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

IN THE MATTER OF THE APPLICATION OF SAMSON RESOURCES COMPANY, KAISER-FRANCIS OIL COMPANY AND MEWBOURNE OIL COMPANY FOR CANCELLATION OF A DRILLING PERMIT AND APPROVAL OF A DRILLING PERMIT, LEA COUNTY, NEW MEXICO,

CASE NO. 13492

and

IN THE MATTER OF THE APPLICATION OF CHESAPEAKE PERMIAN, L.P. FOR COMPULSORY POOLING, LEA COUNTY, NEW MEXICO.

CASE NO. 13493

5 of 8 pm

CHESAPEAKE'S RESPONSE TO MOTION IN LIMINE

Chesapeake Operating, Inc. and Chesapeake Permian, L.P. ("Chesapeake") submit their Response in opposition to the Joint Motion in Limine filed August 5, 2005 by Kaiser-Francis Oil Company, Samson Resources Company and Mewbourne Oil Company (collectively "Kaiser").

INTRODUCTION AND FACTUAL BACKGROUND

Kaiser's Motion is just the latest in a series of pleadings making unfounded accusations regarding Chesapeake in this proceeding. It was Kaiser who first introduced correspondence between Chesapeake and the State Land Office ("SLO") in its effort to prevent Chesapeake from drilling the KF "4' State Well No. 1. In that correspondence, dated May 4, 2005, the Assistant Commissioner of Public Lands stated that the SLO's present understanding was that Chesapeake's activity on trust land "is not in compliance

with state statutes and SLO rules." Ex. 1. The Assistant Commissioner directed Chesapeake to provide a response to the SLO regarding the authority Chesapeake invokes to allow its operations on state trust acreage. *Id.*

In response to this letter from the Assistant Commissioner, and in accordance with his invitation to directly contact the State Land Office, representatives of Chesapeake met with the Commissioner of Public Lands on June 14, 2005 to explain their position. The Commissioner's designee on the Oil Conservation Commission, Jami Bailey, did not participate in the meeting and Chesapeake has never had any communications with Ms. Bailey. Following the meeting, the Commissioner sent a further letter setting forth the Land Office's position on the matter, which was copied to the Director. That letter is the object of Kaiser's Motion in Limine. *See* Ex. A, attached to Kaiser's Motion. In this letter, the Commissioner states that the SLO does not believe that Chesapeake's entry onto state trusts land was in bad faith. The CPL goes on to state that he will defer to the Oil Conservation Division regarding the configuration of the spacing unit for the well. *Id.* at ¶ 2.

As discussed below, the Commissioner does not sit on the Oil Conservation Commission and the accusation of improper *ex parte* communication with the Commissioner is baseless. Additionally, the Division has no jurisdiction to decide issues of trespass and Kaiser should not be allowed to introduce evidence regarding an alleged trespass, including the May 4, 2005 letter from the Assistant Commissioner. However, if the Division considers such evidence, having tried to inject the false issue of trespass into this proceeding, Kaiser should not be heard to argue that the final letter from the Land Office on that subject should be excluded. The letter is clearly admissible under the rules

of evidence governing the hearing and should be considered by the hearing examiner if the Division considers Kaiser's trespass claim in this proceeding.

I. KAISER'S ACCUSATIONS OF IMPROPER *EX PARTE* COMMUNICATIONS WITH THE COMMISSIONER OF PUBLIC LANDS ARE BASELESS.

A. The Commissioner's *Designee*, not the Commissioner, Sits on the Oil Conservation Commission.

Kaiser's motion is premised upon the fanciful notion that because the Commissioner of Public Lands is theoretically entitled to sit on the Oil Conservation Commission which hears appeals from the Division, a communication with the Commissioner violates the Division's rule regarding *ex parte* communications. The contention is baseless. As Kaiser well knows, when appeals from decisions by the Division are heard by the Oil Conservation Commission, in the tradition of his predecessors, Commissioner Lyons does not sit on the OCC. Rather, the Commissioner's ***designee***, Jami Bailey is a member of the Oil Conservation Commission. *Cf.* NMSA 1978, § 70-2-4 (the commission is composed of a designee of the commissioner of public lands, a designee of the secretary of energy, minerals and natural resources, and the director of the oil conservation division). Therefore, should either party here appeal a decision by the Division, there is no threat that the Commissioner will hear the dispute. Thus, any communication between Chesapeake and the Commissioner was proper and in no way implicates the rule regarding *ex parte* communications.

