

**ALBERTA ENERGY AND UTILITIES BOARD**

**IN THE MATTER OF THE *ENERGY RESOURCES  
CONSERVATION ACT*, C. E-10 OF THE REVISED  
STATUTES OF ALBERTA 2000;**

**AND IN THE MATTER OF PROCEEDING NO. 1457147,  
COALBED METHANE REVIEW HEARING (PART 2)**

**REPLY ARGUMENT OF APACHE CANADA LTD.**

**DECEMBER 13, 2006**

1. The following sets out Apache Canada Ltd.'s ("Apache") Reply to the Final Arguments of Carbon Development Partnership ("CDP") and EnCana Corporation ("EnCana"). Apache's Final Argument responds to the majority of the relevant issues addressed in CDP and EnCana's Arguments and, accordingly, Apache has chosen to respond to only a limited number of issues in CDP and EnCana's Arguments. Where Apache has not directly responded to CDP and EnCana's Arguments in this Reply, it should not be implied that Apache agrees with those submissions.
2. The headings below correspond to the headings used in each of CDP and EnCana's Arguments, respectively.

## **CDP FINAL ARGUMENT**

### **III. APPLICABLE LEGISLATION**

3. In paragraph 11, CDP submits that the *Oil and Gas Conservation Act* (the "OGCA") and Directive 56 require that Fairborne Energy Ltd. ("Fairborne") and Devon Canada Corporation ("Devon") – and presumably other applicants - must, as a matter of law, be entitled to the right to produce CBM from the lands affected by their respective applications in which CDP owns the coal.
4. Apache submits that this is either an overstatement of the entitlement requirement or, alternatively, only half the story at best. Apache submits that attempting to draw conclusions regarding what is necessary to establish entitlement in the absence of any consideration of the express statutory requirements for doing so is meaningless. Section 16(2) of the OGCA simply requires that the Board be "satisfied". Directive 56 must be read in the context of the OGCA.
5. CDP relies on the *Oil and Gas Conservation Regulation* and the definition of "common ownership" to support its position regarding a holding order. In numerous places CDP submits that this requires an applicant for a holding order to show "common ownership of the CBM".<sup>1</sup> With respect, Apache submits that there is no support for this proposition;

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<sup>1</sup> CDP Final Argument, paras. 141 and 167. Similar arguments are also made at paras. 16-17 and Ex. 03-036 ("CDP Submission"), paras. 17, 41.

“common ownership” simply means that the ownership of the lessors’ interests is the same.<sup>2</sup>

#### **IV. TERMINOLOGY**

6. At paragraphs 18 to 26 of its Final Argument, CDP issues a caution regarding the use of terminology and other matters. Apache submits that this issue is a red herring and appears to be designed to detract attention from the real issue of terminology. The importance of terminology only goes to determining the vernacular meaning of coal in the various grants for the purpose of addressing the tests in *Borys* and other relevant decisions. In this context, the issue is whether what appears to have generally been referred to as “marsh gas” at the turn of the 20<sup>th</sup> century, and is now commonly referred to as CBM, is coal as “non-scientific” people would have understood the meaning of coal at the relevant times in issue in this proceeding. Apache submits that the mere fact that different terminology has been used throughout the relevant period to describe these substances is a strong indication that people do not consider them to be the same thing.

#### **VI. ALTERNATIVE APPROACHES**

7. Apache submits that the approaches identified by CDP at paragraph 29 do not cover all of the possible approaches that the Board could pursue. Without attempting to be exhaustive, there is at least a gap between (d) and (e) in CDP’s list. While the Board can engage in a detailed review of entitlement if it wishes, there is nothing in the OGCA that compels the Board, as suggested by CDP, to have to “embark upon an extensive review and analysis of underlying property and ownership rights”. Apache submits that although the Board must determine entitlement, in doing so, it may review whatever evidence it considers necessary in the circumstances to satisfy itself of entitlement so long as it considers the relevant factors. As set out at paragraph 32 of Apache’s Final Argument, this level of review can also vary over time and circumstances.

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<sup>2</sup> *Oil and Gas Conservation Regulations*, s. 1.020 (2) 4(i).

