

# CAVIN & INGRAM, P.A.

ATTORNEYS & COUSELORS AT LAW

40 FIRST PLAZA

SUITE 610

ALBUQUERQUE, NEW MEXICO 87102

TELEPHONE  
(505) 243-5400

FACSIMILE  
(505) 243-1700

MAILING ADDRESS  
P.O. BOX 1216  
ALBUQUERQUE, NM 87103-1216  
CILAWFIRM@AOL.COM

SEALY H. CAVIN, JR. †\*\*  
STEPHEN D. INGRAM †

† Also Admitted in Texas  
\*\* Also Admitted in Colorado  
\* New Mexico Board of Legal  
Specialization Recognized Specialist in  
the Area of Natural Resources - Oil and  
Gas Law

February 7, 2014

Via Facsimile to (505) 476-3462 and U.S. Mail

New Mexico Energy, Minerals and  
Natural Resources Department  
Oil Conservation Division  
1220 S. St. Francis Drive  
Santa Fe, NM 87501

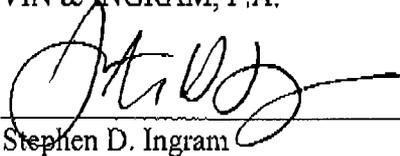
Re: *In the Matter of the Application of Energen Resources Corporation to Amend  
Compulsory Pooling Order No. R-10154, San Juan County, New Mexico;  
NMOCD Case No. 15072*

Gentlemen:

Enclosed for filing in the referenced matter is a Motion to Dismiss Application on behalf of Frank King and Paula S. Elmore f/k/a Paula S. King. 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**

4710-7 3:07

**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**

**MOTION TO DISMISS APPLICATION**

Frank A. King and Paula S. Elmore f/k/a Paula S. King (the "Kings"), by and through their undersigned attorneys, Cavin & Ingram, P.A. (Stephen D. Ingram), hereby move the Hearing Examiner to dismiss the Application of Energen Resources Corporation ("Energen") for an Order Amending Compulsory Pooling Order No. R-10154, and in support thereof would show as follows:

1. The Kings are the owners of the minerals underlying the following lands in San Juan County, New Mexico:

Township 30 North, Range 11 West, NMPM  
Section 19: W/2NW/4SE/4, except 1.63 acres, more or less  
Containing 18.37 acres, more or less

Energen seeks to amend Order No. R-10154, issued on July 19, 1994, so as to pool the Kings' minerals to the base of the Pictured Cliffs Formation (the "King Interests") by its present Application.

2. The Kings leased the King Interests in 1972. Norman L. Gilbreath and Loretta E. Gilbreath (the "Gilbreaths") are the successor lessees under said lease. The leasehold interest granted in the King Interests was in the nature of a fee simple determinable with possibility of reverter in the Kings if production ceased for any cause and was not resumed within sixty (60) days thereafter. In this case, the Wright #1 Well, API 30-045-21174, which originally held the

lease of the King Interests, did not produce any oil or gas during the Gilbreaths' operation of the Wright #1 Well for the periods of May 1990 – February 1991, April 1991 – February 1996, and June 1999 – February 2004, as reflected by the OCD production records regarding said well. Accordingly, the lease expired for non-production at least as of July 1990.

3. The King Interests were purportedly pooled by Order No. R-10154 on application of Energen's predecessor-in-interest, Maralex Resources, Inc. ("Maralex"). The Kings were undisputedly not noticed in said proceeding and were provided no opportunity to participate in said pooling proceeding. Instead, only the Gilbreaths were noticed and appeared as purported lessees of the King Interests sought to be included within the pooled unit. However, as of the 1994 pooling proceeding, the lease of the King Interests had expired for non-production, and the Gilbreaths had no valid leasehold interest in the King Interests as of the time of the 1994 pooling proceeding to be committed to the spacing unit.

