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**FAX TRANSMITTAL FORM**

**To**

Name: **Carl Leach, Esq.**  
Agency:  
Oil Conservation Commission  
Fax: 505-462-3220

- Urgent
- For Reply
- Please Comment
- Please Reply

**From**

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Date sent: 3-11-04  
Time sent: 4:15 pm  
Number of pages including cover page:

*Please see attached letter dated March 11, 2004 and objection to  
The EGI and Breth subpoena.*

**Copy by Facsimile to:**

**Florence Davidson, OCD, 505-476-3462**

**J. Scott [unclear] Esq. 505-989-9857**

**James [unclear] Esq. 505-982-2155**

**Devon Energy Production Company, L.P.  
Attn: Richard Winchester**

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March 11, 2004

**VIA FACSIMILE**

Carol Leach, Esq.  
Oil Conservation Commission  
1220 South St. Francis Drive  
Santa Fe New Mexico 87505

Re: NMOCD Case 12005 (de novo) Subpoena  
Application of EGL Resources, Inc. for pool expansion  
or in the alternative pool creation, Lea County, New Mexico

Re: NMOCC Cases 13048 and 13049 (de novo)  
Order R-11962

(1) Case 13048: Application of Devon Energy Production Company,  
L.P. for compulsory pooling, Lea County, New Mexico

(2) Case 13049: Application of EGL Resources, Inc.  
for compulsory pooling, Lea County, New Mexico

Dear Ms. Leach:

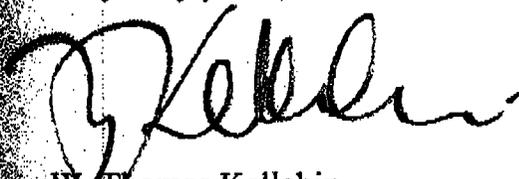
Yesterday, I was advised by Mr. Jim Bruce that Mr. Scott Hall, attorney for EGL-Landreth, had obtained from the Division a subpoena for my client, Devon, to produce data at 9:00 am Friday, March 12, 2003 at the Division's Santa Fe office. I have not and did not accept service, but I now have obtained a copy of this subpoena.

Carol Leach, Esq.  
March 11, 2004  
Page 2

Please find enclosed a joint objection by Devon and Southwestern raising objections to this subpoena. While it is questionable (a) whether there is proper service; (c) whether the Division can issue a valid subpoena for production at a time other than a scheduled hearing; or (d) even has jurisdiction to do so in a case that is pending before the Commission, Devon is gathering data to send to me in response to those items for which there is no objection and upon receipt I will deliver them to Mr. Hall.

As to those items for which there is an objection, I will await your decision on our objections. Unless you direct otherwise, I am not planning to appear at the Division's office at 9:00 am tomorrow.

Very truly yours,



W. Thomas Kellahin

cc: J. Scott Hall, Esq.  
Attorney for J. L. Landreth

James Bruce, Esq.  
Attorney for Southwestern Energy

Devon Energy Production Company, L.P.  
Attn: Richard Winchester

STATE OF NEW MEXICO  
ENERGY, MINERAL AND NATURAL RESOURCES DEPARTMENT  
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE APPLICATION OF  
EGL RESOURCES, INC. AND ROBERT LANDRETH  
FOR POOL EXTENSION FOR THE NORTH BELL LAKE  
DEVONIAN GAS POOL, OR ALTERNATIVELY, FOR A  
POOL CREATION AND SPECIAL POOL RULES, AND  
EXPANSION OF A GAS SPACING AND PRORATION UNIT,  
LEA COUNTY, NEW MEXICO

CASE NO. 13085  
ORDER NO. R-12106  
DE NOVO

DEVON ENERGY PRODUCTION COMPANY, L.P.  
AND  
SOUTHWESTERN ENERGY PRODUCTION COMPANY  
JOINT OBJECTIONS  
TO  
SUBPOENAS DATED MARCH 2, 2004  
ISSUED AT THE REQUEST OF  
EGL RESOURCES, INC. AND ROBERT LANDRETH

Devon Energy Production Company, L.P. ("Devon") by its attorneys, Kellahin & Kellahin, and Southwestern Energy Production Company ("Southwestern") by its attorney James Bruce jointly object to the Subpoena Duces Tecum issued by the Division on March 2, 2004 at the request of J. Scott Hall, attorney for EGL Resources, Inc. and Robert Landreth (jointly "EGL-Landreth") in Case 13085 which commands Devon to appear at 9:00 AM, Friday, March 12, 2004 before the Division and to produce documents set forth in the Subpoena Duces Tecum.