## VII. MATTERS THAT ARE NOT RELEVANT

8. In paragraphs 31 to 37, CDP submits that the fact that CBM is defined as “gas” in certain (most) legislation is irrelevant to the proceeding. This argument is expanded in paragraphs 40 through 44 of CDP’s Final Argument. While Apache agrees that the issue of entitlement is not resolved because CBM is defined as gas in many statutes, Apache disagrees that the legislative definition of CBM is irrelevant. Apache submits that the fact that CBM is defined as gas (and not as coal) in most legislation is further evidence of the common understanding of these substances. While this does not directly address the vernacular meaning at the relevant times in issue, the fact that different words have been used to describe “marsh gas” or CBM and coal consistently from the time of the original grants, through to the transfers of coal to TransAlta Utilities Corporation (“TAU”), to the present time, provides further corroboration of this meaning.
9. CDP submits in paragraph 38 that the scope of this proceeding is limited to ascertaining whether Fairborne, Devon and Bearspaw Petroleum Ltd. (“Bearspaw”) have demonstrated that they are entitled to produce CBM to the satisfaction of the Board. Apache has certainly never understood this to be the case and has always understood that the Board was interested in considering this issue in as broad a context as possible so that future applications did not have to be addressed on an application-by-application basis. CDP’s submission on this topic appears to be directly contradicted by the fact that one form of relief it is seeking is an Order that Bulletin 2006-19 remain in effect.<sup>3</sup>

## IX. REVIEW OF THE LEGAL EVIDENCE

### **Intention of the Parties and Interpretation of the Grant**

10. At paragraphs 49 and 50, CDP relies on the trial decision and Court of Appeal decision in *Borys* in support of its submissions. It repeats references to lower court decisions in other portions of its Argument.<sup>4</sup> Apache is concerned with reliance on these lower court decisions in the absence of express adoption and approval by the Judicial Committee of the Privy Council (“JCPC”). These references may have been put forward to attempt to

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<sup>3</sup> CDP Final Argument, para. 166.

<sup>4</sup> E.g., para. 66.

water-down the clearly expressed principles, in particular the reliance on the vernacular meaning, set out in the JCPC decision in *Borys*. The correct legal approach is to rely on to the ultimate appellate decision and Apache urges this approach on the Board.

11. At paragraph 51, CDP submits that it was because of the absence of any evidence before the Court of the intention of the parties that the Court determined that the vernacular approach was to be applied as a surrogate. Again, this appears to be an attempt to detract attention from the clear application and import of the vernacular meaning. Contrary to CDP's submission, as set out in the JCPC decision in *Borys*, it is not the subjective intent or opinion of the parties to the grant which is being sought.<sup>5</sup> Regardless, there is no direct evidence of the intention of the parties to either the grants in the early part of the 20th century or the transfer of coal to TAU in the early 1980s.
12. In paragraph 53, CDP accepts that there is no direct evidence of the actual intention of the parties to the grants in the early 20<sup>th</sup> century. Apache agrees and, in any event, evidence of this subjective intent is irrelevant. However, this does not mean that there is no evidence of the circumstances surrounding the transactions in question. To the contrary, the evidence is clear regarding what the Canadian Pacific Railway ("CPR") used coal for during the relevant period.<sup>6</sup> There is also evidence that there was no commercial use of CBM in Alberta at that point in time.<sup>7</sup> This is consistent with the US Supreme Court's approach in *Amoco v. Southern Ute*, where it examined "[a]s a practical matter", the circumstances of how Congress dealt with coal at that time.<sup>8</sup>
13. In paragraphs 56 to 65, CDP addresses the 1982 transfer from Dome Petroleum Limited ("Dome") and Hudsons Bay Oil and Gas ("HBOG") to TAU. Apache has addressed this transaction in its Final Argument and will not repeat these here.<sup>9</sup> With respect, Apache submits that CDP still does not fully address this transaction. In particular, without attempting to address this issue in detail, CDP never addresses the evidence head-on that TAU was in the utility business, that the "coal" was bought to support that business, or

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<sup>5</sup> *Borys v. Canadian Pacific Railway*, 7 W.W.R. (N.S.) 546, para. 33.

<sup>6</sup> Apache Final Argument, paras. 45, 62, 64.

<sup>7</sup> *Id.*, paras. 63-64.

<sup>8</sup> *Amoco Production Co. v. Southern Ute Indian Tribe* (98-830) 526 U.S. 865 (1999) pp. 8-9.

the evidence from Canpar that Dome was looking for the opportunity to sell assets that were not already encumbered by Dome's bankers. CDP was able to call evidence from TAU if it believed TAU's evidence would be any different than that put forward in the proceeding.