4. The Kings have filed a lawsuit entitled *Frank A. King and Paula S. Elmore f/k/a Paula S. King v. Norman L. Gilbreath, et al.*, No. 1:13-CV-00862 RHS-LAM, in the United States District Court for the District of New Mexico, in which the Kings have sued to have the court declare that the lease of the King Interests had previously forfeited for non-production and to recover damages for the failure of the Defendants therein to account to the Kings for revenues generated by the production of oil and gas from lands to which the King Interests pertain. The Defendants in said suit include the Gilbreaths, Energen, Maralex, and other working interest owners who purported to jointly operate the King Interests as part of the pooled unit. That suit is pending. See, Exhibit A, Complaint for Declaratory Relief, Accounting, Quiet Title and Other Relief. Said action invokes the district court's jurisdiction to construe the lease provisions, to quiet title to the King Interests, and recover damages for unpaid revenues. The Kings also seek

relief therein for the Defendants' breach of NMSA 1978, §70-2-18(B) of the New Mexico Oil and Gas Act for failure to properly pool the King Interests, in which said statute authorizes the Kings to recover the amount to which they would be entitled if pooling had occurred or the amount to which the Kings are entitled in the absence of pooling, whichever is greater. The Defendants contest the Kings' entitlement to the relief requested in the district court action. Thus, there is pending a contested civil action which involves contractual rights, title disputes, and damage recovery, none of which matters fall within the jurisdiction of the OCD.

5. Energen's Application to Amend Compulsory Pooling Order No. R-10154 was filed after the Kings' district court suit, and is an improper attempt to have the OCD alter the legal status of the parties 20 years after the fact. It would not be in the proper exercise of the OCD's authority to hear this dispute. The Kings accordingly move the Hearing Examiner to dismiss Energen's Application.

6. No New Mexico statute confers jurisdiction upon the OCD to adjudicate issues regarding contractual disputes, title disputes and recovery of damages. The OCD's authority is to prevent waste of oil and gas resources and protect correlative rights. NMSA 1978, §70-2-11; *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 321, 373 P.2d 809, 816 (1962). The OCD has no authority to rule on any application absent this basis of jurisdictional power. See, *Continental Oil Co.*, 70 N.M. at 321. The Kings' claims in the district court action do not implicate the technical expertise of the OCD. Disputes over contractual rights or title do not implicate the OCD's duty to prevent waste or protect correlative rights. The OCD has repeatedly disclaimed authority to resolve disputes over contracts and ownership of property, as being with the exclusive province of the courts:

The Division has no jurisdiction to determine the validity of any title, or the validity or the continuation in force and effect of any

oil and gas lease. Exclusive jurisdiction of such matters reside in the courts of the State of New Mexico.

*In re Timber/Sharp*, Order No. R-11700 (Dec. 13, 2001). The issues in the pending federal court action involve issues of contract, title and damages, all of which are inherently judicial in nature. For the OCD to act on Energen's Application would be to impede on the federal court's jurisdiction.

7. The primary jurisdiction doctrine "provides courts with flexible discretion to refer certain matters to a specialized administrative agency." *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 857 F. Supp. 838, 841 (D.N.M. 1994). The doctrine of primary jurisdiction applies *only* when both a court and administrative agency have concurrent jurisdiction. *Eldridge v. Circle K Corp.*, 1997-NMCA-022, ¶21, 123 N.M. 145, 934 P.2d 1074. In *Eldridge*, the worker's compensation judge was instructed to defer action on a worker's compensation claim until a pending district court tort action by the employee was resolved by the court:

[T]he district court is a constitutional court of general jurisdiction in which parties are afforded full discovery, actual confrontation of witnesses, and the right to a jury trial. In contrast, the WCJ presides over an administrative court of limited jurisdiction with restricted opportunities for discovery, limited live testimony, and no jury trial.... Common law claims for intentional tort involve questions that are 'within the conventional competence of the courts.' [cite omitted.] The common law claim in this case does not invoke the expertise of the WCJ in determining whether the Estate's claim is within the coverage of the Act. Therefore, we conclude that this case does not call for deference to the administrative agency under the doctrine of primary jurisdiction. [cited omitted.]

*Eldridge*, 123 N.M. at 150-1. The OCD neither possesses the expertise or jurisdiction over the issues made the basis of the claims in the federal court litigation. The issues presented by the Kings' federal court suit are squarely within the conventional expertise of judges and are

routinely decided by courts. *See, Johnson v. Yates Petroleum Co.*, 1999-NMCA-066, 127 N.M. 355, 981 P.2d 288 (“Interpreting lease agreements is well within the judicial competence of this court.”). The entire dispute concerning the status of whether the Defendants possess any leasehold or other interests in the King Interest, whether the King Interests were properly pooled, and the damages to which the Kings are entitled as a result of the failure to pay the Kings revenues to which they are entitled from production, have all been submitted to the jurisdiction of the federal court.

