majority of the deep formation working interest in Section 9, which Burlington seeks to compulsory pool for its Scott Well. Under New Mexico law, a working interest is an interest in real property which is protected from deprivation without due process of law pursuant to Article II, Section 18 of the New Mexico

Constitution and the fourteenth amendment of the United States Constitution. See Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991). Plaintiffs were denied their Constitutionally guaranteed right of due process protection by Burlington's failure to deliver to them actual notice of Commission Case 11745. As a consequence of Commission Case 11745, and the resulting Order No. R-10815 appealed herein, Burlington is seeking to compulsory pool the plaintiffs' real property interests in Section 9. As discussed in detail infra, pursuant to Uhden the plaintiffs' Section 9 property rights have been taken with due process of law.

B. RELATIVE ADEQUACY TO THE PLAINTIFF OF AN INJUNCTION WHEN COMPARED WITH OTHER REMEDIES

In New Mexico, injunctions are granted to prevent irreparable injury for which there is no adequate and complete remedy at law. Wilcox v. Timberon Protective Association, supra 111 N.M. at 486. The plaintiffs have no other remedies currently available to them beyond this appeal. If the effect of Order No. R-10815 is not stayed as to the plaintiffs, their interests in Section 9 could be compulsory pooled by the Division pursuant to Burlington's Application in Division Case 11809. Consequently, the plaintiffs would be forced to fund the majority of Burlington's high-risk Scott Well or forfeit their working interest in Section 9 until Burlington has recovered 300% of their share of the Scott Well costs out of the plaintiffs' share of production revenue.

C. THE DELAY, IF ANY, IN BRINGING SUIT. Plaintiffs have not delayed in bringing this action. All relevant filing dates both before the Commission and this Court have been met.

D. PLAINTIFF'S MISCONDUCT, IF ANY. The plaintiffs are innocent parties here

forced to bear the burden and expense of appealing Burlington's wrongful failure to provide them actual notice of its application and the Commission's proceedings in Case 11745. But for Burlington's surreptitious use of "random notice" of Case 11745, which conveniently failed to hit any of the plaintiffs, this appeal would not be before this Court.

E. THE INTERESTS OF THIRD PARTIES. No third parties will be adversely affected if Order No. R-10815 is stayed as to the plaintiffs. Burlington controls the northwest quarter of Section 9, plaintiffs have no interest in that portion of the section, the well is staked to be drilled in the northwest quarter and under the operative rule (if Order R-10815 is stayed) the well can be drilled on 160 acres. Burlington can, and will, drill its Scott Well in the northwest quarter of Section 9 as intended.

F. THE PRACTICABILITY OF GRANTING AND ENFORCING THE ORDER OF JUDGMENT.

This Court can easily fashion an order staying the effect of Commission Order No. R-10815 as to the plaintiffs during pendency of this appeal. The enforcement of this order would not require on-going supervision by this Court. The only other affected party, Burlington, is a defendant in this action.

G. THE RELATIVE HARDSHIP LIKELY TO RESULT TO THE DEFENDANT IF AN INJUNCTION IS GRANTED AND TO THE PLAINTIFF IF IT IS DENIED.

No substantial hardship will result to Burlington should the effect of Order No. R-10815 be stayed as to the plaintiffs pending appeal. Burlington is going to drill the Scott Well with or without the plaintiffs' consent or contribution. Burlington has rushed through its jurisdictional agency permits, sent its cursory form letters and scheduled a

drilling rig for its Scott Well even before having filed its compulsory pooling application before the Division. Staying the effect of Order No. R-10815 as to the plaintiffs is of no practical consequence in Burlington's forge-ahead drilling program for the Scott Well. See news story from the Farmington newspaper attached as Appendix "I."

Not so for the plaintiffs, however. As noted above, Burlington's compulsory pooling case, No. 11808, seeking to force pool the plaintiffs' interest in Section 9, is currently pending before the Division and was heard on July 10, 1997.[1]

Order No. R-10815 is the linchpin of Burlington's strategy against other interest owners. If the effect of Order No. R-10815 is not stayed as to the plaintiffs, Burlington's compulsory pooling application will likely be granted by the Division. If so, the plaintiffs will be forced pay **over 60%** of Burlington's proposed high risk test well, estimated to cost $2,316,973 for completion of the Scott 24, to which Burlington itself assigns only a 10% chance of success, while Burlington gets away with paying only slightly over **14%.** Alternatively, and due to a total black-out of information by Burlington the plaintiffs will probably elect to be non-consent and forfeit their ownership through the imposition of the statutory risk penalty until 300% of the cost of drilling, completing and operating the Scott Well is recovered from the plaintiffs' share of production therefrom. If Order No. R-10815 is not stayed pending appeal, plaintiffs will be severely prejudiced thereby. If it is stayed, Burlington can and will drill the well on its acreage without burdening plaintiffs.

[1] Burlington has taken every possible step to expedite the Division hearing process in the force poling case. Burlington opposed plaintiffs' and other parties' requests for continuance, document production requests, and moved to quash subpoenas to keep its employees from testifying before the Division.

