

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

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION COMMISSION FOR
THE PURPOSE OF CONSIDERING:

APPLICATION OF DELAWARE ENERGY, LLC CASE NO. 15855
TO REVOKE THE INJECTION AUTHORITY (De Novo)
GRANTED UNDER SWD-1680 FOR THE ALPHA
SWD NO. 1 WELL OPERATED BY ALPHA SWD
OPERATING, LLC, EDDY COUNTY, NEW MEXICO.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

May 22, 2018

Santa Fe, New Mexico

BEFORE: HEATHER RILEY, CHAIRWOMAN
ED MARTIN, COMMISSIONER
DR. ROBERT S. BALCH, COMMISSIONER
BILL BRANCARD, ESQ.

This matter came on for hearing before the
New Mexico Oil Conservation Commission on Tuesday,
May 22, 2018, at the New Mexico Energy, Minerals and
Natural Resources Department, Wendell Chino Building,
1220 South St. Francis Drive, Porter Hall, Room 102,
Santa Fe, New Mexico.

REPORTED BY: Mary C. Hankins, CCR, RPR
New Mexico CCR #20
Paul Baca Professional Court Reporters
500 4th Street, Northwest, Suite 105
Albuquerque, New Mexico 87102
(505) 843-9241

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES

FOR APPLICANT DELAWARE ENERGY, LLC:

MICHAEL H. FELDEWERT, ESQ.
HOLLAND & HART, LLP
110 North Guadalupe, Suite 1
Santa Fe, New Mexico 87501
(505) 988-4421
mfeldewert@hollandhart.com

FOR RESPONDENT ALPHA SWD OPERATING, LLC:

GARY W. LARSON, ESQ.
HINKLE SHANOR, LLP
218 Montezuma Avenue
Santa Fe, New Mexico 87501
(505) 982-4554
glarson@hinklelawfirm.com

INDEX

PAGE

Case Number 15855 Called	3
Motion for Judgment by Delaware Energy	3
Executive Session	32
Decision of the Commission	33
Setting of Dates and Other Business	34 - 41
Proceedings Conclude	42
Certificate of Court Reporter	43

EXHIBITS OFFERED AND ADMITTED

(No Exhibits.)

1 (9:14 a.m.)

2 CHAIRWOMAN RILEY: All right. The next
3 matter on the agenda is Case Number 15855, de novo.
4 This has been continued from the April 12th, 2018
5 Commission meeting in order to hear arguments from
6 counsel on the motion for judgment based on the Division
7 record filed by counsel for Delaware, application of
8 Delaware Energy, LLC to revoke the injection authority
9 granted under SWD-1680 for the Alpha SWD No. 1 well
10 operated by Alpha SWD Operating, LLC, Eddy County, New
11 Mexico.

12 So we have both counsel here. We have
13 Mr. Feldewert and Mr. Larson.

14 When you're ready, Mr. Feldewert.

15 MR. FELDEWERT: Yes. As is evident from
16 the title of the de novo appeal, in this matter Delaware
17 Energy filed an application to revoke the injection
18 authority that was granted under SWD-1680 for the Alpha
19 SWD 1 that was operated by -- or was to be operated by
20 Alpha SWD Operating. Now, in its application that was
21 filed before the Division and now before the Commission,
22 Delaware raised a number of reasons -- a number of
23 reasons why the injection authority must be revoked,
24 including, as one of the reasons, that it had been
25 issued prematurely under the Division's rules, which is

1 Rule 26.8. And if I may approach, I have a copy of that
2 rule.

3 CHAIRWOMAN RILEY: Certainly.

4 MR. FELDEWERT: And I've taken the liberty
5 of highlighting the pertinent provision down there in
6 26.8.C(2) in which it says, "The division shall not
7 approve an application for administrative approval until
8 15 days following the division's receipt of form C-108
9 complete with all attachments, including...." And then
10 it goes on to describe certain things. So when you read
11 this rule, it's not the filing of just the C-108
12 application. It must be a complete C-108 application
13 that then starts that 15-day period. Okay?

14 Now, the Division in this case held an
15 all-day hearing. Okay? We presented a single witness
16 and the Division's administrative records to establish a
17 basis for revocation, including -- including the fact
18 that SWD-1680 had been issued prematurely when you look
19 at the timeline in the Division's administrative file,
20 okay, which you have equal access to, just like
21 everybody else.

22 Alpha presented three witnesses on a
23 variety of issues. Okay? But they failed to present
24 any evidence or any records to rebut the fact that when
25 you look at the administrative record timeline, that

1 Order 1680, the injection order, was issued prematurely,
2 before the expiration of that 15-day period.

3 So following that hearing, the Division
4 examined its administrative record. It determined that
5 its administrative order had been issued prematurely,
6 and they filed Division Order R-14484-A rescinding 1680
7 on the basis that it had been issued prematurely, prior
8 to the expiration of the 15-day period. So they ignored
9 everything else and issued their decision based solely
10 on that dispositive issue that it had been issued
11 prematurely for the 15-day period. Alpha has now
12 appealed that Division order to you. Okay?

