

March 11, 1998  
Litigation Update

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

**We filed a Notice of Appeal to the Supreme Court on February 24.  
Burlington has also filed a Notice of Appeal.**



NEW MEXICO ENERGY, MINERALS  
& NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION  
2040 South Pacheco Street  
Santa Fe, New Mexico 87505  
(505) 827-7131

February 23, 1998

Gregory T. Ireland, Clerk  
Eleventh Judicial District  
103 South Oliver Drive  
Aztec, NM 87410

**Re: Johnson et al. v. Burlington Resources Oil & Gas Co. et al.**  
**No. CV 97-572-3**

Dear Mr. Ireland:

Enclosed please find the original and a copy of the New Mexico Oil Conservation Commission's Notice of Appeal to the New Mexico Supreme Court to be filed in the above-referenced case. Please file the original and conform and return to me the copy in the enclosed stamped envelope.

Thank you for your assistance.

Sincerely,



Marilyn S. Hebert

cc: Clerk of the New Mexico Supreme Court  
The Honorable Byron Caton  
W. Thomas Kellahin  
J.E. Gallegos  
Carrie Powell



NEW MEXICO ENERGY, MINERALS  
& NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION  
2040 South Pacheco Street  
Santa Fe, New Mexico 87505  
(505) 827-7131

February 12, 1998

Gregory T. Ireland, Clerk  
Eleventh Judicial District  
103 South Oliver Drive  
Aztec, NM 87410

**Re: Johnson et al. v. Burlington Resources Oil & Gas Co. et al.**  
**No. CV 97-572-3**

Dear Mr. Ireland:

Enclosed please find the original and a copy of the New Mexico Oil Conservation Commission's Exception to Appellants' Cost Bill to be filed in the above-referenced case. Please file the original and conform and return to me the copy in the enclosed stamped envelope. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Marilyn S. Hebert".

Marilyn S. Hebert

cc: W. Thomas Kellahin  
J.E. Gallegos



NEW MEXICO ENERGY, MINERALS  
& NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION  
2040 South Pacheco Street  
Santa Fe, New Mexico 87505  
(505) 827-7131

February 2, 1998

Gregory T. Ireland, Clerk  
Eleventh Judicial District  
103 South Oliver Drive  
Aztec, NM 87410

**Re: Johnson et al. v. Burlington Resources Oil & Gas Co. et al.**  
**No. CV 97-572-3**

Dear Mr. Ireland:

Enclosed please find the original and a copy of the New Mexico Oil Conservation Commission's Motion for Reconsideration to be filed in the above-referenced case. Please file the original and conform and return to me the copy in the enclosed stamped envelope. Thank you for your assistance.

Sincerely,



Marilyn S. Hebert

cc: W. Thomas Kellahin  
J.E. Gallegos

**KELLAHIN AND KELLAHIN**

ATTORNEYS AT LAW

EL PATIO BUILDING

117 NORTH GUADALUPE

POST OFFICE BOX 2265

SANTA FE, NEW MEXICO 87504-2265

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)

TELEPHONE (505) 982-4285

TELEFAX (505) 982-2047

January 20, 1998

**FEDERAL EXPRESS**

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

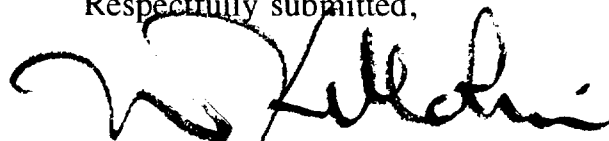
**Re: Johnson et al. v. Burlington Resources Oil & Gas  
Company and Oil Conservation Commission  
No. CV 97-572-3**

Dear Judge Caton:

Please find enclosed Burlington Resources Oil & Gas Company's form of Judgment in the referenced case. We are submitting our form to you for consideration because Mr. Gallegos' proposed judgment submitted to you by letter dated January 12, 1998 does not accurately reflect your decision.

