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April 9, 2012

**HAND DELIVERED**

David K. Brooks, Esq.  
Oil Conservation Division  
1220 South St. Francis Drive  
Santa Fe, New Mexico 87505

Re: NMOCD Case 14582  
Application of Cimarex Energy Co, of Colorado for a  
non-standard spacing and proration unit and  
compulsory pooling, Eddy County, New Mexico

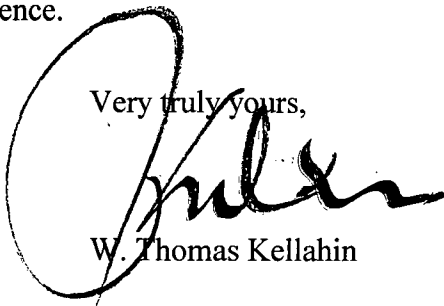
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Dear Mr. Brooks,

On April 5, 2011, on behalf of Cimarex, I received a subpoena issued at the request of Nearburg Producing Company seeking the production of data/documents from Cimarex to be produced at the Division's offices at 9:00 a.m. on Tuesday, April 10, 2012.

In Lieu thereof, please find enclosed Cimarex Energy Co. of Colorado "Cimarex" Memorandum and Motion to Quash that subpoena. I request a hearing on this Motion to Quash at your earliest convenience.

Very truly yours,



W. Thomas Kellahin

cc: Mike Feldewert, Esq.

Attorney for Nearburg Producing Company

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

**APPLICATION OF CIMAREX ENERGY CO. OF COLORADO FOR  
A NON-STANDARD SPACING AND PRORATION UNIT  
AND COMPULSORY POOLING,  
EDDY COUNTY, NEW MEXICO**

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**CASE No. 14582  
Order No. R-13357**

**CIMAREX ENERGY CO. OF COLORADO'S MEMORADUM AND  
MOTION TO QUASH THE SUBPOENA DATED APRIL 5, 2012  
ISSUED AT THE REQUEST OF NEARBURG PRODUCING COMPANY**

Cimarex Energy Co. of Colorado ("Cimarex") by its attorneys, Kellahin & Kellahin, objects to the Subpoena Duces Tecum issued by the Division on April 5, 2012 at the request of Michael H. Feldewert, an attorney for Nearburg Producing Company ("Nearburg") in Case 14582 and delivered to W. Thomas Kellahin in the afternoon of April 5, 2012 which commands Cimarex to appear at 9:00 AM, Tuesday, April 10, 2012 before the Division and to produce documents set forth in the Subpoena Duces Tecum.

As grounds for its objections to this subpoena, Cimarex states the following:

**CIMAREX'S RESPONSE TO SUBPOENA ITEMS**

Cimarex objects to Nearburg's request to the extent that they have attempted to impose obligations that are beyond those required by the Division, the New Mexico Rules of Civil Procedure. Moreover, Cimarex objects to the extent that Nearburg's requests seek confidential business information and is privileged and irrelevant to this proceeding. Nearburg seeks the following documents for Cimarex's Lynch 23 Federal

Com 2-H (API #30-025-40123) Units A, H, I and P, E/2E/2 Sec 23, T20S R34E, NMPM,  
Lea County, New Mexico:

Subpoena Item #1:

- (a) Request: All logs generated during or after the drilling of the above reference well, including but not limited to mud logs (daily and final), LWD logs, FMIs, all field prints of all logs run in the well, final composite prints of all logs run in the well, and any logs conducted but not provide to the State Land Office and/or New Mexico Oil Conservation Division;
- (b) Response: Cimarex has logs including a mud log from 5480 feet to 15,446, measured depth
- (c) Objections:
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - c. Cimarex objects to producing this data including its mud-logs, which are interpretative and confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.
  - d. At this time, Cimarex does not intend to use this mud-log in preparation for the reopening of Case 14582, and therefore, there is no reason that Nearburg should have access to it.

In addition, Nearburg seek eight additional items that identified and objected to as set forth in Exhibit "A" attached and Cimarex's experts' affidavit attached as Exhibit "B."

### THE CENTRAL ISSUE

In its simplest terms the question before Examiner is:

Can a non-consenting party who refused to participate in the costs of drilling of a well drilled pursuant to a compulsory pooling order of the Division use the Division's subpoena power to obtain confidential data obtained from the well under the guise of deciding whether to elect to participate in the drilling of a different well and/or to evaluate this well?

Nearburg's subpoena is an improper attempt to reopen a compulsory pooling case more than a year after the Division entered its Order R-13357 approving the compulsory

Cimarex's Motion to Quash

NMOCD Case 14582

-Page 2-

pooling of Nearburg's interest with Cimarex's to form a proration unit for Cimarex's Lynch 23 Federal Well No. 2-H (API # 30-025-40123) ("the 2-H Well). This well has been drilled, completed and is producing.

