

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

IN THE MATTER OF THE HEARING CALLED BY)
THE OIL CONSERVATION DIVISION FOR THE)
PURPOSE OF CONSIDERING:)
APPLICATION OF DEVON ENERGY PRODUCTION)
COMPANY, L.P., FOR COMPULSORY POOLING,)
EDDY COUNTY, NEW MEXICO)

CASE NO. 13,335

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EXAMINER HEARING

BEFORE: RICHARD EZEANYIM, Hearing Examiner

September 16th, 2004

Santa Fe, New Mexico

2004 OCT 1 PM 2:09

This matter came on for hearing before the New Mexico Oil Conservation Division, RICHARD EZEANYIM, Hearing Examiner, on Thursday, September 16th, 2004, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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 Examiner Hearing
 CASE NO. 13,335

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A P P E A R A N C E S

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By: WILLIAM F. CARR

* * *

1 WHEREUPON, the following proceedings were had at
2 10:40 a.m.:

3 EXAMINER EZEANYIM: The hearing will come to
4 order again.

5 At this time I will call Case Number 13,335,
6 which is the Application of Devon Energy Production
7 Company, L.P., for compulsory pooling, Eddy County, New
8 Mexico.

9 Call for appearances.

10 MR. BRUCE: Mr. Examiner, Jim Bruce of Santa Fe,
11 representing the Applicant. I have one witness to be
12 sworn.

13 MR. CARR: May it please the Examiner, my name is
14 William F. Carr with the Santa Fe office of Holland and
15 Hart, L.L.P. We represent Marbob Energy Corporation and
16 Pitch Energy Corporation in this matter and are here to
17 request the Application be dismissed as to us.

18 MR. BRUCE: As to Marbob and Pitch; is that what
19 you said?

20 MR. CARR: (Nods)

21 EXAMINER EZEANYIM: At this point let me -- Let's
22 swear in the witnesses first. Let the witness stand up to
23 be sworn.

24 (Thereupon, the witness was sworn.)

25 EXAMINER EZEANYIM: Do any of you have any

1 opening statements?

2 MR. BRUCE: I didn't plan on one, Mr. Examiner.
3 We met yesterday, and I think I made my position clear.

4 MR. CARR: I would agree. I think the positions
5 were made clear yesterday. We believe we have a motion to
6 dismiss us pending before the Division at this time.

7 MR. BRUCE: My only comment would be, I think it
8 would be helpful to hear the evidence before the Division
9 decides.

10 EXAMINER EZEANYIM: Okay, I think we'll proceed
11 and hear the evidence.

12 You may proceed then.

13 MR. BRUCE: My first witness is Ken Gray, Mr.
14 Examiner, if the record reflect that he was previously
15 qualified as an expert.

16 EXAMINER EZEANYIM: Okay, Ken Gray is so
17 qualified.

18 KENNETH H. GRAY,
19 the witness herein, having been previously duly sworn upon
20 his oath, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. BRUCE:

23 Q. Mr. Gray, could you identify Exhibit 1 for the
24 Examiner and discuss the well and well units involved?

25 A. Yeah, again, Exhibit 1 is a copy of a land plat

1 reflecting an orange outline around the west half of
2 Section 3, Township 22 South, Range 27 East, which is the
3 proposed spacing unit, and Devon is seeking to pool all
4 uncommitted interest owners in that spacing unit from the
5 surface to the base of the Morrow for the purpose of
6 drilling a 12,000-foot Morrow test.

7 Q. Okay. Now, in this case, Mr. Gray, there is an
8 existing -- Let me make sure I get this right. There is an
9 existing well in the southwest quarter of the section; is
10 that correct?

11 A. Correct.

12 Q. And that is the Number 1 well?

13 A. The Esperanza 3N Number 1, right.

14 Q. And where is the proposed Number 2 well that
15 we're here for today?

16 A. That well is located 1980 from the north line and
17 890 from the west line.

18 EXAMINER EZEANYIM: 1980 --

19 THE WITNESS: 1980 from north, 890 from west.

20 Q. (By Mr. Bruce) And that is an orthodox well
21 location, is it not?

22 A. Yes.

23 Q. Now, besides force pooling 320-acre well units,
24 do you also seek to pool the southwest quarter, northwest
25 quarter, for 40-acre units and the northwest quarter for

1 160-acre well units?

2 A. Yes, we do.

3 Q. Okay. Now, this has already come forth in the
4 hearings, but are there operating agreements involved on
5 this acreage?

6 A. There are two operating agreements involved. One
7 operating agreement is dated 1968, I believe, and it covers
8 certain leases within the spacing unit, totaling about
9 18.75 percent of the unit.

10 There's another operating agreement dated March,
11 2001, that covers the remainder of the interest in the
12 spacing unit, or approximately 81.25 percent.

13 Q. Now, do both operating agreements cover acreage
14 throughout the west half?

15 A. Well, I was trying to think of that a minute ago.
16 It's not undivided throughout the west half. My
17 recollection is that it covers -- that the ownership in the
18 south half of the northwest and the southwest quarter is
19 undivided, and that's where the leases that are covered by
20 separate operating agreements come into conflict.

21 Q. Okay, so on Exhibit 1 there are shown as being
22 two tracts, one covering Lots 3 and 4 and one covering the
23 remainder of the acreage --

24 A. Right.

25 Q. -- correct? And the 1968 operating agreement

1 does include various interests within the south half,
2 northwest, and the southwest quarter?

3 A. That's my recollection, yes.

4 Q. Okay. Let's move on to your Exhibit 2. Could
5 you identify that for the Examiner and tell him what it
6 shows?

7 A. Exhibit 2 is an exhibit of the interest owners in
8 what's called the Carlsbad drilling block, and those people
9 are the interest owners that are subject to the 1968 joint
10 operating agreement that we have already talked about,
11 covering approximately 18.75 percent of the spacing unit.
12 The remainder of the interest, as I've already said, is
13 covered by yet another operating agreement. Those
14 interests aren't listed here. The only interests that are
15 listed here are the ones that are under the 1968 agreement,
16 and --

17 Q. The 2001 agreement partners have already agreed
18 to join in the well?

19 A. Yes.

20 Q. Okay.

21 A. And the interest owners highlighted in yellow are
22 those interest owners who have agreed to participate and
23 have ratified the 2001 operating agreement.

24 Q. Okay, so those persons highlighted in yellow are
25 or were subject to the 1968 JOA, but they have ratified the

1 newer 2001 operating agreement?

2 A. That's right.

3 Q. And they have made their elections under that
4 agreement?

5 A. Right.

6 Q. Okay. And so today are you seeking to pool the
7 people who are not highlighted in yellow on this exhibit?

8 A. That's correct.

9 Q. Okay. Let's go to your Exhibit 3. Please
10 identify that and briefly identify the contacts that were
11 made with the parties whom you seek to pool.

12 A. Yeah, Exhibit 3, the cover sheet on Exhibit 3 is,
13 again, the chronological history of contacts with various
14 interest owners, beginning with the July 8th proposal
15 letter.

16 The July 8th proposal letter basically proposed
17 the well, provided everybody with an AFE, noted that there
18 were two separate operating agreements covering the spacing
19 unit and requesting that all the interest owners under the
20 1968 agreement ratify the newer 2001 operating agreement
21 that was already -- had already been executed by the
22 remainder interest owner.

23 Second is an August 9th telephone conversation
24 with Toni Wood, who's one of the parties to be pooled, at
25 which time she indicated they would participate, sign an

1 AFE, but they are not inclined to sign any additional
2 operating agreements.

3 And again on August the 9th, 2004, a telephone
4 conversation with Raye Miller at Marbob and Pitch,
5 requesting that they -- I think by that time I had received
6 their executed AFE electing to participate. I was
7 requesting that they ratify the 2001 joint operating
8 agreement, and we had a pretty lengthy discussion of the
9 merits of drilling a second well in the spacing unit with
10 different contractual arrangements than were in effect for
11 the drilling of the first well, and Raye couldn't see any
12 real reason why they should or could ratify the 2001
13 operating agreement. And I think we left that conversation
14 with, he would look at it some more and get back to me.

15 Which he did on August the 16th; Raye advised by
16 telephone that they would oppose the pooling application
17 that we had filed. And again, we went through the merits
18 of -- and the discussions of opposing operating agreements
19 and why we should or shouldn't have one operating agreement
20 for the drilling of the second well, when the first well
21 was not drilled in that manner.

22 Let's see, August 30th, another telephone
23 conversation with Raye. By this point we were scheduled
24 for a September 2nd pooling order --

25 Q. Hearing?

1 A. I'm sorry, hearing, pooling hearing. -- and were
2 discussing whether we were going to move forward with the
3 pooling hearing.

4 We discussed it again on August the 31st,
5 actually two times, and during those discussions the issue
6 of the nonconsent penalty under a potential pooling order
7 came up. And Raye's question, among others, was, why
8 should we be subjected to a 300-percent penalty under a
9 potential pooling order, when the operating agreement that
10 the Carlsbad drilling block working interest owners are
11 subject to is only a 200-percent penalty, plus the fact
12 that the Carlsbad drilling block group interest owners
13 would have the benefit of acquiring all the nonconsent
14 interest under their operating agreement.

15 And I think we agreed that day that if we had to
16 we would testify today, when we had the hearing, that we
17 would indeed testify to a 200-percent penalty for those
18 people who nonconsented or were deemed nonconsent. And if
19 the Carlsbad drilling block wanted to take all of that
20 nonconsent interest, we would not -- that would be fine
21 with us.

22 And I thought at that point we were making some
23 headway on making an agreement and -- but we all agreed to
24 continue till today, so -- but I guess we didn't make
25 enough headway on an agreement.

1 Anyway, we ended I guess yesterday or the day
2 before yesterday with another conversation where they were
3 still prepared to contest the hearing, even as of last
4 night, and here we are.

5 Q. And attached to Exhibit 3 are copies of your
6 correspondence, are there not?

7 A. Correct.

8 Q. Now, I want to ask you a couple questions, but in
9 your opinion has Devon made a good-faith effort to obtain
10 the voluntary joinder of the interest owners in the well?

11 A. Yes, I think we have.

12 Q. And let's just clarify a couple of things for the
13 Examiner. Devon would prefer to have everyone under the
14 2000 agreement or under a compulsory pooling order; is that
15 correct?

16 A. Yes.

17 Q. Now, has Devon ever signed the 1968 JOA?

18 A. No.

19 Q. Are there any -- and you mentioned some
20 differences between the 1968 JOA and the 2001 JOA. The
21 1968 JOA provides for a 200-percent penalty; is that
22 correct?

23 A. That's correct.

24 Q. Which under the pooling statute would be a cost
25 plus 100-percent penalty?

1 A. Right.

2 Q. Okay, and the 2001 JOA provides for a 300-percent
3 penalty?

4 A. Right.

5 Q. Which under the pooling statute is a cost-plus-
6 200-percent, the maximum pooling penalty?

7 A. Right.

8 Q. And what you are saying today is, Devon is
9 requesting a penalty against nonconsenting working interest
10 owners, is it not?

