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

**APPLICATION OF COG OPERATING LLC
FOR A NON-STANDARD SPACING AND
PRORATION UNIT AND COMPULSORY POOLING,
LEA COUNTY, NEW MEXICO**

**CASE NOS. 15810, 15811,
15812, 15813**

WELDON BAIRD AND THE BEULAH M. BAIRD TRUST'S CLOSING STATEMENT

Weldon Baird and the Beulah M. Baird Trust ("Baird") submit this closing statement following the August 31, 2017 Examiner Hearing in the above consolidated matters.

Background

Applicant COG Operating LLC ("COG") seeks an order in the following cause of actions before the Oil Conservation Division:

1. **No. 15810:** (1) creating a 320-acre, more or less, spacing and proration unit comprised of the E/2 W/2 of Section 16 and the E/2 W/2 of Section 21, Township 25 South, Range 35 East, NMPM; and (2) pooling all uncommitted interests in the Bone Spring formation;
2. **No. 15811:** (1) creating a 320-acre, more or less, spacing and proration unit comprised of the W/2 W/2 of Section 16 and the W/2 W/2 of Section 21, Township 25 South, Range 35 East, NMPM, Lea County, New Mexico; and (2) pooling all uncommitted interests in the Bone Spring formation;
3. **No. 15812:** (1) creating a 320-acre, more or less, spacing and proration unit comprised of the E/2 W/2 of Section 16 and the E/2 W/2 of Section 21, Township 25 South, Range 35 East, NMPM, Lea County, New Mexico; and (2) pooling all uncommitted interests in the Wolf Camp formation; and

4. **No. 15813:** (1) creating a 320-acre, more or less, spacing and proration unit comprised of the W/2 W/2 of Section 16 and the W/2 W/2 of Section 21, Township 25 South, Range 35 East, NMPM, Lea County, New Mexico; and (2) pooling all uncommitted interests in the Wolf Camp formation.

COG apparently seeks to pool the mineral interests held by Baird, among others. However, Baird's interests are already the subject of a voluntary agreement and therefore may not be force pooled in these proceedings.

Points and Authorities

Both COG and Baird submitted their respective exhibits at the Examiner Hearing on August 31, 2017. Baird presented evidence that their interests have already been placed under a voluntary lease agreement, complete with a pooling clause. Their interests are not available to be force pooled. Under the operation of NMSA 1978 § 70-2-17(C) and established Division precedent, there is no basis for the exercise of the Division's compulsory pooling authority in this case and, consequently, COG's Applications must be dismissed as to the Bairs.

Under the pooling statute, COG has the burden of affirmatively proving that the owners of mineral interests in a spacing unit "have not agreed to pool their interests." Such a showing is a mandatory pre-condition to the exercise of the Division's authority to pool property interests under § 70-2-17(C).

The Division must necessarily address the voluntary agreement issue before it exercises its powers to consolidate the lease interests under the compulsory pooling statute. Typically, the compulsory pooling orders that the Division issues contain an express finding to the following effect:

"() There are interest owners in the subject proration unit that have not agreed to pool their interests."

Such a finding has been included in hundreds of compulsory pooling orders for decades now. The Division's standard practice of considering evidence of and making a finding on the voluntary agreement issue fulfills the directive under the pooling statute. In other words, the Division does not exercise its authority until it first makes a finding that "[the] owners have not agreed to pool their interests and develop their lands as a unit."¹ *See Sims v. Mechem*, 72 N.M. 186, 382 P.2d 183 (1963) ("Unquestionably, the [Division] is authorized to require pooling of property *when such pooling has not been agreed upon by the parties.*" (emphasis added)).

COG entered into a lease on May 1, 2015 with Beulah M. Baird Trust dated July 6, 1990, by Norma Baird Loving and Weldon Baird as co-trustees ("Lease"). Baird Trust Exhibit No. 1. Under the Lease, the Baird Trust is entitled to royalties paid on 25%. *See id.* Presumably, prior to entering into the Lease, COG performed its due diligence to determine that the Baird Trust was the owner of the subject interests and thus voluntarily entered into an agreement with Baird Trust to pool its interests. *See* § 72-2-17(C). At the hearing, COG's land witness, Mike Wallace, admitted that COG had entered into the Lease and testified that COG intended to "honor" the Lease.