Having failed to timely file for rehearing or a *de novo* hearing of the Division's compulsory pooling order, Nearburg has sought to reopen the original pooling case and explain to Nearburg the order entered in this case. Nearburg's belated motion to reopen was filed more than year after Order R-13357 was entered in a proceeding in which Nearburg was served with a copy of the pooling application, and participated in the filed an entry of appearance in the original pooling case, sent an attorney to the hearing held on January 6, 2011. During the hearing, Nearburg failed to introduce any evidence or ask any questions of Cimarex's witnesses. Nearburg was provided with the post order election along with the AFE and itemization of cost but elected to go "non-consent" foregoing the opportunity afforded by Order R-13357 to pay for its proportionate share of costs and the concomitant rights afforded participating owners. The 2-H Well was spud on June 13, 2011 and completed on August 19, 2011 as a horizontal wellbore for production for the "First", "Second" and "Third" intervals of the Bone Springs formation. **See completion report attached as Exhibit "C."**

Having successfully drilled and completed the 2-H Well, in accordance with Rule 19.15.13.10 NMAC, Cimarex has proposed the drilling of an infill well, the Lynch 23 Federal Well No. 3-H. Nearburg has made a qualified election to participate. **See Nearburg letter dated March 21, 2012 attached as Exhibit "D."**

### **CRITICAL PROBLEM**

Cimarex is concerned that this subpoena is simply an effort by Nearburg, a competitor and a non-consenting pooled party, to gain Cimarex's confidential trade secret information, which Nearburg forfeited any right to obtain by electing to go non-consent. Nearburg should not be allowed to obtain Cimarex's mud log data to assess whether Nearburg will now elect to participate in this new wellbore and avoid the Division's 200% risk factor pooling penalty.

## **BACKGROUND**

By Division Order R-13357 (Case 14582) dated February 7, 2011, Cimarex obtained a compulsory pooling order against Nearburg for the drilling of the 2-H Well in the E/2E/2 of Sec 23, T20S, R32W. Order R-13357 afforded Nearburg the opportunity to participate in the costs of drilling the well but Nearburg elected not to participate and is a non-consenting pooled party. On June 13, 2011, 2-H Well was spud and on August 19, 2011 was completed.

By letter dated February 17, 2012, Cimarex proposed an infill well, the Lynch 23 Federal Well No. 3-H in the E/2E/2 of this same section. Nearburg has made a qualified election to participate with Cimarex for the Well No. 3-H but in doing so is attempting to reopen the original pooling case. The Motion to Reopen, filed more than a year after Order R-13357 was entered and beyond the time for rehearing or appeal *de novo*, raises legal issues for which discovery is unnecessary. As an accommodation to Nearburg, Cimerax has already voluntarily provided a copy of the completion report for the 2-H well along with those logs filed in association with that report. Now Nearburg wants more data from Cimarex. On April 5, 2012, Cimarex was served with Nearburg's subpoena for Cimarex's data for which Nearburg had not paid.

## **NEARBURG'S SUBPOENA IS PREMATURE**

Nearburg's has filed a Motion to Reopen this case for the purpose of asking the Division to explain the effect and meaning of Order R-13357. But before Cimarex has file its Response and the Division has heard arguments concerning the legal issues presented by Nearburg's Motion to Reopen, Nearburg has improperly invoked the Division's subpoena power to obtain a Subpoena seeking confidential data from Cimarex that has no bearing on the issues presented by the Motion. Nearburg simply cannot obtain discovery in a case which the Division has yet to reopen.

Nearburg's motion presents a multitude of concerns about a compulsory pooling order that was issued more than one year ago for a case in which Nearburg was a party. At that hearing, Nearburg's had an attorney present who failed to ask any question and did not present any witnesses. After the entry of the order, Nearburg was served with a

post-order election, including AFE, and elected not to participate and is a non-consenting pooled party. All of Nearburg's current questions could have been raised in the original hearing of this case. But instead of filing a timely application for rehearing or hearing *de novo*, Nearburg now wants to reopen this case so that the Division can tell Nearburg how to understand an Division compulsory pooling order and the Division's rules associated with the drilling an infill well within a previously pooled spacing unit. As demonstrated by Cimarex's Response to the Motion to Reopen, Nearburg cannot seek to reopen a case to seek clarification/modification of the terms of the final order after the time for rehearing, appeal and relief from the order has run.

### **NEARBURG SEEKS DOCUMENTS AVAILABLE IN PUBLIC RECORDS**

Nearburg wants reports, geologic and petroleum engineering data which is currently available to it in the public record, including but not limited to Division case files and records and those of the BLM.

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

### **NEARBURG, AS A NON-CONSENTING CO-TENANT, DOES NOT HAVE THE RIGHT TO COMPEL DISCLOSURE OF CIMAREX'S CONFIDENTIAL BUSINESS RECORDS**

Cimarex has no obligation to make or provide documents to assist Nearburg in deciding if it desires to participate in this well or to be involuntarily pooled in Ciimarex's proposed infill well. The documents are sought by Nearburg, ostensibly to help it make an election decision or to market its interest. But neither of these issues is relevant to any decision the Division must make in this case. Nearburg is attempting to do what S.G. Methane sought and failed to do NMOCD Case 14331 where the Division denied that request in Order R-13156 rejecting SG Methane claim that as a co-tenant it was entitled to the confidential business information of XTO Energy, Inc. **See copy of order attached as exhibit "E" to this motion.**

Cimarex's Motion to Quash  
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The subpoenaed data including the mud-log data are considered confidential, trade secret information that is closely guarded in the industry.