We are especially concerned that he failed to include your determination that when the Commission changed General Rule 104 it was engaged in rulemaking which is effective as to all other property owners in the San Juan Basin. (See enclosed transcribed copy of your decision made at the conclusion of the December 17, 1997 oral argument and your decision from the September 15, 1997 motion hearing).

Respectfully submitted,



W. Thomas Kellahin

cc w/ enclosure:

Gene Gallegos, Esq.

Lyn Hebert, Esq.

John Bemis, Esq.

**At the District Court hearing held on September 15, 1997, Judge Caton stated:**

"I am going to find that under the particular circumstances of this case in which Burlington Resources prior to the application for 640-acre spacing had known of its plans to pool, that under Uhden or however you particularly pronounce it, binds this Court totally. It would be my belief in this case that no notice, in this case, is clearly a denial of due process law under New Mexico and Federal constitutions. I make no attempt to strike at the Oil & Gas Commission's notice under its rule making power. But the application in this case was made by Burlington and I impose on them a special duty to inform those individuals, those person and interest in property of whom they had actual notice.

I will order a stay of the spacing rule as it applies only to these 61 parties in question. I consider any other parties in this case to have been adequately informed by the general rules of the Oil & Gas Commission by general publication. That is sufficient.

I am imposing, because of their peculiar knowledge, a burden of actual notice on Burlington Resources.

**Judge Caton's ruling on December 17, 1987**

"I haven't had time to deal with the notification of the withdrawal of the pooling application. It is really..since I have not had time to think about the effects..I can't really in my decision deal with that action. It may be that the decision I make is indeed mooted by the withdrawal of the pooling application. I can't tell..I just don't know.

I am going to follow as nearly as I can the Uhden case in terms of due process. I going to have to find a little more than Justice Franchini found to impose a duty on Burlington to notify the plaintiffs in this case, but I do find that obligation and I separate it from the duty of the Commission itself. I think the sequence of event in this case and the inferences that can be drawn from them and the failure of both the Commission and Burlington to give any notice to any of the plaintiffs of the rulemaking application constitutes a lack of due process and deprived the plaintiffs of their property without a hearing.

I will stay the rule as to the plaintiffs but not as to any other party. I find that Burlington had a special duty arising over the years from..towards the Plaintiffs in this particular case and that indeed they have a duty under their leasehold agreements of fair dealing and by failing to notify have indeed have violated that obligation. So its more than lack of due process.

I am not entirely satisfied that the Commission is giving reasonable notice. I think that the Commission has no duty to give personal notice. I don't find that one day's publication in a newspaper of local circulation is reasonable notice under the requirement of the statute. So in that regard, there is a lack of due process there also. By limiting the matters to the 60 or so plaintiffs I find that I have no real need to make a specific finding if I were asked to do findings of fact and conclusions of law as to the one day publication. I mention this Ms. Hebert because you will be doing an annual review of what is reasonable notice as required by the Open Meeting Act and you can tell the Commission that it is one judge's opinion that the publication for one day is insufficient and I don't care what the licensing board for doctors does. We are dealing with property. It seems to me that we have a golden example in front of us for all types of publications that arise out of the courts. And I don't know of anything that arises out of the courts that would let you get by with publishing for one time. But I find no need to incorporate that finding into my decision.

I'll sign the stay as to the plaintiffs which has been submitted, one without the order for the cause hearing. I will ask you to submit the judgment, Mr. Gallegos....

I hope that with the limitation of the plaintiffs that Ms. Hebert has in mind when she says the obligation of the Commission is to not only prevent waste but to encourage the economic development of oil and gas in the field, that the limitation drawn here will permit the continued economic development possible of the formations below the Dakota.

How we will deal with the 60 is probably like we've been dealing with them all along it's going to be hard isn't it Mr. Gallegos. Thank you very much."

**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**

**ORDER AND FINAL JUDGMENT**

This case involves an appeal of New Mexico Oil Conservation Commission ("Commission") Order R-10815 entered June 5, 1997 which amended the New Mexico Oil Conservation Division ("Division") General Rules 104.B(2)(a) and 104.C(3)(a) and adopted new Division General Rules 104.B(2)(b)(i), 104.B(2)(b)(ii) and 104.CV(3)(b) by changing the size of spacing units for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico (being the "San Juan Basin") from 160-acres per well to 640-acres per well.