13 So I know we all like hearings. We all
14 like all-day hearings. But to avoid a hearing before
15 this Commission, we filed a motion for judgment. Okay?
16 And we attached to the motion the undisputed
17 administrative record. And I don't know if you have the
18 motion in front of you. If not, I have extra copies.
19 So please let me know if you don't.

20 But when you look at that administrative
21 record -- so I'm looking at our supplement to our
22 motion. When you look at that administrative record, it
23 establishes an undisputed timeline. Okay? We attached
24 Exhibit 2. Exhibit 1 was Alpha's C-108 application. We
25 attach an Exhibit 2, which was an email from

1 Mr. McMillan at the Division, in which he said to Alpha
2 on June 12th, "Your application that was received on
3 June 12th will not be placed in the administrative
4 application review process. The following information
5 is required." He was not complete. Okay? He was not
6 complete.

7 So then Alpha responded a number of days
8 later. That's Exhibits 3 and 4. And on June 19th --
9 it's undisputed that on June 19th, they provided the
10 supplemental information necessary to make that C-108
11 application complete, which then starts, under this
12 rule, the 15-day period because you now have a complete
13 application, June 19. Fifteen days from June 19th is
14 July 4th, if I did my math right. Okay? The Division
15 issued that order June 28th, a week too early, in
16 violation of this rule. That alone is a dispositive
17 issue. It was issued prematurely. It must be revoked.
18 And that is what we requested in our application. Okay?

19 Now, we don't need another hearing before
20 the Commission to address this dispositive issue, to
21 address this administrative record and the undisputed
22 timeline. Okay? Alpha does not dispute the timeline.
23 If you look at their response, they don't dispute the
24 authenticity of the records. They don't dispute the
25 timeline. They did present some other documents that

1 had to do with the other issues that we presented for
2 revocation. But the documents they presented in their
3 response had nothing to do with this administrative
4 timeline with respect to when their application was
5 complete and when the order was issued in connection
6 with this 15-day period. So in legal jargon, the
7 documents they presented are not material to the
8 dispositive issue that we have presented to the
9 Commission, okay, because it is undisputed, this
10 timeline of events.

11 And what they have done, therefore, is
12 suggest that you, the Commission, because this is a
13 de novo appeal, have no authority to render a decision
14 based on a set of undisputed facts. Okay? They cite no
15 authority for that proposition other than this is a
16 de novo appeal. A de novo appeal does not prevent
17 you -- you from independently looking at this same
18 undisputed set of facts, this same undisputed timeline,
19 this same undisputed timeline supported by the
20 Division's administrative record. I'm not talking about
21 the hearing below. I'm talking about the administrative
22 record. You've done that before. You have the inherent
23 authority to do so here. You don't have to have a
24 hearing where we address all the issues that we raised
25 in our application when there is a dispositive issue

1 that can dispose of the case that is based on an
2 undisputed set of facts.

3 So we ask you -- in this de novo appeal, we
4 ask you to apply this rule. Independent of what the
5 Division did, you apply the rule. You apply this to the
6 undisputed timeline of events that is shown by the
7 Division's administrative record that we attached to our
8 motion that they do not dispute and have not rebutted
9 either at the Division level or, more importantly, in
10 response to our motion.

11 And we ask when you do that then, it yields
12 the conclusion that this order, this SWD-1680 that was
13 issued on June 28th, 2017, was issued prematurely. It
14 was a week too early and, therefore, should be rescinded
15 so that this case is remanded back to the Division for
16 action on the competing disposal applications that are
17 down there before the Division.

18 But the action you have to do on your de
19 novo appeal is you have the opportunity here to grant
20 our application for a rescission based on a set of
21 undisputed facts. We have other issues we could raise
22 at the hearing, but we don't need to because this is
23 dispositive. And you have the inherent authority to do
24 that, and we ask that you do so here on this de novo
25 appeal.

1 CHAIRWOMAN RILEY: Is it procedurally okay
2 that we listen to Mr. Larson next and then ask
3 questions? Is that all right?

4 MR. BRANCARD: Sure.

5 MR. LARSON: Thank you, Madam Chair.

6 The administrative record that
7 Mr. Feldewert relied on is correct submitted to you.
8 One fact that is not presented is there was no
9 opposition to Alpha SWD's application. And it's Alpha
10 SWD's position that because there was no opposition,
11 that the interpretation of the rule cited by
12 Mr. Feldewert comes into question because the Division
13 could have offered alternative relief which would
14 basically postdate the unopposed application.

15 And as noted in Alpha SWD's response, Alpha
16 SWD has a statutory right to a de novo evidentiary
17 hearing on Delaware's application seeking the revocation
18 of the injection authority granted to Alpha SWD by the
19 Division. And on a fundamental level, Delaware seeks to
20 deny that right in asking the Commission to disregard
21 its obligation under the Oil and Gas Act to provide
22 Alpha SWD a hearing on Delaware's application.

