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

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING:

CASE NO. 15072
ORDER NO. R-10154-B

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

ORDER OF THE DIVISION

This case came on for consideration of Applicant's Motion to Vacate or Stay Portions of Order No. R-10154-A ("the Motion"), filed on August 10, 2016, and Respondents' Opposition to Motion to Vacate or Stay Portions of Order No. R-10154-A ("the Response), filed on August 16, 2016.

NOW, on this 22nd day of August, 2016, the Division Director, having considered the record and the recommendations of the Examiner,

FINDS THAT:

[1] Due notice has been given and the Division has jurisdiction of this case and the subject matter.

[2] The Division issued Order No. R-10154-A ("the Order") in this case on July 28, 2016.

[3] The Motion challenges the correctness of provisions of the Order and seeks a new order vacating or staying certain portions of the Order.

[4] A motion to vacate or stay an order is addressed to the discretion of the Division. Thus, notwithstanding the fact that Applicant's motion addresses only certain provisions of the Order, the Division has authority to consider whether the Order should be vacated or stayed as to particular provisions only, in its entirety, or not at all.

[5] The Order modified an earlier compulsory pooling order, Order No. R-10154, issued in Case No. 11007 on July 19, 1994, to pool the unleased mineral interest of

Frank A. King and Paula S. Elmore f/k/a Paula S. King ("Respondents") in the spacing unit therein described ("the Unit"), which unleased interest was not referred to in Case No. 11007 or in original Order No. R-10154, presumably because it was then assumed that Respondents' interest was subject to a valid and subsisting lease.

[6] Among other provisions, the Order is made effective from date of first production from the Unit and requires Applicant, as the operator of the Unit, to account and pay to Respondents the share of proceeds of production to which Respondents would have been entitled based on their ownership of an unleased mineral interest, from the date when Applicant became operator of the Unit. It is this latter provision that Applicant now asks the Division to vacate or stay.

[7] As indicated in Finding Paragraph (6) of the Order, there exists a pending lawsuit in the United States District Court for the District of New Mexico ("the Federal Court"), Cause No. 1:13-cv-00862, in which Respondents are plaintiffs and Applicant and others are defendants. That lawsuit involves the same controversy as this compulsory pooling application, and the Federal Court has made numerous rulings therein.

[8] As noted in Finding Paragraph (11) of the Order, the Federal Court ruled that the lease covering Respondents' mineral interest expired before issuance of the original pooling order, contrary to assumptions previously made by Applicant and by the Division. The Federal Court's ruling on this issue was called to the attention of the Division prior to its issuance of the Order and had clear legal implications for this compulsory pooling case which are reflected in the Order.

[9] However, the Federal Court also issued other rulings that potentially impact the present case which were not previously brought to the Division's attention. Most significantly, the Federal Court ruled that Respondents' claim asserting the statutory liability of Applicant as operator pursuant to NMSA 1978 Section 70-2-18.B is barred by the applicable statute of limitations, not only as to production more than four years prior to the filing of Respondents' suit, but as to *all* prior production.

[10] Section 70-2-18.B provides that an operator who fails to obtain an agreement of all parties, or to apply for a compulsory pooling order, pooling all interests in a spacing unit "which order shall be effective from the first production,[1]" is liable to any owner whose interest is not so pooled [as applicable to this case] for the amount to which the owner would have been entitled if pooled. Prior to the Federal Court's decision, there existed no published court decision known to the Division that settled the applicability of the statutes of limitations to claims under Section 70-2-18.B, or when such a claim was deemed to accrue.

[11] Applicant argues that the Federal Court's determination of the limitations issue bars issuance of a compulsory order in this case which would require the operator to

[1] This language appears in Section 70-2-18.A. However, Section 70-2-18.B imposes liability on an operator who fails to apply for an order "as required by this section," thus presumably importing the requirements concerning the order to be obtained into Section 70-2-18.B.

account and pay to Respondents their share of proceeds from past production, pursuant to the doctrines of *res judicata* and collateral estoppel.

[12] In addition to the foregoing, Applicant refers to other alleged errors in the Order, advancing in support thereof the various arguments, including the following:

a. Because the putative lessee of Respondents' interest (the Gilbreaths) took Respondents' share of gas in kind, Applicant did not market Respondents' share of production from the Unit, nor receive proceeds attributable thereto, and accordingly should not be required to account or pay the same to Respondents.

b. Because Applicant specifically requested only a prospective pooling order, the Division did not have the right to require accounting for proceeds not received by the previously un-pooled parties prior to issuance of an amended pooling order in this case.

c. The Division should not have ordered an audit of past production because an audit has already been performed.

d. The Division's finding in Paragraph (29) of the Order that Applicant could have protected its interest by a careful title examination is erroneous due to an inadequate evidentiary basis, and because it conflicts with the Federal Court's finding that "the [Respondents] failed to demonstrate that Energen was required by the Division's statutes and rules to go beyond its reliance on county records." [Motion at 8].

