



**MONTGOMERY
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September 14, 2009

Ms. Florene Davidson
NM Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505

Hand Delivered

**Re: Application of Cimarex Energy Corporation for Non-Standard Oil
Spacing and Proration Unit and Compulsory Pooling, Chaves
County, New Mexico, NMOCD Case Nos. 14350, 14351 and
14352**

Dear Ms. Davidson:

On behalf of Delbert Bassett and Nell Blackerby, enclosed for filing in each of
the above cases are an original and six copies of our Motion to Dismiss.

Very truly yours,

J. Scott Hall

Enclosures: a/s

cc: James Bruce, Esq.

{00128614-1}

REPLY TO:

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

RECEIVED 008

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF HEARING: APPLICATION OF CIMAREX ENERGY CO. FOR NON- STANDARD OIL SPACING AND PRORATION UNIT AND COMPULSORY POOLING, CHAVES COUNTY, NEW MEXICO.	2009 SEP 14 P 2:34 CASE NO. 14350
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APPLICATION OF CIMAREX ENERGY CO. FOR NON- STANDARD OIL SPACING AND PRORATION UNIT AND COMPULSORY POOLING, CHAVES COUNTY, NEW MEXICO.	CASE NO. 14351
APPLICATION OF CIMAREX ENERGY CO. FOR NON- STANDARD OIL SPACING AND PRORATION UNIT AND COMPULSORY POOLING, CHAVES COUNTY, NEW MEXICO.	CASE NO. 14352

MOTION TO DISMISS

Come now Delbert Bassett and Nell Blackerby, ("Bassett Heirs"), by and through their undersigned attorneys, Montgomery & Andrews, P.A. (J. Scott Hall), and move the Division enter its order dismissing each of the above three compulsory pooling Applications filed on behalf of Cimarex Energy Co. As grounds for their motion, Bassett Heirs state: Cimarex has not fulfilled its duty to negotiate in good faith to obtain the voluntary participation of the Bassett Heirs prior to invoking the Division's compulsory pooling authority.

Bassett Heirs inherited leasehold working interests in each of the non-standard spacing units Cimarex seeks to pool and dedicate to the Franklin 18 Federal Com Well No. 2H (S/2 N/2 Section 18 T15SR31E) Franklin 18 Federal Com Well No. 3H (N/2 S/2 Section 18) Franklin 18

Federal Com Well No. 4H (S/2 S/2 Section 18). The Basset Heirs live out of state and are not familiar with oil and gas industry practices or the Division's procedures. Cimarex set up for force pooling the Basset Heirs' interests as follows:

- July 2, 2009: Cimarex counsel sends to Ms. Blackerby certified notice of the compulsory pooling applications which were set for hearing on July 23, 2009. An AFE was enclosed.
- July 15, 2009: Cimarex writes to Ms. Blackerby, sending AFE's for each of the wells (\$3,560,451). No other well details, including locations, are provided. Cimarex says it will send a joint operating agreement after Ms. Blackerby signs and returns the AFE's. Cimarex also proposes a farmout. (Ex. A).
- On August 11, 2009, the Division enters Order No. R-13155¹. The order directs that compulsory pooling applications are to be filed thirty days after the operator has furnished to all owners in the proposed unit a formal well proposal, including a proposed form of joint operating agreement and an AFE. Because the requirements set forth under that order were a departure from prior established practice² Order No. R-13155 became quickly known by operators.
- August 23, 2009: Cimarex counsel and Bassett Heirs' counsel (Scotty Holloman, Esq.; Maddox, Holloman & Kirksey in Hobbs) briefly engage in negotiations. Cimarex demands that Bassett Heirs deliver an 80% net revenue interest under a term assignment.
- August 27, 2009: Cimarex sends Mr. Holloman a 1989 form 610 Operating Agreement. It is blank. (Ex.B; excerpted).
- Hearing on the Applications is continued a number of times. On September 8, 2009, it is indicated the cases will be continued to an examiner docket in October (Ex. C).

