

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01475-KLM

CAROL THIELE and LYNN SWANEMYER, individually and on behalf of themselves and a class of similarly situated royalty owners,

Plaintiffs,

v.

ENERGEN RESOURCES CORPORATION,,

Defendant.

**ORDER PRELIMINARY APPROVING THE
PARTIES' PROPOSED CLASS SETTLEMENT**

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter comes before the Court on Plaintiffs' and Defendant Energen Resources Corporation's ("Energen") joint motion for an order: (1) preliminarily approving the proposed Class Settlement; (2) appointing the named Plaintiffs as the Class Representatives for the Settlement Class; (3) appointing Plaintiffs' attorneys as Class Counsel for the Settlement Class; (4) provisionally determining that the Settlement Class meets the requirements for certification of a Fed. R. Civ. P. 23(b)(3) Class; (5) approving the proposed Notice to the Class members; (6) establishing the deadline and manner for the Class members' submission of any elections to opt out of the Settlement Class; (7) establishing the deadline and manner for Class members to submit objections to the proposed Class Settlement, Class Counsel's request for attorneys' fees and expense reimbursements, and the request for incentive awards to the three Class Representatives; (8) establishing the deadline for the Parties' submission of motions in support of final approval of the Class Settlement,

Class Counsel's request for an award of attorneys' fees and expenses, and the request for Class Representative incentive awards; and (9) setting a hearing date to consider the motions for final approval of the proposed Class Settlement, Class Counsel's attorneys' fees and expenses, and the Class Representative incentive awards [#98] (the "Joint Motion"). The Court has determined that a hearing is not necessary on the Joint Motion [98]. Having reviewed and considered the Joint Motion[#98], the proposed Class Settlement Agreement, the proposed Mailed Notice, and pertinent portions of the entire record in this litigation to date, the Court hereby **FINDS** as follows:

1. Under Fed. R. Civ. P. 23(e), preliminary approval of a proposed settlement is the first of two steps required before a class action may be settled. See *Pliego v. Los Arcos Mexican Restaurants, Inc.*, 313 F.R.D. 117, 128 (D. Colo. 2016). The Joint Motion [#98] "pertains to the first step of this process, in which the Court makes a preliminary determination regarding the fairness, reasonableness, and adequacy of the settlement terms." *Id.* The object of such approval is for the Court "to determine whether notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement's fairness." *Id.* (quoting NEWBERG ON CLASS ACTIONS § 13.13); see also *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006). If the proposed settlement is preliminarily approved, the Court enters a preliminary approval order directing notice to class members, setting forth a schedule for objections, and setting a hearing. See *id.*

2. On April 24, 2015, Plaintiffs sued Energen in the District Court of La Plata County, Colorado, for allegedly underpaying royalties and improperly deducting post-production costs on the sale of residue gas, natural gas liquids, and condensate from wells

located in New Mexico and Colorado. Plaintiffs brought their claims on behalf of themselves and a class of similarly situated royalty and overriding royalty owners. Energen subsequently removed the action to United States District Court for the District of Colorado (Case No. 1:15-cv-01475-DME-KLM) (the “Civil Action”), where Plaintiffs filed a First Amended Complaint restating their allegations. Energen denied that it underpaid royalties and overriding royalties to Plaintiffs and the Class.

3. On October 1, 2015, the claims of a third plaintiff, Gerald Ulibarri, were voluntarily dismissed without prejudice. Mr. Ulibarri owned interests in leases governing wells located in New Mexico, and his voluntary dismissal limited the remaining claims in the Civil Action to royalties and overriding royalties paid on the proceeds of production from Colorado wells.

4. Since this litigation was commenced, Plaintiffs’ attorneys (“Class Counsel”) have engaged in extensive informal discovery. Class Counsel have requested, received, and reviewed voluminous documents and electronic data regarding Energen’s calculation and payment of royalties to the Plaintiffs and the Class. Both Parties have retained royalty accounting experts to assist in the evaluation and analysis of the electronic royalty accounting data maintained by Energen. Class Counsel, with the assistance of a qualified royalty accounting expert, have been able to thoroughly analyze the full amount of alleged royalty underpayments by Energen to all of the Class members, based upon Energen’s deduction of certain post-production costs in the calculation of royalties paid to the Class members.

5. The terms of the proposed Class Settlement are set forth in the Settlement Agreement which is attached to the Joint Motion [#98] as Exhibit A. The definitions set forth in the Settlement Agreement are incorporated herein by reference. The Settlement

Agreement resolves the claims of the Class against Energen for natural gas royalty underpayments through September 23, 2020.

