

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

CONSIDERATION OF GANDY MARLEY, INC.'S,
REQUEST FOR REVIEW OF DENIAL OF REQUEST
FOR PARTIAL STAY OF DIVISION ORDER
NO. R-12,306-B IN CASE NO. 13,480

CASE NO. 13,482
AWAITING FINAL COMMISSION ACTION
NO EVIDENCE OR TESTIMONY TAKEN

REPORTER'S TRANSCRIPT OF PROCEEDINGS
COMMISSION HEARING

2005 SEP 27 PM 12 49

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
FRANK T. CHAVEZ: COMMISSIONER

September 15th, 2005
Santa Fe, New Mexico

These matters came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, September 15th, 2005, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

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Commission Hearing

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A P P E A R A N C E S

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* * *

1 CHAIRMAN FESMIRE: I guess the first order of
2 business is the reading of the minutes. Have the
3 Commissioners had the chance to review the minutes as
4 presented?

5 COMMISSIONER BAILEY: Yes, I have, and I move
6 that we adopt them.

7 COMMISSIONER CHAVEZ: I second the motion.

8 CHAIRMAN FESMIRE: The motion having been made
9 and seconded to adopt the minutes, all those in favor?

10 COMMISSIONER BAILEY: Aye.

11 COMMISSIONER CHAVEZ: Aye.

12 CHAIRMAN FESMIRE: Opposed?

13 Let the record reflect that the minutes as
14 presented by the Commission secretary will be adopted and
15 signed.

16 * * *

17
18 CHAIRMAN FESMIRE: The first matter to be
19 considered today is the request of Gandy Marley, Inc., a
20 request for review of the denial of the request for partial
21 stay of Division Order R-12,306-B in Case Number 13,480.
22 At this time no evidence or arguments will be received --
23 are planned to be received by the Commission. Is that the
24 understanding of the parties present?

25 MR. FELDEWERT: Yes.

1 CHAIRMAN FESMIRE: Okay. And at this time I'm
2 going to ask Counselor Brooks to give us a procedural
3 history of that case, if he would, please.

4 MR. BROOKS: Okay, thank you, Mr. Chairman,
5 honorable Commissioners. I am acting -- I have been acting
6 as Commission counsel with respect to this case, and so I
7 will give the Commission the usual briefing on this matter.

8 I do not have the dates assembled but I recall
9 them in general terms, and I believe that the proceedings
10 in this matter began in March of 2005. It seems that the
11 Division raised a question about whether Gandy Marley,
12 Inc., had the authority under its existing Rule 711 waste
13 management facility permit to accept certain types of
14 wastes, that being salt-contaminated drilling fluids, that
15 it was accepting. And the Division sent a letter
16 indicating that they should cease doing so.

17 However, there was a feeling at that time that
18 there was a shortage of available facilities, and Gandy
19 Marley undertook to cooperate. I don't know the terms, but
20 in any event the Division decided to petition the Director,
21 or file an Application with the Director for an emergency
22 order to allow Gandy Marley to continue to accept salt-
23 contaminated drilling fluids as wastes, pending a hearing.
24 That application was granted in March of 2005.

25 Then in May of 2005 there was an Examiner Hearing

1 on Gandy Marley, Inc.'s, Application to have its permit
2 amended so that it would have proper and permanent
3 authority to accept salt-contaminated waste.

4 In -- sometime this summer, and I don't remember
5 the date -- I believe it was in June, but I may be a little
6 bit off on that -- but anyway, the Division entered an
7 order pursuant to the hearing in May, and the terms -- I
8 think it was in August, actually, early August. The
9 Division entered an order. The order denied Gandy Marley's
10 permit without prejudice to refileing because of defects in
11 notice and I believe some other defects in the Application
12 itself.

13 The Division also at that time determined that
14 the emergency order should terminate and be superseded by
15 the Division's order pursuant to the full hearing that was
16 held in May.

17 Following the entry of that order, Gandy Marley,
18 Inc., filed a *de novo* application -- or an application for
19 *de novo* review by this Commission. At the same time or
20 shortly thereafter, Gandy Marley, Inc., also filed a motion
21 for stay of the order of the Commission. Now, Gandy -- or
22 the order of the Division pending action before the
23 Commission.

24 A reading of the entire text of Gandy Marley's
25 Application for a stay indicates that they are suggesting

1 that the matter be stayed until their new Application is
2 filed and heard by the Commission, although their actual
3 prayer for relief only asks, I believe, that it be
4 postponed until the Commission's *de novo* review of the
5 Division's order, and I do not believe there is actually
6 before the Commission at this time an application to stay
7 the *de novo* proceeding pending the new application,
8 although they've indicated that that's the course that they
9 would like to pursue.

