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August 16, 2002

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. R. Kirk Flowers
Director – Jt. Interest/Revenue Accounting
Energen Resources Corporation
605 Richard Arrington, Jr., Boulevard North
Birmingham, Alabama 35203-2702

Re: Martinez #1-3132032A

Dear Mr. Flowers:

Thank you for your letter dated March 11, 2002 ("Your Letter"), which was in response to my February 13, 2002, correspondence. On June 15, 2001 and July 11, 2001, I had notified Energen Resources Corporation ("Energen") by Certified Mail – Return Receipt Requested, that, because of the legend at the end of Energen's monthly Invoices and Statements of Gas Imbalances, my "Agreement with the Statements" and Invoices was assumed to be correct, I was writing to advise of my disagreement with that Statement or Invoice and all future Statements and Invoices. Notwithstanding my letters of June 15 and July 11, Energen has continued to send monthly statements of Gas Imbalances and Invoices with the same legend at the bottom of the Statement or Invoice, and I continue to disagree, as I explain hereafter.

Through the many years of operating Martinez Well No. 1 (the "Well"), the operator has indicated that I was a signatory of, and party to, a Joint Operating Agreement ("JOA"). For example, on January 31, 1992, Meridian Oil sent to me, with highlighting, a JOA dated December 12, 1984, in justification of an Overhead Rate of $462.84 per month. I am enclosing a copy of Meridian's letter dated January 31, 1992 and the JOA, the underscoring, but not the highlighting, on which accompanying JOA of which is mine. You will carefully note that the copy of the JOA between Union Texas Petroleum Company as operator and the Non-operators, including in the category of listed Non-operators Unicon Producing Company (50% Working Interest) and me (8.3333% Working Interest) omits a signature page. Why was the signature page omitted? Were not Union Texas Petroleum Company, the operator, and Unicon Producing Company corporate affiliates? Did any non-operators besides Unicon Producing Company sign the JOA? Thus, the letter of January 31, 1992 justified an overhead charge based upon my having been a party to the JOA. This is a clear and certain misrepresentation of fact that I was a party to and bound by the JOA.

Another instance of misrepresenting that I was a party to and bound by the JOA is a letter to my revocable trust (to which I have transferred my ownership) dated October 22, 1993. A copy of that letter is enclosed, along with the attached Amendment to Joint Operating Agreement and a statement of my interest in the Well and the proposed change in the amount of the Overhead per month. By this amendment, which I did not sign, but which Meridian Oil apparently did, my Revocable Trust is shown as being a party to the JOA with an 8.3333% interest in the Forced Pool 160 acre unit. That amendment represented that I had previously agreed to a Fixed Overhead charge for that period of $39.15, by being a party to the 1984 JOA, subject to the COPAS adjustment, the then current amount attributable to my 8.3333% Working Interest. And, of course, by continuing to send monthly Statements of Gas Imbalances and Invoices, even after Your Letter that conceded that I had not in fact ever signed the 1984 JOA, Energen is guilty of repeating the misrepresentation that I am party to the JOA which provides for Gas Imbalances and the stipulated monthly overhead of $350.00 for the Well, plus the COPAS adjustment.

What if I had been a party to the JOA? According to a Joint Billing Summary from Energen, I would owe Energen $3,445.88 and my Gas Imbalance for the month of March 2002, would be 3,041 units of 1,000 BTUs per unit.

At this point I, as Trustee, may or may not obtain a buyer for the Trust's past and future entitlements. Let us assume that I do obtain a buyer from this time forward. How would I recoup the 3,041 units of gas shown on the records as owed to my trust by Energen?

According to your letter, my Revocable Trust would be allowed to "make up" the 3,041 units at the rate of only 25% of each future monthly entitlement. Assume production of gas at the present rate that entitles the Trust currently to the 69 units, then I could "make up" the 3,041 by receiving and selling 25% of the 69 units per month, to which it would be entitled, or 17.25 units only for a period of 14 years and 8 months (3,041 units ÷ 17.25 units = 1762.9 months or 14 years and 8 months). The foregoing period of time in which the 3,041 units of gas imbalance only could be "made up," assumes that the well will be producing and the trust markets 86.25 units for a period of 14 years and 8 months. Should (1) the trust not have a market, or (2) the New Mexico allotment be reduced, or (3) the well shut down, or (4) production of gas or its sale cease, or (5) the gas reserve be exhausted, or (6) for any other reason my trust not be able to reduce the imbalance, the period of 14 years and 8 months would be cut short and reduce the trust's recoupment of the 3,041 units imbalance.