During the course of the argument in the XTO-SG Methane, dispute, Examiner Brooks stated that he was inclined to agree that XTO's data was protected, trade secret information and that Methane as a co-tenant did not have a right to the data even though it had not paid for it. The support for that decision was in the Texas Supreme Court's case, *In re Continental General Tire*, 979 S. W. 2d 609,611 (Tex. 1998) where the court held that "[t]he party seeking to discover a trade secret must make a particularized showing that the information is necessary to the proof of one or more material elements of the claim and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit." Cimarex's research had not found any case law from producing states discussing whether a non-consenting party in a well claims entitlement to data developed by the operator at its expense and risk. However, the New Mexico Supreme Court, following Texas law, has recognized the basic governing rules regarding cotenants:

In *Neeley v. Intercity Management Corp.*, 732 S.W.2d 644 (Tex.Ct.App.1987), the court set out the general rules governing the relationship between cotenants. The term "nonconsenting" means that the nonoperating cotenant has not given his express or implied consent to share in the expenses of exploration, drilling, development, or operation of an oil well in an operating agreement or otherwise. *See id.* at 646. The court held that in the absence of an operating agreement addressing this eventuality, an operating cotenant has the right to proportionate reimbursement from a nonconsenting cotenant by way of personal judgment or equitable lien when he spends money that is reasonable and necessary to preserve the common estate. *Id.* The law, in effect, implies a contract on the part of the non-consenting cotenant to pay his proportionate share of the reasonable and necessary expenses. *Id.*

*Bellet v. Grynberg*, 114 N.M. 690, 845 P.2d 784, 785 (1992).

Additionally, the New Mexico Court of Appeals, in a case involving Nearburg, recognized that a non-consenting party under a joint operating agreement relinquishes his interest in the joint property when it declines to participate in the costs of drilling a well:

We characterize the non-consent penalty provisions, not as an option, but as a covenant triggered by a condition precedent, see *Conine*, Carried Interest, supra, § 3.04[3][c], or, in the Restatement's terminology, a

covenant or promise subject to a condition, Restatement, supra, § 224 cmt. e. Section 224 of the Restatement defines a condition as an "event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." The covenant is the agreement by the non-consenting party to temporarily relinquish the specified amount of its interest in production in exchange for the consenting party bearing the risk of the operation. The condition is the election not to participate in the proposed operation, made either expressly or tacitly by failure to respond within thirty days.

*Nearburg v. Yates Petroleum Corp.*, 1997 NMCA 69, ¶ 31, 123 N.M. 526, 943 P.2d 560. It has also been held that when a cotenant fails to "voluntarily contribute his respective share of a debt secured by a mortgage or other lien on the common property, he may be compelled to "either . . . pay or . . . forfeit [his] interests in the property." *Eastman v. Nelson*, 319 N.W.2d 134, 136 (N.D. 1982) (citing *Laura v. Christian*, 88 N.M. 127, 129, 537 P.2d 1389, 1391 (N.M. 1975)). Since Nearburg elected not to participate in the costs of drilling the 2-H well, it has forfeited and relinquished any rights in the property as a co-tenant until payout and has no right to obtain Cimarex's confidential, proprietary well data.

#### **CIMAREX'S SUBPOENA SEEKS PRODUCTION OF IRRELEVANT/IMPERTINENT DOCUMENTS**

There are no conceivably relevant or pertinent issues that could be satisfied by the production of any of Cimarex's confidential data. Cimarex questions why Nearburg wants the mud-log data. As Nearburg should know, the mud-log data from a horizontal wellbore will not tell about the well productivity in the test zone. In fact, such information is often misleading because it is obtained prior to the fracture treatment of the well.

Although the Division is not required to strictly adhere to the New Mexico Rules of Evidence, Rule 11-508 of the New Mexico Rules of Evidence provides:

"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, 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, Cimarex's exploration could be compromised. Such information meets the definition of a trade secret defined above because it is information, which Cimarex is using in its exploration business, and which gives it an opportunity to obtain an advantage over competitors who do not have this data.

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

Discovery seeking trade secret information requires a more rigorous analysis than ordinary discovery. While basic relevance is the touchstone for discovery, this is not true where trade secrets are at issue. Under New Mexico law, the party seeking discovery must establish that any trade secret information sought is both **relevant and necessary** to their claims. *Pincheira v. Allstate Ins. Co.*, 164 P.3d 982, 992 (N.M. App. 2007), *aff'd on other grounds*, 190 P.3d 322, 336 (N.M. Sup. Ct. 2008). The *Pincheira* appellate court held that:

If the . . . documents are found to be trade secrets, then the burden shifts to the requesting party to show the **necessity** for document production. . . . Mere relevance is inadequate. The party requesting production of trade secrets must make a particularized showing that the information sought is **relevant and necessary** to the proof of a material element of at least one cause of action presented in the case **and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit.**

*Id.* at 992 (emphasis added). In affirming the appellate court decision on other grounds, the New Mexico Supreme Court stated "the purpose of a protective order is to maintain a trade secret's value, while giving the opposing party access to the information it needs to

fairly prepare for and present its case. 190 P.3d 322, 336 (emphasis added); *see also Pennzoil Company v. Federal Power Commission*, 534 F.2d 627 (5th Cir. 1976) ( Federal Power Commission had abused its discretion when it required disclosure of trade secrets and failed to demonstrate that disclosure of this information would serve a legitimate regulatory function).

The disclosure of Cimarex's data in this case does not serve any legitimate compulsory pooling 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."

The Commission's rules also recognize the confidential and propriety nature of well logs, providing that certain logs required to be filed by an operator with completion reports may be withheld for 90 days upon the request of the operator. *See* 19.15.7.16 NMAC. The mud logs are neither relevant to the issues in this case nor necessary to prove a material element of any claim by Nearburg. Accordingly, they are not subject to discovery.

When deciding the issue of whether to require disclosure of a trade secret and if so under what circumstances, the Division is faced with the following issues:

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

Will disclosure of this type of information significantly aid the Division in fulfilling its functions? In this case, Nearburg pretends to "need" Cimarex's data so Nearburg can contest some unknown portion of compulsory pooling case. However, that "need" is not relevant to any issue to be decided by the Division in the current pooling case. The data is not needed by the Division in order to decide the risk factor penalty,

because the presence or absence of the data does not change the risk factor penalty, which by Rule 35.A is fixed at 200%.<sup>1</sup>

While there is no doubt that Nearburg wants Cimarex's confidential data, the question remains whether any of this data serves any purposes in this pooling case. The answer is no.