8. Additionally, 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 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. 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 unit (although they have failed to pay the Kings revenues owed), yet Energen is now seeking to amend the pooling order to include the King Interests 20 years later.

9. Further, Energen's request to retroactively force-pool the King Interests back to 1994 defeats the purpose of NMSA 1978, §70-2-18(B), 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 responsibilities to properly pool, and "change history" by obtaining a retroactive pooling application 20 years later without consequences for his violation of the pooling statute, the purpose of the statute is defeated.

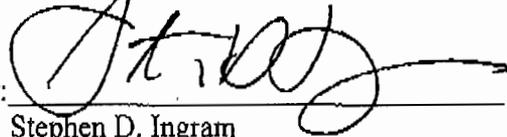
10. Alternatively, it is premature for the OCD to be hearing this matter, pending the determination by the district court of the status of the lease of the King Interests. If the OCD does not dismiss Energen's Application, it should at the very least stay Energen's Application indefinitely pending determination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

11. 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 Energen's Application be dismissed, and that the Kings receive all other and further relief to which they are entitled.

RESPECTFULLY SUBMITTED,

CAVIN & INGRAM, P.A.

By:   
Stephen D. Ingram  
P. O. Box 1216  
Albuquerque, NM 87103  
(505) 243-5400  
[sding1216@aol.com](mailto:sding1216@aol.com)

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 7, 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

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FRANK A. KING and PAULA S. ELMORE )  
f/k/a PAULA S. KING, )

Plaintiffs, )

v. )

No. \_\_\_\_\_ )

NORMAN L. GILBREATH, LORETTA E. )  
GILBREATH, ENERGEN RESOURCES )  
CORPORATION, ROBERT L. BAYLESS, )  
PRODUCER LLC, JAMES M. MARTIN, )  
SAN JUAN BASIN PROPERTIES, LLC )  
a/k/a SAN JUAN BASIN OPERATING )  
a/l/a SAN JUAN BASIN RESOURCES, )  
TOP OPERATING COMPANY, MARALEX )  
RESOURCES, INC., JOHN DOES I-X, AND )  
ALL UNKNOWN PERSONS WHO MAY )  
CLAIM A LIEN, INTEREST OR TITLE )  
ADVERSE TO PLAINTIFFS, )

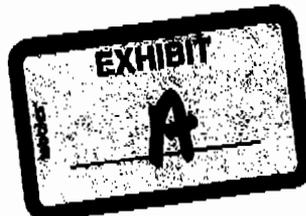
Defendants. )

**COMPLAINT FOR DECLARATORY RELIEF,  
ACCOUNTING, QUIET TITLE AND OTHER RELIEF**

Plaintiffs Frank A. King and Paula S. Elmore f/k/a Paula S. King, for their Complaint,  
state as follows:

**PARTIES**

1. Plaintiff Frank A. King is an individual resident and citizen of Texas.
2. Plaintiff Paula S. Elmore f/k/a Paula S. King is an individual resident and citizen of Texas.
3. Defendant Norman L. Gilbreath is an individual resident and citizen of New Mexico.



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4. Defendant Loretta E. Gilbreath is an individual resident and citizen of New Mexico.

5. Defendant Energen Resources Corporation is a corporation formed under the laws of Alabama with its principal place of business in Alabama.

6. Defendant Robert L. Bayless, Producer LLC, is a limited liability company formed under the laws of Colorado with its principal place of business in Colorado, and is sued as successor-in-interest to Robert L. Bayless.

7. Defendant James M. Martin is an individual resident and citizen of Kansas.

8. Defendant San Juan Basin Properties, L.L.C a/k/a San Juan Basin Operating a/k/a San Juan Basin Resources is a limited liability company formed under the laws of Colorado with its principal place of business in Colorado.

9. Defendant Top Operating Company is a corporation formed under the laws of Colorado with its principal place of business in Colorado.

10. Defendant Maralex Resources, Inc. is a corporation formed under the laws of Colorado with its principal place of business in New Mexico.