23 And as the Commission is fully aware, a de
24 novo hearing -- in a de novo hearing, its responsibility
25 and obligation is to independently consider all of the

1 issues raised in Delaware's application without regard
2 to the action taken by the Division. And Delaware has
3 cited no authority whatsoever that might allow the
4 Commission to abdicate that responsibility.

5 As Delaware's motion properly acknowledges
6 and Mr. Feldewert has acknowledged this morning, this
7 case involves factual and legal issues beyond the
8 interpretation and application of 19.15.26.8.C. For
9 example, there are disputed issues regarding whether
10 Delaware had an application pending when Alpha SWD filed
11 its application that the Division ultimately approved,
12 whether Delaware was entitled to receive notice of Alpha
13 SWD's application, and whether Delaware has standing to
14 oppose the Division's granting of injection on authority
15 to Alpha SWD.

16 And Alpha SWD has devoted significant
17 resources to obtaining injection authority from the
18 Division, and it is entitled to an evidentiary hearing
19 and determination by the Commission whether that
20 authority should be revoked.

21 The Oil and Gas Act and the Commission's
22 rules unquestionably require the Commission to conduct
23 an evidentiary hearing on Delaware's application and
24 afford Alpha SWD a full opportunity to present its
25 opposition to the application.

1 And one other point I would address that
2 Mr. Feldewert raised is that if you were to grant the
3 motion and -- which would ultimately lead to the
4 revocation of Alpha SWD's application, there would be no
5 competing applications in front of the Division. Alpha
6 SWD would have no authority and, therefore, would have
7 no basis to oppose a Delaware application.

8 And for these reasons and the reasons
9 stated in Alpha SWD's response, I submit the Commission
10 should deny Delaware's applications -- I'm sorry -- its
11 motion.

12 MR. FELDEWERT: If I said revoke their
13 application, I didn't mean to. Look at our title, "to
14 revoke the injection authority granted under SWD-1680,"
15 the order that was issued prematurely. That's what we
16 seek under the application that's been filed.

17 Now, this 15-day period applies whether
18 there is opposition or not. Okay? That 15-day period
19 sits there so that there is a period of time after it's
20 deemed complete for people to file opposition. Okay?
21 It is not dependent upon whether there is opposition to
22 the application or not. It is a mandatory waiting
23 period after it's deemed complete and notice fully goes
24 out. One of the things they had to do to supplement
25 their application was the notice, okay, which then

1 triggered the 15-day protest period. But they issued
2 this order a week prematurely, the Division did. Okay?
3 So it is not dependent upon whether there is existing
4 opposition or not. Okay?

5 And, secondly, again, they don't dispute
6 the timeline. They don't dispute the impact of that
7 timeline under this rule. They're just assessing --
8 they're just suggesting to you that look, because
9 Delaware has not only one issue for revocation, this
10 timeline, but there are reasons two, three, four and
11 five as to why it should be revoked, that you now have
12 to have a hearing on all these other issues despite the
13 fact there is a dispositive issue with undisputed facts
14 that eliminates the need to even look at those other
15 issues. Okay? That is inherently wrong.

16 You have the ability to control your
17 docket. You have the ability to decide your cases as
18 expeditiously as possible, and you have, in this case, a
19 dispositive issue with undisputed facts that deals with
20 the application. And you should rule now, after
21 reviewing this administrative record, doing the timeline
22 yourself, doing the math yourselves -- make sure I'm not
23 wrong on my math -- okay? -- and issue a decision that
24 revokes their injection authority because it was issued
25 prematurely.

1 CHAIRWOMAN RILEY: So I have a couple of
2 comments to make. One is, I think what has complicated
3 this is there have been a number of things as far as
4 timing goes that have either been incorrect or just
5 unfortunate or whatever, including what the Division may
6 or may not have done. I have a number of questions that
7 I'd like to ask, but some of the parties aren't here to
8 ask, and this probably isn't the appropriate place to
9 ask it just to unravel this. I spent a little time
10 reviewing this. I feel like this is a version of who's
11 on first and what's on second. I drew out my own
12 timeline of what may or may not have happened here.

13 But I guess one question I might have for
14 you -- if I understand the rules correctly and there was
15 a decision by the Division on an application, would the
16 next step for you and for Delaware -- would that have
17 been by statute for you to then apply to the Commission
18 for a de novo? I mean, was it appropriate to then go
19 back to the Division to look at a decision that they had
20 made and decide it was incorrect, or should this panel
21 have done that? Should we have skipped that?

22 MR. FELDEWERT: Well, let me step back. In
23 the big picture, putting aside this dispositive issue,
24 we had a circumstances where Delaware filed an
25 application and there was a protest, and Delaware was

1 then dealing with the protest through its prior filed
2 application.

3 When Alpha filed its application for the
4 same location, same zone, okay, for whatever reason, the
5 Division either didn't take credence of, forgot about or
6 whatever, didn't have -- didn't take note of the
7 Delaware's competing application, didn't give Delaware
8 notice. Okay? And Delaware wasn't aware of what was
9 going on until the order was issued on June 28th. So
10 then when we started looking at the issue. Okay? There
11 were a number of reasons why we said, "Hey, this
12 SWD-1680 has to be revoked," one of which is -- we said,
13 "They should" -- "somebody should have given us notice."