The equities weigh heavily in favor of the plaintiffs in requesting that this court stay Order No. R-10815 pending appeal. Obtaining the Commission's Order No. R-10815 modifying the Rule 104 wildcat well spacing requirements from 160 acres to 640 acres was a necessary condition precedent to Burlington's agenda to compulsory pool the plaintiffs' working interest in Section 9. The plaintiffs were denied their Constitutional and statutory right of due process to be heard, cross examine Burlington's witnesses, and present evidence concerning this spacing change at the public Commission hearing by Burlington's failure to give them notice.

POINT TWO: CONTROLLING NEW MEXICO LAW INSTRUCTS THAT ORDER R-10815 IS VOID FOR FAILURE OF NOTICE; PLAINTIFFS' PETITION HAS A HIGH LIKELIHOOD OF SUCCESS

Burlington cannot cite to one New Mexico statute, Division or Commission Rule, nor New Mexico case that sanctions its use of "random notice" to inform interested parties, of its application before the Commission in Case 11745. There are none. Indeed, to even discuss the absurdity of Burlington's "random notice" risks giving this disingenuous artifice too much credence. When one takes even a passing glance at the applicable New Mexico statutes, Division and Commission rules, and on-point New Mexico case law, it is obvious that Burlington's "random notice" falls far short of the mark.

Pursuant to NMSA 1878 Section 70-2-23 of the New Mexico Oil and Gas Act, entitled "Hearings on Rules, Regulations and Orders; Notice; Emergency Rules":

> Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the division. The division shall first give **reasonable notice** of such hearing (in no case

> less than ten days, except in an emergency) and at any such hearing **any person having an interest in the subject matter of the hearing shall be entitled to be heard.**

NMSA 1878 Section 70-2-23 (emphasis added.)

Burlington's use of "random notice" falls far short of the "reasonable notice" requirement of Section 70-2-23 which mandates that "any person having an interest in the subject matter shall be entitled to be heard." Indeed, it is likely that Burlington's "random notice" was not random at all. Isn't it curious that not one of the plaintiffs were among those accidentally hit by Burlington's "random notice" of Case No. 11745 while numerous of the plaintiffs' fellow working interest owners in the same acreage did receive such notice? Had the recipients of notice been selected by throwing darts, surely a few of the plaintiffs would have been included. They were not.

In addition to publication notice, Division Rule 1207 mandates additional notice procedures in specific Division and/or Commission proceedings, none of which exactly fits a requested modification of well spacing requirements in Case 11745. Division Rule 1207(11), however, the applicable "catch-all" provision, provides as follows:

> (11) In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities:
>
> (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested).

There can be no doubt that the plaintiffs" property interests have been directly and immediately affected by Case No. 11745 and the resulting Order No. 10815. Further, there can be no doubt that Burlington was well aware of the immediate impact Order No. 10815 would have on the plaintiffs before it filed its application in Case

11745. A mere **six days** after the Commission issued Order No. 10815, Burlington filed its Application in Division Case No. 11808 requesting an order from the OCD compulsorily pooling the plaintiffs' majority working interests in Section 9 for Burlington's proposed $2,316,973 Scott No. 24 Deep Pennsylvanian test well. A cynic might think that Burlington intentionally and systematically failed to provide actual notice to the plaintiffs' in order to keep them from opposing Burlington's Application. Regardless, Burlington's "random notice" is severely deficient and violative of the Division Rule 1207(11) requirement for actual notice.

The simple issue here is what level of notice should the plaintiffs' have been given by Burlington to afford them the due process protection as guaranteed by Article II, Section 18 of the New Mexico Constitution and the fourteenth amendment of the United States Constitution. The on-point holding of the New Mexico Supreme Court in Uhden v. New Mexico Oil Conservation Comm'n, 112 N.M. 528, 917 P.2d 721 (1991) squarely addresses this question. In essence, the basic Constitutional standards for adequacy of notice concerning a Division spacing rule change was set out in Uhden as follows:

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

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

The most significant factor upon which the Supreme Court focused in reaching its holding Uhden that Mrs. Uhden's due process rights were violated was the fact that Amoco knew Mrs. Uhden's name and address, yet failed to provide her with actual notice of its application to the NMOCD for a spacing rule change. Sounds familiar. As the New Mexico Supreme Court held:

> In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, **we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result.** Thus, the Commission Order Nos. R-7588 and No. R-7588-A are hereby **void** as to Uhden.

Uhden, supra 112 N.M. at 531 (emphasis added). See also 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)(on an application for an increase in well spacing to the state commission, court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements. Id. at 644.); Union Texas Petroleum v. Corporation Commission, 651 P.2d 652 (Okla. 1981), cert. denied, 459

U.S. 837, 103 S. Ct. 82, 74 L. Ed. 2d 78 (1982), and Louthan v. Amoco Production Co., 652 P.2d 308 (Okla. Ct. App. 1982), all as cited with approval in Uhden supra 112 N.M. at 530.