11. Defendants John Does I-X are all parties presently unknown who may be subsequently discovered as claiming an interest in the Subject Interests described below and/or who may be responsible to account to Defendants.

12. Plaintiffs are credibly informed and believe, and upon such information and belief allege, that there are persons unknown to Plaintiffs who may claim some lien, interest or title adverse to the ownership of Plaintiffs in and to the Subject Interests described below, or some portion thereof. Plaintiffs have made due and diligent search and inquiry to ascertain the names, residences and whereabouts of such unknown persons, but Plaintiffs have been unable to obtain

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such information. All such persons are made Parties Defendant herein under the name "ALL UNKNOWN PERSONS WHO MAY CLAIM A LIEN, INTEREST OR TITLE ADVERSE TO PLAINTIFFS."

#### JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §1332, in that Plaintiffs are citizens of a state other than that of which all of the other Defendants are citizens as of the time of filing of this Complaint, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

14. Venue in this district is proper under 28 U.S.C. §1391(a), in that a substantial part of the events or omissions giving rise to this claim occurred, or a substantial part of the property that is the subject of this action is situated, in this district.

#### FACTS

15. This is an action to enforce the forfeiture of an oil and gas lease and to recover damages for Defendants' failure to account to Plaintiffs for revenues generated by the production of oil and gas from lands in which Plaintiffs own a mineral interest.

16. Plaintiffs together own 100% of the minerals underlying the following lands in San Juan County, New Mexico:

Township 30 North, Range 11 West, NMPM  
Section 19: W/2NW/4SE/4, except 1.63 acres, more or less  
Containing 18.37 acres, more or less

(hereafter the "Subject Interests").

17. Plaintiffs entered into an Oil and Gas Lease dated August 4, 1972 ("Subject Lease") with Rodney P. Calvin regarding the Subject Interests. The primary term of the Subject Lease was three years and as long thereafter as oil or gas or casinghead gas is produced. The

Subject Lease covers all horizons from the surface of the earth to the base of the Pictured Cliffs Formation.

18. The original lessee, Rodney P. Calvin, thereafter drilled the Wright #1 Well, API 30-045-21174, and completed said well in the Pictured Cliffs Formation. The spacing unit for the Wright #1 Well as approved by the New Mexico Oil Conservation Division ("OCD") includes the Subject Interests. Well spacing is the regulation of the number and location of wells over an oil and gas reservoir as a conservation measure.

19. Norman L. Gilbreath and Loretta E. Gilbreath (the "Gilbreaths") became successor operators of the Wright #1 Well on or about March 5, 1985. Since that time, the Gilbreaths have been responsible for operations on the Wright #1 Well and have been responsible for paying revenues to Plaintiffs as lessors of the Subject Interests for production from said well. However, the Gilbreaths have paid no revenues attributable to production from the Wright #1 Well to Plaintiffs.

20. The Subject Lease has expired by its terms for non-production. There was no production of oil or gas during the Gilbreaths' operation of the Wright #1 Well for the periods of May 1990 - February 1991, April 1991 - February 1996 and June 1999 - February 2004. The Subject Lease contains no shut-in clause allowing it to be perpetuated by being shut-in. No delay rental or shut-in royalty was paid to Plaintiffs. Under the express terms of the Subject Lease, if production ceases for any cause, the Subject Lease terminates if operations for drilling a well are not resumed within 60 days after cessation. No such operations occurred on the Wright #1 Well so as to prevent automatic termination of the Subject Lease. Accordingly, the Subject Interests have been unleased since at least July of 1990.

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21. Maralex Resources, Inc. ("Maralex") as operator purported to pool the Subject Interests in a pooling proceeding before the OCD in 1994. Pooling is a voluntary or compulsory joining of oil and gas interests for common development within a state-established spacing or proration unit. Pooling of separate interests within a spacing unit, whether by agreement or compulsory pooling, is required by New Mexico law in order to protect the correlative rights of all owners within said unit and to prevent waste through the drilling of unnecessary wells. All owners of interests to be pooled must be noticed in such proceeding. At that time, the Gilbreaths had no valid leasehold interest in the Subject Interests. However, only the Gilbreaths, and not Plaintiffs, were noticed in said proceeding as concerns the Subject Interests.

