CAVIN & INGRAM, P.A.

SEALY H. CAVIN, JR.†* °
STEPHEN D. INGRAM† °

† Also Admitted in Texas
* Also Admitted in Colorado
° New Mexico Board of Legal Specialization Certified Specialist in Natural Resources Law (Oil and Gas)

ATTORNEYS & COUNSELORS AT LAW
40 FIRST PLAZA
SUITE 610
ALBUQUERQUE, NEW MEXICO 87102

TELEPHONE
(505) 243-5400
FACSIMILE
(505) 243-1700
MAILING ADDRESS
P.O. BOX 1216
ALBUQUERQUE, NM 87103-1216
OILAWFIRM@AOL.COM

August 15, 2016

Via Facsimile to (505) 476-3462 and U.S. Mail
Florene Davidson
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

Gentlemen:

Enclosed please find the Kings' Opposition to Motion to Vacate or Stay Portions of Order No. R-10154-A in the referenced matter. Thank you for your attention to this matter.

Sincerely,

CAVIN & INGRAM, P.A.

By: _____
Stephen D. Ingram

Enclosure

cc w/enc: David K. Brooks *(via e-mail to DavidK.brooks@state.nm.us and U.S. Mail)*
J. Scott Hall *(via e-mail to shall@montand.com)*
Sharon T. Shaheen *(via e-mail to sshaheen@montand.com)*

RECEIVED OCD
2016 AUG 16 A 7:58

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

IN THE MATTER OF THE APPLICATION OF ENERGEN RESOURCES CORPORATION TO AMEND COMPULSORY POOLING ORDER NO. R-10154, SAN JUAN COUNTY, NEW MEXICO

Case No. 15072

OPPOSITION TO MOTION TO VACATE OR STAY PORTIONS OF ORDER NO. R-10154-A

Frank A. King and Paula S. Elmore f/k/a Paula S. King ("Kings") submit this opposition to Applicant Energen Resources Corporation's ("Energen") Motion to Vacate or Stay Portions of Order No. R-10154-A recently entered by the Division as follows:

Introduction

1. Energen's Motion is not well taken and should be denied. Order No. R-10154-A serves the Division's mandate to prevent waste and protect correlative rights. It was issued as part of its jurisdiction to consolidate affected mineral interests. It serves the legislative purpose behind the pooling statutes. The Division is not collaterally estopped by the limitations ruling in the federal court action in *King v. Gilbreath,* and is not barred by the statute of limitations from granting the relief set forth in its Order. The Kings are entitled to a full and complete accounting for their just and equitable share of production as ordered by the Division.

Order No. R-10154-A Protects Correlative Rights

2. The Division has granted Energen's Application for the extraordinary relief sought of compulsorily pooling the Kings' minerals effective as of the date of first production from the Flora Vista #19-2 Well in 1994. This was done pursuant to the legislative and regulatory mandate that all affected mineral interests be consolidated into the spacing unit for a

well. But the Division's mandate does not end there. The Division is also tasked with the mandate to prevent waste and protect correlative rights. *See,* NMAC 19.15.2.3. "Correlative rights" means "the opportunity afforded, as far as it is practicable to do so, to the owner of each property in a pool to produce without waste the owner's *just and equitable share* of the oil or gas in the pool...." NMAC 19.15.2.7(A)(15) (emphasis added). If Energen is allowed to retroactively pool the Kings' minerals without affording them the opportunity to participate in past production, the Kings will be deprived of their just and equitable share of the oil and gas in the pool. As the Division notes in its Order, its mandate to protect correlative rights requires that it make provision for reimbursement to interest owners such as the Kings, where possible, for their share of past as well as future production from wells. Energen would have the Division compulsorily pool and require the Kings to begin paying operating costs, while making no provision for an accounting to the Kings for their just and equitable share of past production to which they are entitled. This would not protect correlative rights and would be an entirely unjust and inequitable result to the Kings.