11 A. Correct.

12 Q. And is it willing to request a cost-plus-100-
13 percent penalty under -- be placed in the order if an order
14 is issued in this matter?

15 A. Yes, we are.

16 Q. Okay. So that would be equivalent to the 1968
17 JOA?

18 A. Yes.

19 Q. Would Devon also request that if its pooling
20 Application is granted, that any nonconsenting interest
21 owners listed on Exhibit 2 would be shared only by the
22 consenting parties on Exhibit 2?

23 A. Correct.

24 Q. Okay, so Devon would get no share of those
25 nonconsent interests?

1 A. That's right.

2 Q. Could you identify Exhibit 4 and discuss the cost
3 of the proposed well?

4 A. Exhibit 4 is an authority for expenditure
5 estimating the drilling and completion cost for our well.
6 The estimated dryhole cost is \$887,315, and completed well
7 cost of \$1,480,397.

8 Q. And is this cost in line with the cost of other
9 wells drilled by Devon in this area?

10 A. I believe it is.

11 Q. Devon has or is drilling other wells in this
12 area, is it not?

13 A. Yes, we have.

14 Q. Okay. Does Devon request that it be designated
15 operator of the well?

16 A. Yes, we do.

17 Q. Does Devon have the largest single interest in
18 this well?

19 A. Yes.

20 Q. Okay, and what is your recommendation as to the
21 amounts Devon should be paid for supervision and
22 administrative expenses?

23 A. We would request that the order reflect \$6000 per
24 month drilling well rates and \$600 per month producing well
25 rates.

1 Q. And are these amounts equivalent to those
2 normally charged by Devon and other operators for wells of
3 this depth?

4 A. I believe they are.

5 Q. And do you request that the rate be adjusted
6 periodically as provided by the COPAS accounting procedure?

7 A. Yes.

8 Q. And were the interest owners notified of this
9 hearing?

10 A. Yes, they were.

11 Q. And is that reflected in Exhibit 5?

12 A. Yes.

13 MR. BRUCE: Mr. Examiner, one item on Exhibit 5,
14 again, actual notice by certified mail was sent to all of
15 these parties except, if you turn to the final page of
16 Exhibit 5, actual notice was sent to Carolyn Ann Nunnally.
17 The green card was never received. I did have a notice
18 published as against Ms. Nunnally, but unfortunately there
19 was an error in the publication so I've asked that it be
20 republished and would ask to submit that after the hearing

21 And as a result, I do believe that the case
22 should be held open until October 17th -- or 7th -- in
23 order to obtain that affidavit of publication.

24 EXAMINER EZEANYIM: Okay, I'll take notice of
25 that.

1 Q. (By Mr. Bruce) Mr. Gray, were Exhibits 1 through
2 5 prepared by you or under your supervision or compiled
3 from company business records?

4 A. Yes, they were.

5 Q. And in your opinion is the granting of Devon's
6 Application in the interests of conservation and the
7 prevention of waste?

8 A. Yes.

9 MR. BRUCE: Mr. Examiner, I'd move the admission
10 of Devon Exhibits 1 through 5.

11 MR. CARR: No objection.

12 EXAMINER EZEANYIM: Any objection?

13 MR. CARR: No objection.

14 EXAMINER EZEANYIM: Exhibits 1 through 5 will be
15 admitted into evidence.

16 Questions, Bill?

17 CROSS-EXAMINATION

18 BY MR. CARR:

19 Q. Mr. Gray, you understand that it is the duty of
20 the operator of a well to combine the interests in the
21 spacing unit that are dedicated to that well, do you not?

22 A. Yes.

23 Q. That can be done by voluntary agreement; isn't
24 that right?

25 A. Uh-huh.

1 Q. It can also be done by compulsory pooling if you
2 don't reach voluntary agreement; do you agree with me on
3 that?

4 A. Yes.

5 Q. We're here today with a pooling application for a
6 second well on this west-half unit, and my question to you
7 is, how were the interests combined in that west-half unit
8 for the first well?

9 A. Well, I think therein lies our problem today.
10 The first well was drilled in July, I think it was, of
11 2001. The well was proposed under both of the existing
12 operating agreements by Devon to the nonoperators under
13 their agreement and by the then operator, which was
14 Matador, under their agreement, and the well was drilled
15 and completed. And that's the way it has been operated
16 since then.

17 Q. There was no pooling application --

18 A. There was no pooling application.

19 Q. Is it your opinion that there is a properly
20 formed west-half unit for the Number 1 well?

21 A. Probably not, and we've admitted to our friends
22 at Marbob numerous times that that particular well
23 contractually was not done properly, and as a result we've
24 had problems with conflicting operating agreements.

25 Q. Is it your position today that the interests of

1 Marbob and others that were brought into this unit under
2 the 1968 agreement aren't combined for the Number 1 well?

3 A. Probably not legally.

4 Q. Now, you're not a signatory to that 1968 JOA --

5 A. No.

6 Q. -- is that correct?

7 I'd like to -- I think what I should do,
8 probably, Mr. Examiner, is pass out my exhibits at this
9 time. Jim, you have them, right?

10 What we have marked as Marbob Exhibit Number 1 is
11 a letter dated October 5th, 2001. This is signed by you,
12 is it not?

13 A. Yes.

14 Q. And you are offering to various working interest
15 owners, to all working interest owners in this west-half
16 unit, a casingpoint election; is that correct?

17 A. Yes.

18 Q. And in this letter you state you're making that
19 election pursuant to the joint operating agreements, and
20 you reference both of them, the 1968 and the 200 [sic],
21 correct?

22 A. Uh-huh.

23 Q. And Pitch Energy and Marbob accepted your
24 proposal, did they not?

25 A. (Nods)

1 Q. By this letter, weren't you confirming that you
2 were operating the well pursuant to that joint operating
3 agreement, the 1968 agreement?

4 A. I'm not a legal scholar, Mr. Carr, so I don't
5 know that I can answer that.

6 Q. Okay --

7 A. I don't think -- It was not our intent to ever
8 ratify or be a party to that operating agreement.

9 Q. But you were -- that was the vehicle by which
10 these interests were sharing in the well, there was no
11 other contract?

12 A. Other than the other joint operating agreement,
13 right.

14 Q. And Marbob and Pitch aren't signatories to that
15 one?

16 A. No.

17 Q. So is it your testimony that although you've put
18 together a west-half unit for one well, you have to put the
19 west-half unit together in a different fashion for the
20 second well on that spacing unit?

21 A. It's my testimony that the first well was, quote,
22 unquote, put together improperly --

23 Q. Okay.

24 A. -- and it was not done -- I don't want to say
25 illegally, but it was not the right way to do it, and in

1 hindsight I think everybody recognizes that. But that
2 doesn't mean that -- at least in my mind, that the second
3 well drilled should be done improperly.

4 Q. If that was improper, Devon hasn't done anything
5 to correct that mistake as of this date?

6 A. Well, the well seems to be operating. I mean, I
7 don't know that anybody has really been harmed by the way
8 it was done, other than, you know, conflicting agreements.
9 You know, you can ask me, well, why did you give somebody a
10 casingpoint election when they really weren't due one, and
11 so on and so forth. But you know, I had agreements
12 conflicting, and I was trying to do the best I could at
13 the --

14 Q. I'm not quarreling with that --

15 A. Yeah.

16 Q. -- my question really is, does Devon feel like
17 the interests are committed to the first well, the interest
18 owners who were signed under the 1968 agreement?

19 A. I think they are, yeah.

20 Q. Is there anything in that 1968 agreement -- Have
21 you looked at the 1968 agreement?

22 A. Not in a long time.

23 Q. Are you aware of anything in the agreement that
24 would say it would apply differently to one well on this
25 spacing unit, as opposed to the other?

1 A. No.

2 Q. If we look at the -- now, just the Number 2 well,
3 the well that's before us here today, Pitch and Marbob have
4 signed an AFE for the well; is that correct?

5 A. That's correct.

6 Q. And they've agreed to participate by paying their
7 share; isn't that right?

8 A. If that's what signing an AFE means.

9 Q. Now, so you stand today trying to get an order
10 that would pool their interests, and we have a joint
11 operating agreement that has been used to bring their
12 interest into the first well, and we also have a JOA, and
13 is it -- I mean, I'm sorry, a signed AFE --

14 A. Uh-huh.

15 Q. -- and it's your testimony and your belief that
16 they are not voluntarily committed to the second well?

17 A. It's -- That's correct, it's my testimony and my
18 belief that the first well was done improperly and that the
19 second well should be done differently, that the operator
20 of the well at least have a contractual interest with all
21 the other nonoperators, whether by one JOA or a combination
22 of one JOA and a pooling order.

23 Right now, unfortunately, Devon doesn't have a
24 contractual arrangement with all the nonoperators.

25 Q. Aren't you really just trying to use this pooling

1 proceeding to force people to sign a new JOA?

2 A. Well, not if they don't want to. I mean, we
3 testified that if the penalties and those things afforded
4 to them under the owner operating agreement is an issue to
5 them, I would think that that would take care of that. No,
6 I'm not trying to force anybody to sign our operating
7 agreement.

8 Q. If you get a pooling order in this case pooling
9 Marbob and Pitch --

10 A. Uh-huh.

11 Q. -- that order, you understand, would give them an
12 option to pay their share of the well costs and then not be
13 subject to the penalty provisions in that order; do you
14 understand that?

15 A. Right.

16 Q. So what do you get, actually, by a pooling order
17 with a party that owns interest committed to the first well
18 and are ready to pay their share in the second? What are
19 you going to gain by this pooling order?

20 A. I guess -- well, let me answer your question
21 first. I think -- I tried -- I think I just tried to
22 answer that, and again it's my belief that it's proper that
23 the operator have a contractual arrangement with all the
24 nonoperators, and I think that's what we gain by having a
25 pooling order.

1 Q. If a party were to -- and some have -- sign the
2 new JOA, the 2001 JOA, is it your position that by signing
3 that, then, they are under that JOA for both wells, or
4 would one of the earlier parties that were under the 1968
5 JOA still be under the 1968 JOA for the first well?

6 A. That was never really made very clear when we
7 proposed that they ratify it, but in my mind it would -- we
8 could agree to either one, it's not really that important
9 to us at this point.

10 If it were easier and more important to do it or
11 for -- to have that operating agreement just apply to this
12 second well, that would be fine.

13 Q. And so if they signed, you'd still be in a
14 position where you could have two sets of joint operating
15 agreements governing the operations on this one spacing
16 unit for different -- for the same party?

17 A. Yes.

18 Q. Marbob could be under the 1968 for the first well
19 and under the 2001 for the second, if they decided to do
20 that?

