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

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APPLICATION OF APACHE CORPORATION FOR APPROVAL OF A PROJECT AREA ENCOMPASSING COMMUNITIZED LANDS WITHIN T. 17S, R. 31E, N.M.P.M., EDDY COUNTY, *NEW MEXICO, APPROVAL OF SURFACE* COMMINGLING AND ESTABLISHMENT OF A NEW POOL FOR THE COMMUNITIZED PROJECT AREA

CASE NO. 15316

APACHE CORPORATION'S HEARING BRIEF

Apache Corporation ("Apache") submits this Hearing Brief concerning Nestegg Energy Corporation's ("Nestegg") standing to oppose the application in the above-captioned case.

I. Federal Law Exclusively Governs the Creation and Approval of Federal Communitization Agreements.

Before Apache filed its application, in February of 2015, the Bureau of Land Management ("BLM") approved communitization agreement Mod. Com. Agr. NM 134086. The communitization agreement is comprised of four federal leases and there is no state or fee acreage involved. Therefore, all of the mineral interests in the communitized project area are federal minerals and federal surface lands regulated by the federal government. The United States Constitution empowers Congress to regulate federal lands. *See* U.S. Const. art. IV, § 3, cl. 2. Congress has specifically determined in the Mineral Lands Leasing Act of 1920 that the approval and modification of federal unit and communitization agreements lies solely within the discretion of the Department of the Interior ("DOI"), which includes the BLM.

The Mineral Lands Leasing Act of 1920, codified at 30 U.S.C. §§ 181-263, vests the Secretary of the Interior with broad authority to issue rules and regulations concerning oil and gas development on federal leases. 30 U.S.C. § 28k. In 30 U.S.C. § 206(m), Congress vested the Secretary of the Interior with the authority to approve, alter, or modify federal

communitization agreements. The DOI has in turn issued regulations which provide that the BLM is the sole entity responsible for approving unitization and communitization agreements involving federal leases. *See* 43 C.F.R. § 3161.2. Thus, Congress has determined that the DOI is responsible for regulating the form, terms, and approval of federal communitization agreements.

Nestegg is the owner of a small (.5%) overriding royalty interest in three of the four leases. Its prehearing statement did not specify why it may be opposing Apache's application but Apache understands that Nestegg is principally concerned about the retroactive effective date for the agreement determined by the BLM's authorizing officer.[1] This is the wrong forum to raise these objections.[2] In *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*, 406 F.2d 1303 (10th Cir. 1967), the Tenth Circuit held that state law cannot be applied to federal leases ***unless and until*** Congress has decided to deal exclusively with the subject. In 30 U.S.C. § 226(m) (1976), Congress imposed the requirement that communitization agreements involving federal leases must be approved by the federal government. Therefore, orders issued by a state commission cannot change the terms of a federally approved communitization agreement unless the BLM ratifies the change. *See Kennedy & Mitchell, Inc.*, 68 IBLA 80, **82-83 (Oct. 1, 1982). This is because "Congress has preempted from the state regulation of communitization or drilling agreements affecting Federal oil and gas leases." *Id.* Similarly, the IBLA has determined that overriding royalty interest owners lack standing to seek modifications to federal unit agreements. *Chevron U.S.A. Prod. Co. Rio De Viento, Inc.*, 149 IBLA 374, 378-79 (July 28, 1999); *Stanley Mollerstuen*, 146 IBLA 1, *5 (Sept. 24, 1998). This is because overriding royalty interest owners are not adversely impacted by the BLM's approval of such agreements since their interests are carved out of the working interests, which are already parties to the agreement.

II. Nestegg Lacks Standing to Challenge the BLM's Communitization Agreement.

Under federal regulations governing communitization agreements, overriding royalty owners in a federal lease are not necessary parties to federal communitization agreements. 43 C.F.R. § 3105.2-3 only requires that lessees of record and working interest owners must sign the

[1] Nestegg, notably does not object to the common development of the communitized lands, or take issue with well spacing within the communitized project area, surface commingling, or the designation of a new pool by the Division for the communitized lands.

[2] In cases involving the approval of similar communitization agreements, the Division has not required notice to be given to overriding royalty owners. *See* NMOCD Case Nos. 15309 and 15310. The applicant in those submitted assignments creating the override which consented to communitization and cooperative development. As discussed below, that is also the case here.

communitization agreement. In *Daniel T. Davis*, 142 IBLA 317 (Feb. 3, 1998), the IBLA held that the necessary parties include all working interest owners and lessees.