22. Pursuant to said pooling proceeding, the Flora Vista #19-2 Well, API 30-045-29139, was drilled on lands dedicated to the spacing unit for said well, including the Subject Interests, and was completed in the Fruitland Coal Formation. Energen Resources Corporation ("Energen") subsequently took over operations of the Flora Vista #19-2 Well in 2004, and drilled the Flora Vista #19-3 Well, API 30-045-32574, in 2004, within the same pooled unit, under the purported authority of the 1994 OCD pooling order. The Flora Vista #19-3 Well was also completed in the Fruitland Coal Formation.

23. Energen entered into an Operating Agreement dated August 1, 2004 regarding the Flora Vista #19-2 Well with working interest owners James M. Martin, Maralex, Robert L. Bayless, Sun Juan Basin Operating, Top Operating Company, and the Gilbreaths, in which they agreed to jointly develop and operate lands including the Subject Interests.

24. Energen entered into an Operating Agreement dated November 21, 2004 regarding the Flora Vista #19-3 Well with working interest owners James M. Martin, Maralex,

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Robert L. Bayless, San Juan Basin Operating, Top Operating Company and the Gilbreaths, in which they agreed to jointly develop and operate lands including the Subject Interests.

25. The Flora Vista #19-2 and #19-3 Wells which were purportedly pooled by Maralex are now being operated as if pooled by Energen. But the Subject Interests were never properly pooled. Defendants are co-tenants of Plaintiffs regarding the Subject Interests.

26. In August 2005, the Gilbreaths opted to take their gas in kind, and purported to be responsible for paying the royalty burdens attributable to their interests. However, the Gilbreaths did not do so. Plaintiffs have never received payment of revenues from the Gilbreaths attributable to the Flora Vista #19-2 and #19-3 Wells.

27. Plaintiffs have been denied production revenues to which they are entitled by the Gilbreaths with respect to the Wright #1 Well. Plaintiffs have been denied production revenues to which they are entitled by Defendants with respect to the Flora Vista #19-2 and #19-3 Wells.

28. Using reasonable diligence under the circumstances of this case, Plaintiffs could not have discovered facts as to the failure to pay revenues wrongfully withheld from them prior to the expiration of any operative limitations period.

**COUNT ONE**  
**DECLARATORY RELIEF**

29. Plaintiffs incorporate by reference the foregoing allegations.

30. Plaintiffs assert a cause of action to have the Court declare that the Subject Interests have been unleased since at least July of 1990, as the Subject Lease was forfeited for non-production at that time, and that the Subject Interests are unpooled, as they were not properly made the subject of a pooling order or pooling agreement.

31. Under NMSA 1978, §70-1-3, it is the duty of the lessee, within 30 days from the date of the forfeiture of an oil, gas or mineral lease, to release such lease of record in the county

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where the leased land is situated, without cost to the owner thereof. Under NMSA 1978, §70-1-4, the failure of the lessee to so release the lease following forfeiture entitles the owner of the leased premises to sue to obtain such release, upon which it may recover damages in the amount of \$100 plus any additional damages that the evidence warrants, together with costs and reasonable attorney's fees for preparing and prosecuting the suit. Plaintiffs have made demand upon the Gilbreaths to release the Subject Lease, which the Gilbreaths have neglected or refused to execute. Accordingly, Plaintiffs sue to have the Court declare the forfeiture of the Subject Lease, and to recover all damages which they may show in this case, plus costs and reasonable attorney's fees.

32. Under NMSA 1978, §70-2-18(B), a mineral interest must either be included in a voluntary pooling agreement or pooled by OCD order by proper notice to the mineral interest owner. Plaintiffs were owners of the unleased Subject Interests at the time of the 1994 pooling proceeding, but were not noticed therein, and were thereby denied due process. Plaintiffs seek a declaration that the Subject Interests were not and are not effectively pooled.

33. This cause of action is additionally brought under the authority of the New Mexico Declaratory Judgment Act, NMSA 1978, §44-6-1, *et seq.*, for which Plaintiffs seek recovery of their costs as authorized by §44-6-11 of said Act.

