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June 5, 2012

Ms. Jami Bailey, Director
NM Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87501

Hand-Delivered

**Re: NMOCD Case No. 14855: Application of COG Operating LLC for
Compulsory Pooling, Eddy County, New Mexico**

Dear Ms. Bailey:

On behalf of COG Operating LLC, enclosed for filing is an original and one copy of COG's Response to Motion to Dismiss in the above-referenced case.

Very truly yours,

J. Scott Hall

JSH:kw
Enclosures

Cc: James Bruce, Esq.
Davis Brooks, Esq.
Mr. Will Jones

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

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IN THE MATTER OF THE
APPLICATION OF COG OPERATING LLC
FOR COMPULSORY POOLING
EDDY COUNTY, NEW MEXICO

CASE NO. 14855

**COG'S RESPONSE TO
MOTION TO DISMISS**

COG Operating LLC, ("COG"), for its Response to the Motion to Dismiss filed on behalf of Chisos, Ltd. and Apache Corporation states:

The Motion to Dismiss should be denied for the reasons that (1) COG has precisely followed established Division protocol holding that an operator must deal with the owner of the record title interest at the time of the filing of its application for compulsory pooling. (2) A compulsory pooling applicant does not have a duty to negotiate in good faith for the voluntary participation of third parties when those third parties do not yet have title. (3) Claims that a compulsory pooling applicant has not negotiated in good faith should not be decided on preliminary motions.

Points and Authorities

A Leasehold Ownership Title Opinion earlier commissioned by COG for the subject lands showed ownership of the interests claimed by Chisos and Apache to be in Total Petrochemicals and Refining USA, Inc., the corporate successor to Fina, Inc. But through various mesne assignments, Chisos and Apache purported to acquire their interest from Manix Energy, LLC which had previously received an assignment from Fina Oil and Chemical Company, a separate entity which never had title to the property. From day-one, Chisos and Apache were

charged with notice of their lack of title and that the title was in fact vested in Total Petrochemicals. This continued to be the case through the time that COG filed its Application in this matter on May 3, 2012. While it is not known when Chisos and Apache may have begun their pursuit of an assignment, at the time of the Application, their ownership continued to be only aspirational and speculative. Their legal ability to commit interests to the well was non-existent. Any AFE or JOA signed by them would be unenforceable. Correspondingly, while COG was cooperative and kept Chisos and Apache informed, it continued to follow the proper course of conduct by dealing with the actual owner of the record title interest, Total Petrochemicals. It was only on May 22, 2012 that Chisos and Apache provided a copy of their fully executed Correction Assignment which was then provided to COG's title attorney for further review for satisfaction of previous curative requirements.

While we agree an applicant for compulsory pooling does have a duty to pursue good faith negotiations with an interest owner, that duty does not accrue *before* a claimant to title actually acquires its interest. Such a position would be an unwarranted and possibly standard-less extension of the duty to even those whose claims to title might never be entitled to recognition by a title examiner. Further, assignments and conveyances can effect changes to title at any time, without regard to the schedules that are triggered by the filing of a compulsory pooling application. The sudden imposition of new, 30-day well proposal requirements would no doubt prove impracticable in application and otherwise orderly compulsory pooling proceedings would be up-ended.

In other cases presenting similar circumstances, the Division and the Commission have consistently, reliably and predictably held that a compulsory pooling applicant's notification and negotiation duties are fixed and extend only to interest owners known at the time (or reasonably

in advance of the time) of the filing of the application. (See Order No. R-1062-A, Conclusions of Law ¶D (3), Case No. 11510, *Application of Branko, Inc. et al. to Reopen Case No. 10656*; Order No. R-10672-A *De Novo*.) In the *Branko, Inc.* case, a party (Branko) claiming to own a working interest sought to intervene in a compulsory pooling proceeding and obtain a hearing de novo. In fact, record title was in another party, Strata. The Commission concluded that Branko was not an interest owner at the time the original compulsory pooling application and could not re-litigate the case. The common-sense standard established by this precedent should remain undisturbed.

Chisos and Apache also move for dismissal, without further explanation, on the basis that COG has not negotiated in good faith. On such motions in the past, the Division has correctly held that “[t]he issue of compliance with the more subjective requirement the Division has customarily recognized for good faith negotiation is better examined...in most cases, at the compulsory pooling hearing, based on a full evidentiary record, rather than upon a preliminary motion to dismiss.” (See Order No. R-13165, Finding ¶5 (d), Case Nos. 14368, 14369 and 14372, *Application of Cimarex Energy Co. for a Non-Standard Spacing Unit and Compulsory Pooling, Chaves County, New Mexico*. The Division’s reasoning in *Cimarex* is equally applicable here and COG should be afforded the opportunity to present its case. Through either a continuance or a dismissal, Chisos/Apache with their newly-acquired interest would gain only a short-term tactical advantage. COG, on the other hand, would be faced with the uncertainty of delay and the possible disruption of its drilling schedule. Proceeding with a hearing on COG’s Application, as scheduled, does not preclude the parties from negotiating further.

WHEREFORE, COG requests that the Chisos and Apache Motion to Dismiss be denied.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

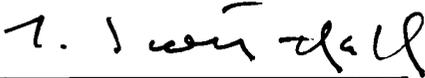
By: 

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served to counsel of record by electronic mail this 5 day of June, 2012.

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J. Scott Hall