Here, it is undisputed that the communitization agreement was entered into by all of the working interest owners and lessees in the communitized area, and was approved by the BLM. Moreover, Nestegg was sent a copy of the proposed communitization agreement by certified mail prior to the BLM's approval of the communitization agreement. *See* Certified mailing of the proposed communitization agreement, attached as Exhibit A. Nestegg did not raise any objections or concerns with the BLM. Nestegg cannot now raise concerns about the agreement with the Division since it has no authority to modify the terms of the BLM's federal communitization agreements.

By expressing objection to the terms of the communitization in this forum, Nestegg is seeking to enforce rights which it surrendered in the instruments creating its overriding royalty interest. Under these assignments, Nestegg clearly consented to any and all forms of cooperative development, communitization or other form of agreement for forming wells spacing or proration units:

> The overriding royalty **shall be subject to any governmentally approved cooperative or unit plan of development or operation or communitization** or other agreement forming a well spacing or proration unit under the rule or regulation of the New Mexico Oil Conservation Division, **to which the lease is now committed or may hereafter be committed, and in such even the overriding royalty shall be computed and paid on the basis of the oil and gas allocated to the lands pursuant to the terms of the plan or agreement.**

See Nestegg Assignment, attached as Exhibit B (emphasis added). If Nestegg has a problem with the communitization of its interest, it can take it up with the working interest owners who committed their leases to the agreement. This is because the ORRI was created from a specific working interest which has executed the communitization agreement. *See, e.g., XAE Corp. v. SMR Prop. Mgmt. Co.*, 1998 OK 51, P23, 968 P.2d 1201, 1206, 1998 Okla. LEXIS 62, *19, 69 O.B.A.J. 2137, 141 Oil & Gas Rep. 557 (Okla. 1998) (citing *Connell v. Kanwa Oil Co., Inc.*, 161 Kan. 649, 170 P.2d 631 (Kan. 1946)) ("An overriding royalty is an interest in the oil and gas lease out of which it is carved, and cannot be a property interest of greater dignity than the lease itself."); *see also In re GHR Energy Corp.*, 972 F.2d 96, 99, 1992 U.S. App. LEXIS 19800, *7 (5th Cir. Tex. 1992). Nestegg has already agreed to be bound by any governmentally approved communitization agreements, and its interests were carved out of working interests which are

parties to the communitization agreement. Therefore, Nestegg lacks standing, or is otherwise estopped, from attacking the communitization agreement through this proceeding.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: _____

Earl E. DeBrine, Jr.
Jennifer L. Bradfute
Post Office Box 2168
Bank of America Centre
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

ATTORNEYS FOR APACHE CORPORATION

Apache

January 13, 2015

Interest Owner
C/O
Address
City State

Re: Notice of Intent to Communitize the Glorieta & Yeso Formations (the "Formations") in the following described lands (the "Lands"):
Township 17 South, Range 31 East
Sections 3, 4, 5, 6, 7, 8, 9, 10
Eddy County, New Mexico

Dear Interest Owner:

Apache Corporation ("Apache"), as Operator, has submitted to the Bureau of Land Management ("BLM") a Super Communitization Agreement ("Super Com" or "Agreement") to effectuate the communitization of the following described leases (the "Leases") insofar and only insofar as they cover the Lands and Formations described above:

1. That certain Oil and Gas Lease USA LC-029426-A dated February 1, 1999 by and between The United States of America, as Lessor, and Atlantic Richfield Company as Lessee.
2. That certain Oil and Gas Lease USA LC-029426-B dated March 1, 1991 by and between The United States of America, as Lessor, and Atlantic Richfield Company as Lessee.
3. That certain Oil and Gas Lease USA LC-029435-B dated November 1, 1991 by and between The United States of America, as Lessor, and Atlantic Richfield Company as Lessee.
4. That certain Oil and Gas Lease USA LC-029435-A dated October 1, 1949 by and between The United States of America, as Lessor, and Sinclair Oil & Gas Company as Lessee.

The Super Com was an option offered by the BLM in order to further the economic development of our horizontal drilling program by allowing Apache to operate the Leases and Lands as one single lease rather than as separate leases. The Agreement will eliminate the need for surface commingling, off lease storage, rights-of-way and other agreements which would otherwise be necessary for operating the Leases, but would adversely impact the economic viability of further horizontal development. Moreover, the Super Com will prevent waste and promote conservation by utilizing the existing Crow Federal and Raven Federal Tank Batteries and equipment, thereby reducing the incremental capital investment that would otherwise be necessary to build a separate facility for each Lease. As a result, the Super Com will improve and extend the economic life of the project.

Enclosed for your review is a copy of the Super Com describing the Leases, Lands and Formations being communitized under this Agreement, as well as the updated communitized ownership.

If you have any questions regarding the aforementioned, please do not hesitate to contact the undersigned at (432) 818-1878.