14 Secondly, it looks to us like we had a
15 competing well proposal on file with the Division at the
16 time they filed theirs. So why didn't we get notice for
17 that reason, and why wasn't it taken into account?

18 But third, we said -- besides all that,
19 this order was issued before the expiration of the 15
20 days because their complete application was not filed.
21 When you look at our Exhibits 3 and 4, it wasn't filed
22 until June 19th, which then starts that 15-day period.
23 So the earliest that the Division could have issued
24 order approving their application is July 4th, and so
25 that is the dispositive. And that is one basis to

1 revoke this, and that's what we seek. We seek the
2 revocation of this, okay, so that then the competing
3 applications can be addressed.

4 But at this point, the only application
5 before the -- before the Division or even before this
6 body is to revoke this injection authority. That's it.

7 CHAIRWOMAN RILEY: Well, but that wouldn't
8 be -- I'm again trying to unravel this because the
9 application that Delaware submitted had lots of stuff in
10 there. It had things about the notice requirements and
11 all these different things within that application. And
12 that was to the Division. The Division, according to
13 what you've said, they made a decision --

14 And stop me where I'm getting off track,
15 Bill.

16 -- they made a decision just on the
17 timeliness of the approval of that injection
18 authority --

19 MR. FELDEWERT: Yes.

20 CHAIRWOMAN RILEY: -- and said they were
21 incorrect, and they rescinded it. Let me see if I can
22 get my correct -- yeah. They rescinded the authority,
23 the administrative order.

24 MR. FELDEWERT: They did so then without
25 prejudice to the right of Alpha to file an application.

1 CHAIRWOMAN RILEY: Okay. But they didn't
2 make any decisions based on the other items that were
3 brought.

4 MR. FELDEWERT: Correct.

5 CHAIRWOMAN RILEY: They left that. And
6 then the next thing we have is an appeal, right --

7 MR. LARSON: (Indicating.)

8 CHAIRWOMAN RILEY: -- from Alpha on this
9 decision. We never are really getting to look at those
10 other items that you just mentioned there and get to
11 question why all that happened. And I'm not sure that
12 that's not appropriate for today for your motion, but it
13 is at some point, right? So where does that come into
14 play? Because I think that we have a lot of
15 inconsistencies or things that have happened throughout
16 all of this, and at some point, the Division or
17 Commission has to make a decision of who gets to inject
18 in a particular place.

19 MR. FELDEWERT: So if I may --

20 CHAIRWOMAN RILEY: Uh-huh.

21 MR. FELDEWERT: -- our application didn't
22 ask the Division to decide who gets to inject. Okay?
23 Our application, which is before you, asked the Division
24 and now the Commission to revoke the injection authority
25 under this order because you can't do anything until

1 this is revoked. Okay? So that's what our application
2 did.

3 Now, in my opinion, once the decision is
4 made on this application as to whether that order should
5 be revoked, once that decision is made, then the parties
6 can move forward from there before the Division in
7 dealing with the filed competing applications. But the
8 first thing that has to happen and, therefore, what we
9 asked in our application was to revoke this injection
10 authority so they're not out there drilling the well and
11 they're not out there doing their injection and making
12 everything else moot. Okay?

13 So in my humble -- in my opinion, the only
14 issue before you, as was the only issue before the
15 Division, is whether that injection authority should be
16 revoked. And we had a number of reasons, all of which
17 were, in my opinion, equally dispositive, but the
18 Division chose one of the four dispositive issues and
19 said that's the basis they're revoking. And my point to
20 you is you can do the same thing by just looking at the
21 same record, and we don't have to get to all the other
22 issues, as to whether we should have gotten notice, for
23 example. We don't need to get to that, because all
24 we're trying to do is revoke the order.

25 CHAIRWOMAN RILEY: Mr. Larson?

1 MR. LARSON: I completely agree with you,
2 Madam Chair. There are a number of issues raised in the
3 application that were not addressed by the Division, and
4 it's incumbent upon the Commission, under the Oil and
5 Gas Act, to independently, regardless of what the
6 Division did, give Alpha SWD an opportunity to put on
7 evidence regarding all of those issues.

8 CHAIRWOMAN RILEY: Okay. So if the
9 Commission were to come back and agree with -- that this
10 application should be revoked based on the timing, if it
11 were to agree with this decision, then you-all would
12 then have -- I'm assuming you, Alpha, could then
13 re-apply, and we'd have competing applications that
14 could then go in front of the Division, and you-all
15 could argue all the rest of that, the notice, the
16 timing, all that. Because I guess one thing I would ask
17 of you is -- you mentioned in your conversation that
18 they didn't object, but really objection doesn't have
19 anything to do with the 15 days, according to what our
20 rules say, that you do have to have a complete
21 application, and then once that date starts, you have 15
22 days. So, essentially, on the 16th day is the day the
23 order can be issued, and this original administrative
24 order was done prior to that. So --

25 MR. LARSON: With regard to the second

1 point you raise, I think there is an issue of fairness
2 from Alpha SWD's perspective because they filed an
3 application in good faith. It's their position the only
4 party they were required to notify was Matador, which
5 they did. There were no objections to the applications,
6 and then perhaps through no fault of its own, the
7 Division jumped the gun on issuing the application. And
8 so from our perspective, there is no reason, with no
9 objection, that they couldn't just postdate the approval
10 of the application.