After being fully briefed and the record from the Commission assembled and filed, the case came before the Court for oral argument on December 17, 1997 with the appellants appearing by



their attorney, J. E. Gallegos, the appellee Commission appearing by its attorney Marilyn S. Hebert and appellee Burlington Resources Oil and Gas Company ("Burlington") appearing by its attorney W. Thomas Kellahin.

The Court has considered the pleadings, affidavits, briefs and legal authorities and received argument of counsels and is fully advised.

The Court concludes as follows and IT IS SO ORDERED.

1. The decision in **Uhden v. New Mexico Conversation Commission**, 112 N.M. 528, 817 P.2d 721 (1991) is controlling regarding plaintiffs' appeal of Commission Order R-10815. Commission Order R-10815 was entered pursuant to a rulemaking hearing held in Commission Case 11745 which changed the Division General Rule 104 which, among other things, deals with the size of spacing units in the San Juan Basin.

2. The Commission provided the required public notice of its public hearing for rulemaking and is not required to give personal notice to any owner including the plaintiffs.

3. Burlington failed to provide plaintiff's with notice of the Commission hearing on this proposed rule change which resulted in Order R-10815.

4. This Court's stay of Commission Order R-10815-A should be made permanent as to the plaintiffs but not as to any other party. Burlington had a special duty arising over the years towards the Plaintiffs in this particular case including a duty under their leasehold agreements of fair dealing and by failing to notify these plaintiffs Burlington has violated that obligation.

5. Because at the time of that hearing, Burlington had plans to form a 640-acre spacing unit for a wildcat well to be drilled in Section 9, T31N, R10W, NMPM, San Juan County, New Mexico, and because Burlington also knew the identities and addresses of the plaintiffs who owned property interests in Section 9, Burlington's failure to provide notice to them of the Commission's rule making hearing was a denial of plaintiffs' right to due process under Uhden.

6. In accordance with Uhden, supra., as to these plaintiff's only, Order R-10815 was not an exercise of general rule making by the Commission but rather an adjudication affecting the property rights of these plaintiffs for which Burlington had the burden to notify them.

**7. Judgment is hereby granted voiding New Mexico Oil Conservation Commission Order R-10815-A only as to the appellants' property interests in Section 9, T31N, R10W, NMPM, San Juan County, New Mexico.**

---

**Honorable Byron Caton,  
District Judge**

**submitted by:**

**By: \_\_\_\_\_  
W. Thomas Kellahin, Esq.  
counsel for Burlington**

**KELLAHIN AND KELLAHIN**

ATTORNEYS AT LAW

EL PATIO BUILDING

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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)

DATE: January 19, 1998      NUMBER OF PAGE -7-  
TIME: 11:15 AM

\*\*\*

TO: LYN HEBERT, ESQ.  
Oil Conservation Commission  
(505) 827-8177

TO: John Bemis, Esq.  
OF: Burlington Resources  
FAX NO: (505) 326-9880

TO: Alan Alexander  
OF: Burlington Resources  
FAX NO: (505) 326-9781

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

Dear Lyn, John & Alan:

Attached is a copy of Judge Caton's decision which I transcribed from the district court tape.

Also attached is a draft judgment to submit to Judge Caton. I would like to federal express this to Judge Caton Tomorrow. Please give me your comments and suggestions as soon as possible.

Regards,

  
W. Thomas Kellahin

\*\*\*

This information contained in this Facsimile Message and Transmission is ATTORNEY PRIVILEGED AND CONFIDENTIAL information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this Facsimile in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service.

**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**

**ORDER**

**OPINION AND FINAL JUDGMENT**

This case involves an appeal of New Mexico Oil Conservation Commission ("Commission") Order R-10815 entered June 5, 1997 which amended the New Mexico Oil Conservation Division ("Division") General Rules 104.B(2)(a) and 104.C(3)(a) and adopted new Division General Rules 104.B(2)(b)(i), 104.B(2)(b)(ii) and 104.CV(3)(b) by changing the size of spacing units for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico (being the "San Juan Basin") from 160-acres per well to 640-acres per well.