If we assume that the trust never acquires a market for the production from the well to which it is "entitled" but continues to the point that the gas reserves are entirely depleted, and the well is necessarily shut down, the Trust will nevertheless have been, according to your letter and the invoices, required to advance to Energen or its successors monthly the costs of production for all of the years of operation. For example, suppose the Well continued to produce through the year 2014 at the same volume. Suppose the annual cost of operations increased by the same percentage that the COPAS has increased from 1984 to January 31, 1994, which would be 37.95% ÷ 10 years or 3.795%

per year. Thus the monthly increase in the present monthly charge of $784.32 would be $2.975 per month. Spread out over 12 years, the monthly cost of operations would be $287.295 for 12 years; that is 144 months x $287.295 or a total of $41,370.48. When added to the $3,445.88 balance of operating costs claimed by Energen to be due for the period of 7/14/00 through 4/15/02, the Trust would have been required to pay out in cash $44,816.36. And if the trust would defer payment, one would need to compute and add interest that, according to the JOA Exhibit C, Paragraph 3, a non-operator would be required to pay Energen at the prime rate plus 1.5%.

Were my Revocable Trust to be unable to find a buyer, it would have thus been required by the JOA (if I had agreed to it) to pay out $44,816.36 over a period of 12 more years, foregoing either the opportunity to invest the costs of operation charged and paid to Energen, or alternatively pay interest on unpaid expenses of operation to Energen at the prime rate plus 1.5%. Either way, the Trust would be paying the expense of producing gas for which Energen is all the time deriving the proceeds of sale and increasing its cash flow and possibly its net income.

For the investment of $44,816.36, together with either interest at the prime rate plus 1.5% or foregoing the investment opportunity by prompt payment to Energen within 15 days as expenses were accrued, what would Energen be required to provide for such exchange? The money it had received from the sale of the gas to which the trust was entitled, but without interest! And, assuming an annual inflationary rate of two to three percent between now and 2014, for example, the dollars paid by Energen would be worth a minimum of one-third less than when Energen had received the same cash by a sale of the gas to which the Trust was entitled. What is worse, the figure I would receive has to be "negotiated." And by that time Energen may have sold the Well, ceased to exist, or gone the way of Enron.

In the above scenario, at best, it is assumed that Energen or its successor is solvent when payback time for imbalances to the other operating interests arrives, and has not fallen into the same insolvent position as Enron, leaving my Trust as an unsecured creditor in bankruptcy.

Fortunately, and unknown to me until receipt of Your Letter, the JOA was not signed by me, as finally admitted for the first time in Your Letter.

Contrary to the gratuitous assertion in Your Letter that the Forced Pool Order of May 5, 1984, "yields the same results related to joint interest owner responsibilities" as if the JOA had been signed by me, I emphatically disagree. Tracking the results that would have followed my signing the JOA if it were enforceable, as I have done in the scenario above, I conclude that only the Order of May 5, 1984 and the laws of New Mexico define and dictate the respective legal positions of Energen and my Trust. And that Order does not make the other operating interest owners responsible for paying the operating costs for producing gas, the proceeds from the sale of which they do not receive.

I have reviewed the file in Case No. 2249 before the Oil Conservation Commission. For your information I secured a copy, which I am enclosing, of the Order of the Commission dated May 5, 1984. The file does not contain the JOA, but the last document on record in that matter appears to be the accounting by Southern Union Production Company for its expenditure of $29,241.00 for the cost of drilling Martinez Well No. 1 and an explanatory letter to Jose Maria Martinez. A copy of the file was obtained and is enclosed.

I believe you will be interested in the first item of expenses in drilling the Well. The Well certainly required more expertise and administration in the drilling and developing than after the time that the Well was developed. That cost was only $150.04; that is, less than .04/100ths for administrative overhead. (The decimal point preceding the "04" is not a typographical error!) When Energen submitted its invoice for March of 2002, its Lease Operating Expense for the month for the Well was $119.63, but its Production Overhead allocated to the Well as contrasted to the real expense was $784.32; that is, 6.58 times the actual expenses on the ground!