11 In terms of the scenario you're presenting,
12 if you were to grant Mr. Feldewert's motion, Alpha comes
13 back and replies, its initial application is moot. And
14 so Delaware, in our perspective, has a second
15 application that was filed after Alpha's. That
16 application remains pending in front of the Division.
17 If Alpha files a new application, all these other issues
18 about whether it was required to provide notice of its
19 first application, those issues are gone.

20 CHAIRWOMAN RILEY: So then this gets me to
21 my dilemma, because I have questions that people are not
22 in the room for me to ask to deal with that, which gets
23 down sort of in the weeds about something that is not
24 really within the motion for today.

25 MR. FELDEWERT: Oh, I would say it's within

1 the scope of the application. Right? All we applied
2 for was to revoke the injection authority, not -- not
3 who should operate a disposal well at this particular
4 location in this zone.

5 CHAIRWOMAN RILEY: So I have a procedural
6 question. Is there any reason that we couldn't revoke
7 the approval of that application of Alpha but not negate
8 the application itself? Why can't their application
9 still be standpoint so that it is as of the date that
10 they applied for it, we just take out the approval,
11 because then that puts everybody back at square one?

12 MR. BRANCARD: Madam Chair, I think what
13 you're talking about is kind of a remand. It's
14 basically remanding the application back to the Division
15 to start over.

16 CHAIRWOMAN RILEY: Is that appropriate?

17 MR. BRANCARD: If you had enough support
18 for that, yes, but since we haven't had a full hearing
19 on the full matter --

20 CHAIRWOMAN RILEY: I know. That's probably
21 not allowing a de novo hearing on this whole thing. Is
22 there more to it, because they --

23 MR. FELDEWERT: If the goal -- or if the --
24 let me step back.

25 What you just said, I think, is entirely

1 correct. They don't have to file a new application.
2 There is no reason why the order could not be rescinded
3 and have the matter sent back to the Division to deal
4 with their pending application in a timely fashion.
5 Okay? Nothing wrong with that. And we haven't said
6 that there is anything wrong with that. That's what
7 we're asking for, in fact. All we're asking for in our
8 application is to rescind the existing approval, and
9 then let things play out from there because the existing
10 approval was done incorrectly. Okay?

11 Now, you don't have to have a hearing on
12 all the other issues as to why this order was issued
13 incorrectly when you have a dispositive issue that deals
14 with it. I mean, we could come here to hearing, and we
15 could present the evidence on the administrative record
16 that you see now, and that would be one basis to rescind
17 the authority. We could come in and argue, "Hey,
18 another reason you should rescind this is because we
19 should have gotten notice, and we didn't get notice."
20 Okay? We could have the arguments on that, but we don't
21 need to when you have a dispositive issue based on
22 undisputed facts, where the end result is what we asked
23 for, and that was simply a rescission of this order so
24 that any applications can play out from there before the
25 Division.

1 CHAIRWOMAN RILEY: But the order itself,
2 order paragraph number two, reads, "This order is
3 without prejudice to the right of Alpha SWD Operating,
4 LLC to file an application to obtain proper injection
5 authority for the proposed well as a new application
6 accompanied by a new form C-108 with notice of new
7 injection application is required under rule [sic]" --
8 "under these rules."

9 MR. FELDEWERT: Yes.

10 CHAIRWOMAN RILEY: So according to this
11 order, they would need to refile.

12 MR. FELDEWERT: Well, I don't read it that
13 way. I see it as they can do whatever they want to do.

14 COMMISSIONER BALCH: The ruling results
15 in -- we can specify it --

16 CHAIRWOMAN RILEY: Yeah.

17 COMMISSIONER BALCH: -- we wish it to occur
18 in that order.

19 MR. FELDEWERT: Yeah.

20 MR. BRANCARD: Yeah. You could be pretty
21 specific and sort of say if we're on day ten of the
22 15-day period when they issued the first order, that
23 they go back to day ten of the 15-day period, and they
24 have to wait five more days, assuming that's where you
25 want to go. But I'm concerned that you've asked other

1 questions that haven't been answered here.

2 CHAIRWOMAN RILEY: Procedurally?

3 MR. BRANCARD: Yes.

4 CHAIRWOMAN RILEY: I think probably we need
5 to go back, Mr. Feldewert, and find out why -- can you
6 go over your answer again? Why, after this order,
7 rather than applying to the OCC for a de novo, why the
8 application was submitted to the Division?

9 MR. BRANCARD: In other words, why isn't
10 the statutory remedy for a de novo appeal from the first
11 Division decision an exclusive remedy for Delaware?

