

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

**IN THE MATTER OF THE FIRST AMENDED
APPLICATION OF XTO ENERGY INC. FOR
COMPULSORY POOLING AND DOWNHOLE COMMINGLING,
SAN JUAN COUNTY, NEW MEXICO**

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CASE NO. 14331

**XTO ENERGY INC.'S OBJECTIONS
TO
SUBPOENA DATED JULY 8, 2009
ISSUED AT THE REQUEST
OF
S. G. METHANE COMPANY, INC.**

XTO Energy Inc. ("XTO") by its attorneys, Kellahin & Kellahin, objects to the Subpoena Duces Tecum issued by the Division on July 8, 2009 at the request of J. Scott Hall, attorney for S. G. Methane Company, Inc ("Methane") in Case 14331 which commands XTO to appear at 9:00 AM, Monday, July 20, 2009 before the Division and to produce documents set forth in the Subpoena Duces Tecum.

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

THE CENTRAL ISSUE

The central issue of this compulsory pooling and downhole commingling proceeding is: should the Division penalize XTO for the fact that it elected to drill this well, but not complete it, before XTO obtained a Division compulsory pooling order, by requiring XTO to give up data, including the well logs, or should the Division require Methane to make its elections on whether or not to participate without a "free look" at XTO's well data?

CRITICAL PROBLEM

XTO is concerned that this subpoena is simply an effort by Methane, a competitor and a party who has failed to enter into a voluntary agreement with XTO, to gain information under the guise of being relevant or leading to be relevant data so that Methane can use XTO's data to assess whether Methane will elect to participate in this well and avoid the Division's 200% risk factor pooling penalty

BACKGROUND

On November 15, 2006, XTO filed an APD with OCD-Aztec that was approved November 21, 2006 and then extended from January 18, 2008 to Nov 21, 2009. On September 26, 2008, the OCD approved form C-103 to add Otero Chacra Pool to the XTO's permit.

By letter, dated October 17, 2008, with AFEs, XTO proposed this well to all the working interest owners including Methane. In addition, XTO proposed a Joint Operating Agreement ("JOA") to Methane that included the specific provisions for the allocation of costs between the Pictured Cliffs and the Chacra formations.

On November 13, 2008, XTO spudded the Martinez well and released the rig six days later. Having failed to reach a voluntary agreement with Methane, XTO filed for Compulsory Pooling on May 15, 2009. Despite filing a pooling application, XTO continued efforts to reach a voluntary agreement either by farm-out or JOA with Methane.

On July 8, 2009, some eight months after the well was drilled, and after numerous attempts to have Methane participate in this well, Methane obtained a Subpoena for XTO's well data including logs for which Methane had not paid.

XTO'S RESPONSE TO SUBPOENA ITEMS

XTO objects to Methane'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, XTO objects to the extent that Methane's requests create an undue burden or seek discovery in violation of the work product, attorney/client and other applicable privileges. Methane seeks the following documents for XTO's Martinez Gas Com D Federal Well No.001R (API #30-045-34063) Unit B, NE/4 Sec 24, T29N R10W, NMOM, San Juan 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 either compulsory pooling or downhole commingling portions of Case 14331;
- b. The Martinez Gas Com D #1R was drilled to 3,200' and open hole logs were run on Nov 19, 2008 from 819 ft to 3,200 feet. For the record, these logs are identified as:

Platform Express Compensated Neutron/Density curves include:

- Gamma Ray
- Caliper
- Formation Density (g/cc)
- Density Correction
- Std Formation Pe
- Tension

Platform Express Array Induction Tool curves include:

- Gamma Ray
- Caliper
- SP
- Induction Resistivity (60-inch)
- Induction Resistivity (20-inch)
- Induction Conductivity (60-inch)
- Induction Resistivity (30-inch)
- Induction Resistivity (90-inch)

Platform Express Triple Lithology Density curves include:

- Gamma Ray
- Caliper
- SP
- Induction Resistivity (60-inch)
- Induction Resistivity (20-inch)
- Induction Conductivity (60-inch)
- Induction Resistivity (30-inch)
- Induction Resistivity (90-inch)
- Density Correction
- Std Formation Pe
- Tension
- Neutron Porosity
- Density Porosity

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- c. XTO objects to producing logs, which are confidential in nature and deserve to be protected as a trade secret until such time as Methane has paid its share of the well costs.
- d. At this time, XTO does not intend to use these logs in preparation for Case 14331, and therefore, there is no reason that Methane should have access to them.

Subpoena Item #2:

- (a) Request: All mud logs from the surface to total depth.
- (b) Response: There are none.

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:
 - i. The only data that XTO has are Pason total gas curve and rate of penetration.
 - ii. This information is not relevant to any issue in either the compulsory pooling or the downhole commingling portions of Case 14331.
 - iii. The data are confidential in nature and deserve to be protected as a trade secret until such time as Methane has paid its share of the well costs.

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 either the compulsory pooling or the downhole commingling portions of Case 14331.
 - ii. The reports are confidential in nature and deserve to be protected as a trade secret until such time as Methane 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 either the compulsory pooling or the downhole commingling portions of Case 14331.
 - (b) There are none.

Subpoena Item #6:

(c) Request: All completion reports as such become available.

(d) Response:

- i. This information is not relevant to any issue in either the compulsory pooling or the downhole commingling portions of Case 14331.
- ii. There are none.

Subpoena Item #7:

(a) Request: These subpoena items are ongoing and you have the obligation to supplement the production of documents and materials responsive hereto as new documents and materials become available

(b) Response:

- a. This information is not relevant to any issue in either the compulsory pooling or the downhole commingling portions of Case 14331.
- b. Objection. XTO has no obligation to provide data to Methane until such time as Methane 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.