6. The Settlement Class, as defined in the Parties' Settlement Agreement, includes the following persons:

All persons and entities, including their respective successors and assigns, to whom Energen has paid royalties or overriding royalties (collectively, "Royalties") on natural gas produced by Energen from wells located in the state of Colorado pursuant to leases, overriding royalty agreements or other agreements which do not expressly authorize Energen to deduct monetary costs, including but not limited to gathering and/or processing costs, and/or the New Mexico natural gas processors' tax, from the sale prices Energen receives from the sale of marketable natural gas at the first commercial market in the calculation of Royalties.

The defined Class excludes: (a) the United States; (b) the state of Colorado; and (d) Energen and its affiliates, and its respective employees, officers and directors.

7. For purposes of the Settlement Agreement, each Plaintiff is a member of the Class.

8. The Settlement Agreement between the Class and Energen appears, upon preliminary review, to be fair, reasonable, and adequate.

9. In determining that the proposed Class Settlement appears to be fair, reasonable and adequate, the Court has considered the following: (a) the proposed Class Settlement has been fairly and honestly negotiated; (b) serious questions of law and fact exist which put the ultimate outcome of a trial on the merits in doubt; (c) the amount of the proposed Class Settlement outweighs the possibility of further relief after protracted and expensive litigation; and (d) the Parties and their attorneys, who are very experienced in class action royalty underpayment litigation, believe that the Class Settlement is fair and adequate, and are requesting that the Class Settlement be preliminarily approved.

10. The Parties have entered into the Settlement Agreement after conducting extensive discovery and fact gathering, and with full knowledge of the relevant factual and legal issues. The Settlement Agreement is the product of non-collusive, arm's-length bargaining between the Parties and their Counsel.

11. The Settlement Class benefits from the Settlement Agreement because Energen has agreed to pay \$1,400,000 to settle the Class members' claims in this litigation.

12. The benefits provided to the Class under the terms of the Settlement Agreement provide a reasonable resolution of the claims of the Class, considering the risk of litigation, the likelihood of protracted and expensive litigation in the absence of the Settlement Agreement, and the Parties' various claims and defenses.

13. Energen also benefits from the Settlement Agreement through the avoidance of protracted and expensive litigation, the elimination of risk of an adverse judgment, the final resolution of disputes with the Class members, and the promotion of a mutually productive business relationship with the Class members.

14. The Court also provisionally determines that each of the requirements for certification of a Fed. R. Civ. P. 23(b)(3) Settlement Class is satisfied, as set forth below.

15. Because there are approximately 443 members of the defined Settlement Class, the numerosity requirement of Rule 23(a)(1) is satisfied.

16. Because there is at least one question of law and fact which is common to the claims of each of the Class members, the commonality requirement of Rule 23(a)(2) is satisfied.

17. Because the claims of the named Plaintiffs are typical of the claims of the other Class members, the typicality requirement of Rule 23(a)(3) is satisfied.

18. Because the Class Representatives and Class Counsel have vigorously prosecuted this litigation on behalf of the named Plaintiffs and the Class, because the Class Representatives and Class Counsel do not have any conflicts of interest with the other members of the Class, and because Class Counsel have had extensive experience in litigating class action royalty underpayment cases, the adequacy of representation requirement of Rule 23(a)(4) is satisfied.

19. Common questions of law and fact predominate over individual questions regarding the Class members' claims against Energen. The overarching issue binding the Class, and mooted by the Settlement Agreement, is the question of whether Energen engaged in a common course of conduct under which it deducted certain post-production costs in the calculation of royalties. The predominance requirement of Rule 23(b)(3) is therefore satisfied.

20. A class action is superior to other available methods for fairly and efficiently adjudicating the Class members' claims against Energen. The fact that none of the Class members have expressed interest in individually controlling the prosecution of separate litigation related to these post-production royalty underpayment claims against Energen further supports the Court's finding that the superiority requirement for certification of a Rule 23(b)(3) Settlement Class is satisfied. The Court makes no finding, however, whether this case, if litigated as a class action, would present intractable case management problems, because evaluation of the manageability factor is unnecessary in cases where class certification is sought only for a Settlement Class.

21. Accordingly, the Court finds that the proposed Class may be provisionally certified, for settlement purposes only, under Fed. R. Civ. P. 23(a) and (b)(3) as an opt-out

Class.