By the terms of the pooling order, the proportionate share of the costs of development and operation of the 160 acre pooled unit were to be borne by each consenting working interest owner and "the share of the costs for development of the pooled unit, as determined above, which is to be paid by the mineral interest owners, shall be withheld only from the working interest share (7/8) of the revenue derived from the sale of hydrocarbon produced from the well on the pooled unit." Thus the Order permitted Southern Union Production Company to withhold the costs of operation solely from my undivided 0.83333 working interest in the gas produced, NO MORE. While I owed to such operator 0.83333% of the cost of operations, the Operator's remedy, in effect, was lien, upon the sales proceeds of the gas, limited to 7/8th of my entitlement, not to 8/8$^{ths.}$

Ostensibly, as the owner of an 8.3333% operating interest, I could be sued by the operator for the costs of the production to which I was entitled, but the operator would be obligated initially to pay me for my 8.3333% of the 1/8th royalty just as it is now obliged to do, and I assume does, pay the Bureau of Land Management 50% of the 12 ½ % royalty because of its Lease on 80 of the 160 acre pooled interest. But in no event did the pooling order give Southern Union Production Company, or its successor ownership, the right to sell and retain the proceeds of any gas exceeding an amount necessary to cover the costs of producing the 8.3333% of the total.

What did Southern Union Production Company's successor operator do? Until 1992 it simply caused the operator to sell as agent for me my 8.3333% of total production, and to deduct what under the JOA would have been its true operating costs, including overhead, and to remit the difference, if any, to me. See a typical notice by Meridian Oil, which we have enclosed, that accompanied Meridian's invoice for operating costs, as computed under the JOA. This notice specified that I was not to pay any expense of operation because it was being applied to the costs.

On September 28, 1995, Meridian Oil gave written notice that it would cease having my gas purchased. It announced that it would terminate the agency relationship as of December 1, 1995. When that happened it would surely have no authority to sell my gas, and do anything other than apply the proceeds to its operating costs. Notwithstanding the notice that it would not market my gas, it continued to do so under the name of Taurus, even offering on February 13, 1998, by letter to net the revenue produced in my behalf to be offset against my share of the production it sold. In other words, it would not only market my gas but simultaneously apply the proceeds of marketing and selling the gas to operating costs.

After a transfer of Meridian Oil's interest, ending with Energen's obtaining such interest both as operator and 50% owner of the operating interest, Energen commenced and continued to sell my 8.3333% of the total gas produced to which it had no title and for which sale it had no authorization. Presumably it had the right by the Pooling Order to sell sufficient of the gas to pay itself its real cost of production from 7/8ths of my 8.3333% interest but no more. I had no quarrel with Energen's selling as my agent and keeping and crediting that portion of my gas entitlement shown on the invoices as LOE (Lease Operating Expense); (e.g., $9.95 on the Invoice No. 03-AR-1682 for March 2002), but I strongly object to applying any part of the proceeds of sale of my gas to the $65.34 charge shown as "Fixed Production Overhead". But, rather than crediting the proceeds of the sale of my gas to its operating costs, Energen proceeded to include such expense in its invoice for my Trust to pay.

The application of any sale proceeds to anything other than the "costs of operation" was not authorized by the Order of the Oil Conservation Commission or by my Trust. So doing constitutes a conversion of my property, and, after Energen enforced its right under the Pooling Order to produce and to sell sufficient gas to enable it to collect its legitimate expenses of production, it did not use such funds for expenses, but pocketed them. That constituted a conversion of such funds for its own use.

Your letter concludes with the observation that "Energen Resources is not an Enron." *Au contraire!*

As I understand two phases of Energen's accounting scam they were (1) inflation of its gross, if not its net, income, and (2) failure to include expenses by offsetting them against expenses paid or accrued as accounts payable by the other owner of the operating interest.

The Pooling Order of the Oil Conservation Commission of New Mexico, to which my former law partner, Thomas F. McKenna, and I consented, provided that the "proportionate share of the costs of development and operation of the pooled unit shall be borne by each consenting working interest owner" and that such share "is to be paid in by the mineral interest owners by withholding only from 7/8ths" of the revenue derived from the sale of the hydrocarbons produced from the well. The foregoing language is the sole and only basis for Southern Union Production Company (and its successors) to keep any of the revenue derived from a sale of the mineral interest owners'

proportionate ownership of the gas. Any gas and resulting revenue claimed by the developer of the well belongs to the mineral owners to the extent that it is not required for development of the well, including "a reasonable charge for supervision." The ownership of the gas, and of the revenue derived from its sale, beyond the amount required for operations certainly could not be successfully claimed to have been transferred to Southern Union Production Company, or its successors, by the Pooling Order of May 5, 1961.

Thus when Union Production Company, as owner of 50% of the working interest in the pooled well entered into the JOA of December 12, 1984 with Union Texas Petroleum Corporation as Operator, neither party could bestow any ownership of my 8.3333% operating interest upon themselves or their successors.