10 I'm describing the documents somewhat carefully,
11 because I'm not totally sure of how they would be
12 interpreted in that regard, but that's my interpretation.

13 You, Mr. Chairman, in your capacity as Director
14 of the Division, entered an order, as you will doubtless
15 recall, a few weeks ago denying Gandy Marley's request for
16 a stay pending the *de novo* hearing.

17 Gandy Marley filed an Application for review of
18 that issue before the Commission. I do not know, Mr.
19 Chairman, honorable Commissioners, if you wish me to give
20 you my advice concerning the legal aspects of such a
21 petition now or in executive session, so I will abide your
22 pleasure on that. I've reviewed the facts, and what is
23 before you now is the Application for stay pending the *de*
24 *novo* hearing, which is in effect an application for the
25 Commission to overrule the Director on that issue.

1 I believe you have three options. One would be
2 to grant it and grant stay, the other would be to overrule
3 the motion and uphold the Director's denial of the stay,
4 and the third would be to set a hearing at some subsequent
5 time. I believe the matter cannot be heard today because
6 it was not on the docket for a hearing.

7 So thank you. I will be happy to give you my
8 legal view, either in public or in executive session at
9 your convenience.

10 CHAIRMAN FESMIRE: Mr. Brooks, I would appreciate
11 legal advice to the Commission, probably be given in
12 executive session.

13 MR. BROOKS: Very well.

14 CHAIRMAN FESMIRE: Counsel Leach, would this be a
15 good time to go into executive session and make that
16 decision?

17 MS. LEACH: Sure.

18 CHAIRMAN FESMIRE: Okay. At this time we will go
19 into executive session for the purposes of discussing the
20 motion before the Commission and for no other purposes. Is
21 there anything else that we need to put on the record
22 before we go into executive session?

23 MS. LEACH: As long as the other -- as long as
24 you have two out of three votes --

25 CHAIRMAN FESMIRE: Okay.

1 MS. LEACH: -- you can go into executive session.

2 CHAIRMAN FESMIRE: The Chair would entertain a
3 motion to go into executive session.

4 COMMISSIONER BAILEY: I so move.

5 COMMISSIONER CHAVEZ: I second.

6 CHAIRMAN FESMIRE: All those in favor?

7 COMMISSIONER BAILEY: Aye.

8 COMMISSIONER CHAVEZ: Aye.

9 CHAIRMAN FESMIRE: At this time the Commission
10 will go into executive session to discuss this motion.

11 (Off the record at 9:11 a.m.)

12 (The following proceedings had at 10:35 a.m.)

13 CHAIRMAN FESMIRE: At this point we'll go back on
14 the record. Let the record reflect that the Commission
15 came out of executive session at 10:35 on the date of the
16 meeting, and at this point the Chair would entertain a
17 motion concerning the deliberations on Cause Number 13,480.

18 COMMISSIONER CHAVEZ: I move that the Commission
19 grant the stay requested by the operator until the October
20 13th meeting, where the Commission will review the
21 operator's progress, the Applicant's progress, in preparing
22 and publishing in accordance with Rule 711 their
23 application for modification of their permit. At the
24 October 13th meeting, the Commission will determine whether
25 to extend this date, based on GMI's progress in application

1 and notice.

2 CHAIRMAN FESMIRE: Is there a second?

3 COMMISSIONER BAILEY: Second.

4 CHAIRMAN FESMIRE: All those in favor?

5 COMMISSIONER BAILEY: Aye.

6 COMMISSIONER CHAVEZ: Aye.

7 CHAIRMAN FESMIRE: All those opposed? Aye.

8 The motion carries. I'll direct Counsel to draft
9 an order to that effect.

10 MR. BROOKS: Okay. Now, let me suggest in terms
11 of timing that we probably want this order entered today,
12 but we do have another matter to hear, so it would seem to
13 me to be appropriate that the Commission go ahead and deal
14 with the other matters and then take a recess to enable
15 counsel to draft the order, and then convene later in the
16 day for the purpose of formally adopting the order if the
17 Commissioners' time and appointments permit.

18 CHAIRMAN FESMIRE: Okay, any objection?

19 COMMISSIONER BAILEY: No objection.

20 COMMISSIONER CHAVEZ: That's fine.

21 CHAIRMAN FESMIRE: The next --

22 MR. BROOKS: I would request a short break before
23 I have to testify.

24 (Laughter)

25 * * *

1 CHAIRMAN FESMIRE: The next cause before the
2 Commission is Case Number 13,482, in the matter of the
3 proposal of the Oil Conservation Commission on its own
4 motion to amend Oil Conservation Division Rules 1201, 1203
5 through 1205, 1207, 1208, 1211, 1212, 1214 and 1220.

