Davidson, Florene, EMNRD

From: Tom Kellahin [tkellahin@comcast.net]
Sent: Wednesday, September 28, 2011 4:27 PM
To: Davidson, Florene, EMNRD; Ezeanyim, Richard, EMNRD; Brooks, David K., EMNRD
Cc: Scott Hall; Compton.Mark
Subject: OCD Case 14741--Cimarex Motion to Quash
Attachments: Cimarex Motion to Quash-Case 14741.pdf

Dear Florene and Gentlemen,

Please find attached for filing, on behalf of Cimarex, my Motion to Quash the Nearburg Subpoena issued on Sept 21 and served upon me on September 26th for the production of documents on Friday, September 30th at 9:00am

I request that instead of producing these documents on Friday, that the time be used for argue this motion.
Mr. Hall is the attorney for Nearburg who filed the Subpoena.

Regards,

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Case 14741

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

IN THE MATTER OF THE APPLICATION OF CIMAREX ENERGY CO. OF COLORADO FOR A NON-STANDARD SPACING AND PRORATION UNIT AND COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO

CASE NO. 14741

CIMAREX ENERGY CO. OF COLORADO MOTION TO QUASH THE SUBPOENA DATED SEPTEMBER 21, 2011 ISSUED AT THE REQUEST OF NEARBURG PRODUCING COMPANY

Cimarex Energy Co. of Colorado ("Cimarex") by its attorneys, Kellahin & Kellahin, objects to the Subpoena Duces Tecum issued by the Division on September 21, 2011 at the request of J. Scott Hall, attorney for Nearburg Producing Company ("Nearburg") in Case 14741 and delivered to W. Thomas Kellahin in the afternoon of September 26, 2011 which commands Cimarex to appear at 9:00 AM, Friday, September 30, 2011 before the Division and to produce documents set forth in the Subpoena Duces Tecum.

As grounds for its objections to this subpoena, Cimarex states the following:

THE CENTRAL ISSUE

The central issue of this compulsory pooling proceeding is: "Should the Division allow Nearburg to have Cimarex's data obtained from an offsetting wellbore in which Nearburg is a non-consenting compulsory pooled party so that Nearburg can make an election for its participation in this new wellbore or should the Division require Nearburg to make its elections on whether or not to participate without a "free look" at Cimarex's well data?

CRITICAL PROBLEM

Cimarex is concerned that this subpoena is simply an effort by Nearburg, a competitor and a non-consenting pooled party to gain information under the guise of being relevant or leading to be relevant data so that Nearburg can use Cimarex's data to assess whether Nearburg will now elect to participate in this new wellbore and avoid the Division's 200% risk factor pooling penalty.

BACKGROUND

W/2W/2 of Section 32:

By Division Order R-13370 (Case 14581) dated March 9, 2011, Cimarex obtained a compulsory pooling order against Nearburg for the drilling of the West Shugart 32 State Com Well No. 1H (API #30-015-38294) in the W/2W/2 of Sec 32, T18S, R31W. Nearburg failed to timely elect to participate in this wellbore and is a non-consenting pooled party. On May 17, 2011 the Well No. 1-H was spud and on June 30, 2011 was completed.

E/2W/2 of Section 32:

By letter dated July 22, 2011, Cimarex proposed an offsetting wellbore, the West Shugart 32 State Com No. 2H in the E/2W/2 of this same section. Nearburg has refused to reach a voluntary agreement with Cimarex for the Well No 2-H unless Cimarex

provides all data on the Well No. 1H for which Nearburg is a non-consenting pooled party. On September 26, 2011, Cimarex was served with Nearburg's subpoena for Cimarex's Well No 1-H data including logs for which Nearburg had not paid.

NEARBURG, AS A CO-TENANT, DOES NOT HAVE THE RIGHT TO COMPEL DISCLOSURE OF CIMAREX'S CONFIDENTIAL BUSINESS RECORDS

Cimarex has no obligation to make or provide documents to assist Nearburg in deciding if it desires to participate in this well or to be involuntarily pooled. They seek documents to help it make that decision or to market its interest neither of which is relevant to any decision the Division must make in this case. Nearburg is attempting to do what S.G. Methane sought and failed to do NMOCD Case 14331 where the Division denied that request in Order R-13156 rejecting SG Methane claim that as a co-tenant it was entitled to the confidential business information of XTO Energy, Inc. See copy of order attached as exhibit "A to this motion.