Meridian and Taurus Exploration marketed my share of the gas as agent, and on February 13, 1998, Taurus notified me that I could simply offset my revenue from the sale of my 8.3333% interest in the gas to the cost of operations. (At that time I believed the letter of January 31, 1992 from Meridian Oil, to the effect that by the JOA, I had agreed that the legitimate cost of operations included a fixed overhead of $462.84.)

Thereafter, Energen decided that it would continue to market or sell all the gas, as its predecessor operators had been doing, not as agent for the other 50% operating owners, but for itself, as if it owned 100% of the gas produced. In this way its revenue from the Martinez Well would be doubled, but at no cost to itself. This scheme was effected by continuing to bill the 50% operating interest owners for the 50% of the purported "cost" (including the fixed overhead called for by the JOA). Assuming that Energen had a multitude of other wells for which the owners of the operating interests could find no market, this maneuver would vastly increase Energen's gross and net profits, particularly with the price of a BTU unit increasing to over $3.00.

But would not the Imbalance (22,874 units at March 31, 2002 and increasing about 10,000 annually) have to be offset as accrued expenses against revenues, and thereby reduce the net profits, but still not the gross revenue?

I suspect that, by creative accounting, Energen would argue that whenever gas production ceased in the distant future and it had to settle up with working interest owners on "Gas Imbalances", its formula under the JOA would be such that any amounts Energen would owe would be so minimal, or uncertain, or subject to negotiation, that any reserve would be inconsequential, or not material. Hence, no reserve needs be set aside. If an analyst were to value Energen with the increased net, and certainly gross, revenue thus resulting from a multitude of oil and gas wells in New Mexico in which Energen had a working interest, he would certainly be inclined to place a greater value on Energen and its stock than if such an accounting legerdemain had not been executed by Energen in the first place.

By simply requiring the remaining working interest owners to market their interests, Energen purported to increase its revenue and profits. But what had changed from before? Energen continued to send out invoices for operating expenses of the well. It continued to market 100% of the production, including the other 50% to which Mr. McKenna, I and others were entitled. But now the sale of such other 50% was no longer as an agent for the owners, but ostensibly as an owner of such other 50%, to which it admittedly was not entitled. See balance statements under the heading of "Entitlement." Being in the business, Energen knew full well what difficulties, technical and otherwise, would be encountered by an owner of a small fraction of the gas attempting to market the gas to which he was admittedly entitled.

What, then, is the basis of any claim of Energen to ownership of the gas to which it concedes the other 50% working interest owners are entitled? You purport to be relying upon the Order of May 5, 1961 for authority to produce and sell my 8.3333% of the gas, and, I assume for authority to produce and sell Mr. McKenna's 8.3333% and that of the owners of the other remaining 33.333% working interest. With the most liberal interpretation of that Order, one could only find authorization for Energen to produce, sell and credit to the reasonable cost of production only sufficient gas to cover such reasonable costs. NO MORE. Under New Mexico's laws, any gas, and the proceeds of such gas sale, belong to the owners of the remaining 50% operating interest. Certainly the Order does not authorize Energen to produce and sell as its own that 50% and simultaneously charge the owners of the other 50%, including me or my trust of which I am presently the sole beneficiary, with 50% of the total production costs.

As the correspondence between Taurus and Energen, on the one hand, and me on the other indicates, I have consistently protested the attempts to disguise the operator's lack of authority to bill me for operating costs of producing gas for the sale of which I have received no proceeds by the device of appending a legend to the billing and balancing statements. Energen hardly has any acquiescence on my part as a defense to my claim to be made whole.

At this point I have spent considerable legal, professional time and effort to right what I consider a wrong done to me by Energen and possibly its predecessors, Meridian and Taurus. As a result, I have come to the following conclusion:

Energen, possibly together with its predecessors in interest whose liabilities Energen assumed, is liable for damages for trespass and/or conversion for the production and sale of gas to which I or my trust was entitled and for the failure to credit as much as was necessary to cover the reasonable costs of producing such gas to its reasonable costs of production. Punitive damages, costs, and attorneys' fees are in order in an individual lawsuit and in a class action.