After being fully briefed and the record from the Commission assembled and filed, the case came before the Court for oral argument on December 17, 1997 with the appellants appearing by

their attorney, J. E. Gallegos, the appellee Commission appearing by its attorney Marilyn S. Hebert and appellee Burlington Resources Oil and Gas Company ("Burlington") appearing by its attorney W. Thomas Kellahin.

The Court has considered the pleadings, affidavits, briefs and legal authorities and received argument of counsels and is fully advised.

The Court concludes as follows and IT IS SO ORDERED.

1. The decision in **Uhden v. New Mexico Conversation Commission**, 112 N.M. 528, 817 P.2d 721 (1991) is controlling regarding plaintiffs' appeal of Commission Order R-10815. Commission Order R-10815 was entered pursuant to a rulemaking hearing held in Commission Case 11745 which changed the Division General Rule 104 which, among other things, deals with the size of spacing units in the San Juan Basin.

2. The Commission provided the required public notice of its public hearing for rulemaking and is not required to give personal notice to any owner including the plaintiffs.

3. Burlington failed to provide plaintiff's with notice of the Commission hearing on this proposed rule change which resulted in Order R-10815.

4. This Court's stay of Commission Order R-10815-A should be made permanent as to the plaintiffs but not as to any other party. Burlington had a special duty arising over the years towards the Plaintiffs in this particular case including a duty under their leasehold agreements of fair dealing and by failing to notify these plaintiffs Burlington has violated that obligation.

5. Because at the time of that hearing, Burlington had plans to form a 640-acre spacing unit for a wildcat well to be drilled in Section 9, T31N, R10W, NMPM, San Juan County, New Mexico, and because Burlington also knew the identities and addresses of the plaintiffs who owned property interests in Section 9, Burlington's failure to provide notice to them of the Commission's rule making hearing was a denial of plaintiffs' right to due process under Uhdén.

6. In accordance with Uhdén, supra., as to these plaintiff's only, Order R-10815 was not an exercise of general rule making by the Commission but rather an adjudication affecting the property rights of these plaintiffs for which Burlington had the burden to notify them.

7. Order R-10815-A is void only as to the appellants and the ~~640-acre spacing units provided for gas production below the base of the Dakota formation in the amended Division General Rule 104~~ is of no force and effect as to their property interests in Section 9, T31N, R10W, NMPM, San Juan County, New Mexico. Appellants are entitled to and are hereby granted judgment in their favor.

Honorable Byron Caton, District Judge

submitted by:

By: \_\_\_\_\_  
W. Thomas Kellahin, Esq.  
counsel for Burlington

noted:

J. E. Gallegos, Esq.  
attorney for Plaintiffs

Marilyn S. Hebert, Esq.  
attorney for Commission



**At the District Court hearing held on September 15, 1997, Judge Caton stated:**

"I am going to find that under the particular circumstances of this case in which Burlington Resources prior to the application for 640-acre spacing had known of its plans to pool, that under Uhden or however you particularly pronounce it, binds this Court totally. It would be my belief in this case that no notice, in this case, is clearly a denial of due process law under New Mexico and Federal constitutions. I make no attempt to strike at the Oil & Gas Commission's notice under its rule making power. But the application in this case was made by Burlington and I impose on them a special duty to inform those individuals, those person and interest in property of whom they had actual notice.

I will order a stay of the spacing rule as it applies only to these 61 parties in question. I consider any other parties in this case to have been adequately informed by the general rules of the Oil & Gas Commission by general publication. That is sufficient.

I am imposing, because of their peculiar knowledge, a burden of actual notice on Burlington Resources.

**Judge Caton's ruling on December 17, 1987**

"I haven't had time to deal with the notification of the withdrawal of the pooling application. It is really..since I have not had time to think about the effects..I can't really in my decision deal with that action. It may be that the decision I make is indeed mooted by the withdrawal of the pooling application. I can't tell..I just don't know.