During the course of the argument in the XTO-SG Methane, dispute, Examiner Brooks stated that he was inclined to agree that XTO's data was a trade secret and protected provided that Methane as a co-tenant did not have a right to have the data even though it had not paid for it. The support for that decision was provide in Texas Supreme Court Case "In re Continental General Tire, 979 S. W. 2d 609 (Nov 12, 1998) at 611 "The party seeking to discover a trade secret must make a particularized showing that the information is necessary to the proof of one or more material elements of the claim and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit."

Additional research for this current case about a co-tenant rights--specifically "if a co-tenant enters upon the tenancy and develops data about the tenancy, does that fact therefore entitle the other co-tenant to have that data even though it did not pay for that data."

The short answer is that we have not been able to find an exact case on this point. We specifically looked in detail at Texas and Oklahoma case law. The case law in Texas is that a co-tenant may develop the minerals on the property without the unleased cotenant's permission; however, the developing co-tenant must account to the unleased co-tenant for the value of the minerals less the reasonable and necessary costs of producing and marketing the same. See Wagner & Brown vs. Sheppard, 282 S.W.3d 410 (Nov 21, 2008), the most recent Texas Supreme Court case that stands for this general proposition.

Additionally, a Baylor Law Review article, which discusses seismic with regard to cotenants and the Frankfort case (a 10th Circuit case) cited in that article (see Part III) discussing the disclosure of seismic data to a cotenant. In that case, based upon the language of the operating agreement ("JOA"), the court held that the developing cotenant was not required to disclose the seismic information but was entitled to the logs only because the JOA require it. Finally, the case law says that the cotenant is entitled to an accounting less the expense of reasonable and necessary costs of producing and marketing. Allowing the disclosure of seismic data without them paying for it seems contrary to this rule of law, which requires accounting only after the cost of production.

CIMAREX'S RESPONSE TO SUBPOENA ITEMS

Cimarex objects to Nearburg's request to the extent that they have attempted to impose obligations that are beyond those required by the Division, the New Mexico Rules of Civil Procedure. Moreover, Cimarex objects to the extent that Nearburg's requests create an undue burden or seek discovery in violation of the work product, attorney/client and other applicable privileges. Nearburg seeks the following documents for Cimarex's West Shugart State Com Well No. 1-H (API #30-015-38294) Unit D, W/2W/2 Sec 32, T18S R31E, NMPM, Eddy County, NM:

Subpoena Item #1:

(a) Request: All open-hole and cased-hole logs from surface to total depth.
(b) Response:

a. These logs are not relevant to any issue in the current compulsory pooling part of this case;
b. The West Shugart 32 State Com #1-H was drilled to 13,354 feet and Halliburton open hole logs were run on June 4, 2011 from 190 ft to 9160 feet. For the record, these logs are identified as:

Dual Spaced Neutron Spectral Density Tool curves include:
- Gamma Ray
- Caliper
- Formation Density (g/cc)
- Density Correction
- Std Formation Pe
- Tension

Dual Laterolog Micro Guard Tool curves include:
- Gamma Ray
- Caliper
- Deep Resistivity
- Shallow Resistivity
- Micro guard

c. Cimarex objects to producing logs, which are confidential in nature and deserve to be protected as a trade secret until such time as Nearburg has paid its share of the well costs.
d. At this time, Cimarex does not intend to use these logs in preparation for the compulsory part of this case, and therefore, there is no reason that Nearburg should have access to them.

Subpoena Item #2:

(a) Request: All mud logs from the surface to total depth.

(c) Response: There is only a mud log from casing at 4,219 feet to TD

(d) Response:

a. This information is not relevant to any issue in the current compulsory pooling part of this case.
b. Objection. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement or as a participating party that has joined pursuant to a compulsory pooling order.

Subpoena Item #3:

(a) Request: All DST reports, including pressure charts, fluid recovery data and observed flow rates, together with service company analysis thereof with respect to reservoir parameters.

(b) Response:

a. This information is not relevant to any issue in the current compulsory pooling part of this case.
b. There are none.

Subpoena Item #4:

(a) Request: All daily drilling reports from commencement through completion of the well.

