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. 14412

APPLICATION OF RELIANT EXPLORATION AND PRODUCTION COMPANY, LLC, FOR CANCELLATION OF TWO PERMITS TO DRILL ("APD") ISSUED TO OXY USA, INC. AND FOR COMPULSORY POOLING IN HARDING COUNTY, NEW MEXICO.

OXY'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to the Division's instruction following a prehearing conference in this matter, OXY USA Inc. ("OXY") submits this reply brief in support of its motion to dismiss Reliant's First Amended Application filed on February 5, 2010. Reliant seeks relief that is not authorized by the Oil and Gas Act or the Rules of the Oil Conservation Division.

ARGUMENT

A review of the governing statute and related regulatory provisions demonstrates that only a party that has "drilled or proposed to drill a well" may invoke the pooling authority of the New Mexico Oil Conservation Division under NMSA 1978, Section 70-2-17(C). When construing a statute, courts must determine and give effect to the Legislature's intent as revealed by the language of the statute. *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009–NMSC–013, ¶ 9, 146 N.M. 24. Courts are aided by classic canons of statutory construction, and will first look to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature clearly and expressly indicates a different meaning was intended. *N.M.*

Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n, 2007–NMSC–053, ¶ 20, 142 N.M. 533. Only if an ambiguity exists will a court proceed further in a statutory construction analysis. *See State v. Maestas*, 2007–NMSC–001, ¶ 14, 140 N.M. 836 (filed 2006) ("Unless ambiguity exists, this Court must adhere to the plain meaning of the language."). If faced with an ambiguous statute, and legislative history that is silent on the issue, a court will look at the overall structure and function of the statute, as well as the public policy embodied in the statute. *See N.M. Dep't of Health v. Compton*, 2001–NMSC–032, ¶ 18, 131 N.M. 204; *see also State v. Rivera*, 2004–NMSC–001, ¶¶ 13–14, 134 N.M. 768 (stating that statutory construction includes looking at a statute's structure, function, history, and policy implications).

Here the plain language of the statute, when the words are given their ordinary meaning, shows the Legislature intended that only a party that "has drilled or proposes to drill a well" may invoke the Commission's pooling authority. The statute reads in part:

> Where, however, such owner or owners have not agreed to pool their interests, and where one such separate owner, or owners, *who has the right to drill has drilled or proposes to drill a well on said unit to a common source of supply*, the division, to avoid the drilling of unnecessary wells or to protect correlative rights, or to prevent waste, shall pool all or any part of such lands or interests or both in the spacing or proration unit as a unit.

NMSA 1978, § 10-2-17(C). This provision indicates that the division shall pool when the interest owners have not reached agreement and the owner who "has drilled or proposes to drill a well" invokes the pooling authority of the Division. Had the Legislature intended any interested person to invoke the Division's pooling authority, it would have adopted language seen in other pooling statutes allowing the applicable regulatory agency to enter a pooling order "upon the application of any interested person." Colo. Rev. Stat. § 34-60-116 (2001). Without similar language in the New Mexico statute, there is no indication the legislature intended an interested party, such as Reliant, to have standing to seek a pooling order from the Division. Instead,

Section 70-2-17(C) indicates that only an interest owner that "has drilled or proposed to drill a well" can invoke the pooling authority of the Division.

Any doubt about the party qualified to seek a pooling order from the Division is answered by the very next section of the New Mexico Act, which clearly and unambiguously imposes the duty on the "operator" of a well "to obtain voluntary agreements pooling said lands or interests or an order of the division pooling said lands..." NMSA 1978, § 70-2-18. Only a party that "has drilled or proposes to drill a well" – or its successor or appointee - will be recognized as operator by the Division in any pooling order. It therefore follows that only a party that "has drilled or proposes to drill a well" has the obligation and standing to seek a pooling order from the Division. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶5, 26 N.M. 413 (statutory provisions must be read together so that all parts are given effect).[1]

The fact that only a party that has "drilled or proposed to drill a well" has standing to seek a pooling order from the Division is further supported by the applicable regulations. Under NMAC 19.15.4.12.A(1) (governing adjudications for compulsory pooling) an "applicant" must provide the Division with evidence that it has sought to locate the interest owners and attempted to reach a voluntary agreement, must provide the Division with the "proposed unit and the proposed well's location," provide proposed overhead charges, and provide "a copy of the AFE the applicant, if appointed operator, will submit to the well's interest owners." NMAC

[1] The only authority cited by Reliant in support of its Application is the Division Order R-11993-A entered in Case No. 14165. *See* Response at p. 3. However, in Case No. 14165 the applicant was Chesapeake Energy Corporation, an interest owner that had drilled a well in the Abo formation and proposed to recomplete the well in a shallower formation and commingle production. At the request of the applicant, Order R-11993-A named Chesapeake Operating Inc. as the operator of the well, since that entity is the operating arm of the applicant. Order R-11993-A in no way supports the proposition that an interest owner, such as Reliant, that has not drilled or proposed to drill a well can invoke the pooling authority of the Division and seek to have itself named as operator of a well drilled, owned and operated by another party.