The Division Has Jurisdiction to Order This Relief

3. Energen brought its Application to amend Order No. R-10154 after the *King v. Gilbreath* suit was filed in 2013. Energen thereby submitted to the Division's jurisdiction the issue of relief appropriate for the failure of the Kings' minerals to have been consolidated into the spacing unit for the Flora Vista Wells. Whether or not Energen requested all of the relief granted in response to its Application is irrelevant, for all of the relief granted was in proper discharge of the Division's jurisdiction.

4. The Oil and Gas Act, NMSA 1978, §§70-2-1 through 70-2-38, grants the Division jurisdiction over "all matters relating to the conservation of oil and gas, the prevention of waste

of oil and gas ... [and] the protection of correlative rights...." NMAC 19.15.2.3. NMSA 1978, §70-2-18(A) requires the "operator" – here, Energen – to consolidate ownership by voluntary agreement or by compulsory pooling order. Said compulsory pooling order can only be issued by the Division. NMSA 1978, §70-2-17 directs that any pooling order "... shall be upon such terms and conditions as are just and reasonable and will afford to the owner or owners of each tract or interest the opportunity to recover or receive without unnecessary expense his just and fair share of the oil or gas or both." Thus, the legislature directed that the *pooling order* afford mineral owners such as the Kings the opportunity to receive their fair share of the gas produced from the Flora Vista Wells. The Division, by legislative directive, has the jurisdiction to enter a pooling order which is to contain appropriate orders for the pooled mineral interest owner's recovery of his share of production. As the pooling here is retroactive, the opportunity for the Kings to receive their fair share must be retroactive.

5. The Division did not exceed its legislative directive. The Division is expressly empowered by §70-2-17 to issue pooling orders on *conditions* that will make the relief granted just and reasonable. New Mexico law is consistent in authorizing state administrative agencies to attach appropriate conditions to its orders. *See, Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n,* 2006-NMCA-115, 140 N.M. 464, 469 (New Mexico Environment Department's authority to attach conditions to mine permit upheld where Water Quality Act authorized agency to attach conditions to permit), *Reynolds v. City of Roswell,* 99 N.M. 84, 86, 654 P.2d 537, 539 (1982) (state engineer has right to attach conditions to applications for permits to protect existing water rights). "In deciding the issue of impairment, the State Engineer is not limited to either an approval or rejection of the application in toto. In order to prevent an impairment of rights, he has authority to approve an application subject to

conditions." *City of Roswell v. Berry,* 80 N.M. 110, 112, 452 P.2d 179, 181 (1969). Here, the Division is not limited to granting Energen's Application without imposing appropriate conditions to protect correlative rights.

6. It is undisputed that there is a regulatory scheme placed within the special competence of this administrative body – the pooling of a mineral interest which has not previously been committed to the spacing unit for a well by lease or other agreement. The federal court has no jurisdiction to enter a pooling order. The federal court, pursuant to *its* jurisdiction, found the Kings' minerals to be unleased. Now the Division, pursuant to *its* jurisdiction, has entered administrative pooling relief appropriate to the facts of this case.

7. The fact that there are related issues in the *King v. Gilbreath* suit does not deprive the Division of jurisdiction to issue its pooling order, as Energen admits in bringing its Application. It cannot deny said jurisdiction now that the Division has entered the pooling relief requested with necessary conditions appropriate to such relief. Energen cannot argue that the Division's Order is outside of its jurisdiction.