COG does not deny the existence of the lease it took, but appears to contend only that the Lease is not "marketable" because the personal representative of the predecessor's estate did not provide letters testamentary prior to conveying the interest to the Trust. *See* Letter, Mike Wallace to Weldon Baird (June 15, 2017), offered as Baird Trust Exhibit 2. COG raised no such concern when it proposed the Lease to the Baird Trust. At hearing, COG's witness, qualified as an expert landman, refused to explain or define "marketability". Nonetheless, the same witness testified that COG sought to force pool the Baird interests for 1/8 royalty and asked the Division to provide a

¹ Section 70-2-17(C) says, in part, "Where, however, such owner or owners have not agreed to pool their interests...the division...shall pool all or any part of such lands or interest or both in the spacing or proration unit as a unit."

200% risk penalty. COG's witness also affirmed that it will seek to recover well costs attributable to the Bairds' pooled interests at 87.5%, rather than 75% that is authorized under its lease. COG's actions do not appear to be taken in good faith, as COG effectively asks the Division to render its lease a nullity.

COG's justification for its about face is unsupported. More than one year following the date of the Lease, COG sent a letter to Weldon Baird, asserting for the first time that title must be cured, and attached what appeared to be a requirement from an unidentified title opinion. *See id.* at 2, § 17. In the letter, COG did not explain what is necessary to cure title, and Mr. Baird was unable to reach a COG representative at the telephone numbers identified in the letter. The letter and the requirement are confusing, particularly in light of the existing Lease.

The purported requirement itself is unclear and inconsistent. The requirement expressly states, "We have given effect to" the Domiciliary Foreign Personal Representatives Deed to Norma Baird Loving and Weldon Baird as Trustees of the Beulah M. Baird Trust. *Id.* On this basis alone, COG should be precluded from denying the efficacy of the Lease. The requirement further states that "you [i.e., COG] should obtain record and provide to this office for review, the authenticated proof of authority referenced in the deed as being in Lea County District Court No. PB-2002-133Mc appointing" Ms. Loving as domiciliary foreign personal representative. *Id.* (2nd ¶); *see* Baird Trust Exhibit No. 3. Mr. Wallace testified, however, that COG did not obtain the documents filed in the foregoing matter for review, as apparently required by the title opinion. To make matters even more confusing, the purported title requirement requests "authenticated copies of the Letters Testamentary," which the requirement states are nonexistent. *Compare id.* at 2, ¶ 5, *to id.* ¶ 7. When asked about this requirement, Mr. Wallace testified that COG did not attempt to obtain documents from the County Court of Dallas County, as instructed in the purported requirement.

Mr. Wallace further testified that COG did not review the Last Will and Testament of Beulah M. Baird, which appoints Ms. Loving as executor, or the Order Admitting Will to Probate, both of which were recorded in the Lea County records in or about September 1995. *See Baird Trust Exhibit No. 4.* Yet, without complying with these requirements or otherwise exercising due diligence, less than two months later, COG filed an application seeking to pool the interests that are already the subject of the Lease. Moreover, despite COG's belated position on title to the subject interests, COG is paying Mr. Baird on other interests under the Lease. *See Baird Trust Exhibit No. 6.*

The foregoing facts illustrate that COG has failed to adequately perform its due diligence and to act in good faith with the Bairs. COG does not dispute that the Baird Trust and its successors in interest, Mr. Baird and Ms. Loving, are the heirs entitled to the subject interests. Mr. Baird and Ms. Loving are the current owners of record. *See Baird Trust Exhibit No. 5 at unnumbered page 2 (Mineral Deed and Assignment, recorded in Lea County Book 2083, page 325-330)*

Under these circumstances, the Division should not pool the Baird interests. Rather, COG should be required to honor the terms of the Lease from the date of first production.² If there are "marketability" issues, the royalties to which the Bairs are entitled under the lease can be held in suspense in accordance with the Proceeds Payment Act if title has not been cured before first production. *See NMSA 1978, § 70-10-4 (1991).*

² Mr. Baird and Ms. Loving are taking the steps necessary to obtain the documents that COG belatedly seeks and will provide such documents as soon as they are obtained from the Lea County court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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