B. Discussions with the Commissioner Were Invited By the SLO.

In addition, the SLO invited communication directly from Chesapeake. Indeed, the Assistant Commissioner directed Chesapeake to submit information regarding Chesapeake's authority for its activities on the state trust land. Ex. 1. It was this letter

that precipitated the meeting between Chesapeake and the Commissioner. Because the Land Office had concerns, identified in the May 4, 2005 letter, Chesapeake thought it imperative to address these allegations with the Commissioner's office, as it was invited to do so by the letter from the Assistant Commissioner. Prior to initiating drilling activity, Chesapeake negotiated a surface use and damages agreement with the surface owner and at all times had the surface owner's permission to enter upon the property. *See* Affidavit of Clabe Pearson, attached hereto as Exhibit "A." Therefore, Chesapeake's communications with the Commissioner were proper and Kaiser had no right to control the operations by the SLO by participating in a meeting with Chesapeake.

C. There is No Evidence or Suggestion that the Merits of the Underlying Dispute Were Discussed During The Meeting With The Commissioner.

The dispute before the Division specifically deals with the configuration of the spacing unit for the well at issue. The Commissioner's letter makes clear that the Commissioner was not considering or weighing in on that subject and specifically states that it is the SLO understands that configuration issues "will be resolved by the proceedings pending in the Oil Conservation Division." *Id.* Therefore, the discussions between Chesapeake and the Commissioner were not improper *ex parte* communications.

II. THE DIVISION LACKS JURISDICTION TO ADJUDICATE CLAIMS OF TRESPASS AND SHOULD EXCLUDE ANY EVIDENCE REGARDING ALLEGED TRESPASS AT THE HEARING.

No New Mexico statute confers jurisdiction upon the Division to adjudicate issues relating to trespass or title disputes, particularly ***claims*** of trespass or title disputes. The Division is vested with authority over the conservation of oil and gas. NMSA 1978, § 70-2-6 (1935). Such authority is not unbounded. The Division's powers are founded

upon the duty to prevent waste and to protect correlative rights. NMSA 1978, § 70-2-11 (1935); *See Continental Oil Co. v. Oil Conservation Comm.*, 70 N.M. 310, 321, 373 P.2d 809, 816 (1962) (statutory authority to act is predicated on prevention of waste); *Santa Fe Exploration Co. v. Oil Conservation Comm.*, 114 N.M. 103, 112, 835 P.2d 819, 828 (1992). Thus, the Division cannot rule on matters absent this basis of jurisdictional power. *See Continental Oil Co., 70 N.M. at 321; Santa Fe Exploration Co.*, 114 N.M. at 112. Trespass and title disputes do not implicate the Division's duty to prevent waste or to protect correlative rights. Rather, they involve issues of property ownership and are inherently judicial in nature. As such, matters relating to trespass and title disputes do not fall within the jurisdictional ambit of the Division.

Trespass and title disputes are matters that properly fall within the exclusive province of the courts. The Oil Conservation Commission's and Division's past precedent support this principle. In the *Timber/Sharp* case, the Division concluded that it had "no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease" and that *Timber/Sharp* could apply for an adequate remedy in District Court. Order No. R-11700. In the same case, the Commission found:

> When an application for permit to drill is filed, the Division does not determine whether an applicant can validly claim a real property interest in the property subject to the application, and therefore whether the applicant is 'duly authorized' and 'is in charge of the development of a lease or the operation of a producing party.' ***The Division has no jurisdiction to determine the validity of any title, or the validity or continuation in force and effect of any oil and gas lease. Exclusive jurisdiction of such matters resides in the courts of the State of New Mexico.***

Order No. R-11700-B (emphasis added). The resolution of a trespass claim, like a title dispute, necessarily involves a determination of property ownership. Therefore, such resolution of this issue should be left for the district court, not the Division, and all evidence regarding alleged trespass should be excluded, including the May 4, 2005 letter from the Assistant Commissioner.