¹ Case Nos. 14365 and 14366: Application of COG Operating LLC for Designation of a Non-Standard Oil Spacing and Proration Unit and for Compulsory Pooling, Eddy County, New Mexico

² See Order No. R-11870.

Subsequently, on September 10, 2009, Cimarex reverses course and indicates the hearing will go forward on the September 17, 2009 docket. (Ex. D).

The Applicable Standards of Good Faith.

Over the course of the last few months, Cimarex has filed scores of applications for compulsory pooling in the Abo/Wolfcamp play. Cimarex uses these applications as a bargaining tool. It approaches these proceedings as if the granting of a compulsory pooling order were its entitlement. In so doing in this case, it has failed to make a good faith effort to obtain an agreement for the voluntary participation of the Bassett Heirs. Cimarex's efforts do not meet the criteria for legitimate well proposals recently set forth in Order No. R-13155.

As Cimarex would have it, under the compulsory pooling statute, an applicant need do nothing more than appear at a hearing and show (1) there are two or more interest owners in a spacing unit, (2) that the owners have not agreed to pool their interests, and (3) it made a well proposal to the other owners, as perfunctory as that effort might have been.

Under NMSA 1978, §70-2-18(A), an applicant proposing to dedicate separately-owned lands to a spacing and proration unit has an "obligation" to negotiate a voluntary agreement with the other interest owners to pool their lands. The Division and the Commission require operators to show that they have made a "diligent" and "good faith" effort to negotiate a voluntary agreement before a compulsory pooling application may be filed.³

³ The "good faith" requirement has been expressly codified in the compulsory unitization procedures of the Statutory Unitization Act at NMSA 1978, §70-7-6-A(5).

The historic treatment by the agency of its compulsory pooling powers is revealing: The first compulsory pooling orders made by the Commission were made with some reluctance. In many instances, the Commission ordered pooling but further ordered that a continuing effort be made to secure the consent of all the interests involved. Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Nat. Resources J. 316 (1963). After a few cases had been decided, the Commission adopted the attitude toward compulsory pooling that still remains today. In each case there is an inquiry concerning the efforts made by the operator to secure the consent of the interests being pooled. The reasonableness of the offer may also be questioned. Morris, Richard, *Compulsory Pooling of Oil and Gas Interests in New Mexico*, 3 Nat. Resources J. 316, 318 (1963). The Division and the Commission continue to recognize the importance of good faith efforts to negotiate before commencing compulsory pooling actions, and use it as one criterion to determine if the application will be accepted or denied.

Until recently, the Division has been circumspect about defining the parameters of what constitutes a “good faith” effort. Now, those parameters have been more sharply defined with the issuance of Order No. R-13155. That order makes clear: compulsory pooling applications are to be filed thirty days after the operator has furnished to all owners in the proposed unit a formal well proposal, including a proposed form of joint operating agreement and an AFE. Cimarex filed its compulsory pooling applications first, then attempted to furnish the required components of a well proposal, but in incomplete and untimely fashion. Its efforts are perfunctory only and do not satisfy the Division’s notions of good faith.

Cimarex should not be permitted to invoke the Division’s police powers with only a perfunctory effort. The procedure of compulsorily pooling the interests of landowners

in order to drill wells is strikingly analogous to the procedure of eminent domain, where one, who seeks to invoke the state's police power of eminent domain, can condemn or expropriate private lands for public use. Both compulsory and eminent domain dramatically affect the rights landowners have in their land, and both compel the landowner into an action that was not of his/her own desire. One of our most basic liberties is the right to property, and it must be guarded. Actions like eminent domain and compulsory pooling must be carefully scrutinized. Enforcing a good faith effort to negotiate is one way the Division, Commission and the courts can slow the imposition on private citizens' rights to property. While eminent domain dissolves all rights of the property owner, its procedure and effect are very similar to the action of compulsory pooling, and can shed light on the proper procedure of conducting these acts in accordance with the right to property.