(b) Response:

i. This information is not relevant to any issue in the current compulsory pooling part of this case.

ii. The reports are confidential in nature and deserve to be protected as a trade secret until such time as Nearburg has paid its share of the well costs.

Subpoena Item #5:

(a) Request: All data, analysis and reports for cores and side-wall cores.

(a) Response:

(a) This information is not relevant to any issue in the current compulsory pooling part of this case.

(b) There are none.

Subpoena Item #6:

(c) Request: All surface access, easement and use agreements along with all surface damage agreements.

(d) Response:

i. This information is not relevant to any issue in the current compulsory pooling part of this case.

ii. They are some

Subpoena Item #7:

(a) Request: A copy of the drilling plan for the subject well

(b) Response:

a. This information is not relevant to any issue in the current compulsory pooling part of this case.

b. Objection. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement or as a participating party that has joined pursuant to a compulsory pooling order.

Subpoena Item #8:

(a) Request: All documents or a summary reflecting actual expenditures form commencement of operations or the well to drilling to total depth

(c) Response:

a. This information is not relevant to any issue in the current compulsory pooling part of this case.

b. Objection. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs

pursuant to a voluntary agreement or as a participating party that has joined pursuant to a compulsory pooling order.

Subpoena Item # 9:

(a) Request: All completion reports.

(d) Response:

a. This information is not relevant to any issue in the current compulsory pooling part of this case.

b. Objection. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement or as a participating party that has joined pursuant to a compulsory pooling order.

Subpoena Item #10:

(a) All reservoir pressure information from the well including all bottomhole pressure tests and build-up test results, current well rates, flowing tubing pressures and choke sizes.

(e) Response:

a. There are no formation build up tests.

b. This information is not relevant to any issue in the current compulsory pooling part of this case.

(b) Objection. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement or as a participating party that has joined pursuant to a compulsory pooling order.

NEARBURG'S SUBPOENA SEEKS DATA THAT IS NOT AVAILABLE TO CIMAREX

There is no obligation for Cimarex to produce data that it does not have.

CIMAREX'S SUBPOENA SEEKS PRODUCTION OF IRRELEVANT DOCUMENTS

There are no relevant issues that could be satisfied by the production of any of Cimarex's data.

Prior to Commission Order R-11992, dated July 17, 2003, the Division allowed parties to be compulsory pooled, to attempt to reduce the statutory 200% risk factor by arguing that the Operator assumed some of that risk by drilling the well prior to pooling.

As a result of Order R-11992, the Commission by Rule makes the 200% automatic for such cases. Thus, the Division no longer will engage in decisions about the 200% risk factor penalty.

In extraordinary cases, the Division will allow geologic and petroleum engineering evidence about the risk factor, provided that the party to be pooled filed a timely pre-hearing statement raising that issue.

Although the Division is not required to strictly adhere to the New Mexico Rules of Evidence, Rule 11-508 of the New Mexico Rules of Evidence provides:

"a person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice..."

The basic purpose of this privilege is to foster technological advances and innovations. Although there is no definition of "trade secret" contained within the rule, available to the public certain information, found justification for withholding certain types of information from the public, including two specific types: (1) trade secrets and other confidential information, and (2) confidential geological and geophysical information.

One of the major incentives for gas exploration is the opportunity to obtain exclusive knowledge concerning potential gas or oil reserves. Without the additional incentive of having this data remain confidential, Cimarex's exploration could be compromised. Such information meets the definition of a trade secret defined above because it is information, which Cimarex is using in its exploration business, and which gives it an opportunity to obtain an advantage over competitors who do not have this data.

DISCLOSURE OF TRADE SECRETS PERMITTED IN LIMITED INSTANCES

Although the trade secret privilege is not absolute, the courts have recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir 1965).

When deciding the issue of whether to require disclosure of a trade secret and if so under what circumstances, the Division is faced with the following issues:

(1) What is the need for disclosure?

Will disclosure of this type of information significantly aid the Division in fulfilling its functions? In this case, Nearburg pretends to "need" Cimarex's data so Nearburg can contest some unknown portion of compulsory pooling case. However, that "need" is not relevant to any issue to be decided by the Division in the current pooling case. The data is not needed by the Division in order to decide the risk factor penalty, because the presence or absence of the data does not change the risk factor penalty, which by Rule 35.A is fixed at 200%.

