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February 13, 2014

Via Facsimile to (505) 476-3462 and U.S. Mail
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 is a Pre-Hearing Statement we are submitting on behalf of Frank A. King and Paula S. Elmore f/k/a Paula S. King in connection with the hearing set for February 20, 2014. Thank you for your attention to this matter.

Sincerely,

CAVIN & INGRAM, P.A.

By: _____
Stephen D. Ingram

Enclosure

cc w/enc: Joseph Scott Hall

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

PRE-HEARING STATEMENT

Frank A. King and Paula S. Elmore f/k/a Paula S. King (the "Kings"), submit their pre-hearing statement in accordance with NMAC 19.15.4.13(B) as follows[1]:

1. **Parties:** Frank A. King and Paula S. Elmore f/k/a Paula S. King.

2. **Parties' Attorney:** Stephen D. Ingram, Cavin & Ingram, P.A., P. O. Box 1216, Albuquerque, New Mexico 87103-1216, (505) 243-5400.

3. **Statement of the Case:** Energen seeks to amend Compulsory Pooling Order No. R-10154 issued on July 19, 1994 to commit the Kings' unleased mineral interest (the "King Interests") to the pooled unit. The Kings oppose said Application because there is a federal district court suit pending regarding this matter, because the OCD's jurisdiction is not properly invoked at this time, because the retroactive relief requested is extraordinary and unjustified under the circumstances, and because amendment of the subject pooling order 20 years later would not prevent waste and protect correlative rights.

4. **Witnesses:** None.

5. **Time Needed to Present Case:** Fifteen (15) minutes.

6. **Estimated Number of Exhibits:** Six (6).

[1]This Pre-Hearing Statement is submitted subject to and without waiving the Kings' pending Motion to Dismiss Energen's Application for lack of jurisdiction.

7. **Procedural Matters to Be Resolved:**

a. The Kings' pending Motion to Dismiss Application for lack of jurisdiction.

b. The Kings' request for documents to be produced by Energen in advance of the hearing. Energen has produced some documents, which are being reviewed for sufficiency.

8. **Statement of Opposition:**

a. The Kings incorporate by reference the arguments and authorities set forth in their pending Motion to Dismiss Application for lack of jurisdiction. As a summary of the arguments and authorities set forth therein, the leasehold interest in the Kings' minerals which is now purportedly held by Norman L. Gilbreath and Loretta E. Gilbreath (the "Gilbreaths") expired for non-production of the Wright #1 Well, API 30-045-21174, which originally held the lease of the Kings minerals, on or about July of 1990. In 1994, the King Interests were purportedly pooled by Order No. R-10154 on application of Energen's predecessor-in-interest, Maralex Resources, Inc. ("Maralex"). However, the Kings were undisputedly not noticed in said proceeding, and the Gilbreaths, who were noticed, had no valid leasehold interest in the King Interests at the time of the 1994 pooling proceeding to be committed to the spacing unit. The Kings have a lawsuit pending entitled *Frank A. King, et al. v. Norman L. Gilbreath, et al.,* in the United States District Court for the District of New Mexico, in which the Kings seek to have the court declare the lease to have previously forfeited for nonproduction and to recover damages. Thus, there is pending a contested civil action which involves contractual rights, title disputes and damage recovery, none of which fall within the jurisdiction of the OCD. *See, i.e., In re Timber/Sharp,* Order No. R-11700 (Dec. 13, 2001) (OCD has no jurisdiction to determine title or

lease validity); *Johnson v. Yates Petroleum Co.*, 1999-NMCA-066, 127 N.M. 355, 981 P.2d 288 (lease interpretation within judicial competence of court). For the OCD to act on Energen's present Application would be to impede on the federal court's jurisdiction, and would not be in proper discharge of its authority to prevent waste and protect correlative rights.

b. Alternatively, it is premature for the OCD to be hearing this matter, pending the determination by the district court of the status of the lease of the King Interests. If the OCD does not dismiss Energen's Application, it should at the very least stay Energen's Application indefinitely pending determination by the federal district court of who has rights in the King Interests.

c. The retroactive relief requested by Energen is extraordinary and unjustified. No OCD Order has been found in which the extraordinary retroactive relief requested by Energen has been granted, in which an unleased mineral interest was pooled 20 years after the initial pooling order, and while a court action was pending regarding the matter. Other cases considering such attempts to retroactively pool have denied such attempts. For example, in *Godfrey v. Chesapeake Exploration, LLC*, 2012 WL 2865187 (Tex. App. – Eastland 2012, *writ denied*), the court held that unless the lease specifically authorized retroactive effective dates on designations of pooled units, the court would not allow a pooling designation to be made effective retroactively, so as to "change history." *Id.* at *2. The Kings' lease does not authorize retroactive pooling. In *Adkins v. Board of Oil, Gas & Mining*, 926 P.2d 880 (Utah 1996), a landowner's request to retroactively expand a drilling unit to include his lands was denied where the drilling unit was established 18 years earlier, the landowner was notified of the original proceeding but did not participate, no well was drilled on the original unit that included the landowner's lands, the oil had since migrated, and the other parties had acted in reliance on

the standing spacing order. *Id.* at 884. By contrast, here, the Kings were not notified of the original pooling proceeding, the Flora Vista Wells were drilled in the spacing unit which included the King Interests, oil and gas is still producing therefrom, and the operator and working interest owners have acted as if the King Interests were committed to the pooled units (although they have not paid the Kings revenues owed), yet Energen is seeking to amend the 20-year-old pooling order to include the King Interests.