Eminent domain is the power of a government entity to take private lands and convert them for public use, with just compensation. Eminent domain is liberally interpreted in New Mexico. *Landavazo v. Sanchez*, 111 N.M. 137, 140, 802 P.2d 1283, 1286 (1990). The decision of the grantee of the power of eminent domain as to the necessity, expediency, or propriety of exercising that power is political, legislative, or administrative and its determination is conclusive and not subject to judicial review, absent fraud, bad faith, or clear abuse of discretion. *Id.* at 140, 1286; *North v. Public Service Co. of New Mexico*, 101 NM 222, 680 P.2d 603 (N.M. App. 1983). While eminent domain is not often subject to the judicial review, it is expressly subject to the courts supervision when it has been exercised in bad faith, or when one has exercised the power and has failed to make a good faith effort to negotiate with landowners

commencing the action. NMSA 1978 § 42-A-1-4A states, “A condemnor shall make reasonable and diligent efforts to acquire property by negotiation.” NMSA 1978 § 42-A-1-6A further states “...an action to condemn property may not be maintained over timely objection by the condemnee unless the condemnor made a good faith effort to acquire the property by purchase before commencing the action.” (emphasis added). Just as NMSA 1978 § 70-2-1 et. seq. sets out the requirements before commencing compulsory pooling, the eminent domain statutes stress the importance and lay out the requirement of good faith negotiations with the landowners before any further action is taken.

There are many eminent domain cases that analyze good faith efforts in negotiations. “What constitutes a good faith offer must be determined in light of its own particular circumstances.” *Unger v. Indiana & Michigan Electric Co.*, 420 N.E.2d 1250, 1254 (Ind. App. 1981). A good faith offer is one where a reasonable offer is made in good faith and a reasonable effort is made to induce the owner to accept it. Perfunctory offers are not sufficient. *Id.* at 1254 (emphasis added.).

Cimarex’s conduct falls far short of the standards that the industry and the Division now expect an operator to meet when negotiating for an interest owner’s voluntary participation in a well proposal. Consequently, its Applications should be dismissed.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By:



J. Scott Hall, Esq.

Post Office Box 2307

Santa Fe, New Mexico 87504

(505) 982-3873

Attorneys for Delbert Bassett and Nell Blackerby

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was delivered by fax to counsel of record on the 14th day of September, 2009.

James Bruce, Esq.

P. O. Box 1056

Santa Fe, NM 87504

(505) 982-2151 fax

00124633



J. Scott Hall

Cimarex Energy Co.

600 N. Marienfeld St.

Suite 600

Midland, Texas 79701

PHONE 432.571.7800



July 15, 2009

Via email and Certified U.S. Mail-Return Receipt Requested No. 7007 0710 0003 0317 4011

Nelma Sue Blackerby, et al.

4601 Lake Park Drive

Arlington, Texas 76016

**Re: Franklin 18 Federal Com No. 2H
S/2N/2 Section 18-15S-31E;
Franklin 18 Federal Com No. 3H
N/2S/2 Section 18-15S-31E;
Franklin 18 Federal Com No. 4H
S/2S/2 Section 18-15S-31E
Chaves County, New Mexico**

Dear Nelma:

Cimarex Energy Co. ("Cimarex") proposes to drill the above-captioned wells according to the project described in the enclosed AFE. If you choose to participate in the drilling of the wells, please sign and return a copy of the AFE to the undersigned. I will send Cimarex's proposed form of operating agreement to you upon receipt of your approved AFE.

Alternatively, if you choose not to participate, Cimarex would be interested in acquiring a farmout of your leasehold interest in the spacing unit dedicated to each well. Cimarex's proposed form of Farmout Agreement is enclosed for your review. The Farmout Agreement provides for the delivery of an eighty percent (80%) net revenue interest lease(s) to Cimarex and 180-day continuous development, among other terms. Please call me at your earliest convenience to discuss. Thank you.