I am going to follow as nearly as I can the Uhden case in terms of due process. I going to have to find a little more than Justice Franchini found to impose a duty on Burlington to notify the plaintiffs in this case, but I do find that obligation and I separate it from the duty of the Commission itself. I think the sequence of event in this case and the inferences that can be drawn from them and the failure of both the Commission and Burlington to give any notice to any of the plaintiffs of the rulemaking application constitutes a lack of due process and deprived the plaintiffs of their property without a hearing.

I will stay the rule as to the plaintiffs but not as to any other party. I find that Burlington had a special duty arising over the years from..towards the Plaintiffs in this particular case and that indeed they have a duty under their leasehold agreements of fair dealing and by failing to notify have indeed have violated that obligation. So its more than lack of due process.

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I'll sign the stay as to the plaintiffs which has been submitted, one without the order for the cause hearing. I will ask you to submit the judgment, Mr. Gallegos....

I hope that with the limitation of the plaintiffs that Ms. Hebert has in mind when she says the obligation of the Commission is to not only prevent waste but to encourage the economic development of oil and gas in the field, that the limitation drawn here will permit the continued economic development possible of the formations below the Dakota.

How we will deal with the 60 is probably like we've been dealing with them all along it's going to be hard isn't it Mr. Gallegos. Thank you very much."

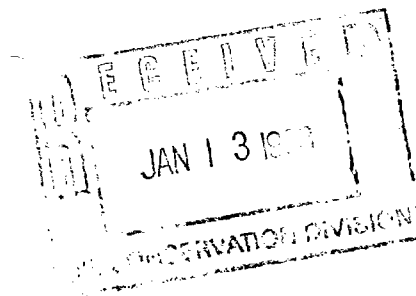
# GALLEGOS LAW FIRM

A Professional Corporation

460 St. Michael's Drive  
Building 300  
Santa Fe, New Mexico 87505  
Telephone No. 505-983-6686  
Telefax No. 505-986-1367  
Telefax No. 505-986-0741

January 12, 1998  
(Our File No. 97-170.01)

JASON E. DOUGHTY\*



The Honorable Byron Caton  
District Judge, Division III  
920 Municipal Dr., Suite 2  
Farmington, NM 87401

Re: Timothy B. Johnson, Trustee for Ralph A. Bard, Jr. Trust U/A/D  
February 12, 1983; et al. v. Burlington Resources Oil & Gas  
Company and the New Mexico Oil Conservation Commission; San  
Juan County Cause No. CV-97-572-3

Dear Judge Caton:

Enclosed please find Appellants' form of Opinion and Final Judgment in the referenced case. We believe this form accurately reflects the factual and legal issues involved in this matter, as well as your ruling from the bench at the oral argument held before you on December 17, 1997.

We submitted this form to counsel for appellees Burlington Resources and the New Mexico Oil Conservation Commission on December 22, 1997 and received comments back last week. While we have incorporated some of counsels' suggested revisions, others do not in our opinion accurately reflect the true nature of this appeal nor your ruling therein. Consequently, we are unable to submit a joint form for your signature. I expect that counsel for appellees will be submitting their own form in the near future.

Should you have questions or comments concerning this matter, please do not hesitate to call.

Respectfully submitted,

GALLEGOS LAW FIRM, P.C.

By:   
JASON E. DOUGHTY

Enclosure

cc: Tom Kellahin--Counsel for Burlington  
John Bemis--Counsel for Burlington  
Lyn Hebert--Counsel for NMOCC  
Steve Hunsicker  
ioc: Jason E. Doughty  
C. Woods/file

STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT

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

Plaintiffs, )

vs. )

Cause No. CV-97-572-3

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

Defendants. )  
\_\_\_\_\_

\_\_\_\_\_  
**OPINION AND FINAL JUDGMENT**  
\_\_\_\_\_

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

## **A. THE PARTIES**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. HOLDING

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



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

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

DATED: January \_\_, 1998.