**COUNT TWO**  
**QUIET TITLE**

34. Plaintiffs incorporate by reference the foregoing allegations.

35. Plaintiffs are credibly informed and believe that Defendants make some claim adverse to the estate of Plaintiffs in and to the Subject Interests, and pray for the establishment of Plaintiffs' estate against such adverse claims, and that Defendants be barred and forever estopped from having or claiming any lien upon or any right or title to the Subject Interests adverse to

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Plaintiffs, and that Plaintiffs' title thereto be forever quieted and set at rest. Plaintiffs are entitled to a decree quieting title to the Subject Interests in Plaintiffs in preference to and against all person or manner of persons whatsoever. In accordance with NMSA 1978, §42-6-1, *et seq.*, Plaintiffs request that title to the Subject Interests be established in Plaintiffs against the adverse claims of Defendants and that the title of Plaintiffs in the Subject Interests be forever quieted and set at rest.

**COUNT THREE**  
**ACCOUNTING**

36. Plaintiffs incorporate by reference the foregoing allegations.

37. Plaintiffs assert a cause of action for an accounting against Defendants. Plaintiffs are entitled to a full and complete accounting as to all revenues generated and costs and expenses incurred with regard to the exploration, drilling and production of oil, gas and minerals regarding the Wright #1 Well as to the Gilbreaths, and regarding the Flora Vista #19-2 and #19-3 Wells as to all Defendants, from the time such operations were commenced thereon through the present. Plaintiffs seek payment of all such revenues to which they are entitled as part of such accounting.

**COUNT FOUR**  
**BREACH OF NMSA 1978, §70-2-18(B)**

38. Plaintiffs incorporate by reference the foregoing allegations.

39. Plaintiffs assert a cause of action against Defendants under NMSA 1978, §70-2-18(B) of the New Mexico Oil and Gas Act, NMSA 1978, §70-2-1, *et seq.* As set forth therein, any operator failing to obtain voluntary pooling agreements or failing to apply for an order of the OCD pooling the lands dedicated to the spacing or proration unit as required shall nevertheless be liable to account to and pay mineral owners either the amount to which each interest would be entitled if pooling had occurred or the amount to which each interest is entitled in the absence of

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pooling, whichever is greater. Defendants failed to properly pool the Subject Interests. The Subject Lease had terminated for non-production prior to the pooling proceeding regarding the Flora Vista #19-2 Well and Plaintiffs were not noticed therein. Defendants are therefore liable under §70-2-18(B) to pay Plaintiffs the greater of the revenues to which they are entitled. Plaintiffs are authorized to bring an action for this breach of said Act under §70-2-29 of the Act.

**COUNT FIVE**  
**TRESPASS**

40. Plaintiffs incorporate by reference the foregoing allegations.

41. Plaintiffs assert a cause of action for trespass against the Gilbreaths. Since the Subject Lease expired, the Gilbreaths entered the lands to which the Subject Interests pertain without authority and wrongfully removed oil and gas therefrom without the permission of Plaintiffs in contravention of Plaintiffs' rights as mineral interest owners.

42. Plaintiffs are entitled to recover their actual damages as a result of the Gilbreaths' trespass, including the value of the oil and gas wrongfully removed from the lands to which Plaintiffs' mineral interest pertains. In the event that the Gilbreaths are found to be good faith trespassers, then Plaintiffs are entitled to the value of the oil and gas less the reasonable cost of bringing the oil and gas to the surface. In the event the Gilbreaths are found to be bad faith trespassers, then Plaintiffs are entitled to the value of the oil and gas in place without deduction for the costs of bringing the oil and gas to the surface.

43. The Gilbreaths' actions were done intentionally, willfully and maliciously, and in reckless and wanton disregard of Plaintiffs' rights, justifying an award of punitive damages.

**COUNT SIX**  
**CONVERSION**

44. Plaintiffs incorporate by reference the foregoing allegations.

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45. Plaintiffs assert a cause of action for conversion against the Gilbreaths. Plaintiffs have ownership rights in oil, gas and minerals produced from those lands attributable to the Subject Interests. Through the Gilbreaths' actions in producing oil and gas from the Wright #1 Well, purporting to take in kind oil and gas produced from the Flora Vista #19-2 and #19-3 Wells, and failing to account to Plaintiffs for their share of the oil and gas produced therefrom, the Gilbreaths have wrongfully exercised dominion and control over such severed oil and gas and/or their proceeds to the exclusion of or in defiance of Plaintiffs' rights in same.