12 MR. FELDEWERT: You mean -- run that by me
13 again.

14 MR. BRANCARD: So the statute says, you
15 know -- I'll read it. "When any matter of proceedings
16 referred to an examiner and a decision is rendered
17 thereon, any party of record adversely affected shall
18 have the right to have the matter heard de novo before
19 the Commission on application filed within 30 days from
20 the time such decision is rendered."

21 So 30 days after the first order, you had
22 the ability to appeal de novo that Division order to the
23 Commission.

24 MR. FELDEWERT: The Division Order R --

25 MR. BRANCARD: No, SWD whatever, the first

1 Division order.

2 MR. FELDEWERT: In a case where we were not
3 a party because we never got notice. We never got
4 notice.

5 MR. BRANCARD: So why isn't that your
6 exclusive remedy?

7 MR. FELDEWERT: On de novo appeal SWD-1680?

8 MR. BRANCARD: Yes, to the Commission.

9 MR. FELDEWERT: Well. We weren't a party
10 to the proceeding. We never got notice. And one of the
11 reasons we filed the application with the Division was
12 to address the issues, find out what happened.

13 MR. BRANCARD: I guess that sort of begs
14 the question: What jurisdiction does the Division have
15 to review its own decision? It seems that only the
16 Commission has the authority to review a Division
17 decision under the statute.

18 MR. FELDEWERT: "Jurisdiction is retained
19 by the Division for the entry of such further orders as
20 may be necessary," under their own SWD order.

21 MR. BRANCARD: Under the SWD order?

22 MR. FELDEWERT: Uh-huh, last paragraph.

23 MR. BRANCARD: Are you looking at SWD-1680?

24 MR. FELDEWERT: Yes, page 3 of 3, last
25 paragraph.

1 MR. BRANCARD: It says, "The jurisdiction
2 is retained by the Division for entry of such further
3 orders as may be necessary for the prevention of waste
4 and the protection of correlative rights or upon failure
5 of the operator to conduct operations to protect fresh
6 or protectable water or consistent with requirements in
7 this order where the Division may, upon after notice of
8 hearing, terminate the disposal authority granted."

9 MR. FELDEWERT: We asked for a termination
10 of disposal authority because it has impacted our
11 correlative rights because it was issued prematurely.

12 MR. BRANCARD: That jurisdiction seems to
13 be based totally on some action that the permit holder
14 would have taken to violate the order, not to review the
15 decision of the order to begin with.

16 MR. FELDEWERT: That's not how I read it.

17 MR. BRANCARD: So I'm really concerned
18 about the precedent the Commission may be setting here,
19 that basically any one of the tens of thousands of well
20 orders that have been issued in the last 83 years are
21 now up for grabs because somebody can go back in the
22 record and find a technical problem with how that well
23 was issued and go to the Commission and get an order. I
24 mean, there is limitation on this ability.

25 COMMISSIONER BALCH: Well, I think you have

1 to demonstrate that correlative rights were impaired,
2 and if they were, that's something that is definitely in
3 the jurisdiction of the Commission.

4 MR. BRANCARD: Well, but this is -- this is
5 a technical problem. It's not a correlative-rights
6 issue.

7 COMMISSIONER BALCH: If I understand
8 Mr. Feldewert correctly, they had a competing
9 application at the time that was somehow disregarded in
10 this process. They weren't told to be -- Alpha was not
11 told to notice them. They were not involved in the
12 proceeding, and then the Alpha application was thrown
13 in -- was put in. Without notice, how can they know to
14 appeal?

15 MR. BRANCARD: Well, there is public notice
16 of every application.

17 COMMISSIONER BALCH: At what point in the
18 timeline did Delaware become aware of the Alpha
19 application, filed the appeal?

20 MR. FELDEWERT: Sometime after this order
21 was entered. I don't remember when.

22 COMMISSIONER BALCH: Within the -- was it
23 30 days?

24 MR. BRANCARD: Well, the application that
25 Delaware submitted for the second hearing says they were

1 immediately notified by Alpha because Alpha was asking
2 them to purchase.

3 MR. FELDEWERT: After the order was
4 entered. That's right. Alpha came to us and said, "Hey
5 do you want to buy our SWD permit?" We said, "What
6 permit?" Forgot about that. Thank you.

7 MR. BRANCARD: So based on their own
8 statement, they seem to have clearly had notice within
9 that 30-day time frame. Now, if they didn't have notice
10 within that time frame, they could still appeal to the
11 Commission and ask for further time because they were
12 never notified of that. Okay? But they appeared to
13 have notice within that 30-day time frame. They just
14 decided -- Delaware just decided not to use the
15 statutory appeal to the Commission. The question is:
16 Is that an exclusive remedy here?

17 I mean, I have gone through the statutes,
18 the regulations to try to find what authority the
19 Division has to simply rescind a prior order based on
20 some flaw in that order. Clearly, there is authority to
21 go back and revisit permits if there are permit
22 violations, if there are problems with somebody drilling
23 in the wrong place or injecting out of zone. We have
24 the ability to take enforcement action against a permit
25 here, but simply going to the Division and saying, you

1 know, "Issue an 'oh, never mind order,' I don't -- I'm
2 troubled because I don't really see authority for the
3 Division to do this.