As grounds for their objections to this subpoena, Devon and Southwestern state the following:

**THE CENTRAL ISSUE**

The central issue of these proceedings is whether the Commission should continue to deny EGL-Landreth's attempts to dedicate a 640-acre gas spacing unit, instead of the required 320-acre gas spacing unit, to the Rio Blanco 4-1 well now dedicated to the N/2 of Section 4, T23S, R34E, Lea County, New Mexico.

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 2

### CRITICAL PROBLEM

Having failed to obtain sufficient reservoir data from their re-entry of the Rio Blanco 4-1 well to support their application for 640-acre spacing for Section 4 (Case 13085, Order R-12106), EGL-Landreth is now attempting to subpoena Devon's data for the well Devon drilled, and is currently completing and testing in the S/2 of Section 33, T22S, R34E. Devon is concerned that this subpoena is simply an effort by Devon-Southwestern's competitors to gain information under the guise of being relevant or leading to relevant data so that EGL-Landreth can use Devon's data to assess the risk for a well EGL-Landreth must now drill in the S/2 of Section 4.

The problem with the EGL-Landreth Subpoena is that, for the most part, it seeks to overcome the Division's denial of their application by Order R-12106, case 13085 by now seeking data from Devon-Southwestern for the wellbore they are still testing. EGL/Landreth had the opportunity to acquire data in the Rio Blanco 4-1 well, but chose not to. Now they want access to Devon's data, at no risk or expense to EGL/Landreth.

### BACKGROUND

Case 13085 is but the latest case involving a dispute between EGL-Landreth and Devon-Southwestern over whether the Rio Blanco 4-1 well located in the N/2 of Section 4 should be dedicated to a 320-acre or a 640-acre gas spacing unit for Devonian production.

Devon sought wildcard classification (320-acre gas well proration unit), pursuant to Division Rule 104, for the Rio Blanco 4-1 well in Case 13048 heard on April 10, 2003. The Division approved by Order R-11962 the dedication of the Rio Blanco 4-1 well to a standard 320-acre gas spacing unit consisting of the N/2 of Section 4. In companion Case 13049, EGL-Landreth sought and the Division denied their request to dedicate a 640-acre gas spacing unit to this same well, but oddly authorized EGL to operate the well despite the fact that EGL-Landreth opposed 320-acre dedication. Both Devon and EGL-Landreth sought and obtained a De Novo hearing before the Commission which was vacated until the Division entered an order in Case 13085.

Case 13085 was heard on October 2, 2003, and Order R-121206 was entered on February 20, 2004, once again, denying EGL-Landreth a 640-acre gas spacing unit for the Rio Blanco 4-1 well.

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 3

EGL-Landreth have no interest in Section 33 and are not involved in any way with Devon's Rio Blanco 33 Federal Well No. 1 in the S/2 of Section 33, yet they attempt to Subpoena items 7-8 concerning AFE and actual well costs for this well.

### DEVON RESPONSE TO SUBPOENA ITEMS

Devon-Southwestern object to EGL-Landreth's request to the extent that they attempt to impose obligations that are beyond those imposed by the New Mexico Rules of Civil Procedure, impose an undue burden, or seek discovery in violation of the work product, attorney/client and other applicable privileges.

For Devon's Rio Blanco 33 Federal Well No.1:

**Subpoena Item #1:**

Request: All open hole and cased hole-logs for the interval from 50' above the top of the Devonian formation to total depth

Response: will produce when available.

**Subpoena Item #2:**

Request: all logs for the interval from 50' above the top of the Devonian to total depth.

Response: will produce.

**Subpoena Item #3:**

Request: All DST reports, including pressures charts, fluid recovery data and observed flow rates, together with service company analysis thereof with respect to reservoir parameters.

Response: will produce only the raw field report available to Devon. Devon has no duty or obligation to do EGL/Landreth's homework.

**Subpoena Item #4:**

Request: All daily drilling reports from commencement through completion of the well.

Response: will produce drilling reports for the period of drilling operations from the top of the Devonian formation to TD. Any other period is irrelevant to this case and could reveal information regarding prospective formations not germane to this case.

