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

IN THE MATTER OF THE APPLICATION OF
EGL RESOURCES, INC.
FOR COMPULOSRY POOLING
LEA COUNTY, NEW MEXICO

RECEIVED
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Oil Conservation Division

CASE NO. 13049

IN THE MATTER OF THE APPLICATION OF
DEVON ENERGY PRODUCTION COMPANY, L.P.
FOR COMPULOSRY POOLING
LEA COUNTY, NEW MEXICO

CASE NO. 13048
Order No. R-11962 *De Novo*

RESPONSE OF
E.G.L. RESOURCES, INC. AND ROBERT LANDRETH
TO DEVON'S MOTION TO REMAND

E.G.L. Resources, Inc., ("EGL"), and Robert Landreth, ("Landreth"), for their response to Devon Energy Production Company's Motion To Remand, state:

SUMMARY

Devon seeks to have the Division amend an order, now on *de novo* appeal, to require the operator of a well currently drilling to the Devonian formation to comply with a non-operator's Plan of Operations. Devon's motion should be denied for the reasons that (1) it violates appellate protocol; (2) requests unprecedented relief; (3) is without legal basis or authority; and, (4) is barred by the doctrines of waiver and estoppel.

BACKGROUND FACTS

On December 4, 2002, EGL provided a Plan of Operations for the proposed re-entry, whipstock and deepening of the Rio Blanco "4" Federal Well No. 1 located in Section 4, T-23-S, R-34-E. Devon stated no objections to the technical aspects of EGL's plan.

On February 28, 2003, Devon circulated an AFE for a re-entry of the Rio Blanco "4" well to be operated by it, but provided no plan of operation to the interest owners. The competing well proposals begat two compulsory pooling applications that were consolidated for hearing before the Division on April 10, 2003. At the hearing, both EGL and Devon presented similar re-entry, drilling and completion procedures, but aside from some minor cost issues, neither party made an issue of the other's plan.

On May 13, 2002, the Division entered Order No. R-11962 pooling Devon's interests and designating EGL Resources, Inc. as the operator of the Rio Blanco "4" Federal Well No. 1 located on the N/2 of Section 4, T-23-S, R-34-E.

At the Division hearing on the pooling applications, operator experience, geology, well costs, risk penalties and the fact that pre-application negotiations occurred were not at issue. In its order, the Division noted in particular that EGL and Landreth owned 75 percent of the working interest in the pooled unit while Devon owned a 12 ½ percent working interest. The Division also found: "*There is no evidence that either applicant is not a prudent operator, or that either applicant would economically recover more oil or gas than would the other by virtue of being awarded operations hereunder.*" (Order No. R-11962, at finding 23.)

On May 15, 2003, following the issuance of Order No. R-11962, EGL and Landreth filed an Application for Hearing De Novo in order to have the Commission further consider the Division's interpretation of its acreage dedication rules. Devon filed its own Application for Hearing De Novo on May 27th.

On May 21, 2003, Devon and EGL discussed EGL's AFE for the Rio Blanco "4" well, and Devon's landman encouraged EGL to proceed with the workover and re-entry procedure "as soon as possible."

Subsequently, on several occasions, EGL and Devon technical staff consulted each other about EGL's planned operation. On June 18, 2003, the engineering staff of the two companies again conferred on the proposed procedure in a conference call and EGL was satisfied that the parties were in "close agreement" on the operation.

On June 23, 2003, Devon, through its counsel, issued a demand that EGL execute an unspecified agreement for the drilling and completion of the Rio Blanco "4" well "within 48 hours". EGL, through its counsel, responded by noting that as it controlled 75% of the working interest, EGL would proceed in due course as a prudent operator, but also invited Devon to provide it with a form of agreement for consideration. Devon did not respond to the invitation and these motions ensued.

On July 8, 2003, EGL commenced drilling operations on the Rio Blanco "4" well with a deep drilling rig. It is anticipated that the well will be completed by August 15th.

POINTS AND AUTHORITIES

1. Devon's Motion Is Procedurally Impermissible.

In a series of whiplash-inducing motions, Devon first sought on July 2nd to have the Division "Reopen" the consolidated cases "For The Purpose Of Amending Division Order R-11962 To Include Devon's Plan Of Operations." On July 7, 2003, Devon's motion was dismissed when the Division correctly pointed out that it had been divested of jurisdiction by virtue of the appeal of Order No. R-11962 to the Commission. See

Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 824 P.2d 1033 (1992). ("An appeal is perfected after the appellant has performed all acts required of him by the statute creating the right to transfer jurisdiction of cause to the superior tribunal.") *Lea County State Bank v. McCaskey Register Co.*, 39 N.M. 454, 49 P.2d 577 (1935).

Two days later on July 9, 2003, Devon filed its Motion To Remand seeking to have the Commission send the matter back to the Division from whence it had been previously booted.

If nothing else, Devon's motion is an impermissible collateral attack against Order No. R-11962.