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

The data is not relevant to the Division's decision in a compulsory pooling case and can serve only to harm the business interests of Cimarex by allowing Nearburg a "free ride" to see data that it has not paid for and forfeited any right to receive by refusing to participate in the costs of drilling the 2-H well. Disclosure will harm Cimarex ability to acquire leases and negotiate the terms of a joint operating agreement before the compulsory pooling case is heard by the Division or Nearburg makes its election to participate after the pooling order is entered.

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

If Nearburg believes it needed such information, then it should have paid its share of well costs and agree to participate in the Well No 2-H. There is no reason for them to receive this data free of costs from Cimarex.

**(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".

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<sup>1</sup> Prior to Commission Order R-11992, dated July 17, 2003, the Division allowed parties to be compulsory pooled, to attempt to reduce the statutory 200% risk factor by arguing that the Operator assumed some of that risk by drilling the well prior to pooling. As a result of Order R-11992, the Commission by Rule makes the 200% automatic for such cases. Thus, the Division no longer will engage in decisions about the 200% risk factor penalty. In extraordinary cases, the Division will allow geologic and petroleum engineering evidence about the risk factor, provided that the party to be pooled filed a timely pre-hearing statement raising that issue.

In this case, it will not be possible for the Division to take adequate measures to protect Cimarex's trade secret from disclosure. No type of confidentiality agreement will protect Cimarex in this case. The very act of turning over any part of this data to Nearburg will allow it to use the information to assess its participation in this well and avoid the regulatory framework of a compulsory pooling order.

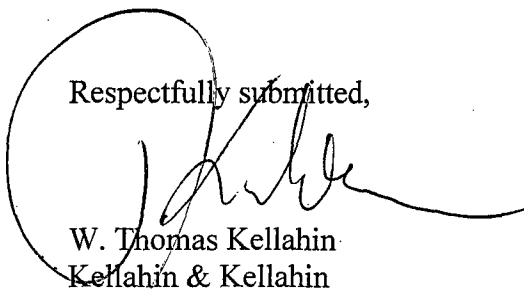
### CONCLUSION

This is a basic compulsory pooling case in which Nearburg is improperly seeking to use the Division subpoena power to obtain confidential data which it forfeited any right to obtain by refusing to participate in the drilling of the 2-H Well.

The real motive of Nearburg appears to be to obtain, free of cost, Cimarex's well data on the 2-H Well so that it can obtain a competitive advantage over Cimarex. Regardless of Nearburg's motives, the discovery of Cimarex's protected data is not relevant to any issue in this pooling case and would be an abuse of the Division's powers.

The Division should not allow Nearburg to gain an unfair advantage by using a Subpoena to have a "free look" at Cimarex's confidential and proprietary business data concerning the drilling of a different well prior to the time that Nearburg paid for its share of the costs this offsetting wellbore. Accordingly, the Division should quash this subpoena.

Respectfully submitted,



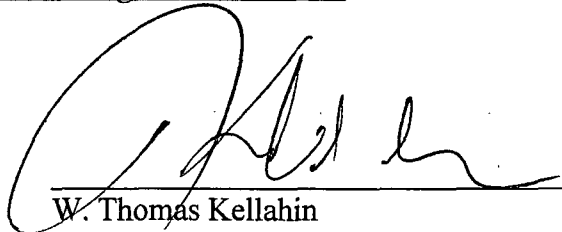
W. Thomas Kellahin  
Kellahin & Kellahin  
706 Gonzales Road  
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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was hand delivered this 9<sup>th</sup> day of April 2012 as follows:

David K. Brooks, Esq.  
OCD Attorney  
Santa Fe, New Mexico 87505  
[david.brooks@state.nm.us](mailto:david.brooks@state.nm.us)

Michael H. Feldewert, Esq.  
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W. Thomas Kellahin

EXHIBIT "A"

Case 14582

Objection to additional subpoenaed items:

Subpoena Item #2:

- (a) Request: Copies of all survey plats, permit to drill, and other regulatory forms, letters and correspondence filed with any governmental agencies
- (b) Response: Cimarex has certain documents some of which have been filed in the public records of the BLM and NMOCD
- (a) Objections: This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - a. Some of the data is available in the public records of the OCD and BLM
  - b. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - c. Cimarex objects to producing this data, which are confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.

Subpoena Item #3:

- (a) Request: Copies of all reports, including but not limited to daily drilling reports, directional drilling, and mud logger reports for the above-referenced well;
- (a) Response: Cimarex has this data
- (b) Objection
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Some of the data is available in the public records of the OCD and BLM
  - a. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - b. Cimarex objects to producing this data, which are confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.

Subpoena Item #4:

- (a) Request : Copies of daily production reports from the date of first production for the above referenced well and any offsetting or nearby wells completed in the Bone Springs formation operated by Cimarex;
- (b) Response: Cimarex has this data and some of it has the filed with the OCD and the BLM
- (c) Objections:
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Some of the data is available in the public records of the OCD and BLM
  - c. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - d. Cimarex objects to producing this data, which are confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.

Subpoena Item #5:

- (b) Request: Copies of the drilling and completion procedures used for the above-referenced well;
- (c) Response: Cimarex has this data
- (d) Objections:
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Some of the data is available in the public records of the OCD and BLM
  - c. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - e. ooling order by failing to timely elect to pay and participate in this wellbore.
  - f. Cimarex objects to producing this data, which are confidential in nature and deserve to be protected as a trade secret/confidential

business record until such time as Nearburg has paid its share of the well costs.