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 4

Subpoena Item #5:

Request: All data, analysis and reports for core and side-wall core obtained in the Devonian formation.

Response: will produce

Subpoena Item #6:

Request: All evidence utilized or which can be utilized in establishing the level of the gas-water contact underlying Section 33

Response: Objectionable due to vagueness. Devon guesses that EGL-Landreth can use information is provided in Item #'s 1 - 5 above as well as publicly available sources to arrive at their opinion.

Subpoena Item #7:

Request: A copy of the AFE that was prepared for execution by Devon's partners.

Response: not relevant

Subpoena Item #8:

Request: All documents or a summary reflecting actual expenditures from commencement of operations on the well through the setting of the liner through the Devonian at total depth.

Response: not relevant

Subpoena Item #9:

Request: All completion reports as such become available

Response: will produce

**EGL-LANDRETH SEEK DEVON'S DATA  
WHICH IS CONFIDENTIAL IN NATURE  
AND DESERVES TO BE PROTECTED  
AS A TRADE SECRET**

In addition to the data provided, Devon has data and interpretations that are classified as confidential business information and the trade secrets of Devon. Although the Division is not required to strictly adhere to the New Mexico Rules of Evidence,<sup>1</sup> Rule 11-508 of the New Mexico Rules of Evidence provides:

<sup>1</sup> OCD Rule 1212 provides in part: "In general, the rules of evidence applicable in a trial before the court without a jury shall be applicable, provided that such rules may be relaxed, where, by so doing, the ends of justice will be better served." (emphasis added).

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 5

"a person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice...."

The basic purpose of this privilege is to foster technological advances and innovations. Although there is no definition of "trade secret" contained within the rule, an often cited definition from the **Restatement of Torts, Section 575 Comment b (1939)** is informative:

"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which give him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers...."

In addition, it is instructive to note that Congress in drafting the Freedom of Information Act ("FOIA"),<sup>1</sup> which requires that every agency of the United States make available to the public certain information, found justification for withholding certain types of information from the public, including two specific types: (1) trade secrets and other confidential information, and (2) confidential geological and geophysical information.

One of the major incentives for gas exploration is the opportunity to obtain exclusive knowledge concerning potential gas or oil reserves. Without the additional incentive of having this data remain confidential, Devon's exploration would be compromised. Such information meets the definition of a trade secret defined above because it is information which Devon is using in its exploration business, and which gives it an opportunity to obtain an advantage over competitors who do not have this seismic data.

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<sup>1</sup> 5 American Law of Libs. Section 186.01 (Matthew Bender 1994).

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 6

### **DISCLOSURE OF TRADE SECRETS PERMITTED IN LIMITED INSTANCES**

Although the trade secret privilege is not absolute, the courts have recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir 1965).

When deciding the issue of whether to require disclosure of a trade secret and if so under what circumstances, the Commission is faced with the following issues:<sup>2</sup>

**(1) What is the need for disclosure?**

Will disclosure of this type of information significantly aid the Commission in fulfilling its functions? In this case, EGL-Landreth pretend to "need" Devon's data so that they can operate a well in the S/2 of Section 4. However, that "need" is not relevant to any issue to be decided by the Commission.

**(2) What is the danger to the owner of the trade secret in requiring disclosure?**

Because Devon-Southwestern and EGL-Landreth own other mineral interests in the immediate vicinity, the disclosure of Devon's confidential data will in fact give EGL-Landreth either (a) a competitive advantage in other tracts in which they own interests and/or (b) establish a commercial value for purposes of selling or trading their interest to others.

In this case, the data is not relevant to the Commission's decision in the compulsory pooling cases involving the N/2 of Section 4 and can serve only to harm the business interests of Devon. EGL has interests in this area, including other potential spacing units in this immediate vicinity. It is without doubt that EGL and Landreth are a competitor of Devon and Southwestern. The disclosure of the data to EGL-Landreth would allow it to obtain an unfair advantage to the detriment of Devon. This information was developed at great cost and is of a type not normally released to the public or to uncommitted investors and would cause substantial competitive harm if released. In *Pennzoil Company v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976) the United States Court of Appeals held that the Federal Power Commission had abused its discretion when it required disclosure of trade secrets including confidential geophysical information. The Court remanded the case because the Commission failed to demonstrate that disclosure of this information would serve a legitimate regulatory function.