21 A. Uh-huh.

22 MR. CARR: That's all I have, thank you.

23 EXAMINER EZEANYIM: Redirect?

24 MR. BRUCE: Just a couple of questions, Mr.

25 Examiner.

REDIRECT EXAMINATION

BY MR. BRUCE:

Q. With respect to the first well, Mr. Gray, did Devon own a leasehold interest in the drill site itself?

A. Uh-huh. Yes, sir.

Q. Getting back to the AFE issue, is it your opinion that signing an AFE is -- doesn't do anything unless there's a JOA or a pooling order in effect?

A. That's always been my opinion.

Q. And then Mr. Carr asked you a question about Marbob Exhibit 1.

A. Uh-huh.

Q. And this was a letter for a casingpoint election; is that correct?

A. Yes.

Q. Again, does the 1968 agreement have a casingpoint election?

A. No, that form of operating agreement does not provide for a casingpoint election.

Q. Okay, so -- and the 2001 agreement does have a casingpoint election?

A. Yes.

Q. So Pitch Energy in this letter was agreeing to a casingpoint election it would only have under a 2001 agreement?

1 A. More or less.

2 MR. BRUCE: That's all I have, Mr. Examiner.

3 EXAMINER EZEANYIM: Mr. Carr?

4 RECROSS-EXAMINATION

5 BY MR. CARR:

6 Q. I mean, a casingpoint election, you don't have
7 that unless there's some contractual basis for it; isn't
8 that right?

9 A. Right.

10 Q. I mean, you don't automatically get that?

11 A. Right.

12 Q. So what you were doing with this letter was, you
13 were just conducting your operations as to all interest
14 owners you believe were committed to the well, correct?

15 A. Right.

16 Q. And you sent this to those who had signed the
17 1968 JOA because you believed at that time they were
18 committed -- those interests were committed to this well
19 and spacing unit, right?

20 A. Right.

21 MR. CARR: That's all.

22 EXAMINER EZEANYIM: As you all know, this is a
23 case that -- I'm not a lawyer, but I understand most of
24 this since I'm a technical...

25 Let me see -- defer to my attorney and see

1 whether she has some questions before I can come in and see
2 whether I have some questions for this witness.

3 MR. CARR: And I also want to call Mr. Miller --

4 EXAMINER EZEANYIM: Yeah.

5 MR. CARR: -- for some testimony.

6 EXAMINER EZEANYIM: I think after that, then we
7 can call Mr. Miller.

8 EXAMINATION

9 BY MS. MacQUESTEN:

10 Q. Mr. Gray, you testified that in your opinion the
11 interests were combined for that first well improperly?

12 A. Uh-huh.

13 Q. Is that because there were the two joint
14 operating agreements out there?

15 A. Correct.

16 Q. What would you have done differently to make it
17 correct?

18 A. I'd do what we're doing now.

19 Q. So that you had one joint operating agreement and
20 possibly parties under a pooling order?

21 A. Yeah.

22 Q. You also indicated that you ran into some
23 problems with that first well because you had two joint
24 operating agreements. What kind of problems did you run
25 into?

1 A. Well, number one is, the casingpoint election.
2 It's been pointed out that, well, you shouldn't have given
3 any of the 1968 owners a casingpoint election because they
4 weren't entitled to one. You should only have given that
5 casingpoint election to the 2001 joint operating agreement
6 interest owners. I mean, that's one thing.

7 Of course, after you give a casingpoint election,
8 under the more current form of joint operating agreement,
9 then the parties that participate have an option to take
10 their proportionate share of any nonconsent interest that
11 comes in. The other form, the older form, doesn't. Those
12 types of things. Not to mention different exhibits, you
13 know, accounting, COPAS exhibits, insurance, things of that
14 nature.

15 Q. Now, if I understood your testimony correctly,
16 you've made some offers to accommodate the concerns of the
17 folks who are under the 1968 joint operating agreement for
18 Well Number 2, to try to make it more consistent?

19 A. As far as the penalties are concerned?

20 Q. Right.

21 A. Yeah.

22 Q. Okay, if it happens that we ended up with both
23 joint operating agreements in effect on Well Number 2,
24 would you still run into the kind of problems that you have
25 with Well Number 1?

1 A. Well, we'd have to address them, yeah. I mean,
2 yeah, we might do things differently if that's how the
3 second well gets drilled.

4 Q. Your list of parties under the 1968 agreement,
5 you have a number of them highlighted, and those are the
6 parties who have --

7 A. Those are the parties who have agreed to ratify
8 the 2001 joint operating agreement.

9 Q. Okay, and the parties who are not highlighted
10 have not --

11 A. Have not --

12 Q. -- committed to that?

13 A. Right. Many of them have -- Like Marbob and
14 Pitch, many of the others also have elected to participate
15 but have not elected to sign the more current operating
16 agreement.

17 Q. Okay. But right now you only have a motion to
18 dismiss as to Marbob and Pitch? You don't have a --

19 A. As far as --

20 Q. -- motion to dismiss --

21 A. -- as far as I know.

22 Q. -- the other parties?

23 A. I don't know of any other.

24 Q. So do we have the potential here -- If we granted
25 Marbob and Pitch's motion to be dismissed, the 1968

1 agreement would apply to them, as I understand it?

2 A. That's the only agreement that they're subject
3 to.

4 Q. And then there would be some parties who were
5 committed under the 2001 agreement and other parties who
6 would be under a compulsory pooling order?

7 A. (Nods)

8 MR. BRUCE: You'll have to answer yes or now,
9 Ken.

10 THE WITNESS: Huh?

11 MR. BRUCE: You should answer yes or no.

12 THE WITNESS: I think that's the way it would end
13 up, yes.

14 MS. MacQUESTEN: Okay, thank you. I don't have
15 any other questions at this time.

16 EXAMINATION

17 BY EXAMINER EZEANYIM:

18 Q. Okay. I have -- It might be a dumb question, but
19 I mean I need to ask these questions to understand it,
20 because as you know, we have to make a decision since you
21 have decided to allow us to make that decision.

22 In this case, one that was submitted by Marbob on
23 this -- are you saying now that included in this November
24 4, 1968, in this casingpoint election, is a mistake, he
25 shouldn't have put that in there? Is that my

1 understanding?

2 A. Well, you could call it a mistake. But again, I
3 had one agreement that does have a casingpoint election
4 that was in effect as to 13/16 of the unit, and one
5 agreement that didn't have a casingpoint election.

6 The casingpoint election is a benefit. I mean,
7 they got to see logs, well information, and then make a
8 decision whether they want to spend more money.

9 Under the old agreement they don't have that
10 benefit. Once you're in the well, you're in through
11 completion.

12 So again, I think I mentioned a while ago, I
13 don't know that anybody has really been harmed by having
14 these two operating agreements.

15 Q. Yeah, I --

16 A. The casingpoint election that we're talking about
17 here was a benefit to everyone, regardless of what
18 agreement they came into the well under. And at the time I
19 couldn't very well not give 81 percent of the unit a
20 casingpoint election just because the other guys didn't
21 have one.

22 Q. Yeah. Now, correct me if I'm wrong. Let's say
23 we just exclude that November 4, 1968. It seems to me the
24 weight of the objection that Marbob and Pitch is saying is
25 that you can't have it both ways. You include the 1968,

1 even though there is no casingpoint election there, and you
2 include the 2001. I'm trying to understand what -- you
3 know, what the issues are here.

4 Suppose you left out November 4, 1968. Maybe
5 Marbob and Pitch would not even be here contesting. I
6 don't know, but I'm asking that question, because it seems
7 to me -- now the point I'm making is that you can't have it
8 both ways, operate that well under the 1968 and then
9 operate the other under 2000, whichever, I don't know, it's
10 maybe -- I'm sorry -- but I'm asking this question, is that
11 why -- what's going on here? Anybody can answer that
12 question because it's very, very important to our decision-
13 making.

14 A. Yeah. Well, maybe we'll get to that eventually.
15 I think we all have our opinions of what's going on.

16 Q. You do?

17 A. We obviously have different opinions, yeah.

18 Q. Then I wonder why this case can be -- Okay, now,
19 there's one more question. I want to understand this.
20 Please pardon me if the questions are dumb, but I need to
21 understand this, you know.

22 A. Okay.

23 Q. Now, under the 2001 election -- Okay, you are
24 asking me to approve cost plus a hundred percent. That's
25 what you are requesting, right? You are requesting cost

1 plus a hundred percent in this Application?

2 A. Yes.

3 Q. I wrote it down, that's what you say you're
4 asking for, right?

5 A. Right.

6 Q. Okay. Now, let's go back to the 1968 JOA. What
7 is the penalty in that? Because I'm not privy to this JOA,
8 so I don't know what the arrangement is.

9 A. Yes.

10 Q. What is the penalty under the 1968 JOA?

11 A. Cost plus 200 percent.

12 Q. Cost plus --

13 A. I'm sorry, plus 100, total of 200 percent.

14 Q. Okay, so it's 200 percent, just like what we have
15 now in OCD, okay.

16 MR. MILLER: Uh -- Oh, sorry.

17 (Laughter)

18 MR. BRUCE: Give him a sedative.

19 Q. (By Examiner Ezeanyim) Okay, under the 2001 JOA,
20 what is the cost there?

21 A. Cost plus 200, total of 300.

22 Q. Okay, 300. So what we're looking at here now is,
23 1968 it's 200; in the OCD it's 200, we have that; and then
24 2001 it's 300 percent, right? That's the cost, right?

25 A. Yes.

1 Q. I just wanted to --

2 MR. BRUCE: Mr. Examiner, just to make clear, the
3 penalty provided in the 1968 agreement is less than what
4 the statute, the pooling statute, allows. I just want to
5 make that clear. What the pooling statute allows is, in
6 essence, 300 percent. That's what the 2001 agreement
7 allows. But the 1968 agreement allows a 200-percent
8 penalty, so it's less --

9 EXAMINER EZEANYIM: Okay.

10 MR. BRUCE: -- than what the 2001 agreement --

11 MR. CARR: 100 percent actual cost, plus 100-
12 percent penalty --

13 EXAMINER EZEANYIM: Okay.

14 MR. CARR: -- would be 200 percent.

15 MR. BRUCE: Correct.

16 EXAMINER EZEANYIM: Okay. Now, I want to
17 understand. Again, your testimony said that if Marbob goes
18 nonconsent, you wouldn't object to it.

19 Now I discussed yesterday, I asked Mr. Bruce
20 about that, if they did go nonconsent, because I don't
21 understand -- what do you mean by, if they go nonconsent
22 you have no problem with that? What are you talking about?
23 You said if they go nonconsent you would go along with
24 the --

25 MR. BRUCE: And just for clarification, Mr. Gray,

1 I think what the Examiner is asking is, maybe explain the
2 nonconsent, but if there is a nonconsent -- if parties
3 nonconsent, who that interest goes to.