4 Clearly, the Commission has that authority
5 because it can review the Division's decision, but
6 Delaware chose not to come to the Commission.

7 MR. FELDEWERT: Delaware chose to go before
8 the Division, the body that issued the order, okay, to
9 point to the last paragraph here of this order, to say,
10 "Hey, our correlative rights have been impacted because
11 you, the Division, issued your order prematurely within
12 that 15-day period," and then as a second basis,
13 "without notice to us." Okay?

14 Now, I view that as falling within this
15 last paragraph. I don't view that as a requirement that
16 we go to the Commission. I view that as an opportunity
17 of the Division to correct their own error.

18 MR. BRANCARD: So you're saying the
19 provision in the Act is sort of meaningless?

20 MR. FELDEWERT: No, I'm not saying it's
21 meaningless.

22 MR. BRANCARD: That an operator can just
23 sort of choose to ignore appealing to the Commission and
24 just go back to the Division?

25 MR. FELDEWERT: This is the first time I've

1 heard you raise this.

2 MR. BRANCARD: I mean, this is a basic
3 process issue of you don't like a Division decision, you
4 appeal it to the Commission. That's how we have these
5 de novo proceedings.

6 COMMISSIONER BALCH: "The division shall
7 not approve an application" within those 15 days. That
8 "shall not" is pretty strong legal language.

9 MR. BRANCARD: Absolutely. And had there
10 been an appeal to the Commission and, you know, if the
11 facts are as Mr. Feldewert presented them, the
12 Commission would have had the basis to overturn that
13 decision, but Delaware did not do that.

14 I'm sort of fearful that we're kind of
15 opening up a whole can of worms to allow people to come
16 back not just months but years, decades later, you know,
17 cruise through all our well files, which are all
18 available on the Internet, look for some little flaw and
19 come back and say, you know, "One of the hundreds of
20 wells you've gotten approved, well, sorry, you have to
21 shut that well in because, you know, the notice wasn't
22 done right a few years ago."

23 COMMISSIONER BALCH: I certainly understand
24 that concern and precedent is very important, but if
25 there is a clear violation of the correlative rights,

1 I'm not sure there is a statute of limitations that
2 should be applied. Where is there in the Oil and Gas
3 Act that tells us that correlative rights have an
4 expiration date?

5 CHAIRWOMAN RILEY: I think what --

6 MR. BRANCARD: I mean, the Division's
7 finding in the second order is that there was a deadline
8 missed. There was no finding that correlative rights
9 were impaired.

10 COMMISSIONER MARTIN: But the deadline was
11 clearly missed.

12 MR. BRANCARD: It appears so.

13 COMMISSIONER MARTIN: It's unequivocal
14 language to me.

15 MR. BRANCARD: It appears so.

16 MR. FELDEWERT: Mr. Brancard, I'm assuming
17 you're looking at Rule 4.23.

18 MR. BRANCARD: I'm looking at the Oil and
19 Gas Act.

20 MR. FELDEWERT: I'm looking at the rules.

21 MR. BRANCARD: Okay.

22 MR. FELDEWERT: "De novo application: when
23 the division enters an order pursuant to a hearing, the
24 party of record who was adversely affected has the right
25 to have the matter heard de novo before the commission

1 provided that they file within 30 days."

2 MR. BRANCARD: Okay. I don't think -- I
3 don't think -- the Oil and Gas Act does not require a
4 hearing. It says, "Any matter of proceeding is referred
5 to an examiner and a decision is rendered thereon."

6 MR. FELDEWERT: This was not referred to an
7 examiner. An examiner arises when you have a hearing.
8 This is an administrative application. There was no
9 examiner.

10 MR. BRANCARD: I think these are puzzling
11 issues then. Perhaps we need a little more discussion
12 if we're going to write an order to make that order
13 quite clear.

14 COMMISSIONER MARTIN: Seems pretty
15 clear-cut to me. I mean, maybe I'm missing some point,
16 but this language is unequivocal.

17 MR. BRANCARD: Uh-huh.

18 COMMISSIONER MARTIN: I think based on this
19 alone, Mr. Feldewert's motion should be upheld. I'm
20 saying maybe we should go back and look at the timeline
21 and verify those facts, but I don't see -- there is
22 nothing in here that says anything about an objection.
23 It's pretty straightforward.

24 And as far as opening a can of worms, I
25 don't think people are going -- if there is no reason to

1 do it, then I don't think people are going to review the
2 files looking for discrepancies.

3 COMMISSIONER BALCH: I'm not so sure about
4 that.

5 (Laughter.)

6 COMMISSIONER MARTIN: Well, there are
7 people.

8 COMMISSIONER BALCH: I suspect people that
9 will do exactly that. But we would have to word the
10 order very carefully if we were to do something like
11 that.