Order No. R-10154-A Serves the Legislative Purpose Behind the Pooling Statutes

8. NMSA 1978, §70-2-18 requires Energen, as operator, to consolidate ownership by voluntary agreement or by compulsory pooling order and to compensate unconsolidated owners. Energen contends it did not take production attributable to the Kings' minerals, and therefore should not be required to account to the Kings. First, Energen is incorrect, as it did take production from the time of its assumption of operations in 2004 until the Gilbreaths' 2005 marketing election. Second, the legislature made this overall the operator's responsibility. The statute makes no provision for an operator to avoid its obligations under §§70-2-17 and 70-2-18 to provide a mineral interest owner with its just and equitable share of production by contracting

away marketing and revenue payment responsibilities to another. The policy behind the pooling statutes is obvious – the *operator* bears the responsibility for ensuring that all interests are consolidated, and the *operator* bears responsibility for *accounting* to mineral interest owners whose interests were not properly consolidated to begin with. To do otherwise would place an undue burden on mineral interest owners to determine the party responsible for consolidating their interests and providing them an opportunity to participate in their fair share of production. The legislative policy expressed in the pooling statutes is that Energen, as operator, bears this responsibility. Whatever contractual arrangements it has made with a co-working interest owner such as the Gilbreaths is a matter between them and is not binding upon the Kings for purposes of this proceeding. The Division's Order serves the legislative purpose of the pooling statutes of imposing upon the operator the responsibility of providing the Kings with their just and fair share of past production.

9. Energen's contention that the Division made erroneous factual assumptions as to its failure to pool is misplaced. The federal court has confirmed that the Kings' minerals were unleased since 1990. It is undisputed that Energen took no action to lease or obtain the Kings' participation in the Flora Vista Wells when it took over operations of the Flora Vista Wells in 2004. Whether or not Energen verified title at the time, it did not consolidate all mineral interests. The Kings' minerals were not consolidated and were required to have been consolidated by statute, as Energen recognized in filing its Application.

The Division Is Not Collaterally Estopped and Is Not Barred by the Statute of Limitations

10. Energen argues that the Division is collaterally estopped by the federal court's ruling that the statute of limitations limits the Kings' action for money damages against Energen and certain other working interest owners to the period of time September 1, 2009 through the

present. Energen is wrong, because collateral estoppel does not apply in these circumstances, and because this Division proceeding is not a court action for money damages which is subject to the bar of limitations.

11. The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of "ultimate facts or issues actually and necessarily decided in a prior suit." *Shovelin v. Central New Mexico Electric Co'op, Inc.*, 115 N.M. 293, 850 P.2d 996, 1000 (1993) (refused to apply collateral estoppel in that case). The federal court's summary judgment ruling on limitations (Doc. No. 315) contains no finding as to Energen's failure to consolidate the Kings' minerals, and as to what relief should be entered in connection with the retroactive consolidation of the Kings' minerals. This issue was therefore not actually litigated in the *King v. Gilbreath* case, and collateral estoppel does not apply. In particular, the issue of whether Energen is entitled to retroactively compulsorily pool the Kings' minerals, and the appropriate relief to be entered in connection therewith to allow the pooled interest owner to participate in his share of production, was not submitted to the federal court, and instead was submitted by Energen to the jurisdiction of the Division. *Deflon v. Sawyers*, 2006-NMSC-025, ¶27, 139 N.M. 637, cited by Energen, *refused* to apply res judicata or collateral estoppel in a state court action following a federal court action because the federal court did not decide issues which barred the subsequent suit. *Deflon* also did not deal with parallel administrative and court proceedings in which different issues were adjudicated, as is the case here.

12. The Division is not barred by limitations, as Energen argues, from ordering that Energen account to the Kings back to 2004. The federal court's statute of limitations ruling does not apply here. In *BP America Production Co. v. Burton*, 549 U.S. 84 (2006), the United States Supreme Court resolved previously conflicting rulings on the issue of whether the federal statute