19.15.13.8.C excuses "an applicant" from the requirement to present technical testimony to justify the risk charged provided by Division rules. Clearly the "applicant" referenced in these regulations can only be the interest owner that has actually "drilled or proposed to drill a well."

Finally, New Mexico's current pooling statute is similar to the Texas Mineral Interest Pooling Act in affect until 1971. The former Texas pooling statute provided:

> When two or more separately-owned tracts of land are embraced within a common reservoir of oil or gas for which the Railroad Commission . . . has established . . . the size and shape of proration units . . . and where there are separately-owned interests in oil or gas embraced within an existing or proposed proration unit in the common reservoir, and the owners have not agreed to pool their interests, and where one or more of the owners *have drilled or propose to drill a well* on the proration unit to the common reservoir, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, or to prevent waste, shall, on the application to the Commission *of any such owner*, establish a unit and pool all of the interests therein within . . . such proration unit . . . [emphasis added]

Railroad Commission of Texas v. Coleman, 460 S.W.2d 404, 406 (Tex. 1970) (quoting the statute). The Texas courts interpreted this statute to mean that the pooling authority of the Texas Railroad Commission could "be invoked only by an owner who has drilled or proposes to drill a well on a proration unit to a common reservoir." *Coleman,* 460 S.W.2d at 408; *Northwest Oil Co. v. The Railroad Commission of Texas,* 462 S.W.2d 371, 374-75 (Tex.App. 1971) (following *Coleman* and stating, "[A]n order entered in favor of one who has neither drilled nor proposes to drill is beyond the power of the Commission. Being beyond its power, it is void.") While the phrase in the former Texas statute "on the application to the Commission of any such owner" is missing from the New Mexico statute, the New Mexico Act maintains the reference to an owner that "has drilled or proposes to drill a well." It is therefore follows that the intent and the meaning is the same as that found by the Texas courts: The interest owner authorized under

these types of statutes to invoke the pooling authority of the regulatory agency is the party that has actually "drilled or proposed to drill a well."[2]

CONCLUSION

Since Reliant has neither drilled nor proposed to drill a well, it does not have standing to invoke the pooling authority of the Division. For this reason, and for the reasons set forth in OXY's Motion to Dismiss filed with the Division on January 25, 2010, the relief sought under Reliant's First Amended Application must be denied.

Respectfully submitted,

HOLLAND & HART, LLP

William F. Carr
Michael H. Feldewert
Adam G. Rankin
Post Office Box 2208
Santa Fe, New Mexico 87504
(505) 988-4421
(505) 983-6043 Facsimile

ATTORNEYS FOR OXY USA, INC.

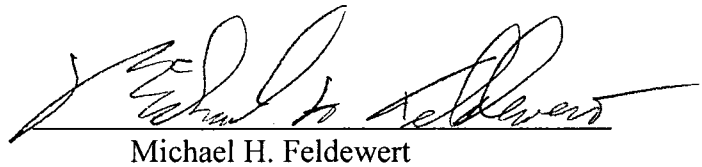
[2] Following these Texas decision, the Texas Legislature amended its pooling statute to authorize the owner of *any interest* (other than royalty interests) in a spacing unit to invoke the pooling authority of the Texas Railroad Commission. Tex. Nat. Res. Code Ann. § 102.011-012 (West). The language adopted by the Texas Legislature following the *Coleman* and *Northwest Oil Company* decisions does not exist in the New Mexico Oil and Gas Act.

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2012, I served a copy of the foregoing upon the following via Electronic Mail:

Earl E. DeBrine, Jr.
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Post Office Box 2168
Bank of America Center
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
E-Mail – edebrine@modrall.com

W. Thomas Kellahin
Kellahin & Kellahin
706 Gonzales Road
Santa Fe, New Mexico 87501-8744
E-Mail – tkellahin@comcast.net



Michael H. Feldewert