Because the Division has no jurisdiction to hear matters related to property ownership, it was not improper for Chesapeake to discuss these issues with the Commissioner and the Division should not consider any evidence at the upcoming hearing designed to show that Chesapeake somehow trespassed on state lands. However, the State Land Office is clearly entitled to take a position of whether or not there was a trespass on state lands. The Commissioner's letter makes clear that the SLO will not be a party to Kaiser's claim or tactics; there is no allegation by the SLO that Chesapeake trespassed on state lands. To the extent the Division considers the issue of alleged trespass, the Commissioner's letter is relevant and admissible to show the SLO's position on this matter as to state lands. To exclude this letter would cause severe prejudice to Chesapeake.

III. THE LETTER FROM THE COMMISSIONER IS CLEARLY ADMISSIBLE.

A. The Letter is Admissible Under the Rules of Evidence Governing OCD Hearings.

Rather than cite to any evidentiary basis for excluding the Commissioner's letter, Kaiser requests that the Division exclude the letter as punishment for what it terms Chesapeake's "questionable conduct." As argued above, the contact between Chesapeake and the Commissioner was not improper in any way, and was in fact invited by the SLO.

Thus, the only sanction that should be considered is upon Kaiser for making irrelevant, unsupported and false accusations in this proceeding. Further, while Kaiser cites to three evidentiary rules for its position that the letter should be excluded, it does not set forth any factual bases for excluding the letter under any of these rules.

It should be noted that the Division has been given the authority to promulgate rules of procedure at hearings. NMSA 1978, § 70-2-7 (1935). The Division has determined that "hearings... shall be conduced without rigid formality." NMAC Oil and Gas Procedure, § 19.15.14.1210(A). Furthermore, while the rules of evidence "***applicable to a trial before a court without a jury***" are generally applicable, the hearing examiner has the authority to relax these rules where "the ends of justice will be better served." *Id.* at § 19.15.14.1212 (A).

During bench trials, a judge is given more flexibility in making admissibility determinations than in jury trials. *Tartaglia v. Hodges*, 129 N.M. 497, 505, 10 P.3d 176, 184 (Ct. App. 2000). Appellate courts "presume that a judge is able to properly weigh evidence, and thus, the erroneous admission of evidence in a bench trial is harmless, unless is appears that the judge must have relied upon improper evidence in rendering a decision." *State v. Hernandez*, 127 N.M. 769, 774, 987 P.2d 1156, 1161 (Ct. App. 1999). Thus, because Division hearings, like a bench trial, the Division's hearing examiner is given wide discretion to admit evidence that might otherwise be excluded in a jury trial.

B. The Letter is Probative, is not Prejudicial to Kaiser and Exclusion of the Letter Would Prejudice Chesapeake.

The prejudice Kaiser asserts is caused by the Commissioner's letter is restricted to that resulting from an alleged *ex parte* communication. *See* Kaiser's Motion at pp. 3-4. Kaiser asserts no independent basis that prejudice might result from the contents of the

letter itself. The Commissioner takes the position that Chesapeake's entry onto state trust lands was not in bad faith, which is merely resolves questions raised in an earlier letter from the Assistant Commissioner's that Kaiser previously introduced in this proceeding and presumably seeks to rely upon at the upcoming hearing. A statement is not considered unfairly prejudicial simply because it is negative for the party opposing the evidence. *State v. Chamberlain*, 112 N.M. 723, 819 P.2d 673 (1991).

In an effort to prejudice the Division and inject a false issue of trespass into this case, Kaiser attached the May 4, 2005 letter from the Assistant Commissioner to Chesapeake to its Joint Motion to Limit Drilling Operations, filed on May 11, 2005. Additionally, Kaiser's prior argument to the Division made repeated mention of the letter. Undoubtedly, the May 4 letter was prompted by what Kaiser is now calling an *ex parte* communication by Kaiser, Mewbourne or Samson with the State Land Office. Presumably, as it has done so previously, Kaiser intends to use this letter as evidence supporting its position that Chesapeake did not have the authority to enter the state trust land, and was not in compliance with State statutes and SLO rules.