46. Plaintiffs have been damaged as a result of Defendants' conversion in an amount equal to the market value of the oil and gas converted by the Gilbreaths at the time of the conversion plus interest. Because the oil and gas converted by the Gilbreaths was a commodity of fluctuating value, the market value of said oil and gas should be the highest value between the date of conversion and the time of trial. In the event that the Gilbreaths are found to have converted Plaintiffs' oil and gas in good faith, Plaintiffs are entitled to recover the value of the oil and gas as enhanced by the Gilbreaths, less the reasonable costs of bringing about the increase in value. In the event the Gilbreaths are found to have converted Plaintiffs' oil and gas willfully or in bad faith, then Plaintiffs are entitled to recover the full value of the oil and gas as enhanced by the Gilbreaths without deduction for any costs in bring about the increase in the value of the oil and gas.

47. The Gilbreaths' actions were done intentionally, willfully and maliciously, and in reckless and wanton disregard of Plaintiffs' rights, justifying an award of punitive damages.

**COUNT SEVEN**  
**BREACH OF FIDUCIARY DUTY**

48. Plaintiffs incorporate by reference the foregoing allegations.

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49. Plaintiffs assert a cause of action for breach of fiduciary duty against the Gilbreaths. The Gilbreaths owed a fiduciary duty to Plaintiffs which the Gilbreaths breached through the aforesaid conduct. Plaintiffs seek to impose a constructive trust as a result of the Gilbreaths' breach of their fiduciary duty, and to recover all damages to which they are entitled as a result of same.

50. The Gilbreaths' actions were done intentionally, willfully and maliciously, and in reckless and wanton disregard of Plaintiffs' rights, justifying an award of punitive damages.

**COUNT EIGHT**  
**UNJUST ENRICHMENT**

51. Plaintiffs incorporate by reference the foregoing allegations.

52. Plaintiffs assert a cause of action for unjust enrichment against the Gilbreaths. The Gilbreaths have failed to timely pay revenues owed to Plaintiffs, and thereby unjustly enriched themselves in the amount of revenues received by them that are owed but were not paid to Plaintiffs.

53. The Gilbreaths' actions were done intentionally, willfully and maliciously, and in reckless and wanton disregard of Plaintiffs' rights, justifying an award of punitive damages.

**COUNT NINE**  
**OIL AND GAS PROCEEDS PAYMENT ACT**

54. Plaintiffs incorporate by reference the foregoing allegations.

55. Plaintiffs assert a cause of action under the New Mexico Oil and Gas Proceeds Payment Act, NMSA 1978, §70-10-1, *et seq.*, against the Gilbreaths. Proceeds from the production of the oil and gas produced from the Wright #1 Well, and the Flora Vista #19-2 and 19-3 Wells, constitute proceeds derived from the sale of production from a well producing oil, gas or related hydrocarbons in New Mexico, and therefore payment of such proceeds are

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governed by said Act. The Gilbreaths have not paid Plaintiffs the proceeds due them arising from the production of oil and gas within the time required by §70-10-3 of the Act. Plaintiffs are entitled to payment of said proceeds plus interest on said proceeds at the rate of 18% per annum in accordance with §70-10-5 of the Act.

56. Plaintiffs additionally seek recovery of their court costs and reasonable attorney's fees as authorized by §70-10-6 of the Act.

**COUNT TEN**  
**NEGLIGENCE**

57. Plaintiffs incorporate by reference the foregoing allegations.

58. Plaintiffs assert a cause of action for negligence against Defendants. Defendants owe a duty of reasonable care to mineral interest owners such as Plaintiffs to determine the status of their rights in the course of their joint operations. Defendants failed to exercise reasonable care by failing to acknowledge and credit Plaintiffs' ownership of the Subject Interests, failing to determine that the Subject Lease had expired, failing to properly pool the Subject Interests, and failing to account to Plaintiffs for revenues to which they are entitled, which proximately caused actual damages to Plaintiffs, for which they seek recovery.

59. As among the Defendants, the Gilbreaths' actions were done intentionally, willfully and maliciously, and in reckless and wanton disregard of Plaintiffs' rights, justifying an award of punitive damages.