of limitations applicable to government actions for money damages was applicable to Minerals Management Service orders assessing parties for past unpaid royalty. The Supreme Court held that it did not apply, because said statute of limitations applies only to "court actions," not administrative payment orders. *Id.* at 94-5. *Burton's* holding should apply here as well. The four-year statute of limitations found in NMSA 1978, §37-1-4 upon which the federal court summary judgment ruling was based by its express terms only applies to "actions," which was defined by the Supreme Court to only refer to "court actions." *Burton,* 549 U.S. at 92-3. The Kings are not bringing an action for money damages before the Division. The Division's Order that Energen account to the Kings for their share of proceeds is therefore not subject to the statute of limitations, as it is not issued in a court action. Energen cannot obtain relief from the Division consolidating the Kings' minerals that extends beyond the statute of limitations applied by the federal court to the Kings' action for money damages, and at the same time not be subject to a duty to account to the Kings for their fair share of production that extends beyond said statute of limitations.[1]

13. Energen admits that the Division has the authority to enter the extraordinary relief of retroactively compulsorily pooling the Kings' minerals back to the 1994 date of first production. The Division must, therefore, have corresponding authority to order Energen to provide the Kings the opportunity to receive their just and equitable share of production back to the time Energen took over operations in 2004. Energen cannot have it both ways: it cannot obtain relief retroactively pooling the Kings' minerals unburdened by limitations, and not simultaneously be bound to account to the Kings unburdened by limitations.

[1]Nor would Energen contend that it is subject to limitations in making retroactive adjustments to a revenue payee's account going back several years, as operators often do.

The Kings Are Entitled to an Accounting from Energen as Ordered[2]

14. Energen should be required, as the Division has ordered, to provide an accounting as soon as possible. The Kings have been required to hire an expert at their own expense in the *King v. Gilbreath* case to calculate the amounts owed to the Kings from production from the Flora Vista Wells. Said accounting was done in part based on estimates due to incomplete information from Energen and other working interest owners in the Flora Vista Wells. Energen is in possession of complete production records and operating cost information not available to the Kings, and should comply with the Division's order to provide a full and complete accounting.

15. Energen also improperly attempts to impose an obligation on the Kings to separately pay operating costs attributable to their unleased mineral interest without paying the Kings the revenues to which they are entitled. The Kings are entitled to be paid revenues as unleased mineral interest owners net of reasonable operating costs. The Kings have no joint operating agreement with Energen. Energen has a duty to account to the Kings for developing and producing their unleased minerals since 2004. The Kings do not have a duty to account to Energen without receiving their fair share of production.

Conclusion

16. Order No. R-10154-A was issued in proper discharge of the Division's authority. The Division's Order that Energen provide an accounting is necessary to protect correlative rights. The Division's Order was issued in discharge of the Division's jurisdiction to issue appropriate pooling orders so as to allow mineral interest owners to receive their just and equitable share of production. Whether or not Energen asked for all of the relief granted is

[2]There is one typographical error in the Order: p. 7, ¶1 refers to the "Bone Spring" formation, and should instead refer to the Fruitland Coal formation.

irrelevant, as the Division had express authority to attach appropriate conditions to the retroactive pooling relief sought by Energen. The Division's Order serves the legislative purpose behind the pooling statutes. The Division is not collaterally estopped by the limitations order of the federal court and is not subject to the statute of limitations in granting administrative relief in response to Energen's Application. Energen should be required to provide the full and complete accounting as ordered by the Division.

WHEREFORE, the Kings request that the Division deny Energen's Motion, that Order No. R-10154-A remain as issued and be enforced by the Division as necessary, and for all other relief which is just and appropriate.

RESPECTFULLY SUBMITTED,

CAVIN & INGRAM, P.A.

By: _____
Stephen D. Ingram
P. O. Box 1216
Albuquerque, NM 87103
(505) 243-5400
sding1216@aol.com

ATTORNEYS FOR FRANK A. KING and
PAULA S. ELMORE f/k/a PAULA S. KING

I hereby certify that a true and correct copy of the foregoing was served via e-mail and U.S. mail on August 15, 2016 to the following:

J. Scott Hall
Sharon T. Shaheen
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307

CAVIN & INGRAM, P.A.

By: _____
Stephen D. Ingram