Subpoena Item #6:

- (a) Request: Copies of initial and final drill stem test any core and/or sidewall core analysis, sample analyses, BHP tests, formation fluid analysis, or test reports on the above referenced well;
- (b) Response: Cimarex does not believe it has any of this data for this well
- (c) Objections: Even if Cimarex has this data, Nearburg is not entitled to it because
  - 1. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - 2. Some of the data is available in the public records of the OCD and BLM and Nearburg can go get it
  - 3. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - 4. Cimarex objects to producing this data, which are confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.

Subpoena Item #7:

- (a) Request: Copies of any frac treating reports and daily reports for all completion work for the above-referenced well;
- (b) Response: Cimarex has this data.
- (c) Objections:
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Some of the data is available in the public records of the OCD and BLM
  - c. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - d. Cimarex objects to producing this data which are confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.



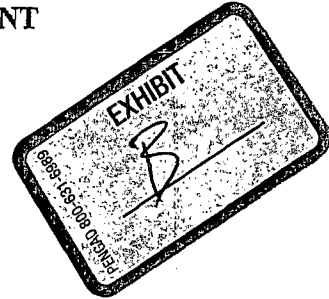
Subpoena Item #8:

- (a) Request: Well samples for the above-referenced well;
- (b) Response: Cimarex does not have any and if it did, Nearburg is not entitled to them because
- (c) Objections:
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Some of the data is available in the public records of the OCD and BLM
  - c. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - d. Cimarex objects to producing this data which is confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the well costs.

Subpoena Item #9:

- (a) Request: Any other data, reports, analysis or sample relating to the drilling and completion of the above-referenced well provided to any regulatory agency not otherwise specified above relating to the above-referenced well.
- (b) Response: Cimarex believes that this request is ambiguous, but also believes it has filed the requested data if either the OCD and/or the BLM
- (c) Objections:
  - a. This information is not relevant to any issue to this motion and if granted then not relevant in this compulsory pooling case.
  - b. Some of the data is available in the public records of the OCD and BLM
  - c. Cimarex has no obligation to provide data to Nearburg until such time as Nearburg has paid its share of the total well costs pursuant to a voluntary agreement. Further Nearburg waived its right to be a participating party and has been joined pursuant to a compulsory pooling order by failing to timely elect to pay and participate in this wellbore.
  - d. Cimarex objects to producing this data which is confidential in nature and deserve to be protected as a trade secret/confidential business record until such time as Nearburg has paid its share of the total costs of this well

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



APPLICATION OF CIMAREX ENERGY CO. OF COLORADO FOR  
A NON-STANDARD SPACING AND PRORATION UNIT  
AND COMPULSORY POOLING,  
EDDY COUNTY, NEW MEXICO

CASE No. 14582  
Order No. R-13357

AFFIDAVIT OF  
MARK COMPTON AND LEE CATALANO

STATE OF TEXAS           §  
  § ss.  
COUNTY OF MIDLAND   §

Before me, the undersigned authority, personally appeared Mark Compton and Lee Catalano who being fully sworn stated:

A. Our names and qualifications as experts are as follows:

Mark Compton

Education:	BS from the University of Tennessee (1984)
Experience:	Practicing Landman for 8 years in Texas and New Mexico,
Certification:	Registered Professional Landman

Lee Catalano

Education:	MS in Geology, Oklahoma State University (1978)
Experience:	Practicing geologist for 34 years, Texas and New Mexico.

B. We are over the age of majority and competent to make this Affidavit.

We are each responsible for and involved in preparing the necessary documents for submittal to the New Mexico Oil Conservation Division for this case.

We are each personally knowledgeable and familiar with the facts and circumstances of this case and the factual statement set forth in the Cimarex's motion to quash.

C. Our expert opinion are based on the following:

**SUMMARY OF SIGNIFICANT EVENTS  
AND  
EXPERT OPINIONS**

The well is the Cimarex's Lynch 23 Federal Well No. 2-H (API # 30-025-40123) "the 2-H Well." It was spud on June 13, 2011 and completed on August 19, 2011 as a horizontal wellbore for production for the "First", "Second" and "Third" intervals of the Bone Springs formation. Having successfully drill and completed the 2-H Well, Cimarex has proposed the drilling of an infill well, the Lynch 23 Federal Well No. 3-H. By letter dated February 17, 2012, Cimarex proposed to Nearburg the drilling of an infill well and Nearburg has made a qualified election to participate.


We have review the Subpoena dated April 5, 2012 in which Nearburg Producing Company is seeking certain data from Cimarex. We have formed the following opinions based upon our respective expertise and upon the foregoing chronology of events:

The factual statements set forth in Cimarex's Motion to Quash are true and correct to the best of our knowledge information and belief. With the exception of the public data that has been filed by Cimarex for this wellbore, all of the data sought by Nearburg is information that is (a) valuable data; (b) not known outside of Cimarex and the voluntary and paying parties to the Joint Operating Agreement for this wellbore; (c) guarded from disclosure to competitors; (d) if disclosed to Nearburg would give away propriety and confidential information that would adversely effect Cimarex's future exploration in the Bone Springs formation.

