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May 17, 2016

Via e-mail to DavidK.brooks@state.nm.us and U.S. Mail
David K. Brooks
New Mexico Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

Re: *In the Matter of the Application of Energen Resources Corporation to Amend Compulsory Pooling Order No. R-10154, San Juan County, New Mexico:*
NMOCD Case No. 15072

Dear Mr. Brooks:

This letter is sent to you on behalf of my clients, Frank A. King and Paula S. Elmore f/k/a Paula S. King ("Kings"), in response to your May 16, 2016 inquiry regarding Energen Resources Corporation's pending Application to Amend Pooling Order No. R-10154 issued in 1994.

I am in receipt of the response of Energen's counsel Scott Hall to your inquiry. Mr. Hall attaches a copy of the United States District Court's Memorandum Opinion and Order holding that the lease of the Kings' minerals expired in 1990, as we have contended. Mr. Hall is correct to the extent that he indicates that the issue of whether the Kings' minerals are unleased has now been resolved by said court. Mr. Hall is incorrect, however, to the extent his response implies that all other issues pending in the federal court suit have been resolved. They have not.

The federal court suit remains pending, and is currently set for trial on October 17, 2016. As to the status of the lawsuit, as a result of the district court's rulings, the Kings have remaining against Energen and the other working interest owners in the Flora Vista #19-2 and #19-3 Wells a claim for damages for unpaid revenues attributable to the Kings' minerals, calculated on the basis of an unleased mineral interest. Energen and other of the working interest owners defend the Kings' suit in part on the basis of contractual relationships between such parties, including joint operating agreements and marketing elections. Thus, there remains pending a contested civil action which involves contractual rights and damage recovery which are outside the jurisdiction of the OCD.

As it stands, therefore, the relief requested by Energen from the OCD remains inappropriate for reasons including the following:

- Energen did not comply with OCD Order No. R-13165, because it did not provide the Kings with an opportunity to participate in the Flora Vista Wells before this proceeding was brought.

- There is still pending in United States District Court a contested civil action which involves contractual rights and damage recovery which fall outside the jurisdiction of the OCD. *See, In Re Timber/Sharp*, Order No. R-11700 (Dec. 13, 2001) (OCD has no jurisdiction to determine title or lease validity); *Johnson v. Yates Petroleum Co.*, 1999-NMCA-066, 127 N.M. 355, 981 P.2d 288 (lease interpretation within judicial competence of court). The OCD would improperly inject itself into said suit if it granted relief to Energen regarding minerals which are the subject of ongoing litigation.

- Energen's application seeks extraordinary relief which is unjustified by the circumstances – amendment of a pooling order to retroactively pool a mineral interest owner who was not provided notice of the original proceedings, approximately 22 years after the original pooling proceeding. *See, Godfrey v. Chesapeake Exploration, LLC*, 2012 WL 2865187 at *2 (Tex. App. – Eastland 2012, *writ denied*) (court would not allow pooling designation to be made effective retroactively so as to "change history").

- Energen's request to retroactively force-pool the Kings' minerals defeats the purpose of NMSA 1978, §70-2-18, which places the burden on the operator to ensure that all interests are properly noticed and included in the pooled unit. If an operator can disregard its statutory responsibilities to properly pool, and then obtain a retroactive pooling order 22 years later without consequences to the operator, the purpose of the pooling statute is defeated.

- Energen's retroactive pooling application seeks to impose a 200% risk penalty on the Kings, yet the Kings were never afforded the opportunity to pay their share of well costs from the beginning. This illustrates the impracticality of affording the relief sought by Energen.

- Granting Energen's application would not serve the OCD's purpose of preventing waste and protecting correlative rights, but rather, would inject the OCD into a pending contested civil litigation matter and involve it in matters not conferred to its expertise and jurisdiction.

For all of these reasons, Energen's application to amend the pooling order should be denied. If you have any questions or need any further information from the parties, please advise. Thank you for your consideration.

Sincerely,

CAVIN & INGRAM, P.A.

By: _____
Stephen D. Ingram

SDI:tg

cc: J. Scott Hall *(via e-mail to shall@montand.com)*