Sincerely,

Cimarex Energy Co.

A handwritten signature in dark ink, appearing to read "Hayden P. Tresner".

Hayden P. Tresner
Landman

**EXHIBIT
A**

A.A.P.L. FORM 610 - 1989

MODEL FORM OPERATING AGREEMENT

WELL NAME/NUMBER

OPERATING AGREEMENT

DATED

OPERATOR: Cimarex Energy Co. of Colorado

CONTRACT AREA: _____

COUNTY OF CHAVES, STATE OF NEW MEXICO

**EXHIBIT
B**

4. Custody of Funds: Operator shall hold for the account of the Non-Operators any funds of the Non-Operators advanced or paid to the Operator, either for the conduct of operations hereunder or as a result of the sale of production from the Contract Area, and such funds shall remain the funds of the Non-Operators on whose account they are advanced or paid until used for their intended purpose or otherwise delivered to the Non-Operators or applied toward the payment of debts as provided in Article VII.B. Nothing in this paragraph shall be construed to establish a fiduciary relationship between Operator and Non-Operators for any purpose other than to account for Non-Operator funds as herein specifically provided. Nothing in this paragraph shall require the maintenance by Operator of separate accounts for the funds of Non-Operators unless the parties otherwise specifically agree.

5. Access to Contract Area and Records: Operator shall, except as otherwise provided herein, permit each Non-Operator or its duly authorized representative, at the Non-Operator's sole risk and cost, full and free access at all reasonable times to all operations of every kind and character being conducted for the joint account on the Contract Area and to the records of operations conducted thereon or production therefrom, including Operator's books and records relating thereto. Such access rights shall not be exercised in a manner interfering with Operator's conduct of an operation hereunder and shall not obligate Operator to furnish any geologic or geophysical data of an interpretive nature unless the cost of preparation of such interpretive data was charged to the joint account. Operator will furnish to each Non-Operator upon request copies of any and all reports and information obtained by Operator in connection with production and related items, including, without limitation, meter and chart reports, production purchaser statements, run tickets and monthly gauge reports, but excluding purchase contracts and pricing information to the extent not applicable to the production of the Non-Operator seeking the information. Any audit of Operator's records relating to amounts expended and the appropriateness of such expenditures shall be conducted in accordance with the audit protocol specified in Exhibit "C."

6. Filing and Furnishing Governmental Reports: Operator will file, and upon written request promptly furnish copies to each requesting Non-Operator not in default of its payment obligations, all operational notices, reports or applications required to be filed by local, State, Federal or Indian agencies or authorities having jurisdiction over operations hereunder. Each Non-Operator shall provide to Operator on a timely basis all information necessary to Operator to make such filings.

7. Drilling and Testing Operations: The following provisions shall apply to each well drilled hereunder, including but not limited to the Initial Well:

(a) Operator will promptly advise Non-Operators of the date on which the well is spudded, or the date on which drilling operations are commenced.

(b) Operator will send to Non-Operators such reports, test results and notices regarding the progress of operations on the well as the Non-Operators shall reasonably request, including, but not limited to, daily drilling reports, completion reports, and well logs.

(c) Operator shall adequately test all Zones encountered which may reasonably be expected to be capable of producing Oil and Gas in paying quantities as a result of examination of the electric log or any other logs or cores or tests conducted hereunder.

8. Cost Estimates: Upon request of any Consenting Party, Operator shall furnish estimates of current and cumulative costs incurred for the joint account at reasonable intervals during the conduct of any operation pursuant to this agreement. Operator shall not be held liable for errors in such estimates so long as the estimates are made in good faith.