**FURTHER AFFIANT SAYETH NOT:**



Mark Compton



Lee Catalano

Affidavit for Cimarex's motion to quash

OCD Case 14582

-Page 2

# ACKNOWLEDGMENT

STATE OF TEXAS           )  
                                  )  
COUNTY OF MIDLAND    )

SS:

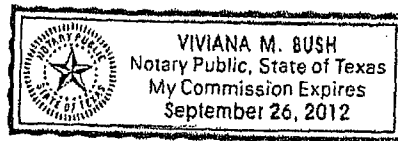
BEFORE me, the undersigned, a Notary Public in and for said County and State, on this 9<sup>th</sup> day of April, 2012, personally appeared Mark Compton and Lee Catalano to me known to be the identical persons who subscribed the name of the maker thereof to the foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and seal the day and year last above written.

Viviana M. Bush  
Notary Public

My Commission expires:

September 26, 2012



UNITED STATES  
DEPARTMENT OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT

HOBBS OCD

OCD Hobbs

JAN 11 2012

FORM APPROVED  
OMB No 1004-0137  
Expires July 31, 2010

## WELL COMPLETION OR RECOMPLETION REPORT AND LOG

RECEIVED

5. Lease Serial No  
NMNM28880

1a Type of Well <input checked="" type="checkbox"/> Oil Well <input type="checkbox"/> Gas Well <input type="checkbox"/> Dry <input type="checkbox"/> Other		6. If Indian, Allottee or Tribe Name	
b Type of Completion <input type="checkbox"/> New Well <input type="checkbox"/> Work Over <input type="checkbox"/> Deepen <input type="checkbox"/> Plug Back <input type="checkbox"/> Diff. Resvr Other		7. Unit or CA Agreement Name and No. NMNM127606	
2 Name of Operator CIMAREX ENERGY COMPANY OF		8. Lease Name and Well No. LYNCH 23 FEDERAL COM 2H	
3. Address 600 NORTH MARIENFELD STREET, SUITE 600 MIDLAND, TX 79701		9. API Well No. 30-025-40123-00-S1	
4. Location of Well (Report location clearly and in accordance with Federal requirements)* At surface N2NE 330FNL 660FEL 32.564968 N Lat, 103.524463 W Lon Unit A At top prod interval reported below N2NE 330FNL 660FEL At total depth S2SE 330FNL 640FEL 4940/12 + 532/12 Unit T		10 Field and Pool, or Exploratory LEA BONE SPRINGS	
14. Date Spudded 06/13/2011		15. Date T.D. Reached 07/08/2011	
16. Date Completed 08/19/2011		17. Elevations (DF, KB, RT, GL)* 3657 GL	
18. Total Depth MD 15449 TVD 11045		19. Plug Back T.D.: MD TVD	
20. Depth Bridge Plug Set: MD TVD		21. Type Electric & Other Mechanical Logs Run (Submit copy of each) 3657 GL	
22 Was well cored? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes (Submit analysis) Was DST run? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes (Submit analysis) Directional Survey? <input type="checkbox"/> No <input checked="" type="checkbox"/> Yes (Submit analysis)			

## 23 Casing and Liner Record (Report all strings set in well)

Hole Size	Size/Grade	Wt (#/ft)	Top (MD)	Bottom (MD)	Stage Cementer Depth	No. of Sks & Type of Cement	Slurry Vol. (BBL)	Cement Top*	Amount Pulled
17.500	13.375 J-55	54.5	0	1708		1250		0	
11.000	9.625 N80	40.0	0	5433		2410		0	
8.750	5.500 P-110	17.0	0	15435		2450		900	

## 24 Tubing Record

Size	Depth Set (MD)	Packer Depth (MD)	Size	Depth Set (MD)	Packer Depth (MD)	Size	Depth Set (MD)	Packer Depth (MD)
2.875	9298							

## 25 Producing Intervals

Formation	Top	Bottom	Perforated Interval	Size	No Holes	Perf. Status
A) BONE SPRING	9636	15353	9536 TO 9778	0.000	80	OPEN
B)			10094 TO 10463	0.000	80	OPEN
C)			11002 TO 11697	0.000	40	OPEN
D)			11926 TO 12621	0.000	40	OPEN

## 27 Acid, Fracture, Treatment, Cement Squeeze, Etc.

Depth Interval	Amount and Type of Material
9536 TO 15162	FRAC W/1,263,610 GALS 20# BORATE XL AND 1,579,286# 20/40 GRC.

RECLAMATION  
DUE 2-19-13

## 28 Production - Interval A

Date First Produced	Test Date	Hours Tested	Test Production	Oil BBL	Gas MCF	Water BBL	Oil Gravity Corr API	Gas Gravity	Production Method
08/19/2011	09/10/2011	24	→	318.0	288.0	437.0	44.8		ELECTRIC PUMP SUB-SURFACE
Choke Size	Tub Press Flwg SI	Csg Press	24 Hr Rate	Oil BBL	Gas MCF	Water BBL	Gas Oil Ratio	Well Status	
	510	200.0	→	318	288	437	905	POW	

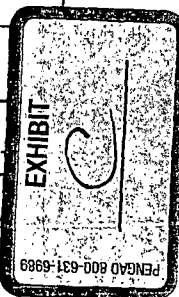
## 28a Production - Interval B

Date First Produced	Test Date	Hours Tested	Test Production	Oil BBL	Gas MCF	Water BBL	Oil Gravity Corr API	Gas Gravity	Production Method
			→						
Choke Size	Tub Press Flwg SI	Csg Press	24 Hr Rate	Oil BBL	Gas MCF	Water BBL	Gas Oil Ratio	Well Status	
			→						

(See Instructions and spaces for additional data on reverse side)

