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

RECEIVED OCD
2014 FEB 18 P 3:00

**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**

**RESPONSE TO**
**MOTION TO DISMISS APPLICATION**

Energen Resources Corporation, ("Energen"), for its response to the Motion to Dismiss filed on behalf of Frank A. King and Paula S. Elmore, f/k/a Paula S. King (the "Kings") states:

The Kings' motion should be denied for three separate, but equally compelling reasons:

(1) The Division's exercise of its compulsory pooling jurisdiction in these circumstances is proper and is supported by agency precedent;

(2) The operator has a duty to consolidate unjoined interests and the Division has an obligation to force pool the interests; and

(3) The retroactive compulsory pooling of interests is routine.

**Points and Authorities**

On July 19, 1994, the Division entered Order No. R-10154 in Case No. 11007 for the compulsory pooling of all mineral interests in the Basin-Fruitland Coal formation[1] in the S/2 of Section 19 T30N R11W NMPM in San Juan County dedicated to the Flora Vista "19"

[1] The Kings' motion states incorrectly that Order R-10154 pooled interests to the base of the Pictured Cliffs formation.

Well No. 2 drilled by Maralex Resources, Inc. The interests pooled into the spacing unit included an oil and gas lease covering the mineral interests in approximately 18.37 acres owned by the Kings from the surface to the base of the Pictured Cliffs formation. The lease itself was owned by Norman and Loretta Gilbreath. According to the Kings, however, the lease covering their ownership interest expired sometime between May of 1990 and February of 2004 due to cessation of production from the Wright No. 1, a Pictured Cliffs formation well on the lands. Consequently, the Kings asserted that their mineral interests were not pooled by Order No. R-10154 and are to this day unconsolidated.

By its Application in this case, Energen seeks to fulfill its statutory obligation to consolidate the apparent unjoined interests. It is appropriate for it to do so as situations such as this are among the reasons that the Division maintains ongoing jurisdiction over its compulsory pooling orders. ("Jurisdiction of this cause is retained for the entry of such further orders as the Division may deem necessary.") Order No. R-10154, Conclusion ¶ 15 (July 19, 1994). Title failures within previously pooled units occasionally occur and by way of example, the situation in this case is similar to that in Case No. 10888[2] where the operator found it necessary to retroactively force pool certain working interests which had automatically converted from overriding royalty interests and were consequently unconsolidated.

In 2013, the Kings filed a lawsuit in district court with the primary objective of quieting title to their mineral interests. In the meantime, two Fruitland Coal formation wells on the S/2 of Section 19, the Flora Vista "19" Wells No. 2 and 3, have continuously produced since 1994 and 2005, respectively. Whether or not the lease covering the King's mineral interests

[2] *Application of Merrion Oil and Gas Corporation for Compulsory Pooling and a Non-standard Gas Proration Unit, Rio Arriba County, New Mexico;* Order No. R-10060 (March 7, 1994).

has expired or remains in good standing is a legal determination pending before the district court. This compulsory pooling proceeding will not affect that determination and the Division may not defer its statutory obligation to consolidate the unjoined interests. In the meantime, even the Kings acknowledge that the consolidation of the apparently unjoined interests, either leased or unleased, is a necessity. ("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 ownership within said unit and to prevent waste through the drilling of unnecessary wells." See *Complaint,* ¶ 21, Motion Exhibit A, *emphasis added.*) Moreover, the Kings' interests have been administered for years as though they had been consolidated under Order No. R-10154, so amending the order to include them serves to maintain the status quo.

In paragraph 7 of their Motion, the Kings address the doctrine of primary jurisdiction, arguing that "[t]he OCD neither possesses the expertise or jurisdiction over the issues made the basis of the claims in the federal court litigation." This argument is a red herring, as primary jurisdiction has no application under the circumstances. As expressly recognized by the Kings, this doctrine does not apply when a court and agency do not have concurrent jurisdiction of the issues raised by the parties. Motion at 7. Comparison of the Application and the Kings' complaint makes clear that the court and the Division do not share jurisdiction over the issues raised by the parties. The Application and the complaint raise entirely different issues. The Application for compulsory pooling raises issues that are within the Division's exclusive statutory jurisdiction. Separately, the complaint raises issues which the Kings describe as "contractual rights, title disputes and damage recovery" that are within the court's jurisdiction,

but outside the Division's. Motion at 3. Thus, the doctrine of primary jurisdiction is of no consequence in this proceeding.

It is correct that the Division does not have jurisdiction to adjudicate competing claims to title or determine the validity of a lease. A compulsory pooling proceeding does neither of those things. The Texas Court of Appeals and Supreme Court have said that permits and orders issued by the Texas Railroad Commission do not affect title. *Nale v. Carroll*, 289 S.W.2d 743 (Tex., 1956) states that the Railroad Commission's rules and regulations for drilling do not effect the transfer of a property. Id., at 559; See also *Miller v. Sutherland,* 179 S.W.2d 801 (Tex. Civ. App., 1943) ("*It is thought to be fundamental that the rules and regulations of the Railroad Commission cannot have the result of effecting a change or transference of property rights.*") Neither does a compulsory pooling order result in a co-tenancy. *Schulte v. Apache Corp.*, 814 P.2d 469, 471 (Okla. 1991).