9. Insurance: At all times while operations are conducted hereunder, Operator shall comply with the workers compensation law of the state where the operations are being conducted; provided, however, that Operator may be a self-insurer for liability under said compensation laws in which event the only charge that shall be made to the joint account shall be as provided in Exhibit "C." Operator shall also carry or provide insurance for the benefit of the joint account of the parties as outlined in Exhibit "D" attached hereto and made a part hereof. Operator shall require all contractors engaged in work on or for the Contract Area to comply with the workers compensation law of the state where the operations are being conducted and to maintain such other insurance as Operator may require.

In the event automobile liability insurance is specified in said Exhibit "D," or subsequently receives the approval of the parties, no direct charge shall be made by Operator for premiums paid for such insurance for Operator's automotive equipment.

ARTICLE VI. DRILLING AND DEVELOPMENT

A. Initial Well:

On or before the _____ day of _____, _____, Operator shall commence the drilling of the Initial Well at the following location: approximately ' FNL and ' FWL of Section , Township South, Range East, N.M.P.M., County, New Mexico;

and shall thereafter continue the drilling of the well with due diligence to a depth

The drilling of the Initial Well and the participation therein by all parties is obligatory, subject to Article VI.C.1. as to participation in Completion operations and Article VI.F. as to termination of operations and Article XI as to occurrence of force majeure.

provides for volumetric balancing on an Mcf basis and for cash balancing on permanent cessation of gas production from a well, cessation of a gas category if different pricing categories are imposed by governmental regulation and if a party sells its interest.

Copies of the Operating Agreement and/or the Gas Balancing Agreement Exhibit can be obtained from any of the undersigned or their successors in interest.

The said Operating Agreement and the Exhibits attached thereto are binding upon the undersigned and their respective heirs, devisees, legal representatives, successors and assigns. This Memorandum of Operating Agreement shall not be deemed an amendment of said Operating Agreement or of said Gas Balancing Agreement Exhibit and shall in no way increase the obligations or decrease the rights of the undersigned thereunder, but is entered into for the sole purpose of providing notice of the existence of said Operating Agreement, the security interest granted thereunder, and the Gas Balancing Agreement attached as an Exhibit thereto.

This Memorandum of Operating Agreement may be executed in any number of duplicate or counterpart copies, including counterpart signature pages, each of which shall be considered an original for all purposes. Photocopies of this Memorandum of Operating Agreement may be filed in the appropriate records as proof of the security interest created hereunder.

Executed as of the date and year indicated in the acknowledgement of each signature, to be effective the date of the Operating Agreement recited above.

Operator:

Cimarex Energy Co. of Colorado

By: _____
Name

Type or Print Name: Roger Alexander

Title: Attorney-in-Fact

Non-Operator(s):

Magnum Hunter Production, Inc.

By: _____
Name

Type or Print Name: _____

Title: _____

Chase Oil Corporation

By: _____
Name

Type or Print Name: _____

Title: _____

Robert C. Chase

By: _____
Name

Type or Print Name: _____

Title: _____

Richard L. Chase

By: _____
Name

Type or Print Name: _____

Title: _____

Gerene Dianne Chase Ferguson

By: _____
Name

Type or Print Name: _____

Title: _____

-----Original Message-----

From: jamesbruc@aol.com [mailto:jamesbruc@aol.com]

Sent: Tuesday, September 08, 2009 10:39 AM

To: shalloman@hobbsnmlaw.com; J. Scott Hall

Subject: Cimarex/OCD Cases 14350, 14351, and 14352

Gentlemen: I am going to continue the cases again, to October.

Have your clients decided whether to participate?

Jim



-----Original Message-----

From: jamesbruc@aol.com [mailto:jamesbruc@aol.com]

Sent: Thursday, September 10, 2009 2:13 PM

To: sholloman@hobbsnmlaw.com; J. Scott Hall

Subject: Cimarex/Sec. 18-15S-31E

Gentlemen: Any word on Cimarex's offer? Let me know.

Also, despite my prior e-mail, Cimarex may want to go forward next week.

Jim

EXHIBIT
D