ELECTRONIC SUBMISSION #126865 VERIFIED BY THE BLM WELL INFORMATION SYSTEM

\*\* BLM REVISED \*\* BLM REVISED \*\* BLM REVISED \*\* BLM REVISED \*\* BLM REVISED \*\*

BUREAU OF LAND MANAGEMENT  
CARLSBAD FIELD OFFICE

## 28b Production - Interval C

Date First Produced	Test Date	Hours Tested	Test Production	Oil BBL	Gas MCF	Water BBL	Oil Gravity Corr API	Gas Gravity	Production Method
			→						
Choke Size	Tbg Press Flwg SI	Csg Press	24 Hr Rate	Oil BBL	Gas MCF	Water BBL	Gas Oil Ratio	Well Status	
			→						

## 28c Production - Interval D

Date First Produced	Test Date	Hours Tested	Test Production	Oil BBL	Gas MCF	Water BBL	Oil Gravity Corr API	Gas Gravity	Production Method
			→						
Choke Size	Tbg Press Flwg SI	Csg Press	24 Hr Rate	Oil BBL	Gas MCF	Water BBL	Gas Oil Ratio	Well Status	
			→						

29. Disposition of Gas (Sold, used for fuel, vented, etc.)  
SOLD

## 30. Summary of Porous Zones (Include Aquifers)

Show all important zones of porosity and contents thereof: Cored intervals and all drill-stem tests, including depth interval tested, cushion used, time tool open, flowing and shut-in pressures and recoveries

## 31. Formation (Log) Markers

Formation	Top	Bottom	Descriptions, Contents, etc.	Name	Top
					Meas. Depth
				BRUSHY CANYON BONE SPRING 1ST BONE SPRING 2ND BONE SPRING	8066 8300 9506 10071

## 32. Additional remarks (include plugging procedure):

#43  
12850-13545 .42 40 holes Open  
13774-14469 .42 40 holes Open  
15698-15162 30 holes Open  
15352-15353 1.5 10 holes Open (trigger toe sub)

Electric logs mailed under separate cover.

## 33. Circle enclosed attachments

- |   |                    |               |                       |
|---|--------------------|---------------|-----------------------|
| 1. Electrical/Mechanical Logs (1 full set req'd)      | 2. Geologic Report | 3. DST Report | 4. Directional Survey |
| 5. Sundry Notice for plugging and cement verification | 6. Core Analysis   | 7. Other      |                       |

## 34. I hereby certify that the foregoing and attached information is complete and correct as determined from all available records (see attached instructions):

Electronic Submission #126865 Verified by the BLM Well Information System.  
For CIMAREX ENERGY COMPANY OF CO, sent to the Hobbs  
Committed to AFMSS for processing by JAMES (JIM) HUGHES on 01/04/2012 (12JLH0099SE)

Name (please print) CAROLYN LARSON

Title REGULATORY ANALYST

Signature (Electronic Submission)

Date 12/28/2011

Title 18 U.S.C. Section 1001 and Title 43 U.S.C. Section 1212, make it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious or fraudulent statements or representations as to any matter within its jurisdiction.

\*\* REVISED \*\* REVISED \*\* REVISED \*\* REVISED \*\* REVISED \*\* REVISED \*\* REVISED \*\* REVISED \*\*

**Nearburg Exploration Company, L.L.C.**

Oil and Gas Exploration  
5300 North "A" Street  
Building 2, Suite 120  
Midland, TX 79705-5421  
432-886-8235  
FAX 432-886-7806

Via Facsimile (432) 571-7840 & Certified Mail - Return Receipt Requested

March 21, 2012

Cimarex Energy Co.  
Attn: Mark Compton  
600 N. Maricfield Street, Suite 600  
Midland, Texas 79701

Re: RHTT PROSPECT

Lea County, New Mexico  
Lynch 23 Federal No 3H Well  
305' FNL & 560' FEL (SHL)  
330' FSL & 660' FEL (EOL)  
Sec. 23, T20S, R34E, NMP.M.  
Nearburg Lease No 451

Gentlemen:

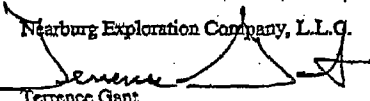
Reference is made to your February 17, 2012 proposal, which was received by this office on February 21, 2012, with AFE attached thereto, to drill the captioned horizontal well from the above approximate surface location (SHL) to a TVD of approximately 10,500' to test the 2<sup>nd</sup> Bone Spring reservoir, with the horizontal lateral drilled within such reservoir in a southerly direction to the terminus (EOL) above, at an approximate TMD of 14,975', with its drilling unit covering the E/2E/2 of said Section 23.

Please find attached hereto your AFE, which has been executed by Nearburg, evidencing its election to participate in the proposed operation with its 50.00% working interest. This election is without prejudice to Request for an Emergency Order Staying Cimarex's Proposal to Drill a "Test" Well in the 2<sup>nd</sup> Bone Spring Sand under Order R-13357 and Application to Reopen Case No. 14582 for Clarification filed contemporaneously herewith by Nearburg with the NMOCD.

In addition, attached is a copy of Nearburg's Well Data Requirements which sets forth the information which we request be furnished to Nearburg pertaining to this operation. Should you have any questions, please feel free to contact the undersigned at (432) 818-2901.

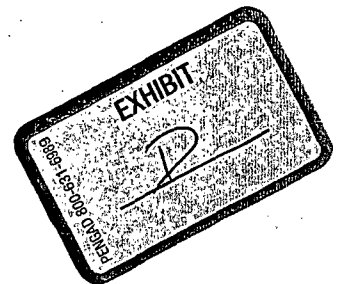
Sincerely,

Nearburg Exploration Company, L.L.C.