The instant facts are indistinguishable from those before the Supreme Court in Uhden. As discussed above, it is beyond doubt that Burlington knew the names and addresses of each and every one of the plaintiffs. It is beyond doubt that Burlington knew that as soon as it obtained the Commission's Order changing the spacing rules, it would immediately begin proceedings to compulsory pool the plaintiffs' leasehold acreage. Further, it is beyond doubt that before it sought the spacing change, Burlington had determined to drill one of the wells on the plaintiffs' acreage.

Had Burlington so desired, it could have easily sent actual notice to the plaintiffs. It did not. As such, under the unequivocal holding of the New Mexico Supreme Court in Uhden, the plaintiffs were deprived of their property without due process of law, in contravention of Article II, Section 18 of the New Mexico Constitution and the Fourteenth Amendment to the United States Constitution. Commission Order No. 10815 is **void** as to the plaintiffs.

POINT THREE: NO SECURITY AGAINST LOSS OR DAMAGE RESULTING FROM A STAY OF ORDER R-10815 IS NECESSARY OR APPROPRIATE

NMSA 1978 Section 70-2-25(C) provides that as a condition to staying or suspending an order or decision, the Court:

> [m]ay require that one or more parties secure, in such form and amount as the court may deem just and proper, one or more other parties against loss or damage due to the staying or suspension of the commission's order or decision, in the event that the action of the commission shall be affirmed.

No such security is necessary or appropriate here. The mere suspension of Order R-10815 as to the plaintiffs pending appeal threatens no loss or damage to Burlington. As is made evident by the compulsory pooling proceedings in Division Case 11809, Burlington is going to drill the Scott Well with or without the plaintiffs' consent or contribution. Indeed, Burlington had scheduled a drilling rig for its Scott Well even before having filed its compulsory pooling application before the Division.

Burlington can still drill the Scott Well in the northwest quarter of Section 9, as it has planned all along. Staying Order R-10815 as to the plaintiffs pending appeal will not impede nor delay drilling the Scott Well and indeed is of little or no practical consequence in Burlington's forge-ahead drilling program for the Scott Well. As set out above, Burlington is the wrongdoer here. But for Burlington's failure to give the plaintiffs notice of Commission Case 11745, this appeal would not be pending. Requiring the plaintiffs, the innocent parties here, to provide security for Burlington against loss or damage due to the staying or suspension of the commission's order would confer an inordinate and undeserved benefit upon Burlington and a concomitantly inordinate and undeserved burden upon the plaintiffs.

CONCLUSION

For the reasons discussed above, and in the accompanying Plaintiffs' Motion plaintiffs respectfully request that this Court enter an Order staying the effect of New Mexico Oil Conservation Commission Order No. R-10815 as to the plaintiffs during the pendency of this appeal.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

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

Attorneys for Plaintiffs

H. R. Kendrick

Burlington rig begins deep test

WAYNE LEUFOLD
BUSINESS EDITOR

JUN 30 1997

What's down there?

No one knows.

In an effort to find out, Burlington Resources Oil and Gas last week spudded a well about eight miles north of Aztec, a well that will be drilled much deeper than normal wells in the San Juan Basin.

Parker Drilling Rig No. 218, brought in from Ozona, Texas, will drill a 14,200-foot exploratory wildcat well to see what's in the Pennsylvanian age formation. Oil and gas production in the basin ranges from 1,500 to 8,000 feet for the normal horizons.

A well this deep hasn't been drilled in the San Juan Basin since 1984, when Phillips Petroleum's San Juan 30-6 Unit 112Y, targeted for the Pennsylvanian, delivered noncommercial amounts of natural gas.

"We're hoping for a lot of promising results, but it's very, very early in the process," said Mark Ellis, vice president of the San Juan Division of Houston-based Burlington Resources. "We'll just keep our fingers crossed. It's a 60-day test, so we'll have to wait and see."

The well, the Burlington No. 2 Marcotte, is being drilled in an area of gas production from Cretaceous Fruitland, Pictured Cliffs, Chacra, Mesa Verde, Graneros and Dakota formations in the Basin/Blanco field.

The nearest production from Pennsylvanian zones, a Burlington release said, is about 23 miles to the west-northwest in the Barker Dome field. That is a paradox gas pool straddling the New Mexico-Colorado border.

Six wells drilled to the Pennsylvanian in the basin before Phillips' attempt also resulted in dry holes. But people who have been in the business here since the second oil and gas boom, the 1950s, say success in drilling to the Penn could spark the area's next energy boom.

"The probability is it would be gas," Ellis said. "The question is, will it be gas in commercial quantities? We can't determine that off seismic, so that's why we're drilling a well."

Burlington and Conoco Inc. are the main partners in the test well. The companies own a significant acreage portion in the basin.

The Burlington release said where support for such wells can be obtained, the companies may drill other wildcats into the deep Penn.

In January, Burlington announced it would drill two test wells to the deep Penn this year.

EXHIBIT B