It is at best ironic and at worst bad faith that Kaiser seeks to rely on the earlier communication between the SLO and Chesapeake, while at the same time condemning Chesapeake for relying upon a like communication. Indeed, it would be prejudicial to ***Chesapeake***, and clear error, if the Division allows consideration of the Assistant Commissioner's letter, but excludes the Commissioner's letter. The probative value of the Commissioner's letter, which sets forth the State Land Office's final position on the matter, is far outweighed by any potential prejudice that Kaiser might suffer. Indeed, any potential prejudice suffered by Kaiser as a result of the Commissioner's letter would be

no greater than that suffered by Chesapeake as a result of the Assistant Commissioner's letter.

Further, any potential prejudice has already occurred, as the evidence in question is already before the Division. The Commissioner copied the Division's Director on the letter. Kaiser has chosen to bring the letter to the Division's attention and highlight it through the Motion in Limine. As noted, the Division should not address any issue concerning an alleged trespass at the hearing. However, the Division should retain its discretion to weigh all the evidence, including the Commissioner's letter, and determine whether or not it has probative value when making its decisions regarding the underlying dispute if it considers the false issue Kaiser has injected into this proceeding.

C. The Letter Does not Constitute Inadmissible Opinion Testimony.

Kaiser cites to Rule 11-701 NMRA for the proposition that the Commissioner's letter should be excluded, but goes no further than citing the rule. Presumably, Kaiser intended to target the Commissioner's statement that Chesapeake's activities were not in bad faith as alleged inadmissible lay opinion testimony.

Rule 11-701 states:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Id. The Commissioner is of the course the constitutional officer charged with the duty of administering state trust lands. His letter makes clear that his opinion is rationally based on his perception. *See* Ex. A ("Based on the discussions presented, the SLO's [sic] does not believe that this entry onto State Trust Lands by Chesapeake was in bad faith....").

Furthermore, the Commissioner's opinion is helpful for determination of a fact regarding the false issue Kaiser injected into this proceeding, specifically, to show that there is no allegation by the SLO that Chesapeake trespassed on state lands in bad faith.

In addition, the prior letter from the Assistant Commissioner, relied on by Kaiser to inject a false issue into these proceeding, sets forth the opinion that "[t]he SLO's present understanding is that Chesapeake's activity on trust land is not in compliance with the state statutes and SLO rules." The Commissioner's letter, which is similar in form to the Assistant Commissioner's opinion merely closes the loop on the false issue of trespass on state trust lands. However, if the Commissioner's letter is excluded, the previous letter from the Assistant Commissioner must likewise be excluded.

D. The Letter is Not Inadmissible Hearsay.

The Commissioner's letter falls with the hearsay exceptions allowing admission of records of regularly conducted activity, Rule 11-803(F), public records and reports, Rule 11-803(H) NMRA, and allowing statements in documents affecting an interest in property, Rule 11-803(O) NMRA. *See State v. Padilla*, 92 N.M. 19, 582 P.2d 396 (Ct. App. 1978), *cert. denied*, 92 N.M. 180, 585 P.2d 324 (1978) (public record can be admitted as proof of the facts which it relates without foundation testimony because of the assurance of accuracy for public records).

CONCLUSION

For the foregoing reasons, Chesapeake respectfully requests that Kaiser's Motion in Limine be denied, that the Division issue an order which limits the proof at the upcoming hearing solely to geological issues presented by the parties competing applications for spacing units for the KF "4" State Well No. 1, and that the Division

award Chesapeake its attorney's fees and costs incurred in responding to the Motion as part of its costs recoverable from interest owners in any unit approved by the Division encompassing the well.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: _____

John R. Cooney
Earl E. DeBrine, Jr.
Paul T. Halajian
Post Office Box 2168
Bank of America Centre
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505.848.1800

and

W. Thomas Kellahin
P. O. Box 2265
Santa Fe, New Mexico 87504
(505) 982-4285

ATTORNEYS FOR CHESAPEAKE OPERATING, INC.
AND CHESAPEAKE PERMIAN, L.P.

WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was faxed and mailed to the following counsel of record this 12th day of August, 2005:

J.E. Gallegos, Esq.
Gallegos Law Firm PC
460 St. Michaels Dr. #300
Santa Fe, NM 87505-1367
ATTORNEY FOR SAMSON RESOURCES COMPANY
Fax: 505-986-1367

James Bruce, Esq.,
P. O. Box 1056
Santa Fe, New Mexico 87504
ATTORNEY FOR MEWBOURNE OIL COMPANY
Fax: 505-982-2151

J. Scott Hall, Esq.
P. O. Box 1986
Santa Fe, New Mexico 87504
ATTORNEY FOR KAISER-FRANCIS OIL COMPANY
Fax: 505-989-9857

Gail MacQuesten, Esq.
NM Energy, Mineral & Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87504
Fax: 505-476-3462

David K. Brooks, Esq.
NM Energy, Mineral & Natural Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
Fax: (505) 476-3462

William V. Jones, Hearing Examiner
New Mexico Oil Conservation Division
1220 South St. Francis Drive
Santa Fe, New Mexico 87505
Fax: (505) 476-3462

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: _____
John R. Cooney

K:\dox\client\23254\116\W0510279.DOC

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

IN THE MATTER OF THE APPLICATION
OF MEWBOURNE OIL COMPANY FOR
CANCELLATION OF A DRILLING PERMIT
AND APPROVAL OF A DRILLING PERMIT
LEA COUNTY, NEW MEXICO.

CASE NO. 13492
ORDER R-12343

AFFIDAVIT OF CLABE PEARSON

Clabe Pearson, being first duly sworn, deposes and states:

1. I am over the age of eighteen years, am competent to testify to the matters contained herein, and have personal knowledge thereof.

2. I am the ~~owner~~ President of Merchant Livestock Company, Inc., a corporation that operates a cattle ranch in Lea County, New Mexico, consisting of fee acreage and land leased from the State of New Mexico.

3. Merchant Livestock Company is the Lessee under a surface lease with the State of New Mexico covering lands in the Township 21S, Range 35 East, Section 4 SE/4.

4. On or about March 30, 2005, I was approached by a representative for Chesapeake Permian, LP and Chesapeake Operating, Inc about obtaining a surface use easement so Chesapeake could come onto the surface of the property leased by Merchant Livestock in order to drill an oil and gas well.

5. On behalf of Merchant Livestock Company, I reached an agreement with Chesapeake, granting it permission to conduct operations of the surface of the property leased from the State by Merchant Livestock Company. Under the terms of that agreement, Chesapeake agreed to pay a fixed amount for surface damages that might be caused by the drilling of the Well and Merchant Livestock Company granted Chesapeake a surface easement to conduct operations.

6. Pursuant to the terms of the agreement, Chesapeake provided me with a check for surface use and damages for $5,000 and a formal written agreement. Although I negotiated the check, but because I was busy running cattle the written agreement was not signed by me until June 3, 2005. Before it began any preparatory work for drilling

EXHIBIT
tabbies
A

the well, which I understand has been designated the KF "4" State Well, Chesapeake had Merchant Livestock Company's consent to enter the leased lands and drill the well.

7. Chesapeake began location work during the middle of April and moved a rig in and started drilling a couple of weeks later, on approximately April 27, 2005. At all times it conducted any work on the property subject to Merchant Livestock Company's State lease, Chesapeake had been granted permission by Merchant Livestock Company to conduct surface operation.

FURTHER AFFIANT SAYETH NOT.

Clabe Pearson

Clabe Pearson

STATE OF NEW MEXICO)
) ss.
COUNTY OF LEA)

Signed and sworn to before me this 13th day of June, 2005, by Clabe Pearson, the President for Merchant Livestock Company.

Jackie Miller

Notary Public
My Commission Expires: 11/2/2008

(Seal)

K:\Agn\client\23251\0\W0489318.DOC