---

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



NEW MEXICO ENERGY, MINERALS  
& NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION  
2040 South Pacheco Street  
Santa Fe, New Mexico 87505  
(505) 827-7131

VIA FAX

January 7, 1998

Jason E. Doughty  
Gallegos Law Firm  
460 St. Michael's Drive  
Santa Fe, NM 87505

**Re: Johnson, Trustee for Bard et al. v. Burlington and New Mexico Oil Conservation  
Commission, San Juan County Cause No. CV 97-572-3**

Dear Jason:

Enclosed is a copy of your proposed order with changes I have made that I believe reflect Judge Caton's expressions at the conclusion of oral argument in December. I also share Tom's concern that the proposed order does not include the Judge's determinations as to the rulemaking vs. adjudicatory issue which will be the significant issue on appeal. As the Judge deems the changes to Rule 104 to be effective as to all the world except for the Appellants, the Commission must have been engaged in rulemaking in Case No. 11745. Finally, the second sentence of paragraph 10 of your order has appeared in several of the Appellants' filings. However, I do not recall Judge Caton making such a statement.

Please let me know if you want to discuss the proposed order.

Sincerely,

A handwritten signature in dark ink, appearing to read "Marilyn S. Hebert".

Marilyn S. Hebert

cc: W. Thomas 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. )

---

OPINION AND FINAL JUDGMENT

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

New Mexico Oil Conservation Division ("Division") Rules 104.B(2)(a) and 104.C(3)(a)

and adopted new rules 104.B(2)(b) and 104.C(3)(b), by changing the ~~default~~ spacing (i) 104B(2)(b) (ii) ✓✓

~~Set~~ for gas production below the base of the Dakota formation in San Juan, Rio Arriba, ✓

Sandoval and McKinley Counties, New Mexico from 160 to 640 acres. After being fully

briefed and the record from the Commission assembled and filed, the case came

before the Court for oral argument on December 17, 1997 with the appellants

appearing by their attorney, J.E. Gallegos, the appellee Commission appearing by its

attorney Marilyn S. Hebert and appellee Burlington Resources Oil and Gas Company

("Burlington") appearing by its attorney W. Thomas Kellahin. The Court has

considered the pleadings, briefs and legal authorities and received arguments of

counsel and is fully advised. The Court concludes as follows and IT IS SO ORDERED.

**A. THE PARTIES**

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

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

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

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

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

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

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

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

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

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

9. On June 5, 1997, the Commission entered its Order No. R-10815 <sup>amending</sup> ~~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.  
("Order R-10815.")

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

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

### C. HOLDING

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

pool the interests of the appellants for a wildcat well on 640-acre spacing and knowing the identities and whereabouts of the appellants, Burlington's failure to provide personal notice to them of the ~~spacing case proceeding underlying Order No. R-10815~~ *hearing on the proposed rule change* ✓

deprived the appellants of their property without due process of law in violation of the United States and New Mexico constitutions. Burlington breached its duty of good faith by failing to provide personal notice to the appellants of the ~~spacing case proceeding underlying Order No. R-10815~~ *hearing on the proposed rule change* ✓

*The Commission provided the required public notice of its public hearing for rulemaking.*  
13. Order No. R-10815 is void as to only the appellants and the 640-acre

spacing provided for therein and in the amended ~~New Mexico Oil Conservation~~ Division ✓

Rule 104 is of no force and effect as to their property interests in the San Juan Basin.

Appellants are entitled to and are hereby granted judgment in their favor and against

the defendants and shall recover costs as allowed by law.

DATED: ~~December~~, 1997.

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

TO: <i>Ly. Hebert</i> <i>occ</i>	FROM: <i>KELLAH</i>	DATE: <i>1/6/98</i> PAGES INCLUDING THIS PAGE: <i>1</i>
FAX #:	FAX #:	PHONE #:

**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)

**FACSIMILE COVER SHEET**

DATE: January 6, 1997      NUMBER OF PAGES -7-  
TIME: 9:22 AM (Santa Fe time)

\*\*\*

TO: Jason Doughty, Esq      FROM: W. THOMAS KELLAHIN  
OF: Gallegos Law Firm  
FAX NO: (505) 986-1367 or 986-0741

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

Dear Jason:

I do not share your sense of urgency in submitting an order to the Court. I suggest we take care in doing this so that the Supreme Court has a clear understanding of Judge Caton's decision.

