

Burlington ST. 101 -
- TL

KELLAHIN AND KELLAHIN

ATTORNEYS AT LAW

EL PATIO BUILDING

117 NORTH GUADALUPE

POST OFFICE BOX 2265

SANTA FE, NEW MEXICO 87504-2265

TELEPHONE (505) 982-4285

TELEFAX (505) 982-2047

W. THOMAS KELLAHIN*

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

JASON KELLAHIN (RETIRED 1991)

June 9, 1998

HAND DELIVERED

Mrs. Marilyn S. Hebert, Esq.
Oil Conservation Commission
2040 South Pacheco
Santa Fe, New Mexico 87502

Re: *Supreme Court Cases 25,061/25,062*
Application of Burlington Resources Oil & Gas
Company for 640-acre Deep Gas Spacing, San
Juan Basin, New Mexico

Dear Lyn:

Attached is a rough first draft of a possible response to Gallegos' motion to strike. This "felt good" when I wrote it last night but now I'm not sure I like my approach. I am very interested in your comments and suggestions.

A quick search for cases citing Rule 12-213, leaves me with only cases where counsel have been scolded for rule violations. I have not found a case where the Court rejected the type of argument Gallegos is advancing- there must be some.

Best Regards,


W. Thomas Kellahin

CC: M + 152 HTH
Ask TK about
① Burlington
② Supreme Court
cont.
Burlington
① RP- ST. 101, M
② [unclear]

**IN THE SUPREME COURT
STATE OF NEW MEXICO**

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

vs.

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

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

DRAFT

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

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

BACKGROUND

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

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

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

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

(d) During this period, Burlington attempted to negotiate with the interest owners in Section 9, including the Plaintiffs, for their voluntary participation in this well. However, by June 12, 1997, it was apparent that the Plaintiffs were unwilling to voluntarily participate in this well and Burlington filed a compulsory pooling case with the New Mexico Oil Conservation Division (Case 11809) asking the Division

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to determine if and how the interest owners in Section 9 would be afforded participation in this well.

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

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

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

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

(c) the Plaintiffs owned oil and gas mineral interest in the San Juan Basin and claimed to be "uniquely and exceptionally affected" by the Commission's rule making decision in Case 11745; **See Burlington Brief in Chief Page 23. Also see District Court decision.**

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

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

3. As set forth the District Court opinion attached as Exhibit A to Burlington's Docketing Statement, an opinion prepared by the Plaintiffs, the District Court agreed that the Commission was engaged in "rule-making" and not "adjudicating" when it adopted Order R-10815 which established 640-acre spacing units for any deep gas wells in the San Juan Basin **but then** found that because Burlington knew of these Plaintiffs, had been dealing with them in an effort to form a voluntary 640-acre unit for the Scott Well No. 24, and had not provided them with actual notice of the rule making case, the Commission's 640-acre rule-making

order did not apply to these Plaintiffs. See **District Court decision.**

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

- (a) a brief statement of the nature of the case;
- (b) the disposition in the District Court describing that decision;
- (c) the issues Burlington desire to raise to the Supreme Court;
- (d) a summary of the facts relevant to the issues raised by Burlington; and
- (e) arguments and citations to the record proper and authorities in support of its arguments as to these issues.

Appellate Rules

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

Plaintiffs' Motion to Strike

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

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Plaintiff's Motion Should Be Denied

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

A review of these pleadings reflect that both the Commission and Burlington have made known to the Court the facts relevant to the issues on appeal and did so in an objective and fair manner. If Plaintiffs desire to discuss the facts from their perspective, then that is the purpose of the Answer Brief which affords them the opportunity to advance their position on the issues raised by Burlington and the Commission in this appeal.

Burlington and the Commission desire that the Court focus its attention on the notification required when the Commission engages in rule-making. The Plaintiffs desire to posture this case as some type of special adjudication which would require actual notice only to them and not the thousands of other property owners in the San Juan Basin. The Rules of Appellate Procedure provide an opportunity to the Plaintiffs to make their own summary of the proceedings and their own arguments within the context of their Answer Brief.

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

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

Respectfully submitted by:

DRAFT

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

CERTIFICATION OF SERVICE

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

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

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

W. Thomas Kellahin

KELLAHIN AND KELLAHIN

ATTORNEYS AT LAW

EL PATIO BUILDING

117 NORTH GUADALUPE

POST OFFICE BOX 2265

SANTA FE, NEW MEXICO 87504-2265

TELEPHONE (505) 982-4285

TELEFAX (505) 982-2047

W. THOMAS KELLAHIN*

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

JASON KELLAHIN (RETIRED 1991)

April 6, 1998

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

REF: **Johnson et al. v. Burlington and Oil Commission**
 San Juan County Cause CV-97-572-3

Dear Lyn:

Please find enclosed for your signature, the original of the stipulation to consolidate. Gene has send it. Please call me and I will pick it up and file it.

Regards,

A handwritten signature in black ink, appearing to be 'W. Thomas Kellahin', written over a faint, light-colored signature line.

W. Thomas Kellahin

KELLAHIN AND KELLAHIN

ATTORNEYS AT LAW

EL PATIO BUILDING

117 NORTH GUADALUPE

POST OFFICE BOX 2285

SANTA FE, NEW MEXICO 87504-2285

W. THOMAS KELLAHIN*

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

TELEPHONE (505) 982-4285

TELEFAX (505) 982-2047

JASON KELLAHIN (RETIRED 1991)

FACSIMILE COVER SHEETDATE: March 31, 1998
TIME: 11:20 AM

NUMBER OF PAGE -4-

TO: Gene Gallegos, Esq. FROM: W. THOMAS KELLAHIN
OF: Gallegos Law Firm
FAX NO: (505) 986-1367 or 986-0741TO: Lyn Hebert, Esq.
OF: Oil Conservation Commission
FAX NO: (505) 827-8177TO: John Bemis, Esq.
OF: Burlington Resources Oil & Gas Company
FAX NO: (505) 326-9880REF: Johnson et al. v. Burlington and Oil Commission
San Juan County Cause CV-97-572-3

Dear Counsel:

Lyn and I propose the Commission appeal and the Burlington appeal be consolidated by stipulation.

I have drafted for your approval and concurrence a proposed stipulation. Please let me know if you have any comments. Then I will circulate the original for signature and filing with the court.

Regards,



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

Respectfully submitted,

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

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

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

CERTIFICATE OF MAILING

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

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

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

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

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

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

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

W. Thomas Kellahin

**IN THE SUPREME COURT
STATE OF NEW MEXICO**

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

vs.

No. 25061

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

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

vs.

No. 25062

**BURLINGTON RESOURCES OIL & GAS COMPANY
Defendant/Appellant.**

**STIPULATION
TO CONSOLIDATE APPEALS**

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