We start with the premise I (and I suspect most other owners of the 50% operating interest) did not become parties to the JOA of December 12, 1984. Therefore the Fixed Overhead Charge that was spelled out in the JOA and which was charged monthly from the beginning of production is in no way

binding upon non-parties, including me and my trust (for the sake of simplicity, I will refer to myself as including my revocable trust of which I am the trustee and sole beneficiary). The burden of proving that such Fixed Overhead Charge is and was "reasonable" is upon Energen as it is not "fixed" by the unsigned JOA, contrary to the representations of the operator at the time and up to the receipt of your March 11, 2002 letter.

Nothing in the Pooling Order of May 5, 1961 purports to authorize Southern Union Production Company as owner of a 50% operating interest to produce and sell more gas than is required for the payment of reasonable costs of its production. Contrary to your construction, and possibly an interpretation adopted by prior operators, including Taurus, the operator of the Well was authorized to sell for its own account only the reasonable cost of producing the gas sold. The remainder of the gas of the other owners of 50% operating interest could be sold by the operator only as an agent of the owners of such other 50%.

The system of "gas balancing" under which the operator sells for itself 100% of the gas produced while charging the owners of the other 50% of the operating interest for the cost of production of such other 50%, is solely the invention of Energen as successor to the known signers of the JOA, Union Texas Petroleum Corporation, Operator, and Union Producing Company, Owner of a 50% working interest. From what I know, the two corporations were affiliated and, with its Fixed Operating Overhead, the JOA was a "sweetheart deal." Even for the owners of a part of the other 50% operating interests who signed the JOA, there is certainly a justifiable doubt as to the validity or enforceability of such an agreement.

As long as Meridian and its predecessor and successor operators continued to produce and sell my 8.3333% of the gas as my agent, and, after taking out the reasonable costs (assuming arguendo that the costs of production were reasonable) and remitting to me the amount left over as my agent, there was no conversion.

BUT, when Energen appropriated the proceeds of the sale of the gas without my consent, and billed me for the costs of its production, it certainly was guilty of a trespass to my interest or a conversion.

Although Section 30-14-1, NMSA 1978, providing for double damages to real property applies only to the surface, there still remains the common law action for trespass by adversely affecting the minerals. See Hartman v. Texaco, 1997, 123 NM 220 (Ct. of App.), 937 P. 2d 979, in which the Court said (at page 224):

> We recognize that in New Mexico an action for common law trespass does provide relief for trespass beneath the surface of the land. See Swartzmann, Inc. v. Atchison, Topeka & S.F. Ry., 857 F. Supp. 838, 844 (D. NM 1994) (trespass for pollution of groundwater). See also Lincoln-Lucky & Lee Mining Co. v. Hendry, 9 NM 149, 155, 50 P. 330, 332 (1897) (subsurface trespass by mining shaft). See generally

> Restatement (Second) of Torts § 159 (1965). ... Texaco does not challenge the legal efficacy of Hartman's claim for common law trespass, and we do not disturb it on appeal. Rather than limiting or abolishing a right that existed under the common law, Section 30-14-1.1 (D) provides an additional remedy in certain statutorily defined circumstances.

Thus, the unlawful taking of gas belonging to me, and those owners of the other remaining 50% operating interest, constituted a tort of trespass.

Alternatively, it constituted the tort of conversion of the gas and its sales proceeds.

In Woods v. Collins, 1975, 87 NM 370, 371, the Supreme Court held that "the rule in conversion in New Mexico is given in Crosby v. Basin Motor Co., 83 NM 77, 488 P. 2d 127 (Ct. of App. 1971):

> The measure of damages in conversion is the value of the property at the time of conversion with interest...

As Energen had no ownership of the gas which it sold or of the proceeds of sale, the definition of the tort of conversion quoted hereafter applies squarely to Energen's actions of producing and selling my 8.3333% of the gas, for the production of which it had the chutzpah to bill me.

For a definition of the tort of conversion, see Nosker v. Trinity Land Co., 1998, 107 NM 333, 337-338, 757 P.2d 803 (Ct. App.) p. 337-338, in which the Court said:

> Conversion is defined as the unlawful exercise of dominion and control over personal property belonging to another in exclusion or defiance of the owner's rights, or acts constituting an unauthorized and injurious use of another's property, or a wrongful detention after demand has been made. Bowman v. Butler, 98 NM 357, 648 P. 2d 815 (Ct. App. 1982); Taylor v. McBee, 78 NM 503, 433 P. 2d 88 (Ct. App. 1967).
>
> Moreover, in New Mexico a party damaged by another's conversion of his property may recover punitive damages. See Aragon v. General Electric Credit Corporation, 1976, 89 NM 723, 726, 557 P. 2d 576. There the appellate court set aside a finding that the defendant, in unlawfully reclaiming a check due to plaintiff, acted "in good faith." In so doing, it held as follows:
>
> [4] Plaintiffs are entitled to recover compensatory damages from defendant for conversion.
>
> Plaintiffs also seek punitive damages. The trial court concluded that "Defendant acted in accordance with the terms of its contract and in good faith." We disagree.