Sincerely,

APACHE CORPORATION

Chris Lanning

Christopher T. Lanning
Senior Landman
chris.lanning@apachecorp.com

EXHIBIT

U.S. Postal Service
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
For delivery information visit our website at www.usps.com
OFFICIAL USE

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Postmark Here

7013 1090 0000 5658 8838

Total P
Sent To University of Southern California
University Park
Street, A or PO Bo Los Angeles, CA 90089
City, Stat CL – CEDAR LKE SUPR COM REV AGMT

PS Form 3800, August 2006 See Reverse for Instructions

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Restricted Delivery Fee (Endorsement Required)
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7013 1090 0000 5658 8821

Total F
Sent To Theodore H. Willis & Agnes D. Willis,
Trustees of the THW & ADW Living Trust
Street, A or PO B No. 1 West Carter Avenue
City, Sta Sierra Madre, CA 91024-1218
CL – CEDAR LKE SUPR COM REV AGMT

PS Form 3800, August 2006 See Reverse for Instructions

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Sent
Stree or P
City,
COG Operating LLC
600 W. Illinois Avenue
Midland, TX 79701
CL – CEDAR LKE SUPR COM REV AGMT

PS Form 3800, August 2006 See Reverse for Instructions

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Total
Sent T
Street, or PO
City, St
Nestegg Energy Corporation
2308 Sierra Vista Road
Artesia, NM 88210
CL – CEDAR LKE SUPR COM REV AGMT

PS Form 3800, August 2006 See Reverse for Instructions

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Total
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Street or PO
City, S
Concho Oil & Gas LLC
600 W. Illinois Avenue
Midland, TX 79701
CL – CEDAR LKE SUPR COM REV AGMT

PS Form 3800, August 2006 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Nestegg Energy Corporation
2308 Sierra Vista Road
Artesia, NM 88210
CL – CEDAR LKE SUPR COM REV AGMT

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Joel W. Miller C. Date of Delivery 1-2015

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail® ☐ Priority Mail Express™
☑ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7013 1090 0000 5658 8845

PS Form 3811, July 2013 Domestic Return Receipt

ASSIGNMENT OF OVERRIDING ROYALTY

THIS ASSIGNMENT, between MARBOB ENERGY CORPORATION, a New Mexico corporation, hereinafter referred to as "Assignor", and NESTEGG ENERGY CORPORATION, a New Mexico corporation, 2308 Sierra Vista Road, Artesia, New Mexico 88210, hereinafter referred to as "Assignee,"

WITNESSETH

Assignor, in consideration of Ten and Other Dollars, the receipt and sufficiency of which are hereby acknowledged, does hereby grant, assign and convey to Assignee and Assignee's heirs, successors and assigns, an undivided 0.00250000 overriding royalty, covering the following lands in Eddy County, New Mexico:

Township 17 South, Range 31 East, N.M.P.M.

United States Oil and Gas Lease No. LC-029426-B

Section 3:	S/2
Section 4:	W/2
Section 9:	All
Section 10:	All

The overriding royalty shall be computed and paid at the same time and in the same manner as royalties payable to the lessor under the terms of the lease are computed and paid, and Assignee shall be responsible for Assignee's proportionate part of all taxes and assessments levied upon or against or measured by the production of oil and gas therefrom. The overriding royalty shall be subject to any governmentally approved cooperative or unit plan of development or operation or communitization or other agreement forming a well spacing or proration unit under the rules or regulations of the New Mexico Oil Conservation Division, to which the lease is now committed or may hereafter be committed, and in such event the overriding royalty shall be computed and paid on the basis of the oil and gas allocated to the lands pursuant to the terms of the plan or agreement.

EXECUTED this 16 day of September, 2010, but effective December 1, 2008.

"Assignor"

MARBOB ENERGY CORPORATION

By: _____
Dean Chumbley, Attorney-in-Fact

EXHIBIT
B

STATE OF NEW MEXICO)
) ss.
COUNTY OF EDDY)

This instrument was acknowledged before me on September 16, 2010, by Dean Chumbley, Attorney-in-Fact of MARBOB ENERGY CORPORATION, a New Mexico corporation, on behalf of said corporation.

_____
Notary Public

OFFICIAL SEAL
Melanie J. Parker
NOTARY PUBLIC-STATE OF NEW MEXICO
My commission expires: Oct 26, 2012

RECEPTION NO: 1009425 STATE OF NEW MEXICO, COUNTY OF EDDY
RECORDED 09/16/2010 10:45 AM
BOOK 0826 PAGE 0808
DARLENE ROSPRIM, COUNTY CLERK

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COUNTY CLERK SEAL EDDY COUNTY, NEW MEXICO

Raye Miller
2308 Sierra Vista Rd
Artesia NM 88210