4 EXAMINER EZEANYIM: Yes, that's --

5 THE WITNESS: Oh, okay. Well, during our
6 discussions with Marbob it finally came out that in their
7 opinion this second well to be drilled in the spacing unit
8 was less risky than the first well. And we can't argue
9 with that because Marbob has drilled all of --

10 EXAMINER EZEANYIM: Yeah.

11 THE WITNESS: They have offset wells close to our
12 -- well or wells, close to our proposed well. So it is
13 less risky, and he didn't think it was right that we try
14 and pool these interests under a 300-percent penalty when,
15 if he were allowed to participate under his 1968 joint
16 operating agreement, it only allowed for a 200-percent
17 penalty. And I told him we would testify to a 200-percent
18 penalty if that was a big issue with him, and we've already
19 done that.

20 And secondly, he said, well, we don't get -- we
21 would not get to share in as much of the nonconsent -- I
22 think that's the way it would work -- under a pooling order
23 as we would under the 1968 joint operating agreement.

24 And I said, if that's an issue you can have all
25 the nonconsent interest that comes in.

1 I think that's what -- Does that answer your
2 question?

3 EXAMINER EZEANYIM: Yeah.

4 THE WITNESS: Okay.

5 Q. (By Examiner Ezeanyim) I know I asked this
6 question yesterday. You are not a party to the 1968
7 agreement, right?

8 A. No.

9 Q. Are you -- You don't intend to be, because --

10 A. There's no reason for us to be.

11 Q. I mean, what do you mean by that, no reason? I
12 mean --

13 A. We don't own any leasehold interest under the
14 contract, the 1968 operating agreement, unless we bought
15 one of their leasehold interests under that 1968 agreement,
16 we wouldn't have an interest in it.

17 Q. So if you don't have an interest, you do business
18 with that joint operating agreement, if you don't have an
19 interest in that, are you supposed to do any business with
20 that, even though you're not a party to that agreement?

21 A. Well, I don't know what you mean by "do
22 business". We have to recognize the fact that there are
23 operating agreements covering -- well, the pooling hearing
24 we just had on the previous case, there were two operating
25 agreements in existence in the same spacing unit, and we

1 proposed the well to those people under the agreement to
2 which we were not subject, and that's basically what we did
3 here.

4 So we have to do business with those people, but
5 in a different manner. We can't propose a well pursuant to
6 their operating agreement because we're not a party to it.
7 Likewise, they can't propose a well to us in this case
8 because they're not a party to it.

9 Q. Uh-huh.

10 A. But we do have to recognize that they're there
11 and deal with it in this manner, is one way to do it.

12 Q. Okay. I know there are some mistakes that have
13 been made. If that mistake had been avoided, I don't think
14 we should be here. This is my question, okay. You stated
15 that nobody is being harmed by the mistake in drilling the
16 first well, right?

17 A. Not that I know of.

18 Q. Okay, nobody is being harmed. But is it wise for
19 them to go and correct their mistake? Or because nobody is
20 being harmed, there's no need to correct the mistake?

21 A. Well --

22 Q. Or can we correct the mistake?

23 A. I don't know. We -- You know, I don't know what
24 the remedy would be at this point.

25 Q. Okay, but --

1 A. Maybe one of our attorneys could tell us
2 whether --

3 MR. BRUCE: I would say, Mr. Examiner, I think it
4 would be up to Devon or the other interest owners in the
5 unit to take action, not the Division itself.

6 EXAMINER EZEANYIM: Okay. Yeah, that's -- I
7 think that's right.

8 Q. (By Examiner Ezeanyim) So what is your answer to
9 the question that, have you -- if you have done it right in
10 2001 and drilled the well correctly by, you know, using
11 maybe compulsory pooling to do that, should you have been
12 here today?

13 A. Probably.

14 Q. Because -- ?

15 A. Well, because there are some people on this list
16 that don't ever respond to anything, or very seldom. There
17 are always going to be people on this list who don't
18 respond to well proposals.

19 Or, as the case is, probably more often than not,
20 they respond, but they respond to -- depending on what
21 their election is, either to participate or to be
22 nonconsent, but more often than not it's under the 1968
23 agreement. They always -- not always but most -- they like
24 to elect under the 1968 agreement, because that's the one
25 that they're subject to.

1 But to answer your question, yeah, if the first
2 well had been done properly, there's always going to be
3 somebody who doesn't respond that we'll have to bring in
4 either by voluntary agreement or pooling, at least in this
5 case. We wouldn't be contested, I don't think, but we
6 would still be here.

7 Q. Okay.

8 A. Is that --

9 Q. Yeah.

10 A. Yeah.

11 Q. Okay, yeah, that's why --

12 A. Yeah.

13 Q. -- you know, I mean, you know, what I mean by
14 being here and being contested --

15 A. Oh.

16 Q. -- because you don't -- no contest, and --

17 A. Right.

18 Q. -- may be approved.

19 EXAMINER EZEANYIM: Bill, do you have any
20 other --

21 MR. CARR: No, I do not.

22 MR. BRUCE: Nothing further of this witness.

23 EXAMINER EZEANYIM: Okay, he can be excused.

24 MR. CARR: Mr. Examiner at this time I call Raye
25 Miller.

1 Ray, come on up.

2 EXAMINER EZEANYIM: You have been sworn anyway.

3 Okay, you may proceed, Bill

4 RAYE P. MILLER,

5 the witness herein, after having been first duly sworn upon
6 his oath, was examined and testified as follows:

7 DIRECT EXAMINATION

8 BY MR. CARR:

9 Q. Would you state your full name for the record,
10 please?

11 A. My name is Raye, R-a-y-e, Paul Miller.

12 Q. Mr. Miller, where do you reside?

13 A. Artesia, New Mexico.

14 Q. By whom are you employed?

15 A. Marbob Energy Corporation.

16 Q. And what is your position with Marbob Energy
17 Corporation?

18 A. I wear several hats. I'm officially an officer
19 of the corporation, titled secretary-treasurer.

20 Q. What do your duties with Marbob include?

21 A. I do land work, I oversee the accounting group, I
22 oversee the production reporting group, I have some
23 oversight of geology and engineering, I also have some
24 oversight of the land department.

25 Q. How long have you been involved with the oil and

1 gas industry?

2 A. I came to work for Marbob Oil and Gas in 1980.

3 Q. Have you previously testified before this
4 Division?

5 A. Yes, sir, I have.

6 Q. And at the time of that prior testimony were you
7 qualified as a practical oilman?

8 A. Yes, sir.

9 MR. CARR: Mr. Examiner, are Mr. Miller's
10 qualifications acceptable as a practical oilman?

11 EXAMINER EZEANYIM: Yes, they're so accepted.

12 Q. (By Mr. Carr) What does Marbob seek in this
13 case?

14 A. Marbob seeks to actually oppose the pooling
15 request by Devon.

16 Obviously all we can ask for is probably to
17 dismiss ourself, but we found flaws with what we saw as
18 Devon's logic in the pooling, primarily since all the
19 parties have been covered under JOAs, although it would be
20 two JOAs under the drilling of the initial well in this
21 proration unit, and that it was just a subsequent well or
22 an infill well in that unit. We didn't feel it was
23 appropriate, since all the parties were covered under one
24 or the other and the first well had been done by those two
25 JOAs, to actually now try to force folks, when they were

1 not done that way initially.

2 Devon, in our mind, had honored those agreements
3 by using them to drill the first well. It winds up while
4 they're not a party to the second well -- or to the second
5 agreement, the 1968 agreement, they used another person who
6 was a party to AFE, the parties under that agreement, so
7 that they could move forward with the operation, and Devon
8 has been advised that if that party wouldn't do that for
9 them on the second well, that Marbob would be happy to AFE
10 those parties under the 1968 agreement since we are a party
11 to the 1968 agreement, such that they could move forward.

12 And in fact, they could have moved forward much
13 sooner, on a more timely basis, had they elected to do
14 that, because of the automatic requirement to join or
15 nonconsent with 30 days under the JOA.

16 Q. Marbob and Pitch own working interests in the
17 west half of this section, do they not?

18 A. Yes, sir, they do.

19 Q. And because of that interest in the west half of
20 this section, they are sharing in production from the
21 Number 1 well; isn't that right?

22 A. Yes, sir, they are.

23 Q. Is there anything that you're aware of that would
24 suggest that there is a different basis for sharing in the
25 Number 1 well than in the Number 2?

1 A. That was part of the reason that we didn't
2 understand exactly why Devon wasn't proposing the well in
3 the -- for the second well under the same manner that it
4 proposed the first well.

5 Q. In your relationships concerning the Number 1
6 well, has Devon honored the 1968 joint operating agreement?

7 A. When Devon requested and Mr. Gray called and
8 asked us to ratify the agreement, I became suspicious.
9 Independent oil people are all suspicious of what the
10 others are doing. And as a result, I started analyzing and
11 research what I believed were Devon's ulterior motives by
12 having everyone ratify the 2001 JOA, rather than proposing
13 the well as to what they had done.

14 There are several components, a couple of which
15 have been talked about already, which are different under
16 the 1968 agreement than are under the 2001.

17 The first difference that I think may have been
18 pointed out, but I'll just reiterate it, is that when a
19 party is noticed of a AFE to participate under the 1968
20 well, if they elect to participate they are automatically
21 accepting their share of the nonconsent interest, or the
22 parties who elect not to participate.

23 In the original well proposal for the Number 1
24 well, which at the time it was drilled was pretty well a
25 wildcat well in this area because there was not a lot of

1 Morrow production prevalent at that time, they AFE'd under
2 the 1968 agreement through the secondary party, those
3 parties. The parties who elected not to participate under
4 the 1968 agreement were spread automatically to the parties
5 who participated.

6 So in a risky well the parties under the 1968 had
7 a force that they were obligated to take non-electing
8 parties' interest by their election to participate.

9 It's also been talked about in the fact that --
10 and it was a discovery of mine, that they had given the
11 casingpoint election, which should not have been done, to
12 the 1968 parties to the agreement, because the 1968
13 agreement does not provide for a casingpoint election.

14 It winds up being a thing where at the time a
15 casingpoint election is made, you actually have logs, you
16 have at least some reason to believe whether or not you may
17 be able to make a well in the formation. While I agree
18 that the casingpoint election should have been provided to
19 the 2001, it should have not been sent to the 1968.

20 I'm not sure, but I believe the only party who
21 elected not to participate in the casingpoint election was
22 a 1968 party who owned a sizeable interest under that
23 agreement.

24 Devon then asked people -- all of the parties,
25 1968 and 2001 -- whether they wanted to pick up additional

1 interest. That interest then was spread, Devon agreeing to
2 pick up interest. The largest portion of that was actually
3 given to them.

4 Q. Mr. Miller, are you talking about now and
5 referring to the letter from Mr. Gray dated October 5,
6 2001, that has been marked as Marbob Exhibit 1?

7 A. Right.

8 Q. All right.

9 A. That is a letter that Marbob shouldn't have
10 received under 1968, as well as the parties of the 1968
11 agreement, while what we use it for in this presentation is
12 to show that, you know, we believe Devon recognized that
13 they were acting under the 1968 and have continued to act
14 under the 1968 for the Number 1 well.