6 We'll entertain appearances of counsel at this
7 time.

8 Is that you, Cheryl?

9 MS. BADA: That's me. Cheryl Bada for the
10 Energy, Minerals and Natural Resources Department, Oil
11 Conservation Division.

12 CHAIRMAN FESMIRE: Okay, are there any other
13 counsel present who are going to be involved today?

14 Ms. Bada, do you have any witnesses?

15 MS. BADA: No, we do not.

16 CHAIRMAN FESMIRE: Ms. Bada, I'll turn it over to
17 you at this time.

18 MS. BADA: I believe counsel for the Commission
19 has prepared an order for the Commission to adopt the
20 proposed Rules and attached as exhibits the repeal of the
21 current Rules and the replacement for those Rules, as well
22 as amendments to 19.5.1.7, which would include the two new
23 definitions, Commission clerk and Division clerk.

24 CHAIRMAN FESMIRE: Okay. And do you have a
25 suggestion at this time of what you're --

1 MS. BADA: I would recommend the Commission adopt
2 those rules as submitted.

3 CHAIRMAN FESMIRE: Have the Commissioners had the
4 opportunity to review the Rules as drafted?

5 COMMISSIONER BAILEY: Yes, I have, and I intend
6 to sign the order.

7 COMMISSIONER CHAVEZ: I have, and I will also
8 sign the order.

9 CHAIRMAN FESMIRE: And the Chair has done the
10 same, so at this time we'll entertain a motion to adopt the
11 Rules as drafted.

12 COMMISSIONER BAILEY: I move.

13 COMMISSIONER CHAVEZ: I second.

14 CHAIRMAN FESMIRE: All those in favor?

15 COMMISSIONER BAILEY: Aye.

16 COMMISSIONER CHAVEZ: Aye.

17 CHAIRMAN FESMIRE: Opposed? Let the record
18 reflect that the motion carried and that the Rules will be
19 signed -- and that the Order adopting the Rules will be
20 signed at this time.

21 That concludes the action that the Commission
22 needs to take on Case Number 13,482.

23 (Off the record at 10:40 a.m.)

24 (The following proceedings had at 1:37 p.m.)

25 CHAIRMAN FESMIRE: We need to address a couple of

1 administrative issues with respect to Case Number 13,480.

2 In the past we have drafted -- where there has
3 been a dissenting vote, we have drafted an order that
4 represents to the record that a majority of the
5 Commissioners have adopted this order, and I think that's a
6 good tradition. Would the Commissioners like to do that,
7 or would they rather have it drafted for the signature of
8 the two Commissioners in the majority?

9 COMMISSIONER BAILEY: The reason why we
10 originally put it as the majority was because there were
11 several different issues that were addressed during that
12 case, and the order was very specific that a majority
13 agreed for certain portions, and the entire Commission
14 agreed for other portions. So that's the history on that
15 one.

16 This only deals with one issue, so it really
17 doesn't make any difference to me. I just thought it was
18 important to understand that it's critical in those areas
19 where we have different factors, but for one factor it
20 really doesn't matter.

21 CHAIRMAN FESMIRE: Okay. Counsel, is there any
22 reason to draft it one way or the other?

23 MR. BROOKS: Not that I'm aware of.

24 CHAIRMAN FESMIRE: Okay. How long do you think
25 it will take you to draft an order?

1 MR. BROOKS: Very difficult to really know. I
2 could say maybe a couple of hours, but unfortunately when I
3 get to drafting these things sometimes they take longer
4 than I think, so I just -- you know, it's hard to say. I
5 do have to first go back and refresh my recollection as to
6 exactly what was in the Division Order, so I know what
7 we're dealing with.

8 CHAIRMAN FESMIRE: Okay. Would the Commission
9 rather bet that Counsel drafts it today or set up another
10 procedure for getting it signed?

11 COMMISSIONER BAILEY: Frank, do you have to go
12 back this afternoon?

13 COMMISSIONER CHAVEZ: Yes, I do, I have to leave
14 for Albuquerque tonight, because I'm leaving for Abilene
15 first thing in the morning, so I won't be available.

16 COMMISSIONER BAILEY: I normally leave at 4:00,
17 but that's immaterial.

18 CHAIRMAN FESMIRE: We're going to be gone from
19 tomorrow.

20 COMMISSIONER BAILEY: It was all figured out
21 John. We figured it all out.

22 MR. BEMIS: Oh, did you?

23 CHAIRMAN FESMIRE: If we'd a knowed we were going
24 to have an audience, we'd have waited for you.

25 Why don't I get counsel to draft the order and

1 draft it in -- Well, I'm going to leave tomorrow morning.