22. The Notice of Class Settlement to be mailed to the members of the Class, which is attached to the Joint Motion as Exhibit B (the “Notice”), adequately informs the Class members of the following: (1) the nature of this Class action lawsuit; (2) the definition of the proposed Settlement Class; (3) the Class members’ claims, the issues, and Energen’s denial of the Class members’ claims; (4) a description of the terms of the Class Settlement, including information about the Class members’ right to obtain a copy of the Settlement Agreement from Class Counsel; (5) that the Court will exclude from the Class any member who properly requests exclusion; (7) the deadline and manner for requesting exclusion; (8) the right of any Class member to object to the proposed Class Settlement, Class Counsel’s request for reimbursement of expenses and for attorneys’ fees, or to the requested incentive awards for the Class Representatives, and the deadline for any such objections; and (9) the binding effect of the Class Settlement on Class members who do not elect to be excluded from the Class.

In light of the Court’s findings and conclusions, and pending further considerations at a final fairness hearing, IT IS HEREBY **ORDERED** THAT:

1. The Settlement Agreement is **preliminarily approved** as being fair, adequate, and reasonable.

2. The named Plaintiffs are appointed as the Class Representatives for the Settlement Class.

3. The Plaintiffs’ attorneys are appointed as Class Counsel for the Settlement Class.

4. The Court provisionally determines that each of the requirements for certification of a Fed. R. Civ. P. 23(b)(3) Settlement Class is satisfied.

5. Within **14 days** of the date of this Order preliminarily approving the Class Settlement, Energen shall deposit the settlement payment of \$1,400,000 into the Escrow Account established pursuant to the Escrow Agreement, as provided for in Paragraph 2 of the Settlement Agreement, and subject to the conditions set forth in the Settlement Agreement and the Escrow Agreement.

6. The Court approves the form and content of the Notice attached to the Joint Motion as Exhibit B.

7. Class Counsel shall be responsible for mailing the Notice, by first class United States mail, to the Settlement Class members within **ten days** after the date of this Order preliminarily approving the Class Settlement.

8. Any member of the Settlement Class who wishes to request exclusion (“Opt Out”) from the Settlement Class must submit a written Opt Out election, which must be postmarked on or before the date which is **60 days** after the postmark date of Class Counsel’s mailing of the Notice to the members of the Class, which date shall be specified in the Notice. In accordance with the procedures set forth in the Notice, any such Opt Out election must be in writing, and must be mailed to Class Counsel at the address provided in the Notice.

9. On or before **February 15, 2021**, the date which is **21 days** before the scheduled date for the final fairness hearing, the Parties shall file motions in support of final approval

of the Class Settlement, and Class Counsel shall file their request for attorneys' fees and expense reimbursements, and for Class Representative incentive awards.

10. Any member of the Class who wishes to make objections to, or comment on, the proposed Class Settlement, Class Counsel's request for attorney's fees and expenses reimbursements, or the request for Class Representative incentive awards, shall postmark and mail such objections or comments on or before **February 22, 2021**, the date which is **14 days** before the scheduled date for the final fairness hearing. In accordance with the procedures set forth in the Mailed Notice, any such objections or comments must be mailed to Class Counsel, Energen's counsel, and the Court.

11. Any Class member who wishes to appear and be heard at the final approval hearing must postmark and mail notice of such intention by at least **March 1, 2021**, at least **7 days** before the scheduled date for the final fairness hearing. Notice of such intention must be mailed to Class Counsel, Energen's counsel, and the Court.

12. Also by at least **March 1, 2021**, at least 7 days before the scheduled date for the final fairness hearing, Class Counsel and Energen may file a response to any Class member's objections or comments. A copy of such response shall be mailed to all Class members who have submitted timely objections or comments.

13. The Court will conduct a hearing to consider final approval of the proposed Class Settlement, Class Counsel's request for attorneys' fees and expense reimbursements, and the request for Class Representative incentive awards, on **March 8, 2021**, beginning at **1:30 p.m.** in Courtroom A-401, Fourth Floor, Alfred A. Arraj United States Courthouse, 901 19th Street, Denver, Colorado.

14. All pending discovery and case management deadlines in this action are **STAYED** until further order of this Court.

Dated: December 14, 2020

BY THE COURT:

A handwritten signature in black ink, appearing to read "Kristen L. Mix". The signature is written in a cursive, flowing style.

Kristen L. Mix
United States Magistrate Judge