14. At paragraph 65, CDP submits that it expects the Board is interested in the 1982 TAU transaction because it is an example of a split title created in the more recent past. The Board may be interested from this perspective; however, beyond this, the 1982 TAU transaction is directly relevant to the genesis of title to some of the applications in question<sup>10</sup> and is the subject of numerous split titles in Alberta beyond those applications themselves.<sup>11</sup>

#### **What Comprises the “Vernacular”/Extent of Precedence over Scientific Evidence**

15. In paragraph 67, CDP quotes from Lord Porter in *Borys*. CDP then goes on to refer to Professor Lucas<sup>12</sup> and then suggests that the terminology may be derived from the commercial context of the transaction in question.<sup>13</sup>
16. Apache agrees that the context will potentially influence the relevant vernacular meaning, to the extent there are different ones and, from this perspective, it would not be appropriate to look at the same evidence to assess the vernacular meaning of coal in the early 20<sup>th</sup> century in a land grant with a reservation of coal as a commercial transaction in 1982. However, Apache cautions the Board not to place too much emphasis on this discussion in the context of the original land grants. The JCPC in *Borys* considered grants effectively in the same timeframe as are in issue in this proceeding in the early 20<sup>th</sup> century and specifically endorsed the vernacular meaning test for the point in time of those types of transactions.<sup>14</sup>

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<sup>9</sup> Apache Final Argument, paras. 65-66.

<sup>10</sup> This includes applications pertaining to Sections 8, 9, and 17 of 34-26-W4M, including application nos.: 1383132; 1383134; 1383136; 1383137; 1383138; 13883139; 1383140; 1383141; 1380005; 1380010; 1380013; and 1380014.

<sup>11</sup> 3T493, II. 2-23.

<sup>12</sup> CDP Final Argument, para. 68.

<sup>13</sup> CDP Final Argument, para. 69.

<sup>14</sup> *Borys*, para. 33.

17. In paragraph 70, CDP submits, inexplicably, that the only evidence as to the vernacular is in the report of Dr. Levine. This is not true. Apache led significant evidence of the vernacular meaning of “coal” both in the early 20<sup>th</sup> century and in the early 1980’s, including, in general terms:<sup>15</sup>
- i) The Supreme Court of Canada’s acceptance of facts relating to CPR’s transfer of land and mineral interests in *Anderson v. Amoco*;
  - ii) The US Supreme Court’s consideration of the vernacular meaning of coal in *Amoco v. Southern Ute.*;
  - iii) Various dictionary definitions from the relevant time periods;
  - iv) Examples of the use of coal at the relevant time periods; and
  - v) Evidence of the commercial circumstances pertaining to the transfers.
18. CDP appears to place some reliance on the cases on phase change at paragraphs 73 to 74 of its Final Argument. Apache submits that these cases are not relevant to the issue before the Board. The issue is the vernacular meaning of coal during the relevant periods. The issue is not what phase CBM is in *in situ*.
19. Apache repeats its arguments in its Final Argument in response to CDP’s submission on *Little v. Western Transfer and Storage*.<sup>16</sup> If the CPR had wished to reserve the entire stratum containing coal in its original land grants it could have done so; other transfers took this approach.<sup>17</sup> Apache submits that esoteric arguments regarding “outstroke” are not of assistance in interpreting a grant when it was expressly open to achieve the same result directly.
20. Apache repeats its submission in its Reply Submission to CDP’s argument attempting to distinguish *Southern Ute* on the basis that the US Supreme Court was addressing the

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<sup>15</sup> Apache Final Argument, paras. 45, 62-66.

<sup>16</sup> *Id.*, paras. 60-61.

<sup>17</sup> See *Caballo Coal Co. v. Fidelity Exploration and Production Co.*, 84 P. 3d. 311 (Wyo. 2004).

intention of Congress in *Southern Ute* as compared to the private parties to a grant.<sup>18</sup> A fair reading of *Southern Ute* discloses that the Court was effectively addressing the same issue in *Southern Ute*, with Congress effectively being one of the parties to the grant, and in exactly the same way as Canadian cases – by looking at the “ordinary and popular” meaning of the words. Contrary to CDP’s speculation at paragraph 81 of its Argument, a review of the decision does not disclose any special rules of statutory interpretation that might have been in issue that would make *Southern Ute* inapplicable to a Canadian context. CDP has not referenced any other US Supreme Court decisions dealing with the ownership of CBM and does not offer any support for its proposition that lower US court decisions are to be given the same weight as the US Supreme Court decision in *Southern Ute*.<sup>19</sup>