It is the common practice of the appellate courts to remand jurisdiction of a case back to a trial court only after the appellate court has concluded its deliberations and rendered its decision. However, the procedural substance of the relief sought by Devon is to have the appellate body before which a lower administrative body's adjudicatory order is properly pending on appeal, temporarily divest itself of jurisdiction over the appealed order and remand the same so that the lower body can add new substantive provisions to the order Devon previously appealed, which, we suppose, is then expected to be included within the scope of the appeal that is pending, sort-of, before the Commission. Devon has not shown the existence of such exceptional circumstances to justify the relief it seeks or that the Division would even be inclined to grant it. Consequently, Devon's motion to remand is impermissible. See *Edwards v. Franchini*, 1998-NMCA 128, {Par. 14}, 125 N.M. 734, 738, 965 P.2d 318, 322, cert. denied, 126 N.M. 107, 967 P.2d 447 (1998), cert. denied, 526 U.S. 1124 (1999), reh. denied, 527 U.S. 1064 (1999).

We are unable to locate any corollary authority that would support Devon's motion in the body of law deriving from either judicial or administrative appeals. Of course, all this begs the question of why Devon failed to make an issue of well operations at the Division Examiner hearing in the first place. That question is answered in item 4, below.

Should Devon's motion be granted, and were the Division to re-assume jurisdiction, then the Commission would be compelled to consider what effect the fragmentation of this case would mean for the further disposition of the appeal and all its attendant deadlines and schedules. These questions are answered in item 2.

2. Devon Seeks Unprecedented Relief.

Devon cites to no Commission precedent for the type of relief it seeks. There is none to cite to. The full implications caused by such a disruption to the regular jurisdictional order are unknown, but granting Devon's motion would undoubtedly result in havoc to the agency's appellate process. Conceivably, the Commission could be prevented from advancing its own proceedings while a portion of a matter were remanded back to the Division for further deliberations there. Further, what is to stop Devon or any other dissatisfied appellant from seeking additional remands back to the Division on this or any other subject matter, related or not? The possibilities are endless.

Devon offers no procedural guidelines or precedent and neither the Commission, the Division nor EGL/Landreth are able to reasonably assess the procedural and substantive consequences of what Devon is proposing. Is a hearing contemplated? Devon doesn't say. Surely Devon doesn't expect the Division to order EGL to essentially surrender operations and substitute a drilling and completion program on the strength of a

vague and ambiguous exhibit attached to its motion. Neither could Devon expect EGL and Landreth to acquiesce to such a scheme without a contest.

Devon is attempting to approach the de novo appeal in this case in a piecemeal manner with the result that judicial (or, in this case, administrative) efficiency is disrupted. Devon's motion is clearly contra-indicated under New Mexico law. See *Principal Mutual Life Ins. Co.ds v. Straus*, 116 N.M. 412, 415; 863 P.2d 447, 449 (1993). ("There is a strong policy in New Mexico of disfavoring piecemeal appeals...and of avoiding fragmentation in the adjudication of related legal or factual issues."); *cf. State ex. rel Hyde Park Co. LLC v. Planning Commission of the City of Santa Fe*, 1998-NMCA-146, 125 N.M. 832, 834.

3. There Is No Legal Basis For The Relief Devon Seeks.

The Commission should not open the door to the extraordinary type of relief sought by Devon.

Assuming it could overcome the procedural and jurisdictional obstacles to its motion, Devon would have the Division amend an otherwise unremarkable compulsory pooling order to include provisions "to require any re-entry of the Rio Blanco 4-1 to be in accordance with Devon's Plan of Operations". (Devon's Motion To Remand, pg. 4.) In other words, Devon, the owner of a 12 ½ percent non-operating force-pooled working interest in the well wishes to substitute its judgment for that of the designated operator (translation: "second-guess") on the testing and completion of the well.

It is an impracticable proposition. The motion essentially asks the Commission to allow the Division to compel EGL to surrender operations to Devon. While we speculate that a surrender of operations or removal of operator might conceivably be permissible

under the terms of an operating agreement in only the most extraordinary of circumstances, there is no such contractual provision to be invoked here. Devon lost the opportunity to participate under a voluntarily negotiated agreement long ago. As a result, the relationship of the parties are governed by the specifically prescribed terms of a compulsory pooling order and there are no provisions under the order or in the Division's statutes or rules authorizing the imposition of new "contract" terms after the fact.

Finally, the impracticability of Devon's requested relief is further belied by the fact that EGL's drilling operations have commenced and are well under way. Devon's motion, then, has been well-rendered moot. EGL should be allowed to prosecute drilling and completion operations under the standards applicable to prudent operators and without further interference from Devon.

4. Devon Has Waived Any Right To Seek The Relief Requested.

As indicated above, the Division determined: "*There is no evidence that either applicant is not a prudent operator, or that either applicant would economically recover more oil or gas than would the other by virtue of being awarded operations hereunder.*" (Order No. R-11962, at finding 23.) By failing to make an issue of operatorship or even mention the matter of a drilling plan before the Division while it still had jurisdiction, Devon has waived the right to raise the matter on its appeal to the Commission. *Mitchell v. Allison*, 54 N.M. 56, 213 P.2d 231 (1949). (Question not raised in district court would not be considered by the Supreme Court on appeal.)

CONCLUSION

The Commission should deny Devon's Motion To Remand for the reasons stated above.

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Certificate of Mailing

I hereby certify that a true and correct copy of the foregoing was faxed to counsel of record on the 15th day of July 2003, as follows:

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