15 Now, it has also been talked about that the
16 penalties under the two operating agreements are actually
17 different. The penalty as you all would describe it under
18 the 1968 is a 100 percent of costs plus a 100-percent
19 penalty. The penalty under the 2001 agreement is a 100
20 percent of costs plus a 200-percent penalty.

21 It winds up being a thing where at this point the
22 election -- or the casingpoint election was done in error,
23 but to date, even though the well has produced quite a bit
24 of gas, Devon has not given any of the parties a payout
25 statement to identify whether or not the casingpoint

1 penalty has been met.

2 One of the questions that was posed to Devon was,
3 were there accountings using the 200-percent penalty of the
4 1968 or the 300-percent penalty of the 2001, because the
5 additional penalty might be why they haven't already backed
6 in the party who was -- who made an election that they
7 should not have been offered in the first place.

8 It winds up being another question as to the fact
9 that Devon made an error in actually issuing that
10 casingpoint election, should those parties or the parties
11 who made the election not to participate, should they
12 actually have any penalty imposed on them, because they
13 shouldn't have been given that election. And as a result,
14 should they only suffer what Devon and the other parties
15 need to recover of its cost, and then they be allowed back
16 in?

17 It wound up being a thing where, you know, as a
18 result, as I said, I became very suspicious that what Devon
19 was doing was trying to acquire additional interest in the
20 second well, which was less risky, versus forcing parties
21 to the 1968 to assume those risks under the first well,
22 which was more risky in drilling.

23 Now, I will say that I asked Mr. Gray about what
24 his intentions were in this relation, and he said that was
25 not his intention, and I believe him. But at the same

1 time, it looks very bad given all of what has actually
2 transpired.

3 Q. Now, you've been focusing on the first well
4 basically?

5 A. Yes.

6 Q. What about the second well? How does the
7 proposal that is on the table impact Marbob and Pitch as to
8 the second well?

9 A. The second well, to us, is an extremely good
10 prospect. I mean, as Mr. Gray alluded, there have been
11 wells now drilled in this area virtually surrounding this
12 location. I mean, the Morrow is a very risky formation,
13 but I think geologically and engineering, a person who
14 would be analyzing the prospect for a decision as to
15 whether they wanted to participate, if they were in a
16 vacuum and knew only what they knew at the first well,
17 versus now what they know at the second well, would
18 perceive that there is a lot less risk in a decision to
19 move forward on the second well.

20 The other thing that bothers me about the way
21 this second well was proposed is that if the parties had
22 ratified the JOA, then to a degree we might have covered up
23 Devon's sins and errors under the election and the issue as
24 to how much penalty and all should be imposed upon the
25 election in error.

1 Now, I believe personally that the 1968
2 nonconsent of that casingpoint election, as I've said
3 before, has been paid. I've already mentioned that no
4 payout statements have been sent. If a new JOA had been
5 ratified by the nonconsenting party, then Mr. Gray could
6 have probably actually imposed a 300-percent penalty under
7 their Number 1 election, because they were ratifying that
8 agreement, and the JOA that Mr. Gray proposed, I believe --
9 and you may want to ask him this later -- but not only
10 covered the entire proration unit but also extended to
11 lands outside the proration unit. And that was why several
12 of us were bothered as to what he was actually trying to
13 do.

14 Now, again, I've talked to Mr. Gray and he said
15 it was not his intention to -- trying to cover his prior
16 sins, that I was the person who made him aware of those.
17 But for us, it became a thing where it appeared that Devon,
18 large company, was largely bullying the little people into
19 forcing them to agree to a JOA, which put them in a
20 position of less opportunity to acquire interest in a less
21 risky well than what was originally afforded. It winds up
22 being a thing that it just -- it didn't fit right.

23 Now, I will also tell you at this point that when
24 we advised Mr. Gray that we were going to oppose his
25 pooling, we notified all of the other parties to the case

1 that we were going to oppose the pooling, and several of
2 the parties responded, thanked us. Many of them -- thanked
3 us for what we were doing. Many of them indicated that
4 they had also agreed to participate but had not ratified
5 the JOA and didn't understand what Devon was doing.

6 It winds up being a thing where as a result, part
7 of the reason that -- and we'll talk about it later -- that
8 we couldn't reach, or I couldn't rightfully reach agreement
9 with Mr. Gray to settle this case is because once I started
10 talking about ways to try to rectify some of the problems
11 with what we saw is, I felt I had an obligation to talk to
12 the other parties that we'd sent saying that we were going
13 to oppose the case.

14 In talking to those parties who had responded
15 back to me, a couple of them had no problem with me cutting
16 whatever deal. Their interest is so small that, you know,
17 they felt if I was satisfied, then they were satisfied.

18 One of the parties -- and that is my problem at
19 this point. One of the parties is the party which is
20 subject to a lot of the errors, has not told me that they
21 would be satisfied with us settling under the terms of Mr.
22 Gray as proposed. And as a result, since I started the
23 crusade, that's why I'm here.

24 Q. Now, let me -- Mr. Gray in his testimony
25 presented a number of concessions that Devon was willing to

1 make. Are any of those needed if Devon will simply honor
2 the 1968 JOA in the second well, as you did in the first?

3 A. No, if they would have us or one of the other
4 parties propose the well, they could move forward and be
5 drilling their well after 30 days' election period.

6 Q. Marbob and Pitch have received an AFE for the
7 second well; is that correct?

8 A. That's correct.

9 Q. And our Exhibit Number 2 is a copy of the AFE
10 that has been signed by Marbob and pitch; is that right?

11 A. That's correct, we've agreed to pay our share,
12 we've agreed to participate in the well. We believe there
13 are other parties who have signed the AFE to participate in
14 the well, that they have expressed willingness to
15 voluntarily participate. I honestly believe those parties
16 should be dismissed from the case as well as us, but -- I
17 obviously don't have authority legally on their behalf to
18 make that request to you, but I -- that's my personal
19 belief.

20 Q. Is Marbob Exhibit Number 3 a copy of the 1968
21 joint operating agreement?

22 A. Yes.

23 Q. And is this the agreement that you believe
24 governs your relationship with Devon in the west-half
25 spacing unit for both wells?

1 A. Yes.

2 Q. Is it your testimony that it is Marbob's position
3 and the position of Pitch Energy that you have an agreement
4 to combine these lands?

5 A. Yes.

6 Q. And that is the 1968 agreement?

7 A. Yes.

8 Q. And that is the agreement that was used to
9 combine these very same lands for the Number 1 well?

10 A. Yes.

11 Q. You have signed an AFE, and you've agreed to
12 participate in the well by paying your share; isn't that
13 true?

14 A. That is correct.

15 Q. That's Exhibit 2?

16 A. Yes.

17 Q. Do you believe that you stand before the Division
18 having reached voluntary agreement with Devon for the
19 development of this acreage and the drilling of this well?

20 A. Yes.

21 Q. Do you request to be dismissed from this
22 Application?

23 A. Yes, we do.

24 Q. Were Exhibits 1 through 3 either prepared by you
25 or compiled at your direction?

1 A. Yes, they were.

2 MR. CARR: May it please the Examiner, at this
3 time I would move the admission into evidence of Marbob
4 Exhibits 1 through 3.

5 EXAMINER EZEANYIM: Any objection?

6 MR. BRUCE: No objection.

7 EXAMINER EZEANYIM: Exhibits 1 through 3 will be
8 admitted into evidence at this time.

9 MR. CARR: And that concludes my direct
10 examination of Mr. Miller.

11 EXAMINER EZEANYIM: Mr. Bruce?

12 MR. BRUCE: Just a few questions.

13 CROSS-EXAMINATION

14 BY MR. BRUCE:

15 Q. Mr. Miller, do you agree that there's no
16 casingpoint election in the 1968 agreement?

17 A. Yes.

18 Q. But yet you did make -- both Marbob and Pitch --
19 although your Exhibit 1 is only signed by Pitch, both
20 Marbob and Pitch did make a casingpoint election?

21 A. Yes, they did.

22 Q. Couldn't that be considered that you're ratifying
23 the 2001 operating agreement?

24 A. If it is, then Mr. Gray wouldn't have to be here.

25 Q. Does Marbob think it was properly joined in the

1 Number 1 well?

2 A. Yes, we do, under the 1968 agreement.

3 Q. Just one other question. Well, two other
4 questions. The casingpoint matters you discussed, isn't
5 that an issue, when you do have two different operating
6 agreements, a practical problem for an operator, whether
7 it's Devon or Marbob?

8 A. I think it was an error. People make errors. I
9 think Mr. Gray is a competent landman and could easily
10 handle a correct accounting under both operating
11 agreements. He's certainly understood enough of the 1968
12 that he spread the nonparticipating 1968 interests
13 automatically to the 1968 parties.

14 Now, we have wells in this same area that are
15 covered by two agreements, one of them being the 1968, and
16 a later joint operating agreement, just like Mr. Gray has,
17 with some of the parties that Mr. Gray has in his operating
18 agreement.

19 I have exactly the same problems, but we believe
20 we're accounting for them properly, and I believe Mr. Gray
21 and his company could account for them properly and manage
22 under the two agreements quite effectively.

23 Q. Are you saying that the 1968 agreement was
24 amended only as to the -- or was adopted only as to the
25 west half of Section 3?

1 A. Mr. Gray's proposal to the parties was for the
2 drilling of the Number 1 well on a west-half proration
3 unit, and that was the proposal that was submitted to the
4 parties for consideration of the Number 1 well.

5 MR. BRUCE: That's all I have, Mr. Examiner.

6 EXAMINER EZEANYIM: Mr. Carr, you examine?

7 | MR. CARR: Nothing further.

8 EXAMINER EZEANYIM: Gail, do you have some
9 questions for this witness?

10	EXAMINATION
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11 BY MS. MacQUESTEN:

12 Q. Mr. Miller, you've mentioned several times the
13 sins of Devon in connection with the Well Number 1.

14 | A. Maybe it's better titled the mistakes or errors.

15 Q. Is the error you're referring to the proposal of
16 the well under two joint operating agreements?

17 A. No, we don't believe that that was a problem.

18 Q. Okay, what do you think was the problem?

19 A. The errors -- the casingpoint election is an
20 error, how they may or may not be accounting for the
21 nonconsent under that casingpoint election may be an error.
22 The spreading of that casingpoint election to all the
23 parties was an error. You know, I mean, there have been
24 multiple errors.

25 I mean, I pointed out another error to Mr. Gray

1 that they made a title requirement in regards to our
2 interest in the Number 1 well. They sent us a copy of the
3 title requirement, said they were suspending our interest,
4 or two-thirds of our interest at the time. We sent title
5 curative in November of 2002 to satisfy that title
6 curative. They released our money in June of 2004 with no
7 correspondence as to any reason why they hadn't released it
8 previous to that.

9 There have been requests for payout statements by
10 parties. They have not provided those.

11 I mean, many of the things that -- there have
12 just been several problems that happened with this well,
13 and while we all make mistakes -- and as Ken will point
14 out, or as he referenced at one point, I do have an
15 accounting background. It is very easy for me to go back
16 and analyze all of the errors that were done after the fact
17 and focus on those.