While there is no doubt that Nearburg wants this data, the question remains whether any of this data serves any purposes in this pooling case. The answer is no.

(2) What is the danger to the owner of the trade secret in requiring disclosure?

In this case, the data is not relevant to the Division's decision in a compulsory pooling case and can serve only to harm the business interests of Cimarex by allowing Nearburg a "free ride" to see data that it has not paid for. In *Pennzoil Company v. Federal Power Commission*, the United States Court of Appeals held that the Federal Power Commission had abused its discretion when it required disclosure of trade secrets. 534 F.2d 627 (5th Cir. 1976) The Court remanded the case because the Commission failed to demonstrate that disclosure of this information would serve a legitimate regulatory function. *Id.*

The disclosure of Cimarex's data in this case does not serve any legitimate compulsory pooling function of the Division. See 70-2-17(C) NMSA (1979). In *Amerada Hess Corp.*, the Federal Power Commission held that:

> "The general disclosure of proprietary reserve data would have an inhibiting effect on future exploration of natural gas reserves so speculators could equally benefit with those producers when they make geological and geophysical expenditures." 50 FPC 1048 (1970),

(3) Are there alternative means of obtaining the same or similar information without requiring disclosure?

If Nearburg believes it needed such information, then it should have paid its share of well costs and agree to participate in the Well No 1-H. There is no reason for them to receive this data free of costs from Cimarex.

(4) How adequate are the protective measures available to the Division?

The second sentence of Rule 11-508 requires the Court (the Division) to take "such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require".

In this case, it will not be possible for the Division to take adequate measures to protect Cimarex's trade secret from disclosure. No type of confidentiality agreement will protect Cimarex in this case. The very act of turning over any part of this data to Nearburg will allow it to use the information to assess its participation in this well and avoid the regulatory framework of a compulsory pooling order.

NEARBURG SEEKS CIMAREX'S CONFIDENTIAL BUSINESS RECORDS

Cimarex has no obligation to make or provide documents to assist Nearburg in deciding if it desires to participate in this well or to be involuntarily pooled.

They seek documents to help it make that decision or to market its interest neither of which is relevant to any decision the Division must make in this case.

AUTHORITY FOR EXPENDITURE "AFEs"

The Division's compulsory pooling orders provide a procedure for determination of the reasonableness of the actual costs of the well.

If Nearburg is concerned about its share of actual costs, then it has prematurely raised this issue. The Division's pooling orders provide an opportunity "after the well is drilled and completed" for any pooled party to request a reasonable well cost

determination hearing. That determination is not made from searching Cimarex's files but rather by Nearburg going out into the industry, obtaining its own estimates, quotes and preparing its own estimates of reasonable well costs.

CONCLUSION

This is a basic compulsory pooling case in which Nearburg is seeking to unnecessarily obtain confidential data so that it can give itself a competitive advantage and/or avoid the 200% risk factor penalty to be awarded in this compulsory pooling case.

The real motive of Nearburg appears to be to obtain, free of cost, Cimarex's well data on the West Shugart 32 State Com Well No. 1-H so that it can make its decision about election to participate pursuant to a compulsory pooling order to be entered for a different well—the West Shugart 32 State Com Well No. 2-H.

Regardless of Nearburg's motives, the discovery of Cimarex's protected data is not relevant to any issue in this pooling case and would be an abuse of the Division's powers.

Must the Division allow Nearburg to gain an unfair advantage by using a Subpoena to have a "free look" at Cimarex's confidential and proprietary business data concerning the drilling of a different well prior to the time that Nearburg paid for its share of the costs this offsetting wellbore? Cimarex urges the Division to say "no" by granting this motion to quash this subpoena.

Respectfully submitted,

W. Thomas Kellahin
Kellahin & Kellahin
706 Gonzales Road
Santa Fe, New Mexico 87501
tkellahin@comcast.net

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was transmitted by email this 28th day of September 2011 as follows:

J. Scott Hall, Esq.
Montgomery & Andrews
Santa Fe, New Mexico 87501
shall@montand.com

David K. Brooks, Esq.
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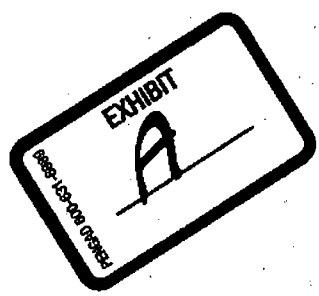
W. Thomas Kellahin

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:

CASE NO. 14331
ORDER NO. R-13156

APPLICATION OF XTO ENERGY, INC. FOR COMPULSORY POOLING AND DOWNHOLE COMMINGLING, SAN JUAN COUNTY, NEW MEXICO.



ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for consideration of XTO Energy, Inc's Motion to Quash Subpoena Duces Tecum, at a pre-hearing conference on July 15, 2009, at Santa Fe, New Mexico, before Examiners David K. Brooks and Richard Ezeanyim.

NOW, on this 12th day of August, 2009, the Division Director, having considered the arguments and the recommendations of the Examiners,

FINDS THAT:

(1) Due notice has been given, and the Division has jurisdiction of the subject matter of this case.

(2) This is a compulsory pooling case in which XTO Energy, Inc. ("XTO") seeks establishment of a unit comprising the NE/4 of Section 24, Township 29 North, Range 10 West, NMPM, San Juan County, New Mexico, in the Pictured Cliffs and Chacra formations ("the unit"), said unit to be dedicated to XTO's Martinez Gas Com. D Well No. 1 (API No. 30-045-34063) ["the well"].

(3) The following facts are apparently undisputed:

(a) XTO and S.G. Methane Company ("SG") each own undivided interests in the unit.

(b) The well has been drilled, but has not been completed.

(c) SG has not agreed to participate in the well, and has not paid, nor agreed to pay, any part of the costs thereof.

(4) SG entered an appearance in this case and procured from the Division a subpoena duces tecum ("the subpoena") requiring XTO to produce data in its possession concerning the well, including well logs and daily drilling reports ("well-specific data"). XTO filed a motion to quash the subpoena.

(5) SG contends that the well-specific data is relevant, or at least potentially relevant, to issues that will be considered at the hearing of this case, and is accordingly discoverable. XTO contends that the well-specific data contains privileged trade secrets.

(6) The Division concludes that the well specific data, if not technically "trade secret," constitutes confidential business information of a character that is typically closely guarded in the industry. The Division has recognized the confidential and sensitive nature of this information by adopting Rule 7.16(C), providing that the Division will preserve the confidentiality of well logs for a period of 90 days after completion of a well. Due to the confidential and sensitive character of this information, the production of the well-specific data should not be ordered in the absence of a clearly articulated demonstration of its relevance to an issue that will actually be controverted at the hearing.

(7) SG has not demonstrated how the well-specific data will be relevant to any issue that will, or even may, arise at the hearing. SG has suggested that the data could have a bearing on the amount of the risk penalty to be allowed the operator. This contention is not persuasive because XTO made its decision to incur the risks associated with drilling the well prior to commencement thereof, at a time when it did not have the well-specific data. The fact that XTO chose, as it was legally entitled to do [*see* NMSA 1978 Section 70-2-17.C], to defer applying for compulsory pooling until after drilling the well reduced neither the risk XTO incurred in drilling the well nor the benefit thereby conferred on SG or other non-joining owners.

(8) SG also contends that it is entitled to the well-specific data as a co-owner of the land to which the data relates. XTO contends that SG is not entitled to data as a co-owner unless and until it pays its share of the costs associated with the data's acquisition.

(9) Neither party has cited, and the Division has not found, any decision from any jurisdiction that addresses this specific issue. However, the law of co-tenancy generally provides that a co-tenant may recover its share of *net* proceeds of exploitation of the common property. Accordingly, the Division concludes that a co-tenant does not have a right to compel disclosure of information regarding the jointly owned property acquired by the efforts of another co-tenant, when it has not reimbursed, or offered to reimburse, the other co-tenant for a prorata share of the costs the other co-tenant incurred in acquiring the information.

(10) Accordingly, XTO's Motion to Quash should be granted.

IT IS THEREFORE ORDERED THAT:

(1) The subpoena duces tecum previously issued by the Division is hereby quashed to the extent it orders XTO to deliver the well-specific data to SG.

(2) This order concerns only the issue of discoverability, and does not constitute an advance ruling on any matters that may arise at any hearing of the application on the merits.

(3) Jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

SEAL

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

MARK E. FESMIRE, P.E.
Director