I have enclosed my suggested changes to your proposed order. I am particularly concerned that paragraph 6 is factually wrong. In addition, paragraph 6 is not relevant to this matter. I am concerned that your proposed order does not articulate Judge Caton's decision concerning rule making versus adjudication. He concluded that Rule 104 was appropriate rule making and applicable to all owners in the San Juan Basin except for the GLA 66 Group who were in a unique position which entitled them to actual notice. In paragraph 12, I suggest that there is no legal authority for the notion that Burlington had any good faith duty and that it "breached its duty of good faith..." I doubt that you want that extraneous issue in this order because you cannot defend it on appeal and you may have inadvertently introduce reversible error.

Please let me know if you desire to consider my comments. If not, then I will submit a proposed order to Judge Caton. I will be involved in Division hearings until Friday of this week. Please call me if you would like to discuss.

Regards,

cfx: John Bemis, Esq.  
Lyn Hebert, Esq.

\*\*\*



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**STATE OF NEW MEXICO  
COUNTY OF SAN JUAN  
ELEVENTH JUDICIAL DISTRICT**

**Timothy B. Johnson, Trustee for Ralph A.  
Bord, Jr. Trust WAD 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-87-572-3**

**OPINION AND FINAL JUDGMENT**

This case involves an appeal of New Mexico Oil Conservation Commission ("Commission") Order No. R-10815 entered June 5, 1987 which, inter alia, modified the New Mexico Oil Conservation Division ("Division") Rules 104.B(2)(a) and 104.C(3)(a) and adopted new rules 104.B(2)(b) and 104.C(3)(b), by changing the default spacing unit for gas production below the base of the Dakota formation in San Juan, Rio Arriba, Sandoval and McKinley Counties, New Mexico from 160 to 640 acres. After being fully briefed and the record from the Commission assembled and filed, the case came before the Court for oral argument on December 17, 1987 with the appellants appearing by their attorney, J.E. Gallegos, the appellee Commission appearing by its attorney Marilyn S. Hebert and appellee Burlington Resources Oil and Gas Company ("Burlington") appearing by its attorney W. Thomas Kellahin. The Court has considered the pleadings, briefs and legal authorities and received arguments of counsel and is fully advised. The Court concludes as follows and IT IS SO ORDERED.

01/06/1998 10:51 5059822047  
12/23/1997 14:52 505982207  
12/22/97 17:09 STATION

W THOMAS KELLAHIN  
ID: 5052268781  
W THOMAS KELLAHIN  
(123)456-1290

PAGE 03  
PAGE 3  
P. 004

#### A. THE PARTIES

1. Each of the appellants are the holders of operating rights interests in,

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

THEY WERE  
ADVISED THAT  
WILL WOULD  
BE ARRIED  
ON 640 AC.  
THEY WERE  
ALSO GIVEN  
COPIES OF  
2 EXHIBITS BEFORE  
ORDER WAS  
ISSUED WHILE  
IN COURT  
OPEN FOR COMMENT  
NO COMMENT  
WAS MADE  
BY APPELLANT.

5. At no time did Burlington's communications advise the appellants of its plans to make an application to the Commission for the purpose of changing the Rule 104 spacing requirements from 160 to 640-acres for wildcat gas wells below the base of the Dakota formation in San Juan County, New Mexico. On February 27, 1997

Burlington filed an application with the Commission to change the spacing unit for deep gas wells in the San Juan Basin from 160 to 640 acres. This case was docketed as Commission Case No. 11745 ("Case 11745").