[5] "Bad faith" means "any frivolous or unfounded refusal to pay; it is not necessary that such refusal be fraudulent." Curtiss v. Aetna Life Insurance Company, (Ct. App.) No. 2338, decided June 15, 1976, cert. Denied July 15, 1976; State Farm General Insurance Company v. Clifton, 86 NM 757, 527 P.2d 798 (1974).

[6] Defendant had no right to impose on plaintiffs its "company policy," absent prior notice or agreement, and with knowledge that plaintiffs were unable to make the repairs without the money. Defendant made no attempt to assist plaintiffs in repairing their home for a period of nine months from September 1973 to June 25, 1974 when defendant authorized disbursement to plaintiffs of the major portion of the insurance proceeds. Defendant had a duty to disburse the money when it received the check for endorsement. Upon demand having been made, defendant refused to endorse the checks and send them to plaintiffs. Defendant did not act in good faith. It was an "unfounded refusal to pay."

Plaintiffs are entitled to punitive damages.

During the trial of the case, plaintiffs sought to question defendant on its financial condition. Objection was made by defendant and sustained by the trial court despite plaintiffs' offer of proof that punitive damages were being sought and therefore wealth was relevant.

This is a matter of first impression in New Mexico.

[7, 8]The general rule is clear that evidence is admissible to consider defendant's wealth and pecuniary ability in fixing the amount of punitive damages. 25 CJS Damages § 126(2) and (3) (1966); 22 am. Jur. 2d Damages, § 322 (1965); Acheson v. Shafter, 107 Ariz. 576, 490 P. 2d 832 (1971); Cox v. Stolworthy, 94 Idaho 683, 496 P. 2d 682 (1972); Southern Pacific Company v. Watkins, 83 Nev. 471, 435 P. 2d 498 (1967); Seifert v. Solem, 387 F. 2d 925 (7th Cir. 1967). See, McCauley v. Ray, 80 NM 171, 453 P. 2d 192 (1968); Whitehead v. Allen, 63 NM 63, 313 P. 2d 335 (1957). We adopt this rule. Plaintiffs were entitled to introduce evidence of defendant's financial condition. Evidence of defendant's worth is a proper consideration when assessing punitive damages.

In the recent case of Aken v. Plains Electric Generation and Transmission Cooperative, Inc. and Craig Chapman, Vol. 41, No. 28, July 11, 2002, page 20, the New Mexico Supreme Court sustained a jury verdict for wrongful termination of employment of $500,000 for compensatory damages and $1,7570,000 punitive damages and for defamation of $100,000 compensatory damages and $1,000,000 punitive damages, the latter being a ratio of ten punitive to one compensatory. There, the amount of punitive damages was held to be constitutional.

At the outset, I think the question of the statute of limitations should be clarified. Until the fraud, mistake, injury or conversion shall have been discovered by the party aggrieved, the cause of action on any of these grounds is not deemed to have accrued. Section 37-1-7, NMSA 1978. In my case, until receipt of your letter dated March 11, 2002, I had been led to believe that I had signed the JOA and therefore that its provisions regarding the accrual of imbalances had some application to my 8.3333% operating interest and requirement to pay for the monthly operating costs of production of gas. I suspect that not only the owners of the remaining 50% operating interests in Martinez No. 1 even now are under the same impression as was given to me, but that owners of operating interests in numerous other gas and oil wells operated by Energen are in the same category as I, and therefore no statute of limitations applies to them as well as to me.

I know from correspondence with Mr. Thomas F. McKenna, previously my law partner, a copy of which letter dated October 5, 1995 is enclosed, that Meridian thoroughly reviewed the matter of its not marketing his 8.3333% of production before his death on February 6, 1996. (See enclosed clipping from the Santa Fe New Mexican dated February 8, 1996.) So the matter must have been weighed by Meridian at that time. The decision to not market the gas of other operating owners of the gas being produced by Energen at the same time as billing such owners for the cost of production, rather than applying the proceeds of production of such gas to the cost of operations and remitting the balance to the owner, was thus not an administrative error or inadvertence. It was a studied and deliberate action.