2 COMMISSIONER BAILEY: So we need to sign it
3 tonight then.

4 CHAIRMAN FESMIRE: Well, if it's just the two of
5 you -- Are you going to be coming back through in the near
6 future?

7 COMMISSIONER CHAVEZ: I wasn't intending to, no.

8 CHAIRMAN FESMIRE: Do we have to be in session to
9 sign an order, or can the individual Commissioners --

10 MR. BROOKS: I believe that we do.

11 CHAIRMAN FESMIRE: Do we?

12 MR. BROOKS: Yes, that's my understanding.

13 COMMISSIONER CHAVEZ: We can convene just a
14 quorum with Jami and myself, but we need a record.

15 MR. BROOKS: Yes, you could do that, two members
16 of the Commission constitute a quorum.

17 COMMISSIONER CHAVEZ: And we do need a record on
18 that. Do we need a record to sign the order?

19 MR. BROOKS: Yes.

20 COMMISSIONER CHAVEZ: Would that help, Mark?

21 CHAIRMAN FESMIRE: Yeah, I mean especially if we
22 draft it so the -- that way.

23 When could you -- Can we do it next week
24 sometime? Or you -- you're not coming back, are you?

25 COMMISSIONER CHAVEZ: No.

1 COMMISSIONER BAILEY: No, it has to be this
2 afternoon or not for a long time, for Frank's schedule,
3 right?

4 COMMISSIONER CHAVEZ: Pretty much. Monday, I may
5 be -- I may be available, but I'm not sure that it would be
6 Monday.

7 CHAIRMAN FESMIRE: Okay, could we overnight it to
8 him wherever he's at?

9 MR. BROOKS: We could do that.

10 CHAIRMAN FESMIRE: But you said that they had to
11 be --

12 COMMISSIONER BAILEY: It has to be in session.

13 CHAIRMAN FESMIRE: -- in session.

14 MR. BROOKS: Well --

15 COMMISSIONER CHAVEZ: Can we take the session --
16 now there are regulations that allow attendance by phone.

17 MR. BROOKS: Yes, there is a provision for that.

18 COMMISSIONER CHAVEZ: I can't physically sign it,
19 however --

20 MR. BROOKS: Well, I suppose if you had to -- I
21 don't know. It's possible if you had a counterpart you
22 could sign it, if you were present by phone. I don't know.
23 I don't think it's ever been done that way, and there's
24 nothing that deals with it specifically.

25 CHAIRMAN FESMIRE: Well, we'd better dot the

1 i's --

2 MR. BEMIS: I hope the underlying decision wasn't
3 this hard?

4 CHAIRMAN FESMIRE: Oh, it was harder.

5 (Laughter)

6 COMMISSIONER CHAVEZ: I'd be glad to --

7 COMMISSIONER BAILEY: We were in executive
8 session --

9 COMMISSIONER CHAVEZ: -- do it by telephone --

10 COMMISSIONER BAILEY: -- for two hours.

11 COMMISSIONER CHAVEZ: -- except I physically
12 can't sign the document. Now, I could approve it and then
13 physically sign it with overnight mail, if that -- or does
14 the signature have to be during the actual meeting?

15 MR. BROOKS: It says that -- I don't think that
16 it's real specific, I don't think it gets down to that
17 level of specificity. We have always interpreted it -- I
18 don't remember the exact language, but we have always
19 interpreted it that the order has to be signed during a
20 Commission meeting.

21 CHAIRMAN FESMIRE: And can we hold Commission
22 meetings by conference call?

23 MR. BROOKS: We can hold Commission meetings by
24 telephone. That's specifically provided.

25 CHAIRMAN FESMIRE: Okay. Well then, why don't we

1 let you draft the order, and then we'll call a special
2 meeting to sign it by conference call.

3 MR. BROOKS: Okay.

4 CHAIRMAN FESMIRE: And you're going to be around?

5 COMMISSIONER BAILEY: Yes, I'll be here --

6 CHAIRMAN FESMIRE: Well, we'll be in Wyoming if
7 we don't get it done tomorrow.

8 COMMISSIONER BAILEY: Yeah.

9 CHAIRMAN FESMIRE: Okay.

10 COMMISSIONER BAILEY: But I don't get there till
11 Saturday.

12 CHAIRMAN FESMIRE: Well, if we don't get it done
13 tonight, I don't think we'll get it tomorrow, will we?

14 MR. BROOKS: Yeah, I think we can get it --

15 COMMISSIONER CHAVEZ: I'll be on the road
16 tomorrow.

17 CHAIRMAN FESMIRE: So much for that.

18 MR. BROOKS: Yeah, so --

19 CHAIRMAN FESMIRE: But early next week we could
20 do that?

21 MR. BROOKS: Well, yeah, I will be in Wyoming
22 next week but, you know, I can get the order done by then,
23 I would assume.