18 And truly, I was very suspicious that Devon had
19 an ulterior motive initially. Mr. Gray has indicated to me
20 that he did not, and I have no reason to believe that Mr.
21 Gray is not telling myself and the man I work for the
22 truth. So he's -- I've dealt with Ken a long time, so it
23 appears that they just made mistakes. But we all mistakes.

24 Q. So you don't have a problem with the fact that
25 Well Number 1 is being operated under two different joint

1 operating agreements?

2 A. No, I don't.

3 Q. So your problems go more towards the
4 administration of those joint operating agreements?

5 A. My problems come in the attempt by Devon when
6 they proposed the well under two agreements and it was a
7 high-risk well, to now decide that they don't want to
8 propose the second well in the same proration unit under
9 the same manner that they did.

10 As I explained to Mr. Gray last night, had Devon
11 attempted to propose it under the two agreements and
12 Magnum-Hunter, successor to Matador, wouldn't propose the
13 well under the 1968 for them, or they called Marbob and we
14 wouldn't have proposed it under the 1968, where they had no
15 right to, quote, possibly propose it under the 1968, since
16 they haven't signed that, then I could see them coming
17 forward with a request for pooling.

18 But in the fact that they handled the Number 1
19 well under two agreements, the wells in the Morrow, the
20 target of the second well is the Morrow, the Number 1 well
21 is still producing, then I believe that it would have been
22 appropriate for them to handle the Number 2 well, even if
23 they don't like it and would prefer not to be that way,
24 they should have handled the Number 2 well in the same
25 manner, and thereby would not have needed this compulsory

1 pooling case and could have already drilled a well.

2 Q. So it's your position they could have just gone
3 forward with Well Number 2 the same way they did with Well
4 Number 1?

5 A. That is the case, and we have volunteered to AFE
6 for them under the 1968, their AFE for the Number 2 well.

7 Q. If we granted Marbob an Pitch's motion to be
8 dismissed from this compulsory pooling action, is it your
9 position that Devon could go forward with the well, that
10 you would be under the 1968 agreement?

11 A. If you decide to grant my motion, you should
12 probably dismiss their entire case, because while I can
13 only ask for myself, it would not make sense to exclude me
14 but then obligate other parties who are also under the same
15 agreement and in the same circumstance to be the subject of
16 force pooling.

17 Q. So you're really asking for more than just
18 dismissal of Marbob and Pitch, but a rejection of the
19 compulsory pooling Application?

20 A. I think our initial request was that their entire
21 hearing or case be dismissed, because they didn't need to
22 actually have a force pooling hearing. And they believe
23 that they want one agreement, but they have not proposed
24 any remedy for the Number 1 well, and so I don't believe
25 that it's justified because we're going to have two

1 agreements on at least one well in that proration unit.
2 Why should they now be allowed to force, or attempt to
3 force, to one agreement on a second well?

4 Q. If we were to agree with you and dismiss the
5 Application, would you expect the result to be that they
6 could go forward but under the same terms as Well Number 1?

7 A. Absolutely. They could have done that weeks ago.

8 MS. MacQUESTEN: Okay, thank you.

9 EXAMINATION

10 BY EXAMINER EZEANYIM:

11 Q. Okay, before I ask some of my questions I wanted
12 to explore what she just asked you about. Let's say we
13 dismiss the case. I'm not saying that's what we're doing,
14 but just take that scenario. And you say the well will be
15 drilled under the 2001 agreement; is that --

16 A. It would be drilled, like the Number 1 well,
17 under both agreements. It would be proposed to the 2001
18 parties under the 2001; it would be proposed to the 1968
19 parties under the 1968 agreement.

20 Q. Okay, if there are dissenting parties to that,
21 then how would they agree to -- some of that parties in
22 that unit don't want the well drilled --

23 A. All of the parties are covered under one or the
24 other agreement. Each agreement has a mechanism for
25 handling nonparticipating parties.

1 Q. Oh, in that agreement?

2 A. In those agreements, yes, sir.

3 Q. Okay. So you are saying that -- Let's say the
4 case is dismissed. That's how the well would be drilled?

5 A. That's how I believe they'd try to move forward.

6 Q. Okay. And I know Marbob, Pitch and other
7 interest owners, they don't want to ratify the 2001
8 agreement, because you're a party to the 1968. What are
9 the consequences if you were to ratify the 2001 agreement?
10 I mean to Marbob or Pitch or to whoever is dissenting from
11 here. What are the consequences? I want to understand the
12 consequences of --

13 A. The consequences of ratifying the agreement would
14 have lessened our ability to receive the nonconsent
15 interest on a less risky well that we were obligated to
16 take on a more risky well, being the Number 1. I mean, in
17 an ideological fashion, that our -- you know, Mr. Gray has
18 tried to identify that, you know, the force pooled
19 interests would be allocated that way. He's trying to
20 basically get us to the 1968 agreement through the
21 compulsory pooling. It just -- He didn't need to go there.
22 If he was going to get to the 1968 agreement, he ought to
23 just have used it.

24 Q. Okay, so that's what they are looking at, okay.

25 A. And the other issue is, they -- It wasn't

1 somebody else who drilled the Number 1 well and they've now
2 inherited this problem. Devon actually was the party who
3 proposed the well, went to Matador, asked them to AFE all
4 of the parties under the 1968 agreement, and they drilled
5 the well and utilized both agreements to move forward with
6 the prospect.

7 You know, even though they made some errors, they
8 were the party who actually elected as to how to set it up
9 in the first place.

10 Q. Okay. You signed this October letter because you
11 wanted to participate in the Number 1 well, right? That's
12 why you signed that --

13 A. Yes.

14 Q. -- you signed it, right?

15 A. Yeah, we signed an AFE prior to that on the
16 Number 1 well, and we signed that when they sent out the
17 casingpoint election. We just pulled that as at least
18 utilizing it to show that, you know, there was a 1968 and a
19 2001 agreement.

20 Q. Okay, so if they drill the well under the terms
21 and conditions of that 1968, you have no problem, right?

22 A. Right.

23 Q. Okay. Now you see, all we're talking about here
24 is, I want to ask -- This is a question maybe to both
25 parties. We talk about waste, are there any waste issues,

1 conservation issues, are there any correlative-rights
2 issues, or is this issue being driven by economic factors?
3 You know, I just -- as we delve into why we are here, it
4 might help us make a decision.

5 Is it driven by economic factors inherent in
6 those JOAs, or are we fighting because of correlative
7 rights? I don't know whether waste may be an issue. The
8 well is not drilled. I mean, I would like the well to be
9 drilled if it has to be drilled, so waste would be an
10 issue. But is correlative rights an issue here, or is
11 really the real thing driving this matter economic factors?

12 MR. BRUCE: Mr. Examiner, if I could answer
13 first, I mean, correlative rights, I think all the people
14 and most -- everybody except maybe a total of one percent
15 in this well has joined in the well or intends to join in
16 the well, and so they believe that their correlative rights
17 will be protected by drilling the well. I mean, they think
18 -- well, and this is not quite getting at your point, but
19 obviously if the well isn't drilled there will be waste
20 because both these parties here think there are reserves to
21 be recovered and their correlative rights will be protected
22 by the well, so...

23 And I don't know that it's economics. I think
24 for -- I can't speak to Mr. Miller, but for my client --
25 and Mr. Gray can expound on that -- it's just -- Mr. Miller

1 has raised some issues that we think don't have anything to
2 do with the Number 2 well, but it does show the issues that
3 arise when you have two different JOAs, and we're just
4 looking for ease -- for one thing, and I think I mentioned
5 this yesterday -- ease of administration. It's easier to
6 operate when the operator has one -- more or less one set
7 of facts to deal with, rather than two.

8 And you know, have some mistakes been made? Mr.
9 Gray has admitted that, and it's probably compounded things
10 over the last few years in administering the production and
11 distribution of production from this well. It's a good
12 well, so fortunately the people have made money. But
13 that's certainly one issue.

14 I don't that it's economics because I don't know
15 if Mr. Miller has spoken to the JOA -- I mean to the AFE,
16 but apparently it's probably a reasonable well cost, so I
17 don't know if it's economics from that matter. All the
18 parties do want to get the well drilled, and I'll let Mr.
19 Miller and Mr. Carr speak as to Marbob's standpoint.

20 MR. CARR: Is there a waste issue? No, I don't
21 think so. The well will be drilled, production will be
22 recovered -- I mean, reserves will be recovered. So there
23 isn't.

24 Correlative rights is a harder question.
25 Correlative rights is defined, you know, as the opportunity

1 to receive your fair share, and you get that by receiving a
2 volume -- you can -- or you can get that by receiving a
3 share of the money. And so there is an economic side to
4 correlative rights. My share, my fair share, is dependent,
5 really, on how much revenue is attributed my interest. So
6 it gets a little gray there. But definitely no waste
7 issue, I think, is before you.

8 And there were other comments by Mr. Bruce, I'm
9 not sure directly in response to your question, but what
10 Devon is looking for is ease of administration, one set of
11 rules. But what Mr. Bruce says doesn't match the
12 testimony. Mr. Gray says they're willing to have different
13 relationships with parties, we could be under 1968 in the
14 Number 1 and under the 2001 under the Number 2. Some will
15 be in, some will be out, some may be under the 2001 JOA,
16 some may be pooled. And so you see the ease of
17 administration probably can't come out of this.

18 But as to correlative rights, possibly an issue
19 of waste, no.

20 MR. CARR: Okay, can you address, is it driven by
21 economic factors, since you -- Is it driven by economic
22 factors since you said --

23 MR. CARR: I think they impact your ability to
24 receive your fair share, because what I get is most of the
25 time not a barrel of oil in my front yard but a check in my

1 mailbox, and that's how I get my correlative rights.

2 EXAMINER EZEANYIM: So you think it's correlative
3 rights?

4 MR. CARR: Yeah, I think there is.

5 EXAMINER EZEANYIM: And how so?

6 MR. CARR: Well, I think if the contractual
7 arrangement that was proposed under the 2001 agreement
8 would inflate one party's interest in the proceeds at the
9 expense of the others just because of how the nonconsent
10 penalty is going to be shared, in fact, that can impact
11 your correlative rights, because you receive less. One
12 receives less and one receives more.

13 EXAMINER EZEANYIM: Okay. Now, with that
14 correlative rights -- we need to get there, because now
15 you're asking to be dismissed from this --

16 MR. CARR: Uh-huh.

17 EXAMINER EZEANYIM: -- but now I hear Raye saying
18 that, well, if we dismiss you, we dismiss the case.

19 So suppose that we just dismiss Marbob and Pitch
20 and issue the order -- I'm not saying that's what we're
21 going to do, because I'm taking notes here -- and dismiss
22 you. You still participate in the well, right?

23 THE WITNESS: Absolutely.

24 Q. (By Examiner Ezeanyim) And by then -- what Bill
25 is saying, would that, then, protect your correlative

1 right?