The Division concludes as follows:

[13] The Federal Court's ruling on applicability of limitations to Respondents' claims under NMSA 1978 Section 70-2-18.B does not preclude the Division from issuing a compulsory pooling order including a requirement that the operator account to a pooled party for past proceeds of production from the Unit to the extent that the Division determines that such an order is just and reasonable and is necessary to protect correlative rights. Section 70-2-18.A expressly directs that the operator has a duty to obtain a compulsory pooling order "which . . . shall be effective from the first production." This mandatory directive binds both the operator and the Division in any compulsory pooling proceeding. The statutory liability set forth in Section 70.2.18.B applies only if the interest is not pooled because the operator fails to apply for a proper compulsory pooling order.[2]

[2] Section 70-2-18.A provides that the operator has a duty to "*obtain* . . . an order of the division pooling said lands" [emphasis added], whereas Section 70-2-18.B provides that an operator's liability arises from its "failing to *apply for* an order of the division pooling said lands [emphasis added]." We view this distinction as confirming that the Legislature contemplated that if a pooling proceeding were commenced, the Division would make a fair and reasonable order regarding disposition of proceeds of production "effective from first production;" so that statutory liability only needed to be imposed if the operator failed to apply for such a determination. This distinction reinforces our conclusion below that

[14] The doctrine of *Res judicata* does not apply to bar such an order in this case because the claims are distinct. Collateral estoppel does not apply because the Federal Court did not find that requiring the operator to account for proceeds of past production would not be fair and reasonable, or that it would not be necessary to protect correlative rights. It found only that Respondents had knowledge of facts more than four years prior to their filing suit that gave rise to a duty of investigation which, if pursued, would have led to the discovery of their un-pooled or defectively pooled interest. These findings, if brought to the Division's attention, would arguably have been relevant to determining what provisions would be fair and reasonable in a compulsory pooling order, but are not conclusive.

[15] The apparently undisputed fact that the putative lessee of Respondents' interest took in kind and separately marketed the share of gas produced from the Unit attributable to Respondents' interest, is a material, though not necessarily a determinative, factor that was not previously considered by the Division. Respondents are not, of course, bound, with respect to their unleased interest, by marketing arrangements to which they were not parties. However, if Applicant has not received any proceeds of production properly attributable to Respondents' interest, that circumstance is relevant to determining what provisions would be fair and equitable in an amended pooling order, and arguably distinguishes this case from that considered by the Commission in Order No. R-1960-B.

[16] Because relevant and material facts were not developed in the hearing held in this case more than two years ago, and were not known to the Division during its consideration of the case, the Division now concludes that the Order was improvidently issued, and should be vacated in its entirety.

[17] In view of this finding, it is unnecessary for the Division at this time to consider the other contentions in the Motion.

[18] Since other relevant facts may emerge from the future course of the case in Federal Court, the Division further concludes that this Division case should be stayed until the Federal Court issues a final judgment disposing of all issues remaining before it, including, but not limited to, the liability of the Gilbreaths (the putative lessee of Respondents' unleased interest) to account to Respondents for proceeds of production that the Gibreaths received that were attributable to Respondents' interest. When such a final judgment is rendered, or if the Federal Court case is dismissed, the Division can conduct another hearing which will enable it to determine on a fully developed record what provisions in an amended compulsory pooling order will be fair and reasonable to all parties.

[19] There is no necessity for an order at this time on Applicant's request for a determination that it is entitled to reimbursement for current costs of operation of the wells on the Unit. Under NMSA 1978 Section 70-2-17.C provision for reimbursement of operating costs and an allowance for administrative overhead is mandatory in all

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the proceedings in the Court and the Division with respect to past production involve different legal claims.

compulsory pooling orders, if such costs have been incurred, are reasonable, and are not waived by the party entitled to such recovery. Therefore, the parties can rest assured that such provisions will be included in any final order subsequently issued, unless the Federal Court determines that Respondents are entitled to the gross value of production attributable to their interest based on a legal claim not within the Division's jurisdiction.

IT IS THEREFORE ORDERED:

[1] Division Order No. R10154-A, issued in this case on July 28, 2016, is hereby vacated in its entirety.

[2] Further proceedings in this case are stayed until the Division is notified that the United States District Court for the District of New Mexico has entered a final judgment in Cause No. 1:13-cv-00862, in which Respondents are plaintiffs and Applicant and others are defendants, disposing of all claims therein or dismissing said case, and a copy of such final judgment or order of dismissal has been filed with the Division.

[3] Jurisdiction of this case is retained for the entry of such further orders as may be deemed necessary.

DONE at Santa Fe, New Mexico, on the date herein above stated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

David R. Catanach

DAVID R. CATANACH
Director

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