## **X. RELEVANCE OF THE SCIENTIFIC EVIDENCE**

21. At paragraph 84, CDP submits that the evidence of Dr. Levine provides the Board with a better scientific understanding to facilitate a proper application of the appropriate legal principles. With respect, under a proper application of the legal principles, Dr. Levine’s opinion should be given little, if any, weight.<sup>20</sup>
22. CDP goes on to submit that Dr. Levine also provided evidence respecting the understanding of “reasonably knowledgeable persons involved in the coal industry” in the late 19th century and early 20th century and this was the only evidence on this issue. This is not consistent with what the JPC required in *Borys*, which was to derive the vernacular meaning from non-scientific persons, such as landowners, businessmen or engineers, or the “uninstructed mind.”<sup>21</sup> Beyond this, Apache also submits that the Board should be cautious of Dr. Levine’s “evidence” on this topic. Dr. Levine specifically indicated that he specifically put forward evidence that supported his view rather than attempting to put forward an objective review of this evidence. Additionally, Dr. Levine admitted he had no formal training in the fields of linguistics, etymology, or

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<sup>18</sup> Apache Reply Submission; paras. 47-55, 63-64, CDP Final Argument, paras. 80 to 81.

<sup>19</sup> CDP Final Argument, para. 82.

<sup>20</sup> See para. 41 of Apache Final Argument.

<sup>21</sup> *Borys*, para. 27.

lexicography.<sup>22</sup> Further, none of Dr. Levine's evidence addressed the understanding or use of coal at the relevant time in Alberta. Finally, Dr. Levine's evidence was not the only evidence put forward on this issue. As indicated above, Apache put forward a number of pieces of evidence that were specifically directed at the vernacular meaning of "coal" during the relevant periods and also the use of coal (and marsh gas or fire damp) during the relevant periods.

## **I. CDP'S POSITION ON THE ISSUES**

### **The Jurisdiction of the Board**

23. CDP now expressly accepts that the Board has the jurisdiction to address entitlement.<sup>23</sup> However, it goes on to say, apparently as a question of fact, that it is impossible for the Board to be satisfied that a party is entitled to produce CBM in the face of a "*bona fide* and seriously arguable" dispute as to ownership. As indicated in Apache's Final Argument, there is no support for this proposition.<sup>24</sup>

### **Have the Applicants Demonstrated Entitlement**

24. CDP's submissions on this issue raise the same concern addressed in paragraph 23 above. CDP attempts to split the issue of entitlement and, in their submission what this implies in terms of establishing entitlement,<sup>25</sup> from the provisions of section 16(2) of the OGCA which expressly addresses the express standard that an applicant needs to meet to establish entitlement. As indicated above, there is no support for this approach.
25. Apache relies on paragraphs 8 and 9 of its Reply Submission dated September 29, 2007<sup>26</sup> in response to the cases referenced at paragraphs 125 to 129 of CDP's Argument.

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<sup>22</sup> 8T1199, ll. 20-24.

<sup>23</sup> CDP Argument, para. 122.

<sup>24</sup> Paras. 10 - 20.

<sup>25</sup> E.g., para. 130 of CDP's Final Argument.

<sup>26</sup> Apache Reply Submission.

### **The Appropriate Threshold for the Board to be Satisfied**

26. At paragraph 132, CDP attempts to distinguish *R. v. Hurrell* on its facts because it concerned the issue that evidence on an application for a warrant had to be under oath. Apache did not cite *R. v. Hurrell* because it was similar on the facts to the issue before the Board. Apache referenced *R. v. Hurrell* because it considered the use of the word “satisfied” and what that term meant in terms of the standard that needs to be addressed. This standard was less than the standard argued by CDP, as the Ontario Court of Justice also found for an administrative tribunal in *Re Hayward*,<sup>27</sup> a case which was not addressed by CDP.
27. CDP also appears to attempt to confuse the burden on a trier of fact with the subsequent standard of review on a review or appeal of a tribunal’s decision. In the court system, the burden on a lower court judge is generally on a balance of probabilities, regardless of whether the decision in question is one that may be reviewed on a standard of correctness or some more deferential standard. CDP does not cite any authority for why this situation should be any different for an administrative tribunal.