d. Energen's Application is also barred under the doctrine of laches. While there may not be a formal statute of limitations barring Energen's Application 20 years after the fact, attempts to modify pooling orders before an administrative body years after the fact have been found to be barred under the doctrine of laches. "[R]elief in equity may yet be denied on the ground of a plaintiff's laches even where a statute of limitation is not a bar." *Adkins v. Board of Oil, Gas & Mining*, 926 P.2d 880, 884 (Utah 1996). In *Adkins*, 18 years of inaction by the landowner before seeking to modify a spacing unit to include his lands was found to result in the denial of his application under the doctrine of laches. *Id.* Energen's Application should similarly be denied under the doctrine of laches.

e. Energen's request to retroactively force-pool the King Interests back to 1994 defeats the purpose of NMSA 1978, §70-2-18, which places the burden on the operator to ensure that all interests are properly noticed and included in the pooled unit. If an operator can disregard his statutory responsibilities to properly pool, and then obtain a retroactive pooling application 20 years later without consequences to the operator, the purpose of the pooling statute is defeated. The Kings' pending federal court suit seeks to enforce the consequences of violation of §70-2-18. Any action by the OCD on Energen's present Application would interfere with the enforcement of the pooling statute in said action.

f. Energen's retroactive pooling application also makes no sense from a practical standpoint because of the time that has passed. The Flora Vista Wells drilled under Order No. R-10154 have presumably long since paid out. Yet Energen is now seeking to impose a 200% risk penalty on the King Interests. Yet, if the King Interests were validly leased, the Kings would have received their lease royalty from the Flora Vista wells throughout the payout period, and the operator, using a 1/8 royalty, would have received 87.5% of the proceeds towards drilling costs versus 100% of the proceeds during the payout period for an unleased mineral interest. The Kings were never afforded the opportunity to pay their share of well costs to the operator in lieu of paying their share of reasonable well costs out of production. In fact, the Kings were never afforded the opportunity to participate at all. The Kings would note that, in the 1994 proceeding in this matter, Maralex provided evidence that it had approached the Gilbreaths to sell, to farmout, and then to participate in the Flora Vista #19-2 Well. No such offers have been made to the Kings. It would therefore be unfair to reward Energen with a risk penalty when the Kings were never afforded the opportunity to assume such risk.

g. Energen has not satisfied a necessary precondition to its present application to amend Order No. R-10154. Energen only offered to lease the Kings' minerals contingent on a determination of the unleased status of said minerals, and the Kings received no offer to participate as a working interest owner as discussed above.

h. Energen also does not indicate what drilling costs it seeks to have assessed in this matter. The Kings' present federal court suit seeks an accounting of both the revenues generated and the costs incurred in the drilling and operations of the Flora Vista Wells. No assessment of the drilling costs should occur without a determination of the amount and

reasonableness of costs and without payment of the revenues from such production owed to the Kings. Again, such matters are committed to the jurisdiction of the federal district court.

i. Energen, its predecessor operator, and its co-working interest owners, have benefitted from the inclusion of the King Interests in the pooled unit for the Flora Vista Wells. But the King Interests were not properly pooled in 1994. Since that time, the Kings have not received their just and equitable share of production from the Flora Vista Wells as required. This is the subject of the Kings' pending district court suit. The OCD should not accept Energen's invitation to change history at this stage and amend Order No. R-10154 to retroactively pool the King Interests back to 1994. This would not prevent waste and protect correlative rights. Rather, it would exceed the OCD's authority and involve it in pending litigation and matters not conferred to its expertise and jurisdiction.

WHEREFORE, Frank A. King and Paula S. Elmore f/k/a Paula S. King request that the Division deny Energen Resources Corporation's Application to Amend Compulsory Pooling Order No. R-10154, and that the Kings receive all other and further relief to which they are entitled.

RESPECTFULLY SUBMITTED,

CAVIN & INGRAM, P.A.

By: _____
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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 February 13, 2014 to the following:

Joseph Scott Hall
Montgomery & Andrews PA
P.O. Box 2307
Santa Fe, NM 87504-2307

CAVIN & INGRAM, P.A.

By: _____
Stephen D. Ingram