HOLLAND&HART LLP

William F. Carr
wcarr@hollandhart.com

August 30, 2004

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VIA HAND DELIVERY

Mr. Mark E. Fesmire, P.E.
Director
Oil Conservation Division
New Mexico Department of Energy,
Minerals and Natural Resources
1220 South Saint Francis Drive
Santa Fe, New Mexico 87505

Re: Case No. 13335: Application of Devon Energy Production Company, L.P. for compulsory pooling, Eddy County, New Mexico.

Dear Mr Fesmire:

Enclosed is the Reply of Marbob Energy Corporation and Pitch Energy Corporation to Devon's Reply to the Motion to Dismiss.

Your consideration of this matter is appreciated.

Very truly yours,

William F. Carr
Attorney for Marbob Energy Corporation
and Pitch Energy Corporation

cc: James Bruce, Esq.
Mr. Will Jones, Hearing Examiner
Ms. Gail MacQuesten, Esq.
Mr. Raye Miller

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

IN THE MATTER OF THE APPLICATION OF
DEVON ENERGY PRODUCTION COMPANY, L.P.
FOR COMPULSORY POOLING, EDDY COUNTY,
NEW MEXICO.

CASE NO. 13335

2004 AUG 30 PM 4 10

REPLY OF MARBOB ENERGY CORPORATION AND PITCH ENERGY CORPORATION TO DEVON RESPONSE TO MOTION TO DISMISS

COME NOW, MARBOB ENERGY CORPORATION, ("Marbob") and PITCH ENERGY CORPORATION ("Pitch"), through their undersigned attorneys, hereby Reply to the Response of Devon Energy Production Company, L.P. ("Devon") to its Motion to Dismiss as follows:

1. Devon states that it improperly proposed the original well on the subject spacing unit well under the 1968 Joint Operating Agreement. While it contends it acted improperly, to date, it has not corrected what it did wrong.

2. Devon proposed the original well under the 1968 Joint Operating Agreement, drilled the well under this agreement and has operated this spacing unit as if it had "properly" proposed the well and developed this land. By its course of conduct it has ratified and adopted the 1968 Joint Operating Agreement and cannot now reject it. See, *See-Tee Mining Corporation v. National Sales, Inc.*, 76 N.M. 677, 417 P.2d 810, 811 (1966). All the Division has to do is look at Exhibit B to the Motion to Dismiss to see that Devon has been conducting its operations, not just when it was proposing to drill but thereafter, pursuant to the 1968 Agreement.

3. Each time Devon drills on this spacing unit its selects whichever Joint Operating Agreement maximizes the interest of Devon at the expense of other interest owners in this acreage:

A. When the original well was drilled, Devon proposed and drilled the well under the 1968 Joint Operating Agreement. This well was a high risk well and, under the 1968 Agreement, Devon was able to spread the interest of the pooled parties to the other participating interest owners in this 320-acre spacing unit. In other words, Marbob and other participating interest owners had to assume their respective share of the risk of drilling.

B. Now that the area has been developed and the risk associated with the

second well is greatly reduced, Devon proposes to drill under the March 1, 2001 Joint Operating Agreement that permits Devon to advance the pooled parties share of drilling costs and keep the entire 200% charge for risk imposed by the pooling order -- without sharing it with Marbob, Pitch and others.

See, *Yucca Mining & Petroleum Company v. Howard C. Phillips Petroleum Company*, 69 N.M. 281, 365 P.2d 925 (1961) where the New Mexico Supreme Court stated "the law will not permit a party to sit idly by and await the results which, if favorable, he will receive the benefit of, but if unfavorable, ask rescission."

4. To obtain a compulsory pooling order, Devon must first show that it has made a good faith attempt to reach voluntary agreement with the parties whose interests it seeks to pool. On the facts of this case, Marbob and Pitch do not know what contracts and orders govern their interests in this unit or in these wells. Devon cannot assert that it has made a good faith effort to reach a voluntary agreement for the development of these lands until it sorts this matter out and makes proposals to the other interest owners that, if accepted, will clarify the rights and interests of the parties in the proposed well.

WHEREFORE, MARBOB ENERGY CORPORATION and PITCH ENERGY CORPORATION request that they be dismissed from this compulsory pooling application because (1) their interests are committed to this spacing unit and the proposed well by the 1968 Joint Operating Agreement that was used by Devon to form the spacing unit and to drill and operate the initial well thereon, and (2) because Devon has not made a good faith effort to secure voluntary agreement for the development of this spacing unit. IN THE ALTERNATIVE, Marbob and Pitch request that the hearing on Devon's pooling application be continued until Devon clarifies to Marbob and Pitch what it is that Devon is proposing and what contracts and orders govern their interests in this spacing unit.

Respectfully submitted,

HOLLAND & HART LLP

By: _____
William F. Carr
Post Office Box 2208
Santa Fe, NM 87504
Telephone: (505) 988-4421

ATTORNEYS FOR MARBOB ENERGY CORPORATION

CERTIFICATE OF SERVICE

I certify that on August 30, 2004 I served a copy of the foregoing document to the following by Facsimile to:

Devon Energy Production Company, L.P.
c/o James Bruce, Esq.
369 Montezuma, No. 213
Santa Fe, New Mexico 87501
Fax No. (505) 982-2151

William F. Carr

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