### **XIV. CDP’S POSITION ON THE ALTERNATIVE APPROACHES OPEN TO THE BOARD**

28. In paragraph 141, CDP repeats its argument that, again, apparently as a matter of fact, in the face of a *bona fide*, seriously arguable issue as to the ownership of CBM, an applicant is unable to satisfy the Board that it is entitled to produce CBM. In paragraph 142, CDP repeats its submission that the only other choice open to the Board is to embark on an extensive review and analysis of underlying property rights.
29. Please see paragraph 7 above for Apache’s reply submissions on these points. As indicated in paragraphs 17 and 76 of Apache’s Final Argument, the Board has significant flexibility regarding how to address these issues in the circumstances of a given case and how to address these as the issue progresses over time.

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<sup>27</sup> Apache Final Argument, para. 34.

## XV. RESPONSES TO SPECIFIC MATTERS RAISED

### Quieting Title

30. In paragraph 143, CDP appears to be suggesting that the Board's decision in *Goodwell* supports its argument that to produce CBM on split title lands, applicants for well licenses should have to enter into an agreement with the coal owner. Apache submits that *Goodwell* does not support this proposition. The Board shut-in production in *Goodwell* for two main reasons: first, in relation to conservation, the Board was concerned that the high oil-to-gas ratio in the wells might have a negative impact on the overall recovery of bitumen from the region;<sup>28</sup> and second, in the Board's opinion, AEC did not have any right under its oil sands leases to produce initial gas-cap gas from the four wells.<sup>29</sup> *Goodwell* is not a case on quieting title.
31. CDP goes on to rely on a quote attributed to Gerry DeSorcy in the trial decision in *Anderson* in support of its argument for "quieting title".<sup>30</sup> Assuming that the quote from Mr. DeSorcy is correct, it is not surprising that the Board expected an agreement between the owner of the petroleum and the owner of the gas-cap gas since *Borys* had already established that the owner of the petroleum did not own the gas-cap gas.
32. CDP does not put forward any material issued by the Board in support of its argument that requiring applicants who wish to produce CBM on split title lands to enter into an agreement or to obtain a court order would be "a continuation of an existing policy".<sup>31</sup> To the contrary, the fact that the Board issued the authorizations sought to Fairborne, Devon and Bears paw suggests that the Board does not have such a policy.
33. In any event, the Board is required to make its decisions based on the facts and circumstances before it.<sup>32</sup> Given the strength of the arguments that:

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<sup>28</sup> *Alberta Energy Company Limited v. Goodwell Petroleum Limited* (2003, 233 D.L.R. (4<sup>th</sup>), para. 10 ("*Goodwell*").

<sup>29</sup> *Goodwell*, para. 11.

<sup>30</sup> CDP Final Argument, paras. 145 to 146.

<sup>31</sup> CDP Final Argument, para. 146.

<sup>32</sup> See s. 1 of the *Alberta Energy and Utilities Board Rules of Practice, Reg. 101/2001*, which states that the Rules "must be liberally construed in the public interest to ensure the most fair, expeditious and efficient *determination on its merits of every proceeding before the Board*" [emphasis added].

- i) entitlement to CBM resides with the natural gas or mines and minerals owner;
- ii) the consequences of shutting-in CBM production on split title lands, in the absence of an agreement with CDP or a definitive court order; and
- iii) the availability of other remedies to CDP if it does have a serious issue to be tried and can establish that it is being irreparably harmed,<sup>33</sup>

Apache continues to submit that the Board should not grant the relief sought by CDP.

### **Injunction**

34. In paragraphs 148 and 149, CDP argues that continuation of Bulletin 2006-19 would allow for efficient and orderly production because, in the absence of it, CDP (and EnCana) would be forced to intervene in each and every application where they own the coal underlying affected lands and this would be inefficient.
35. In court proceedings, this is generally referred to as an *in terrorem* or floodgates argument; that finding in a certain way will cause an uncontrollable deluge of litigation. The courts are faced with these arguments on a regular basis. The Alberta Court of Appeal has stated the following regarding such arguments:
- This is essentially a “floodgates” argument. Our usual answer to that argument is that the flood has not yet started and will be dealt with when it does. If a process becomes stultified by overly numerous interventions by persons with the same interest, we have no doubt that the tribunal has the power, in the regulation of its own process, to combine those with similar interests and require them to speak with one voice. There may also be other reasonable solutions to that problem.<sup>34</sup>
36. Apache submits that the Board should be no more terrorized than the courts by these arguments. As set out at paragraph 32 of Apache’s Final Argument, even if CDP pursues its threatened course of action, there is nothing in the OGCA that compels the Board to undertake a full inquiry every time that an entitlement dispute arises and, if CDP has not put forward all of its arguments in this proceeding, Apache expects that the Board could address any remaining arguments relatively efficiently in future challenges.