The exercise of compulsory pooling authority by the Division and the Commission during the pendency of related court litigation involving disputed title is not new. The *TMBR/Sharp* line of cases involved four consolidated competing compulsory pooling applications[3] and two consolidated applications seeking a cessation of operations and appealing the denial of two APD's.[4] Simultaneously, the parties to those cases filed a lawsuit in the Fifth Judicial District Court in Lea County which sought to quiet title to the oil and gas lease interests that were the subject of the six applications pending before the NMOCC. The

---

[3] Case No. 12816, *Application of TMBR/Sharp Drilling, Inc. for Compulsory Pooling, Lea County, New Mexico;* Case No. 12841, *Application of Ocean Energy, Inc. for Compulsory Pooling, Lea County, New Mexico;* Case No. 12859, *Application of David H. Arrington Oil and Gas Inc. for Compulsory Pooling, Lea County, New Mexico;* Case No. 12860, *Application of Ocean Energy, Inc. for Compulsory Pooling, Lea County, New Mexico*

[4] Case No. 12731, *Application of TMBR/Sharp Drilling, Inc. for an Order Staying David H. Arrington, Inc. from Commencing Operations, Lea County, New Mexico;* Case No. 12744, *Application of TMBR/Sharp Drilling, Inc. Appealing the Hobbs District Supervisor's Decision Denying Approval of Two Applications for Permit To Drill, Lea County, New Mexico. These cases resulted in Orders No. R-11700 through R-11700-D. Orders R-11700-C and R-11700-D were compulsory pooling orders.*

Commission specifically noted the pendency of the lawsuit in court and the likelihood of an appeal, but the Commission affirmatively elected to retain jurisdiction over the administrative applications and proceeded to conduct hearings on them to their conclusion. Order No. R-11700-B, Order ¶ 30 (April 26, 2002). In deciding this matter, the Division should maintain a consistent practice and follow the precedent established by the Commission in the *TMBR/Sharp* cases.

**Operators and the Division have the Duty to Consolidate Unjoined Interests; Retroactivity of Orders**

The consolidation of unjoined interests in a well unit is not optional, it is required. NMSA 1978, §70-2-18(A) (1977) of the Oil and Gas Act unambiguously provides:

> **Spacing or proration unit with divided mineral ownership.**
>
> Whenever the operator of any oil or gas well shall dedicate lands comprising a standard spacing or proration unit to an oil or gas well, it shall be the obligation of the operator, if two or more separately owned tracts of land are embraced within the spacing or proration unit, or where there are owners of royalty interests or undivided interests in oil or gas minerals which are separately owned or any combination thereof, embraced within such spacing or proration unit, to obtain voluntary agreements pooling said lands or interests or an order of the division pooling said lands, which agreement or order shall be effective from the first production. Any division order that increases the size of a standard spacing or proration unit for a pool, or extends the boundaries of such a pool, shall require dedication of acreage to existing wells in the pool in accordance with the acreage dedication requirements for said pool, and all interests in the spacing or proration units that are dedicated to the affected wells shall share in production from the effective date of the said order. (Emphasis added.)

NMSA 1978 §70-2-17(C) (1977) states that if no voluntary agreement is reached the Division (or Commission) "shall" pool the well unit, and the statute expressly allows pooling before or after a well is drilled. §70-2-18(A) also makes clear that regardless of when an order

pooling separately owned interests is obtained, even after drilling, it is to be "effective from the first production."

Under NMSA 1978, §70-2-18(A), an applicant proposing to dedicate separately-owned lands or undivided interests to a spacing and proration unit has an "obligation" to negotiate a voluntary agreement with the other interest owners to pool their lands. The Division and the Commission require operators to show that they have made a "diligent" and "good faith" effort to negotiate a voluntary agreement before a compulsory pooling application may be filed.[5] Where all the conditions precedent to compulsory pooling exist, then it is the firmly established view of the Division that it has a mandatory duty under §70-2-17 to issue a compulsory pooling order. See Order No. R-13547, Case No. 12601, *Application of Reliant Exploration and Production Company, LLC to Terminate the Temporary Abandonment Status of Two CO2 wells Drilled by Oxy USA, Inc., and for Compulsory Pooling*, (May 10, 2012), Conclusion of Law ¶ 15.

Finally, the Kings are wrong when they claim an inability to find any order where the Division force pooled interests retroactively. The *Reliant Exploration* and the *Merrion Oil and Gas Corporation* orders cited above are two examples where the Division has force pooled interests retroactively. Order No. R-12343-E entered in the *Samson Resources/Chesapeake* case[6] is another notable example in a case that involved contemporaneous litigation.

For all the reasons set forth above, the Motion To Dismiss must be denied.

---

[5] The "good faith" requirement has been expressly codified in the compulsory unitization procedures of the Statutory Unitization Act at NMSA 1978, §70-7-6-A(5).

[6] Case No. 13492, *Application of Samson Resources Company, Kaiser-Francis Oil Company and Mewbourne Oil Company for Cancellation of Two Drilling Permits and Approval of a Drilling Permit, Lea County, New Mexico* consolidated with Case No. 13493, *Application of Chesapeake Operating, Inc.for Compulsory Pooling, Lea County, New Mexico.*

Respectfully submitted

MONTGOMERY & ANDREWS, P.A.

By */s/ J. Scott Hall*
J. Scott Hall
Sharon T. Shaheen
*Attorneys for Defendant TOP Operating Co.*
P. O. Box 2307
Santa Fe, New Mexico 87504
(505) 986-2659
shall@montand.com
sshaheen@montand.com

I hereby certify that a true and correct copy of the foregoing was served via email and U.S. Mail on February 18, 2014 to the following:

Stephen D. Ingram
*Attorneys for Plaintiffs*
P.O. Box 1216
Albuquerque, NM 87103
Tele (505) 243-5400
Sding1216@aol.com

By: */s/ J. Scott Hall*
J. Scott Hall