**METHANE'S SUBPOENA SEEKS DATA THAT IS
NOT AVAILABLE TO XTO**

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

**METHANE'S SUBPOENA SEEKS PRODUCTION OF
IRRELEVANT DOCUMENTS**

There are no relevant issues that could be satisfied by the production of any of XTO'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 argument 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. In this case, Methane filed a pre-hearing statement, but failed to raise that issue. Assuming that there would be some relevance, Methane has waived this issue and in doing so, admits that it has no relevant need for the XTO's data. See Division Rule 35.B

Although the Division is not required to strictly adhere to the New Mexico Rules of Evidence¹, 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, an often-cited definition from the Restatement of Torts, Section 575 Comment b (1939) is informative:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which give him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other devise, or a list of customers..."

In addition, it is instructive to note that Congress in drafting the Freedom of Information Act ("FOIA"),² which requires that every agency of the United States make 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.

1

OCD Rule 1212 provides in part: "In general, the rules of evidence applicable in a trial before a court without a jury shall be applicable, **provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served.**" (emphasis added).

² 5 American Law of Mining Section 186.01 (Matthew Bender 1994).

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, XTO's exploration could be compromised. Such information meets the definition of a trade secret defined above because it is information, which XTO 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:³

(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, Methane pretends to "need" XTO's data so Methane can contest some unknown portion of compulsory pooling or downhole commingling. However, that "need" is not relevant to any issue to be decided by the Division in Case 14331. 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%. The data is not needed by either Methane or the Division in order to decide downhole commingling Pictured Cliffs and Chacra production, a very common procedure in the San Juan Basin. There is no dispute over the well location--it is a standard well location, which XTO wanted and which was not objected to by Methane.

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

³ **Pennzoil Co. v. Federal Power Commission**, 534 F.2d 627 (5th Cir. 1976).

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(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 XTO by allowing Methane 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 XTO'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 Methane believes it needs such information, then it can pay its share of well costs and agree to participate in this well. There is no reason for them to receive this data free of costs from XTO.

(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 XTO's trade secret from disclosure. No type of confidentiality agreement will protect XTO in this case. The very act of turning over any part of this data to Methane

will allow it to use the information to assess its participation in this well and avoid the regulatory framework of a compulsory pooling order.

METHANE SEEKS XTO'S CONFIDENTIAL BUSINESS RECORDS

XTO has no obligation to make or provide documents to assist Methane 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 Methane 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 XTO's files but rather by Methane 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 Methane 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.

Methane has already conceded that (a) XTO has made the only well proposal; (b) XTO's location is acceptable to Methane; (c) XTO's proposed spacing unit is acceptable to Methane; and (d) Methane may want to participate in XTO's well or farm-out its interest to XTO. The only things Methane may want to address are the well costs and

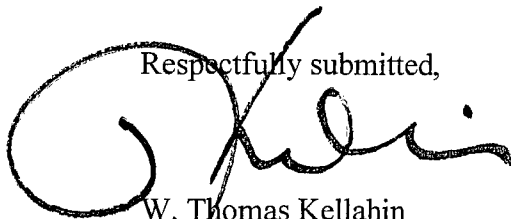
production allocations between the Pictured Cliffs and the Chacra formations either in the compulsory pooling portions or in the downhole commingling portion of Case 14331.

The real motive of Methane appears to be to obtain, free of cost, XTO's well data so that Methane can avoid the 200% risk factor penalty

Regardless of Methane's motives, the discovery of XTO's trade secrets is not relevant to any issue in this pooling/downhole commingling case and would be an abuse of the Division's powers.

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

Respectfully submitted,

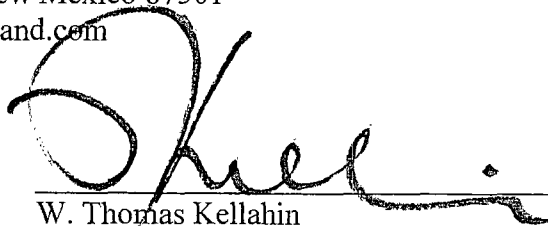


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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was transmitted by email this 13th day of July 2009 as follows:

J. Scott Hall, Esq.
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W. Thomas Kellahin

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

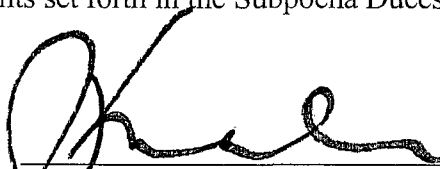
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IN THE MATTER OF THE APPLICATION
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POOLING AND DOWNHOLE COMMINGLING
SAN JUAN COUNTY, NEW MEXICO

CASE NO. 14331

ACCEPTANCE OF SERVICE OF SUBPOENA

XTO Energy Inc. ("XTO") by its attorney, W. Thomas Kellahin, hereby on 9th day of July 2009 accepts service for and on behalf of XTO of that Subpoena issued by the Division on July 8, 2008 at the request of J. Scott Hall, attorney for S. G. Methane ("Methane") in Case 14331 which commands XTO to produce documents set forth in the Subpoena Duces Tecum at 9:00 am July 20, 2009.

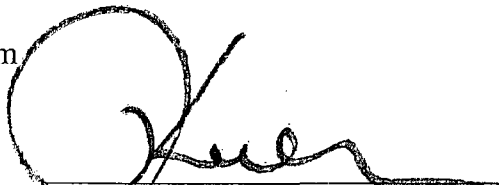


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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was transmitted by email to opposing counsel this 13th day of July 2009 as follows:

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