2 A. It may --

3 Q. And if that would protect it, how would it
4 protect your correlative right when you are dismissed and
5 not protect your correlative right when you are not
6 dismissed, when you are forced -- when you are compulsory
7 pooled? I just want to understand the issues here to be
8 able to decide what to do.

9 A. Right. Well, it's very complex because the
10 penalties are different under the two agreements. And so
11 if you dismiss me but you retain all of the other folks,
12 and if Mr. Gray is allowed to force them to join a
13 subsequent agreement, then opportunity I would have to pick
14 up their interest, he's indicated, would come to the
15 parties of the 1968. I don't know if he would still ask
16 for that if I'm the only party who is dismissed, because
17 all those other folks would then be subject to either the
18 force pooling or joining his agreement, is what he's trying
19 to get you to do.

20 It winds up being a thing where a casingpoint
21 election I would not have under the 1968. The parties who
22 were under 1968 with me would have been under the same
23 thing; they would now have a casingpoint election if they
24 were forced to join a 2001 casingpoint election, may be
25 perceived as high risk or lower risk. Ken's probably

1 smarter than I am on that. But there are certainly issues
2 as to who gains, who loses, depending on how you act, if
3 you decide probably only to dismiss us.

4 Q. Okay. How many of those interest owners you talk
5 to that would like to do what you're doing now? I know
6 it's not only Marbob and Pitch; there are other interests
7 that would like to be dismissed.

8 A. You want to identify who actually has already
9 signed to participate?

10 MR. CARR: That would be on Exhibit 2, your
11 Exhibit 2, Ken.

12 MR. GRAY: Uh-huh. Sign an AFE?

13 THE WITNESS: Uh-huh.

14 EXAMINER EZEANYIM: Is that -- Is signing an AFE
15 indication, or just indication that you are going to
16 participate in that -- because we discussed it here, but I
17 don't know --

18 MR. GRAY: That's an indication that you're going
19 to participate, but under what agreement, I guess, is the
20 whole issue here.

21 EXAMINER EZEANYIM: Okay, what I wanted to know
22 now are those Raye is talking about that -- you know, who
23 want to be dismissed from this case. I want to know how
24 many of them.

25 THE WITNESS: Who has already signed a

1 participation or an AFE, but not actually ratified, because
2 your yellow identifies the parties who have signed AFEs and
3 ratified.

4 MR. GRAY: Well, let's see. Magnum-Hunter, at
5 the top of this list.

6 EXAMINER EZEANYIM: Okay, let me get that,
7 please.

8 MR. GRAY: Magnum-Hunter has elected to sign an
9 AFE.

10 EXAMINER EZEANYIM: Now, what does that mean,
11 Magnum-Hunter? Is that -- They are willing to participate
12 or -- They signed the AFE; what does that mean?

13 MR. GRAY: Well, according to Mr. Carr and Mr.
14 Miller that's all that's required, is that they -- that
15 their agreement can -- they therefore shouldn't be able to
16 be pooled, because they made a voluntary agreement to
17 participate in the well.

18 EXAMINER EZEANYIM: Oh, okay, they want to
19 participate but they don't want to be pooled; is that
20 right?

21 MR. GRAY: Well, nobody wants to be pooled,
22 apparently, but they don't want to sign the operating
23 agreement either, so -- because they are already subject to
24 their own operating agreement.

25 EXAMINER EZEANYIM: Okay.

1 MR. GRAY: To answer your question, how many
2 people have elected to join that haven't -- Is that the
3 question? How many have elected to join --

4 EXAMINER EZEANYIM: Yeah.

5 MR. GRAY: -- that haven't ratified the new
6 operating agreement?

7 EXAMINER EZEANYIM: Yeah.

8 MR. GRAY: Okay. Magnum-Hunter, Pozo Rico --

9 EXAMINER EZEANYIM: Pozo Rico, okay.

10 MR. GRAY: Uh-huh. Obviously Marbob, Pitch, and
11 I think that's all.

12 THE WITNESS: What about Wadi?

13 MR. GRAY: Well, you know, I can't remember. I
14 think --

15 THE WITNESS: I believe Wadi signed the AFE but
16 didn't ratify --

17 MR. GRAY: That's possible --

18 THE WITNESS: -- is my understanding from --

19 MR. GRAY: -- Wadi may have also.

20 EXAMINER EZEANYIM: Who is that?

21 MR. GRAY: Wadi, W- -- the third one from the --
22 or second one from the bottom.

23 EXAMINER EZEANYIM: Oh, okay, Wadi. Okay. Okay,
24 this one we just picked, they have -- they want to
25 participate in the well under the 1968 agreement; is

1 that --

2 MR. GRAY: Yes.

3 EXAMINER EZEANYIM: Okay. Then the ones in
4 yellow, what are those?

5 MR. GRAY: Those are the ones that have elected
6 to participate, signed an AFE and have ratified the 2001
7 joint operating agreement.

8 EXAMINER EZEANYIM: So from what you are telling
9 me now is, these ones that I just checked off -- one, two,
10 three, four, five -- would like to be dismissed from the
11 case if we can -- I mean, is that -- I just -- I'm trying
12 to understand that. Even though they have signed the AFE,
13 but they -- you know, they want to be dismissed. Is that
14 what you are saying, Raye?

15 THE WITNESS: I certainly think they should be
16 because, you know, they're all in similar stand. I mean,
17 they have agreed to participate, which would appear to be
18 voluntary agreement, but -- and they're under a JOA
19 covering the first well, and at least at some point in the
20 well's life they agreed to participate, I think those
21 people did, in the Number 1.

22 I'm not sure about Pozo Rico. Did they
23 participate?

24 MR. GRAY: I don't remember.

25 EXAMINER EZEANYIM: Okay, thank you.

1 MS. MacQUESTEN: Mr. Carr, is it your position
2 that you are asking for --

3 MR. CARR: No, we're asking --

4 MS. MacQUESTEN: -- the dismissal or simply for
5 dismissal of the two parties?

6 MR. CARR: We're asking for dismissal of Marbob
7 and Pitch, because Devon has ratified and adopted by their
8 actions and by letters that they have signed the 1968
9 agreement. That is what our motion is.

10 The impact of that on other interest owners I'm
11 really not sure of, because I'm not sure what exactly their
12 position is, although ratification and adoption of the JOA
13 could well moot the issue as to others.

14 EXAMINER EZEANYIM: So following that, you say
15 even if we grant your motion, we can still issue the order
16 by --

17 MR. CARR: I think you can dismiss Marbob and
18 Pitch. They have requested to be dismissed and have filed
19 the motion.

20 EXAMINER EZEANYIM: And still if you do other --

21 MR. CARR: There's nothing -- I mean, I think you
22 only grant or deny what's before you.

23 EXAMINER EZEANYIM: Oh, okay. Yeah, I'm sorry.

24 MS. MacQUESTEN: At the danger of cutting into
25 the lunch hour, could I just follow up on one thing?

1 EXAMINER EZEANYIM: Yeah, well --

2 MR. BRUCE: We don't want to --

3 EXAMINER EZEANYIM: -- we can go to lunch --

4 MR. BRUCE: We don't want to go, we want to
5 finish.

6 EXAMINER EZEANYIM: We do want to finish, we want
7 to finish this.

8 MR. CARR: We're trying to make Gray buy dinner
9 tonight, so...

10 (Laughter)

11 FURTHER EXAMINATION

12 BY MS. MacQUESTEN:

13 Q. Mr. Miller, you said that -- I think, and correct
14 me if I'm not getting this correctly -- that Devon's
15 Application in this case has tried to accommodate some of
16 the concerns of those entities that have signed on to the
17 1968 agreement so that their Application is starting to
18 look more and more like the 1968 agreement?

19 A. Some of the concessions which Devon offered in
20 their testimony, such as changing the proposed penalty to
21 being a 100-percent -- cost-plus-100-percent penalty, then
22 conforms with the 1968.

23 Likewise, their concession to actually allow the
24 force pooled interests to actually be allocated to the 1968
25 parties, since it's all 1968 parties who have not agreed to

1 consent, makes it resemble the 1968 agreement.

2 Q. Is it your position that there are benefits in
3 the 1968 agreement that do not exist under this
4 Application?

5 A. There are detriments to the parties in the 1968
6 agreement in drilling a more risky well, being the Number
7 1, that by not being allowed to do under the 1968 agreement
8 for the Number 2, that those parties lose. They actually
9 are -- they were forced to take interest under a more risky
10 well in the Number 1 by what Devon initially proposed.
11 They would have lost that opportunity to pick up those same
12 interests if they elected not to participate. They would
13 be diluted and shared, and Devon, having the largest
14 interest, would have been allowed to acquire the majority
15 of those interests.

16 So they suffered the consequences of 1968 under
17 the Number 1. Devon is now trying to deny them those same
18 benefits under the Number 2, was the appearance of the case
19 initially, yeah.

20 MS. MacQUESTEN: Thank you.

21 EXAMINER EZEANYIM: Anything further? Jim?

22 MR. BRUCE: I have nothing further.

23 MR. CARR: I have a statement, is all.

24 EXAMINER EZEANYIM: Okay, all right.

25 MR. CARR: I'm sure Mr. Bruce does too, and Mr.

1 Bruce gets to go last, which is outrageous.

2 Are you ready?

3 EXAMINER EZEANYIM: Yes.

4 MR. CARR: Mr. Examiner, what you've heard today
5 sounds very confusing and very complicated, and yet I think
6 when you sift through it, I think you hit the nail on the
7 head when a little while ago you asked if the real issue
8 here wasn't that we felt Devon can't have it both ways.
9 And the answer to that is yes, and that's the heart and
10 soul of why we're here.

11 You either combine interests in a unit, a spacing
12 unit, this time being the west half of this section -- you
13 either combine those interests or you do not. You can't
14 have it both ways. You can't sort of combine them for one
15 well and then honor a contract and then reject that very
16 same agreement, that same contract for the same land, as it
17 applies to the same parties, just because now you're going
18 to continue development of that acreage with a second well.

19 No matter what the status of the lands may be
20 tract by tract as you move through the west half, it is the
21 duty of the operator to combine all the interests in the
22 spacing unit. And I'm sure we could all find exhibits
23 where parties have contractually agreed to different
24 relationships in separate wells on a spacing unit. But
25 that's because they contractually agreed, not because one

1 party was able to impose it on the other or because this
2 agency ordered it.

3 Mr. Gray has indicated that Devon still stands on
4 the 1968 agreement as it applies to the Number 1 well. He
5 has stated they're willing to accommodate the concerns of
6 these parties with various proposal sort of bandages we
7 want to stick on this at the end. But none of these things
8 are needed if they honor the same contract, the 1968
9 agreement, the contract that brought us into this on the
10 front end.

11 Now, you heard legal arguments yesterday, and we
12 showed you a letter where they've referenced the agreement
13 we've all signed, recognizing it is applicable to the
14 Number 1 well.