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<sup>33</sup> Apache Final Argument, para. 30.

<sup>34</sup> *Leduc (County No. 25) v. Alberta (Local Authorities Board)*, 54 Alta. L.R. (2d) 396 (Alta. C.A.), para 14.

37. CDP goes on to argue that they are not seeking an injunction and that the natural gas producers are confusing cause with effect.<sup>35</sup> Apache addressed injunctive proceedings because it appeared that one of CDP and EnCana's primary submissions was that they would be irreparably harmed unless their relief was granted.<sup>36</sup> For instance, CDP stated at paragraph 30 of their Submission:

If there is any chance of a court determining in the future that the gas producers' lessor is not the owner of CBM, the Board should not consider itself satisfied of the gas producers' entitlement. It would be wrong for the Board to pre-judge the merits of the respective claims to ownership over CBM and grant a well licence on that basis. The potential consequence would be that the gas producers had irreversibly interfered with the true owner's property right in the CBM. While the true owner could claim damages for trespass and conversion from the gas producers, it could not put the CBM back underground. It would have permanently lost a fundamental attribute of property and to extract that to exclude others from its property and to extract that resource on its own timetable and according to its own drilling program.<sup>37</sup>

38. If this is the case, Apache's simple proposition was that this is an argument that the courts are confronted with on a regular basis and this form of argument should be addressed to the court given their experience in these matters.<sup>38</sup>

### **Drainage**

39. CDP attempts to narrow this concern by suggesting, "there is no technical evidence that drainage is occurring on the lands which are the subject of the Devon Applications and the Fairborne Application."<sup>39</sup> In the context of the broad relief that CDP is seeking, Apache submits that attempting to restrict widely held concerns regarding drainage to specific parcels avoids the issue. CDP's argument that "technical evidence", presumably data and analysis, is necessary to support these concerns is also unsupported. Mr. Herbert gave clear, uncontradicted evidence that in his experience in the Powder River basin, which had lands equivalent to freehold and Crown lands in Alberta, the non-

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<sup>35</sup> CDP Final Argument, paras. 150 to 151.

<sup>36</sup> Apache Final Argument, para. 30.

<sup>37</sup> See also Ex. 07-024, para. 91 ("EnCana Submission") where EnCana cites Williams and Meyers to suggest that the development of land in the midst of a conflicting claim of title to minerals is "ultra hazardous."

<sup>38</sup> Apache Final Argument, para. 30.

<sup>39</sup> CDP Final Argument, para. 157.

producing parcels suffered from drainage.<sup>40</sup> Other parties echoed these concerns. If CDP wished to challenge this evidence through technical evidence or seek Apache's "technical evidence" in support of these concerns it had every opportunity to do so.

## **XVI. PUBLIC INTEREST**

40. Apache will let other parties speak for themselves in response to CDP's submissions on this issue but, in Apache's case, CDP's summary is a significant overstatement of Apache's argument.
41. Apache does not rely on the "public interest" to say the Board should find in favour of natural gas producers. Apache's primary argument is that the Board has the jurisdiction to consider entitlement even where this is disputed and that, on the evidence and argument before the Board, the vernacular meaning of coal in the transfers in does not include CBM and, therefore, the Board should be satisfied that for these transfers the entitlement, to produce CBM resides with the natural gas or mineral rights owner.
42. Apache only raised the Board's mandate to promote conservation and efficient development in response to an argument that, even if the Board has jurisdiction to consider entitlement, it should not do so.<sup>41</sup>

## **EnCana Final Argument**

### **I. Introduction**

43. In paragraph 2, EnCana submits that the Board has no power to decide ownership disputes. This argument appears to go further than CDP who now concede that the Board does have the jurisdiction to address entitlement but that the Board should not do so on the facts.<sup>42</sup> Apache's reply to this issue is set out at paragraphs 47 to 49 below.
44. In paragraph 6, EnCana argues, as predicted by CDP, that if Bulletin 2006-19 is not continued, EnCana will object to "all applications to produce CBM from split title lands"

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<sup>40</sup> 3T495, 1.20 – 3T496, 1.6.

<sup>41</sup> Apache Final Argument, para. 28(c) and paras. 29 to 30.