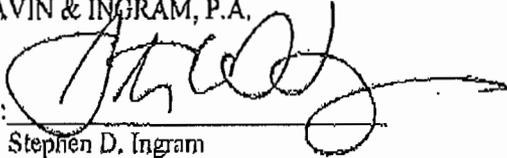
WHEREFORE, PREMISES CONSIDERED, Plaintiffs Frank A. King and Paula S. Elmore f/k/a Paula S. King pray that Defendants be cited to answer and appear herein, that Plaintiffs recover judgment against Defendants for declaratory relief as requested herein, actual damages, punitive damages, attorney's fees, costs, pre-judgment and post-judgment interest at

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the maximum rate allowed by law, and that Plaintiffs have all other and further relief to which they are entitled.

RESPECTFULLY SUBMITTED,

CAVIN & INGRAM, P.A.

By: 

Stephen D. Ingram

P. O. Box 1216

Albuquerque, NM 87103

(505) 243-5400

ATTORNEYS FOR PLAINTIFFS

FRANK A. KING and PAULA S. ELMORE

f/k/a PAULA S. KING

VERIFICATION

STATE OF TEXAS            )  
  )  
COUNTY OF DALLAS        )

FRANK A. KING, being first duly sworn, upon his oath deposes and states that he has read the above and foregoing Complaint for Declaratory Relief, Accounting, Quiet Title and Other Relief and from personal knowledge knows the matters therein contained to be true and correct, or else on information and belief believes them to be true.

Frank A. King  
FRANK A. KING

Subscribed and sworn to before me this 9<sup>th</sup> day of Sept., 2013 by Frank A. King.

Jill K Cramble  
Notary Public

My Commission Expires:

11.02.2013



VERIFICATION

STATE OF TEXAS            )  
  )  
COUNTY OF WICHITA FALLS    )

PAULA S. ELMORE f/k/a PAULA S. KING being first duly sworn, upon her oath deposes and states that she has read the above and foregoing Complaint for Declaratory Relief, Accounting, Quiet Title and Other Relief and from personal knowledge knows the matters therein contained to be true and correct, or else on information and belief believes them to be true.

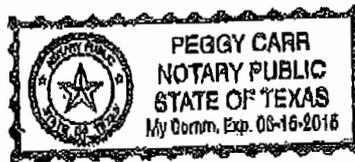
Paula S. Elmore  
PAULA S. ELMORE f/k/a  
PAULA S. KING

Subscribed and sworn to before me this 5th day of Sept., 2013 by Paula S. Elmore f/k/a Paula S. King.

Peggy Carr  
Notary Public

My Commission Expires:

6/15/15



JS 44 (Rev. 12/13)

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM)

I. (a) PLAINTIFFS

Frank A. King and Paula S. Elmore I/k/a Paula S. King

(b) County of Residence of First Listed Plaintiff Dallas County, Texas (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Stephen D. Ingram, Cavin & Ingram, P.A. P.O. Box 1216, Albuquerque, NM 87103-1216 (505) 243-5400

DEFENDANTS

Norman L. Gilbreath, Loretta E. Gilbreath, Energen Resources Corporation, Robert L. Bayless, Producer LLC, James M. Martin, San Juan Basin Properties, LLC a/k/a San Juan Basin Operating ...

Country of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Plaintiff Defendant
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, LABOR, LABOR STANDARDS, LABOR MANAGEMENT RELATIONS, LABOR ACT, LABOR LITIGATION, EMPLOYEE RETIREMENT INCOME SECURITY ACT, IMMIGRATION, FORFEITURE/PENALTY, LABOR, LABOR STANDARDS, LABOR MANAGEMENT RELATIONS, LABOR ACT, LABOR LITIGATION, EMPLOYEE RETIREMENT INCOME SECURITY ACT, IMMIGRATION, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. §1332
Brief description of cause: Declaratory Relief, Accounting, Quiet Title and Other Relief

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 500,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See Instructions).

JUDGE DOCKET NUMBER

DATE 09/10/2013 SIGNATURE OF ATTORNEY OF RECORD s/Stephen D. Ingram

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFF JUDGE MAG. JUDGE

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
- Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
- Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; NOTE: federal question actions take precedence over diversity cases.)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
- Original Proceedings. (1) Cases which originate in the United States district courts.
- Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
- Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
- Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
- Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
- Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. Do not cite jurisdictional statutes unless diversity. Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint, Class Action.** Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.