Nor was the misleading statement in your letter any inadvertence since, conceding that I never signed the JOA of December 12, 1984, you go on by supporting Energen's position by asserting that "this fact does not relieve your responsibility of paying all billed charges because you are covered by the May 5, 1961 Forced Pool ruling; this ruling yields the same results related to joint interest owner responsibilities."

As pointed out above, that Order, insofar as the other joint owners were concerned, simply enabled the share of the costs of development and operation of the pooled unit to be "withheld only from the working interests' share (7/8ths) of the revenue derived from the sale of the hydrocarbons produced from the well on the pooled unit. As Mr. McKenna explained to Ms. Sharon D. Reed-Richison, we were overriding royalty holders, i.e., the authorization to withhold revenues did not relate to the 1/8th or royalty interest that he and I possessed. In that connection he noted that "even as to the Martinez lease we have no burden to try to find someone to purchase our gas", i.e., the royalty portion of one-eighth because "it was literally impossible for us to find someone to buy our share of working interest of the gas and someone else to buy the royalty share of the gas." From that premise Mr. McKenna concluded that Meridian had an obligation to market our gas, because of the impossibility of separating the two types of interest, working and royalty for marketing purposes. Meridian admittedly has a duty to market the royalty portion. It follows that it could only fulfill that obligation by marketing both portions. To conclude this phase of the matter, after Ms. Reed-Richison on behalf of Meridian has "indicated that Meridian would have to keep paying us," no one at Meridian,

Burlington Resources, Taurus or Energen has disputed its obligation to pay at least the royalty interest in gas, but has simply cavalierly ignored it by keeping the 1/8th royalty gas as its own and then marketing or selling it. What I have said here with respect to royalty is completely independent of my position that you converted my working interest gas by selling it and keeping the proceeds, rather than applying the proceeds to operating expenses and remitting to me the balance. If you have an answer to this contention, please let me know what it may be. If you do not inform me why you disagree with the position with Ms. Reed-Richison, I will assume that you agree with her statement to Mr. McKenna.

Thomas F. McKenna and I each acquired our combined 33.3333% operating interest in the minerals in the SW ¼ from Jose Marie Martinez. As such we each also had 16.6666% of the one-eighth royalty interest in the S ½ of SW ¼ of Section 2, T. 25 N, R. 3 W, NMPN and consented to the Application of Southern Union Production Company to pool its 100% interest in the N ½ of the SW ¼ of Section 2, T. 25 N., Range 3 W. NMPN with each of our 16.667% interests in the S ½ of the same section. Consequently we were charged with paying from production only our proportionate share of the cost of developing the Martinez No. 1 well, whereas Jose Marie Martinez, who did not consent to the pooling, was charged with paying from production 110% of his proportionate share, but after these costs of developing the gas well ($39,341) were recovered by Southern Union Production Company, Jose Marie Martinez's royalty interests in gas produced was 50% of the 17/30ths that he owned and the royalty interest of Thomas F. McKenna and me 50% of our respective 8.3333% of the one-eighth royalty interest. I mention this because of the interpretation of its Pooling Order by the Oil Conservation Commission in its letter of May 5, 1961 to Jose Marie Martinez. A copy of that letter is enclosed. As you can see, the Commission there held that the Pooling Order "... means that you will receive payment, without charge for operating costs, for your royalty interest beginning as soon as a well is drilled and is producing." How else, then, could Jose Marie Martinez, and the other owners of the royalty, including Mr. Thomas F. McKenna and me, receive royalty payments unless the operator was obliged to market the gas produced to pay the royalty owners? Incidentally, from your Gas Balancing Statements it would appear that Energen is actually marketing the gas to which Jose Maria Martinez was entitled, namely the 28.3333% now owned by his daughter, Olivia Y. Cordova.

It is clear that Energen as operator has not been adhering to the Pooling Order that requires marketing and paying me and other non-signers of the JOA, any royalty interest on the gas it is producing and marketing, much less paying such royalty free and clear of operating costs. Instead, Energen and predecessor operators have substituted for royalty payments to which we are shown as being entitled so-called "Cumulative Imbalances." For example, assuming Jose Marie Martinez's heiress, Olivia Cordova, with a "Cumulative Balance" of 6,594 as of March 2002. MCFs should have received the proceeds of the sale of 824.23 MCFs (6,594 ÷ 8) as royalties. I should have received the proceeds of the sale of a cumulative balance as of March 2002 of 380 MCFs (3041 ÷ 8) as royalties.