<sup>42</sup> CDP Final Argument, paras. 121-122; EnCana Submission, para. 90.

individually. This suggests EnCana will bring legal action in any instance where production is allowed from split title lands. Apache's reply to EnCana's *in terrorem* arguments and the ability of the Board to address this situation should it materialize from the Board's perspective is set out at paragraphs 35 and 36 above. Apache submits that the threat of multiple objections or lawsuits should inform either the question of the Board's jurisdiction in these matters or the exercise of that jurisdiction.

## **II. CNG have Only a Disputed Proprietary Claim to CBM**

45. With respect, Apache submits that Encana falls into the same error in this portion of its Argument as CDP in focussing solely on the issue of entitlement and ignoring the express provisions in the OGCA setting out the standard for establishing entitlement.<sup>43</sup> As set out below, EnCana's argument that entitlement requires a "legal determination that coal did not include CBM" significantly overstates the onus on the Board in these circumstances. The Board is not, and cannot, as a question of jurisdiction, make a legal determination of entitlement.<sup>44</sup> However, that does not mean that the Board cannot consider entitlement, as it is required by the legislation to do, and be satisfied in a given situation that an applicant has the right to produce the substance in question.
46. EnCana's quote from *Goodwell* also ignores what is necessary to satisfy section 16 of the OGCA.<sup>45</sup>

## **III. The Board Has No Power to Decide Competing Proprietary Claims**

47. EnCana argues that because the Board does not have the express power to determine entitlement claims, it therefore does not have the power to consider these in exercising its own jurisdiction.<sup>46</sup>
48. Apache will not repeat its Final Argument on this issue. There is no necessary connection, as implied by EnCana, between the Board's jurisdiction, or lack thereof, to make final and binding determinations regarding private property disputes and its ability

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<sup>43</sup> See paras. 24-25 above.

<sup>44</sup> Apache Final Argument, paras. 12, 17.

<sup>45</sup> See para. 10 of EnCana Final Argument.

<sup>46</sup> EnCana Final Argument, paras. 21-25.

to consider entitlement issues. To the contrary, the Board is given the express power to consider entitlement. In doing so, the Board is in no way determining competing proprietary claims.<sup>47</sup>

49. In paragraphs 19 and 20 of EnCana's Argument, EnCana submits that the Board does not have either the express or implied power to decide competing proprietary claims but acknowledges that the Board may cancel a licence if a licensee does not prove entitlement to the Board's satisfaction. Apache submits that this highlights the distinction between the Board deciding these claims versus considering them for the purpose of exercising its own jurisdiction. EnCana fails to mention that, in the event that an applicant can establish entitlement to the Board's satisfaction, the Board clearly has the power to maintain the licence in question rather than cancel it.

**C. Irrelevant Considerations May Not be Taken Into Account**

50. This issue is addressed above in reply to CDP's Argument.<sup>48</sup>
51. EnCana's submissions at paragraph 59 of its Argument that there is no drainage is contrary to the evidence of Mr. Welsh who acknowledged that drainage may occur.<sup>49</sup> Apache continues to rely on its Final Argument in this regard<sup>50</sup> and on its reply to CDP on this issue.<sup>51</sup>

**IV. If the Board has the Power to Decide Competing Proprietary Claims it Ought Not to Exercise It**

52. In this portion of EnCana's Argument, it raises potential concerns regarding procedural fairness which may be raised by third parties,<sup>52</sup> its own concerns with the process that has been followed in this proceeding,<sup>53</sup> and concerns about the adequacy of the record.<sup>54</sup>

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<sup>47</sup> Apache Final Argument, paras. 12, 17.

<sup>48</sup> See paras. 40-42 above.

<sup>49</sup> 6T851, ll. 12-14.

<sup>50</sup> Apache Final Argument, para. 29.

<sup>51</sup> See para. 39 above.

<sup>52</sup> EnCana Final Argument, para. 61 to 67.

<sup>53</sup> EnCana Final Argument, para. 68.