24 CHAIRMAN FESMIRE: Okay. Well, why don't we just
25 -- Frank, do you have a phone number where you'll be

1 available early next week?

2 COMMISSIONER CHAVEZ: Yes.

3 CHAIRMAN FESMIRE: Why don't you leave it with
4 Florene and we'll get the order done, and we may have to
5 conduct most of the meeting from Wyoming and conference you
6 in and --

7 MR. BROOKS: We'll have to figure out exactly how
8 we go about noticing the meeting. I will undertake to do
9 that.

10 CHAIRMAN FESMIRE: Okay, would we have to notice
11 a meeting for sign- -- yeah, I guess --

12 MR. BROOKS: Whenever we have a meeting we have
13 to give notice.

14 CHAIRMAN FESMIRE: Can we continue this meeting?

15 MR. BROOKS: We can continue this meeting, that's
16 true.

17 CHAIRMAN FESMIRE: To a time certain --

18 MR. BROOKS: Yeah, that's the only trouble, it
19 has to be to a date and place specified. Of course, we
20 could deal with the place, I suppose, by having Florene
21 here with a conference telephone and plugging everybody in,
22 wherever they were, and then anybody that came here could
23 hear what happened, but that -- we do have to have a date,
24 time and place specified to continue this up to --

25 CHAIRMAN FESMIRE: Okay, Frank, are you going to

1 be someplace Friday where you'll be around a phone?

2 COMMISSIONER CHAVEZ: Tomorrow?

3 CHAIRMAN FESMIRE: No, a week from tomorrow.

4 COMMISSIONER CHAVEZ: Yes.

5 CHAIRMAN FESMIRE: Are you going to be --

6 COMMISSIONER BAILEY: I'll be in town.

7 CHAIRMAN FESMIRE: Why don't we just continue
8 this meeting until Friday morning, nine o'clock, in Porter
9 Hall --

10 COMMISSIONER CHAVEZ: Before we do that, would
11 the order be much different than this particular one?

12 MR. BROOKS: It's going to have to be somewhat
13 different from that. That's the one that refuses the stay,
14 right?

15 COMMISSIONER CHAVEZ: That's right.

16 MR. BROOKS: It's going to have to be somewhat
17 different than that because if you're going to have to --
18 in the first place, we grant the stay, but also, I assume,
19 we want to give reasons, especially since the Commission is
20 divided. And furthermore, we've got to put the conditions
21 in.

22 COMMISSIONER CHAVEZ: Okay, very good.

23 MR. BROOKS: So it is going to be more complex.

24 COMMISSIONER CHAVEZ: I see, yeah, exactly.

25 Continuing it to Friday would be fine.

1 CHAIRMAN FESMIRE: Okay, and you can conference
2 in?

3 COMMISSIONER CHAVEZ: Yes.

4 CHAIRMAN FESMIRE: And Jami and I will be here.

5 COMMISSIONER BAILEY: Okay, Friday at 9:00.

6 CHAIRMAN FESMIRE: Friday at nine o'clock.

7 COMMISSIONER CHAVEZ: Could we make that --
8 sorry, Friday at 10:00?

9 CHAIRMAN FESMIRE: Friday at 10:00?

10 MR. BROOKS: That is Friday, September the 23rd?

11 COMMISSIONER BAILEY: Uh-huh.

12 CHAIRMAN FESMIRE: Okay, and we need to --
13 Anything else? Oh, we need to make sure that the Applicant
14 understands that the new order doesn't take effect until
15 signed, until the Commission's order is signed. So the
16 stay will be in effect until the new order is signed.

17 Anything else?

18 COMMISSIONER BAILEY: That's it.

19 CHAIRMAN FESMIRE: The Chair would entertain a
20 motion for -- dismissal is not the right word --
21 adjournment.

22 COMMISSIONER CHAVEZ: I so move.

23 COMMISSIONER BAILEY: Second.

24 CHAIRMAN FESMIRE: All those in favor?

25 COMMISSIONER BAILEY: Aye.

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COMMISSIONER CHAVEZ: Aye.

CHAIRMAN FESMIRE: Opposed? The meeting is
adjourned at 1:45 p.m.

(Thereupon, these proceedings were concluded at
1:45 p.m.)

* * *