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

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

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

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

10. On June 11, 1987, six days after the Commission issued Order R-10815, Burlington filed an application with the Division seeking to compulsory pool the appellants' interests in the east half and southwest quarter of Section 9 for its proposed Scott Well No 24, which was to be located in the northwest quarter of Section 9 on a 640-acre spacing unit. Obtaining Order No. R-10815 from the Commission modifying the Rule 104 wildcat well spacing requirements from 160 acres to 640 acres was a necessary condition precedent to Burlington's initiation of compulsory pooling proceedings against the appellants' interests in Section 9. Under the original Rule 104 160 acre default wildcat gas well spacing, the appellants' working interest in the east half and southwest quarter of Section 9 could not be compulsorily pooled with the northeast quarter of Section 9 to form a 640 acre spacing unit for Burlington's Scott Well No. 24.

IRRELEVANT

*OF ORDER R-10815*  
11. On June 24, 1987, the appellants timely filed their Application for Rehearing with the Commission pursuant to NMSA 1978 §70-2-25 (A) and NMOCOD Rule 1222. Pursuant to §70-2-25 (A), the appellants' Application was considered denied on July 4, 1987 when the Commission failed to act thereon within 10 days. Such failure to act by the Commission on the appellants' Application is deemed a refusal thereof and a final disposition of such Application. The appellants properly and timely appeal this matter pursuant to NMSA 1978 §70-2-25 (B).

#### G. HOLDING

12. The decision in Under v. New Mexico Oil Conservation Commission, 112 N.M. 526, 817 P.2d 721 (1991) is controlling on this appeal. Knowing of its plan to

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

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

DATED: December \_\_, 1997.

Honorable Byron Caton, District Judge

SUBMITTED:

J.E. GALLEGOB  
JASON E. DOUGHTY  
480 St. Michael's Drive, Bldg. 300  
Santa Fe, New Mexico 87505  
(505) 983-0888

Attorney for Plaintiffs

→ DOES NOT FULLY ADDRESS THE  
ISSUES OF RULE MAKING — US —  
ADJUDICATION. DOES NOT REFLECT  
CATON'S DECISION THAT RULE # 104  
CHANGE WAS RULE MAKING AND  
ALL OTHER S.J. BASIN OWNERS  
RECEIVED REQUIRED NOTICE.

# GALLEGOS LAW FIRM

A Professional Corporation

460 St. Michael's Drive  
Building 300  
Santa Fe, New Mexico 87505  
Telephone No. 505-983-6686  
Telefax No. 505-986-1367  
Telefax No. 505-986-0741

January 2, 19988  
(Our File No. 97-170.1)

JASON E. DOUGHTY\*

**VIA FAX**

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

**VIA FAX**

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

Re: **JOHNSON, TRUSTEE FOR BARD et al. v. BURLINGTON  
RESOURCES OIL AND NEW MEXICO OIL CONSERVATION  
COMMISSION; San Juan County Cause No. CV-97-572-3**

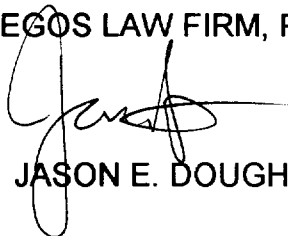
Dear Tom and Lyn:

On December 22, 1997, I sent to you our draft Opinion and Final Judgment in the referenced case. As yet, I have had no response from either of you. We would like to wrap this matter up as soon as possible. As such, I again request that you either give me your comments on, or concurrence with, this draft at your earliest possible convenience. Thanks for your attention to this matter.

Sincerely,

GALLEGOS LAW FIRM, P.C.

By

  
JASON E. DOUGHTY

ioc: J. E. Gallegos  
C. Woods/file

**GALLEGOS LAW FIRM**

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December 22, 1997  
(Our File No. 97-170.1)

JASON E. DOUGHTY\*

**VIA FAX**

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

**VIA FAX**

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

Re: **JOHNSON, TRUSTEE FOR BARD et al. v. BURLINGTON  
RESOURCES OIL AND NEW MEXICO OIL CONSERVATION  
San Juan County Cause No. CV-97-572-3**

Dear Tom and Lyn:

Enclosed herewith please find our draft Opinion and Final Judgment in the referenced case. Please give me your approval or comments at your earliest convenience.

Sincerely,

GALLEGOS LAW FIRM, P.C.

By

  
JASON E. DOUGHTY

Enclosure

cc: J. E. Gallegos  
Julie L. Hall