53. As a preliminary comment, Apache submits that the underlying premise for these concerns is flawed. These concerns appear to be centered on EnCana's repeated view that if the Board addresses the issue of entitlement in any way it is somehow necessarily making a legal determination of this issue, which therefore has the power to affect third parties and the parties in this hearing beyond those matters which are the subject of the Board's jurisdiction. As indicated above, this is not the case.
54. Beyond this preliminary comment, Apache is not aware of any claim by EnCana to this point in time that its procedural rights have been offended or by any similar claims by third parties. If EnCana was concerned about the procedure that has been employed by the Board, Apache submits that it should have raised those concerns at the time these could have been addressed. Regarding discovery, EnCana had the full right to ask Information Requests under rule 27 of the *Alberta Energy Board Rules of Practice*. If EnCana did not believe this procedure was adequate, it could have sought further procedural opportunities from the Board. Apache submits that there is an adequate record before the Board to address the issue of entitlement. If EnCana had wished to lead further evidence or to pursue other evidence in cross-examination, it had the full opportunity to do so. The Board can address any procedural fairness concerns raised by third parties if these are raised in the future. As indicated in paragraphs 17 and 76 of Apache's Final Argument, if a third party brings forward facts or an argument that has not been addressed by the Board in this proceeding, the Board can engage in a fuller consideration of these matters should it choose to do so.

**V. If the Board is to Decide CBM Ownership, it is the Coal Owners'**

55. Many of EnCana's submissions under this heading have already been responded to in Apache's Final Argument and in its reply to CDP. In brief response to specific issues raised in this portion of EnCana's Argument:
56. EnCana's "evidence" that CBM was used by coal owners is irrelevant. There is no evidence that CBM was used by coal owners in Alberta during the relevant periods. This

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<sup>54</sup> EnCana Final Argument, para. 69 to 70.

argument was specifically raised and dismissed in *Southern Ute*.<sup>55</sup> The Court in *Southern Ute* also considered and expressly addressed the argument that the right to incidentally release fire damp was not an indication of ownership.<sup>56</sup> This finding is inconsistent with the argument raised in paragraph 55 of CDP's submission, which would otherwise suggest that responsibility, over a substance somehow translates to ownership of it.

57. With respect, Item A that the, "*CNG producers have not established a legal construction that "natural gas" in situ, in the contemporaneous vernacular, included CBM*" misstates the relevant question. The early 20<sup>th</sup> century grants reserve "coal". The substance sold to TAU was "coal". The vernacular to be established is regarding the words in the grant. Accordingly, the issue isn't whether natural gas was understood at the time to include gas from coal (although Apache submits that the answer is to this is clear); the question is what was the vernacular meaning of "coal".
58. *Continental Resources* relies on the rights and obligations associated with extraction of the resource as being demonstrative of ownership; this is inconsistent with Canadian decisions such as *Borys*, and *Anderson*, which confirm that substances are owned *in situ*.<sup>57</sup> Accordingly, Apache submits that the *Continental Resources* decision is not of assistance.
59. Apache disagrees with EnCana's analysis under Item C; however, this is irrelevant. The opinion of experts is irrelevant to the establishment of the vernacular meaning<sup>58</sup> and there is no evidence that any of Dr. Levine's theories were the subject of common knowledge in either the early 20<sup>th</sup> century or 1982.

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<sup>55</sup> *Amoco v. Southern Ute*, p. 11.

<sup>56</sup> *Id.*, pp. 11-12.

<sup>57</sup> See Apache Final Argument, para. 46.

<sup>58</sup> *Borys*, para. 27.

## **VI. Remedies**

### **A. Cancellation of the Well Licences is Mandated**

60. Apache has responded to EnCana's primary argument under this subheading above. Please see Apache's reply to CDP at paragraphs 30 to 33 regarding Apache's submissions on quieting title. No evidence has been led regarding the "requirement" to quiet title in other jurisdictions that would allow the Board to compare the situation that it is addressing with the issues being addressed in other jurisdictions or the Board's statutory mandate and obligations in comparison to other jurisdictions.<sup>59</sup> If EnCana had wished to argue the practices in certain other jurisdictions should be imported into Alberta, it had the full opportunity to lead such evidence.

### **B. There is No Bar to Cancellation of the Well Licences**

61. Apache did not make an argument that EnCana should be barred from the relief it is seeking based on its past actions. Apache notes that EnCana indicates at paragraph 123 that it always and still says that the "Board must consider and determine 'relative ownership of the parties'". This statement appears to either be inconsistent with EnCana's fundamental proposition advanced in its Argument that the Board is prevented at law from addressing questions of entitlement or is meaningless.

### **C. Continuation of Bulletin 2006-19**

62. Please see Apache's reply to CDP's Argument at paragraphs 34 to 38 above.

All of which is respectfully submitted this 13<sup>th</sup> day of December, 2006.

*"Original signed By"*

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<sup>59</sup> EnCana Final Argument, para. 118.