  
Terrence Gant  
Midland Manager

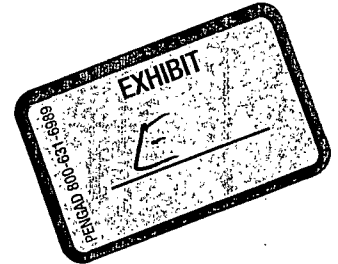
attachments

cc: Holland & Hart LLP  
P. O. Box 2208  
Santa Fe, NM 87504-2208  
Attention: Michael H. Feldewert  
Adam G. Rankin



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

IN THE MATTER OF THE HEARING  
CALLED BY THE OIL CONSERVATION  
DIVISION FOR THE PURPOSE OF  
CONSIDERING:



CASE NO. 14331  
ORDER NO. R-13156

APPLICATION OF XTO ENERGY, INC. FOR  
COMPULSORY POOLING AND DOWNHOLE  
COMMINGLING, SAN JUAN COUNTY, NEW  
MEXICO.

ORDER OF THE DIVISION

BY THE DIVISION:

This case came on for consideration of XTO Energy, Inc's Motion to Quash Subpoena Duces Tecum, at a pre-hearing conference on July 15, 2009, at Santa Fe, New Mexico, before Examiners David K. Brooks and Richard Ezeanyim.

NOW, on this 12<sup>th</sup> day of August, 2009, the Division Director, having considered the arguments and the recommendations of the Examiners,

FINDS THAT:

(1) Due notice has been given, and the Division has jurisdiction of the subject matter of this case.

(2) This is a compulsory pooling case in which XTO Energy, Inc. ("XTO") seeks establishment of a unit comprising the NE/4 of Section 24, Township 29 North, Range 10 West, NMPM, San Juan County, New Mexico, in the Pictured Cliffs and Chacra formations ("the unit"), said unit to be dedicated to XTO's Martinez Gas Com. D Well No. 1 (API No. 30-045-34063) ["the well"].

(3) The following facts are apparently undisputed:

(a) XTO and S.G. Methane Company ("SG") each own undivided interests in the unit.

(b) The well has been drilled, but has not been completed.



(c) SG has not agreed to participate in the well, and has not paid, nor agreed to pay, any part of the costs thereof.

(4) SG entered an appearance in this case and procured from the Division a subpoena duces tecum ("the subpoena") requiring XTO to produce data in its possession concerning the well, including well logs and daily drilling reports ("well-specific data"). XTO filed a motion to quash the subpoena.

(5) SG contends that the well-specific data is relevant, or at least potentially relevant, to issues that will be considered at the hearing of this case, and is accordingly discoverable. XTO contends that the well-specific data contains privileged trade secrets.

(6) The Division concludes that the well specific data, if not technically "trade secret," constitutes confidential business information of a character that is typically closely guarded in the industry. The Division has recognized the confidential and sensitive nature of this information by adopting Rule 7.16(C), providing that the Division will preserve the confidentiality of well logs for a period of 90 days after completion of a well. Due to the confidential and sensitive character of this information, the production of the well-specific data should not be ordered in the absence of a clearly articulated demonstration of its relevance to an issue that will actually be controverted at the hearing.

(7) SG has not demonstrated how the well-specific data will be relevant to any issue that will, or even may, arise at the hearing. SG has suggested that the data could have a bearing on the amount of the risk penalty to be allowed the operator. This contention is not persuasive because XTO made its decision to incur the risks associated with drilling the well prior to commencement thereof, at a time when it did not have the well-specific data. The fact that XTO chose, as it was legally entitled to do [see NMSA 1978 Section 70-2-17.C], to defer applying for compulsory pooling until after drilling the well reduced neither the risk XTO incurred in drilling the well nor the benefit thereby conferred on SG or other non-joining owners.

(8) SG also contends that it is entitled to the well-specific data as a co-owner of the land to which the data relates. XTO contends that SG is not entitled to data as a co-owner unless and until it pays its share of the costs associated with the data's acquisition.

(9) Neither party has cited, and the Division has not found, any decision from any jurisdiction that addresses this specific issue. However, the law of co-tenancy generally provides that a co-tenant may recover its share of *net* proceeds of exploitation of the common property. Accordingly, the Division concludes that a co-tenant does not have a right to compel disclosure of information regarding the jointly owned property acquired by the efforts of another co-tenant, when it has not reimbursed, or offered to reimburse, the other co-tenant for a prorata share of the costs the other co-tenant incurred in acquiring the information.

(10) Accordingly, XTO's Motion to Quash should be granted.

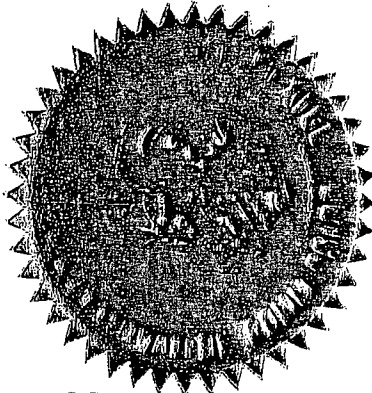
**IT IS THEREFORE ORDERED THAT:**

(1) The subpoena duces tecum previously issued by the Division is hereby quashed to the extent it orders XTO to deliver the well-specific data to SG.

(2) This order concerns only the issue of discoverability, and does not constitute an advance ruling on any matters that may arise at any hearing of the application on the merits.

(3) Jurisdiction of this case is retained for the entry of such further orders as the Division may deem necessary.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.



SEAL

STATE OF NEW MEXICO  
OIL CONSERVATION DIVISION

A handwritten signature in black ink, appearing to read "Mark E. Fesmire".

MARK E. FESMIRE, P.E.  
Director