15 But I think it's important to recognize that
16 there is more than one way we can enter a contract. You
17 enter it by signing it, which is the traditional, simple
18 way. But you also become bound to a contract when through
19 your actions you adopt and ratify the agreement.

20 And here we have the 1968 agreement, the letter
21 that's our Exhibit 1, the conduct in terms of how the wells
22 have been operated. Devon has ratified and accepted that
23 agreement. They are a party to that contract.

24 Now, Ms. MacQuesten has been concerned, and I
25 think rightly so through this hearing, about trying to go

1 forward from this point with different agreements impacting
2 the interest owners in this property. That's what we've
3 had so far. We've had different agreements.

4 I would submit that it isn't really a problem;
5 it's not a problem that can't be dealt with. It's not a
6 desirable situation; we've had it so far. And even if
7 there was something you could do to clean this up and have
8 one contractual arrangement that applied to all interest
9 owners -- That would be great, but that's not where this is
10 going to go.

11 Some are going to remain under the 2001 joint
12 operating agreement, either because they signed it earlier
13 or recently ratified, some are either going to be under the
14 1968 agreement because it is determined that Devon has
15 ratified and adopted that agreement, or you're going to
16 have them under the 2001 JOA and you're going to have some
17 force pooled -- and I submit maybe that's the worst of all
18 worlds, because I believe although you don't have anything
19 to do after all this, we said maybe the individual parties
20 might -- well, if we're pooled and we're being treated
21 differently than under the 1968 agreement, perhaps that's
22 the point in time when some of the parties have to act.

23 Mr. Gray is probably right, to date no one has
24 been harmed. And if we go in the future and honor the
25 contract, if they agree they have ratified and adopted the

1 1968 agreement, no one's going to be harmed in the future.

2 It's our position that we have an agreement with
3 them for the development of the property. That's the 1968
4 joint operating agreement. It's been ratified and adopted
5 by the conduct of Devon; it's been ratified by what they've
6 done, by their operations on the unit, by the letter and
7 other documents, the AFE, which we haven't offered, but the
8 letter which you have is our Exhibit 1. They've ratified
9 it by those things.

10 I would also submit to you they've ratified that
11 1968 by things that they have not done. They say it was
12 improper to form the unit under the 1968 agreement. They
13 haven't done anything to correct that. And I would submit
14 to you that they haven't, because what they really did was
15 ratify that contract, and that contract is in place, and
16 that contract governs the activities on this unit.

17 And it would apply if they've ratified it. All
18 parties would now have reached an agreement, because
19 everybody would either be under the 2001 agreement by
20 signing it, or under the 1968 agreement that Devon has
21 accepted by ratifying it. So the problem at that point is
22 resolved.

23 So we believe we have an agreement that governs
24 the land. We have signed the AFE, the authority for
25 expenditure. We've committed to pay our share, and we will

1 pay our share, as the other people that we recently
2 identified.

3 And we therefore believe that there is a
4 voluntary agreement, that just like we had on the first
5 well, we have a voluntary agreement here, and they can't
6 have it both ways. We have an agreement, and therefore our
7 interest cannot be pooled.

8 EXAMINER EZEANYIM: Mr. Bruce?

9 MR. BRUCE: Mr. Examiner, the first point is that
10 an operator must have an agreement with everyone in the
11 well. And whether that agreement is voluntary or
12 compulsory under the compulsory pooling order, that's why
13 we're here today. Devon wants to have an agreement with
14 everyone.

15 Side issue with respect to that is signing an
16 AFE, and I can get the Division's attorney case law on
17 this, but absent a pooling order or a JOA, signing an AFE
18 does nothing. There's case law that say an AFE is not an
19 agreement to pay. It's simply a cost estimate, and you
20 say, yup, this is a cost estimate. So we need either a JOA
21 or a pooling order for any AFE to be effective.

22 Mr. Carr talked about ratification of Devon, of
23 the 1968 operating agreement. I've addressed -- there were
24 some -- in the briefs that were filed a couple weeks ago,
25 Mr. Examiner, there were some cases cited by Mr. Carr. The

1 problem for Mr. Carr in those cases is, that's where
2 somebody had actually signed the agreement itself, that
3 there was a contract that a couple of parties had signed,
4 and there was questions about ratification. That is not
5 the issue here.

6 Devon -- the only testimony is, Devon has never
7 signed that 1968 agreement, and all Marbob and Pitch are
8 relying on is their Exhibit 1, this 2001 letter. This
9 could just as easily be used to say that Marbob and Pitch
10 had ratified the 2001 operating agreement because they're
11 agreeing to a casingpoint election they don't have under
12 their 1968 operating agreement.

13 Furthermore -- and I said this yesterday -- if
14 there's a ratification -- and I don't think there is --
15 this would only be for the Number 1 well. It does not --
16 it mentions a specific well and a specific well only. It
17 gives the footage of the well and has nothing to do with
18 the Number 2 well.

19 If there -- And the Number 1 well is sitting out
20 there; nobody's complained about it. I would say that
21 apparently the people have acquiesced in the current
22 situation, at most; I do not believe there is a
23 ratification.

24 As far as force pooling these interest owners, I
25 don't have the order number in front of me, but the west

1 half of Section 11, just to the southeast of this well
2 unit, was force pooled by Devon a couple of months ago, and
3 the same 1968 operating agreement was involved. Devon came
4 in and force pooled all of those parties.

5 And I don't know -- I don't think Marbob was a
6 party in that particular section, but that same 1968
7 agreement was involved in that force pooling case, and I
8 can get you the pooling order number, but those 1968
9 parties were involved in that case, and the Division force
10 pooled them and Devon was not a party to that agreement.

11 A side issue, yesterday, Ms. MacQuesten, you
12 raised the issue of jurisdiction, and Mr. Carr and I have
13 discussed that. I guess my only point on that is, since
14 this is a contractual issue in large part, but the Division
15 itself has to decide if the parties have reached a
16 voluntary agreement in order to reach the threshold of
17 compulsory pooling under Section 70-2-17. So necessarily
18 the Division must decide this issue in the first instance,
19 I'm afraid. I know you don't like these -- The Division
20 has never liked these cases, but it is what it is.

21 Really, just two short minor points. Marbob has
22 said that it's willing to propose under the 1968 JOA. I
23 mean, that in itself is an admission that Devon isn't an
24 operator under that JOA, and therefore Devon can't propose
25 under that JOA. Again, we don't believe anybody has been

1 harmed by this, with the concessions Devon has made. And
2 we just believe that there is no voluntary agreement except
3 for the 2001 JOA parties with respect to the Number 2 well,
4 and we'd ask you to issue a pooling order.

5 Thank you.

6 EXAMINER EZEANYIM: Any questions?

7 Mr. Carr, do you have any?

8 MR. CARR: Nothing further.

9 MS. MacQUESTEN: Mr. Bruce, when you mentioned
10 that force pooling case, if you could get me the --

11 MR. BRUCE: I will give you that later today.

12 MS. MacQUESTEN: Was that a case where Devon was
13 force pooling some entities who had signed this 1968
14 agreement? Is that --

15 MR. BRUCE: What it was -- and Mr. -- Gray
16 reminded me that -- it's bad when you forget your client's
17 name, Ms. MacQuesten. It was the same agreement. Not all
18 the parties were pooled because some had come to terms with
19 Devon beforehand. But it was the same agreement, and a
20 force pooling order was issued on that well.

21 MS. MacQUESTEN: Was it a situation where there
22 were conflicting pooling agreements, conflicting JOAs?

23 MR. GRAY: They're almost identical.

24 MR. CARR: Was it for the second well on the
25 unit?

1 MR. GRAY: Yes, it actually was. Well, there's
2 an existing Wolfcamp well in that spacing unit, but yeah,
3 for a gas spacing unit it is the second well.

4 MR. MILLER: But you were targeting the Morrow in
5 the second well.

6 MR. GRAY: Yeah. But nonetheless, it was real
7 similar. We had an existing operating agreement that Devon
8 and a bunch of other people were subject to, and we had the
9 1968 owners, some of whom -- it was a little different
10 because some of the 1968 owners had signed this newer
11 operating agreement way back when the initial well was
12 drilled, but some of them didn't, and it was real similar.

13 We asked everybody to ratify the newer agreement
14 so we could have one. And as we did here, we got responses
15 from most of the people that responded -- well, we --
16 whatever we want to do is only under the 1968 agreement.
17 So we ended up only pooling a few of these 1968 interest
18 owners, not all of them, because a lot of them agreed to
19 ratify the operating agreement, just like they have here.

20 MR. BRUCE: I will get you that, and I will
21 inform Mr. Carr of that also.

22 MR. CARR: You bet.

23 MS. MacQUESTEN: Okay, thank you.

24 (Off the record)

25 EXAMINER EZEANYIM: Well, we've heard everything

1 from everybody. Thank you.

2 But I'm not sure -- I'm not going to take this
3 case under advisement today for two reasons. One is that
4 you promised to submit to me that affidavit of publication.

5 MR. BRUCE: Yes, sir.

6 EXAMINER EZEANYIM: -- that we talked about at
7 first. So we need to have that.

8 Now, and I think I will continue this case to
9 October 7th. Then you know, in my view, for both parties
10 to go back to the drawing table and see whether there's
11 anything that can come out of this. I know you guys have
12 tried and tried and tried, and you couldn't come up with
13 anything, but I just urge you again to go back. Maybe
14 there's something -- try that. Because on October 7 we may
15 take this under advisement and we're going to make a
16 ruling. The case is before us today. We're going to make
17 a ruling. And we don't want to be just so divisive in this
18 case because when we make that ruling it will sever one and
19 not sever the other.

20 So that's why I emphasize that you go back to the
21 drawing table, try to talk it over, all right, and see what
22 could happen within this -- you see, three weeks, now we
23 have three weeks, not two weeks. October 7th is three
24 weeks from today. So you have enough time to talk this
25 over and see whether you can come to an agreement. If you

1 do, then we dismiss the case. If not, then we get
2 everything, we'll wind up with this case and take it under
3 advisement on that day and then make a ruling at that
4 point. Is that what you want? Okay. But I urge you to go
5 back and try to settle this as operators. I hope you will
6 try. But otherwise, we'll have a case -- we'll make a
7 decision.

8 So I'm going to continue this case to October
9 7th, and then we'll make a decision on that date. And if
10 you come up with something, please let us know.

11 MR. BRUCE: Thank you, Mr. Examiner.

12 MR. CARR: Thank you.

13 EXAMINER EZEANYIM: I think that concludes the
14 hearing today.

15 (Thereupon, these proceedings were concluded at
16 12:20 p.m.)

17 * * *

18
19
20 I do hereby certify that the foregoing is
21 a complete record of the proceedings in
the Examiner hearing of Case No. _____
heard by me on _____

22 _____, Examiner
23 Oil Conservation Division
24
25


CERTIFICATE OF REPORTER

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Division was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL September 20th, 2004.



STEVEN T. BRENNER
CCR No. 7

My commission expires: October 16th, 2006