That brings us to the question of punitive damages. For the moment I will limit my evidence to the dealings with me individually, although in large part I suspect the circumstances I relate also apply not only to many other owners of working interests in Martinez No. 1 but also to a host of others in New Mexico who are not parties to a JOA. As evidence showing that punitive damages are recoverable, we point to the following:

1. The letter of January 1992 from Meridian Oil (which enclosed Joint Operating Agreement dated December 1984) justifying the rate being charged for overhead, as if I had signed it.

2. The letter of December 23, 1997 from Burlington Resources (enclosed) verifying that Burlington was using gas balancing statements pursuant to the JOA. Incidentally, this letter establishes that in the past Burlington Resources or its predecessor operators had sold, in its words "on your behalf" 6.315 MCF of gas. This continued with each monthly billing the misrepresentation that I was a party to the JOA.

3. By letter dated October 22, 1993, Meridian Oil sent an Amendment to Joint Operating Agreements San Juan Basin, NM and Co. to the J.A. Sommer Revocable Trust, indicating that I was already a party to the JOA, saying that "If we do not receive a response from you within thirty (30) days from your receipt of this letter, we will assume that you have agreed to this proposal." This was a rather brazen attempt to bind me by amending an agreement to which I was not a party.

4. By letter of 18 February 1998, Taurus Exploration, Inc. sent to me a listing of invoices of "past due account," advising that if I should either send payment in full or if I disagreed, I should let them know the reason for the delay. I replied on the bottom of the letter on February 24, 1998 that I had not received any reply to my letter of January 5, 1998, and I would ignore their invoices just as they had ignored my letter. At the same time I sent Taurus a copy of my January 5, 1998 letter. Enclosed are my reply and my letter of January 5, 1998.

5. For the month of February 1998, Taurus sent me an invoice dated 3/13/98 stating that my "share" of expenses, including Fixed Overhead set in the JOA, was $53.68. On 16 March 1998, I replied again that my letter of January 5, 1998 had received no reply for ten weeks and I would again ignore the invoice. I added, "please stop sending invoices." A copy of the invoice and my reply is enclosed.

6. There followed from Taurus another invoice dated April 10, 1998 for $53.43, to which on April 17, 1998 I again replied. A copy is enclosed.

7. In the face of the foregoing, Energen Resources sent me a letter dated October 26, 1998, requesting a confirmation "of the amount owed" and that I forward payment for these past due invoices so that "the delinquency flag" on my account can be removed.

8. After you finally replied to my sundry protests on March 11, 2002, conceding that I was not a party to the JOA, Energen has continued to send me monthly invoices, each with the legend appended as previously noted. These have been sent to me just as if I had signed the JOA. Your statement that "this ruling [of May 5, 1961] yields the same results related to joint interest owner responsibilities [as if I had signed the JOA] is certainly a false statement. Your statement involved "rights, remedies or obligations" on my part. As explained above, it was contrary to the prohibitions of the Unfair Practices Act. See Sections 57-12-2 D (15) and 57-12-3, NMSA 1978 that render such false statements actionable.

Under the Unfair Practices Act the actions of Energen in attempting to collect currently for the operating costs of producing gas expropriated by Energen [and predecessor operators] as its own and substituting in lieu of the gas thus converted so-called "Imbalances," constitutes an unfair and deceptive trade practice, as demonstrated above, especially for the numerous owners of overriding royalties and operating interests in Martinez No. 1 and other wells in New Mexico operated by Energen who have not signed a JOA.

I call your attention to the fact that, under private remedies provided by the Unfair Practices Act, Section 57-12-10, NMSA 1978, both an individual and class may be awarded triple damages and attorneys' fees and costs. In a class action the members of the class may be awarded "such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice." If no class action has been filed up to now against Energen and/or its predecessor operators for unfair or deceptive trade practices and/or conversion, I am surprised, and Energen and its predecessor operators should indeed count themselves fortunate.

In many instances I believe class actions are completely without merit or justification, especially where the members of the class have suffered no damages or injury, as is often the case. But here members of the class, each with relatively small factional interests or royalties have measurable, provable damages that would justify a large recovery and very likely triple damages and costs and attorneys fees.

As you may observe from the length of this letter, I have given much thought, work and effort to exploring all the ramifications of this matter . Heretofore my attention to it has been purely perfunctory. But this time unless Energen comes up with a satisfactory solution, I do not intend to let my claim rest in limbo.

Now that the cards are on the table, so to speak, please let me know what Energen proposes to do about my grievance.

Sincerely yours,

Joseph A. Sommer

JAS/mp

Enclosures