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<sup>2</sup> *Pennzoil Co. v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976).

NMOCD Case 13085

Devon-Southwestern's Objections to Subpoena

Page 7

The disclosure of Devon's data in these cases does not serve any legitimate new pool designation or pool extension function of the Division. See 70-2-17(C) NMSA (1979). In *Amerada Hess Corp.*, 50 FPC 1048 (1970), the Federal Power Commission held that:

"The general disclosure of proprietary reserve data would have an inhibiting effect on future exploration of natural gas reserves so speculators could equally benefit with those producers when they make geological and geophysical expenditures."

**(3) Are there alternative means of obtaining the same or similar information without requiring disclosure?**

To require disclosure of data in this case would be a substantial departure from prior decisions by the Division. Even in cases where such data is relevant to an issue, the Division has respected requests for the confidentiality of such data and has allowed applicants and opponents to exchange the raw data and conduct their own studies and analysis.

If EGL-Landreth believe they need such studies, reports or analysis of service company work, then it can go out and purchase its own studies. There is no reason for them to receive it free of cost from Devon.

**(4) How adequate are the protective measures available to the Division?**

The second sentence of Rule 11-508 requires the Court (the Division) to take "such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require".

In this case, it will not be possible for the Division to take adequate measures to protect Devon's trade secrets from disclosure. No type of confidentiality agreement will protect Devon in this case. The very act of turning over any part of this data to EGL-Landreth will allow them to use the information to assess the potential of its other properties.

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 8

### **EGL-LANDRETH SEEKS DOCUMENTS AVAILABLE IN PUBLIC RECORDS**

EGL-Landreth wants geologic and petroleum engineering data concerning the gas/water contact in Section 33. No new relevant data has been obtained regarding the specific location of the gas/water contact. Prior information regarding the gas/water contact is available in the public record.

EGL-Landreth is asking Devon to prepare EGL-Landreth case and to do EGL-Landreth's research. All relevant data is already available to EGL-Landreth either in public records or in EGL-Landreth's possession. Devon has no obligation or duty to do homework for EGL-Landreth.

### **EGL-LANDRETH SEEK DEVON'S CONFIDENTIAL BUSINESS RECORDS**

EGL-Landreth seeks production of Devon's internal economic documents concerning estimates of costs analysis which are not relevant. Devon-Southwestern have no obligation to make or provide documents to assist EGL-Landreth in deciding if they desire to drill a well is the subject of Section 4. They seek documents to help them make that decision or to value its interest, neither of which is relevant to any decision the Commission must make in this case.

### **AUTHORITY FOR EXPENDITURE "AFEs"**

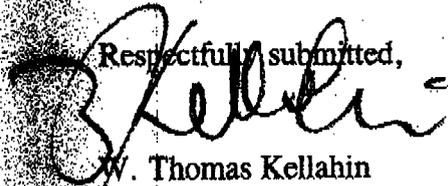
Devon's cost information regarding drilling, completion and testing of the Rio Blanco "33" Federal Com. well is confidential to Devon, and of no relevance to this case.

NMOCD Case 13085  
Devon-Southwestern's Objections to Subpoena  
Page 9

### CONCLUSION

This is a plain well-spacing case in which EGL-Landreth are seeking to unnecessarily obtain confidential data so that it can give itself a competitive advantage in other tracts in which it owns interests, and to establish a commercial value for its interests in this area. Devon has no obligation to provide confidential data to assist EGL-Landreth in deciding if it desires to drill and operate a well in the S/2 of Section 4. It seeks documents to help it make that decision or to value its interest neither of which is relevant to any decision the Commission must make in this case. Regardless of EGL-Landreth's motives, the discovery of Devon's trade secrets is not relevant to any issue in these cases and would be an abuse of the Division's powers.

Respectfully submitted,



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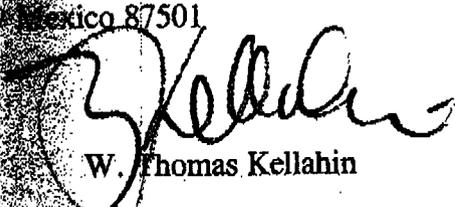
### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was transmitted by facsimile or hand delivered on the 11th day of March, 2004 as follows:

Carol Leach, Esq.  
Oil Conservation Commission  
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