12 Do we want to go into closed session?

13 CHAIRWOMAN RILEY: Yes.

14 COMMISSIONER BALCH: I make a motion to go
15 into closed session.

16 COMMISSIONER MARTIN: Second.

17 MR. FELDEWERT: We'll step out.

18 CHAIRWOMAN RILEY: Thank you.

19 (Executive session off the record, 9:58 to
20 10:42 a.m.)

21 CHAIRWOMAN RILEY: Let's go ahead and start
22 up again.

23 COMMISSIONER BALCH: I would move we go
24 back into regular session.

25 COMMISSIONER MARTIN: Second.

1 CHAIRWOMAN RILEY: Moved.

2 COMMISSIONER BALCH: Do you want to make a
3 statement?

4 MR. BRANCARD: All the Commission members
5 discussed in executive session were matters related to
6 the adjudicatory matters specific to Case 15855.

7 CHAIRWOMAN RILEY: I think at this point,
8 do you want to go ahead with what we decided, or do you
9 want me to say it?

10 COMMISSIONER BALCH: Given it's in the
11 correct legal speak, I think he should do it.

12 CHAIRWOMAN RILEY: I would like that. So
13 if wouldn't you mind, please.

14 MR. BRANCARD: Okay. So first of all, this
15 is on the motion filed by Delaware. The Commission
16 denies the motion from Delaware and sets this matter for
17 hearing, but the Commission will limit the hearing to
18 the following issues. Okay? First, the Commission will
19 hear about the jurisdiction of the Division in the case
20 below, whether they had jurisdiction to consider this
21 matter after a failure to file an appeal under the Oil
22 and Gas Act.

23 Second, if the Commission then does not
24 have jurisdiction in this matter, this case will be
25 limited to the single issue on which the Division

1 decided the case below, which is the question of the
2 15-day deadline and whether that was applied. So we
3 have already received some evidence, but if the parties
4 have any more evidence on that issue, that can be
5 presented at that point.

6 And third, if the Commission has
7 jurisdiction, if the Commission rules that there was a
8 violation of that particular regulation, then the
9 Commission would like the parties to address the
10 question of what would be a proper remedy in that
11 matter.

12 So we can set this for a hearing date and
13 also allow the parties to file anything in writing prior
14 to that hearing to address those three issues, in
15 particular the first and the third issue.

16 Are you looking for dates?

17 CHAIRWOMAN RILEY: I am. I don't know if
18 everybody wants to consult their calendars, but the next
19 time to meet is in June. We canceled the hearing for
20 May 24th, which is Thursday. So June 6th will be the
21 spill rule. I doubt we'll have time to put this in
22 that, but I'll take suggestions.

23 COMMISSIONER MARTIN: The next meeting date
24 is the 21st.

25 CHAIRWOMAN RILEY: The next one is the

1 21st. However, we'll be missing our law clerk and our
2 counsel.

3 MR. BRANCARD: I may be able to get back in
4 time for that.

5 CHAIRWOMAN RILEY: We would just need to
6 find a substitute for Miss Florene.

7 COMMISSIONER MARTIN: There is no
8 substitute.

9 CHAIRWOMAN RILEY: I know.

10 COMMISSIONER BALCH: Find somebody who
11 writes shorthand.

12 CHAIRWOMAN RILEY: July 19th is the next
13 one after that, which we have the FA rules scheduled for
14 that one. We could make it into a two-day hearing, if
15 that would work for everyone.

16 COMMISSIONER BALCH: 19th of July?

17 CHAIRWOMAN RILEY: Uh-huh.

18 COMMISSIONER MARTIN: 18 and 19 or 19 and
19 20? I don't care.

20 CHAIRWOMAN RILEY: I don't care.

21 COMMISSIONER MARTIN: Doesn't matter to me.
22 Either one of those days is fine.

23 COMMISSIONER BALCH: Typically, we just
24 spread into the Friday, if there is more than one day,
25 unless we move it forward more than two days. What else

1 do we have on the 19th of July?

2 CHAIRWOMAN RILEY: That's the FA rule,
3 financial assurance rule.

4 COMMISSIONER BALCH: And that's probably
5 going to take a full day.

6 CHAIRWOMAN RILEY: Uh-huh.

7 COMMISSIONER BALCH: It's primarily going
8 to be legal arguments.

9 MR. LARSON: That was my question. And as
10 a point of clarification, it sounds like legal
11 arguments, but are we open for any witnesses to present
12 evidence --

13 COMMISSIONER BALCH: I think as long as --

14 MR. LARSON: -- as it pertains to the
15 second issue.

16 MR. BRANCARD: The second issue, yes, which
17 is compliance with the -- in other words, what the
18 Division ruled on in the second Division order.

19 MR. FELDEWERT: Run that by me again.

20 MR. BRANCARD: The issue that the Division
21 decided the case on in the second order.

22 MR. FELDEWERT: That issue alone?

23 MR. BRANCARD: Yes.

24 MR. FELDEWERT: Not the other bases raised
25 in the application?

1 MR. BRANCARD: No.

2 COMMISSIONER BALCH: So probably less than
3 a day for that hearing? Do you have a sense? We could
4 continue to Monday, too, I think.

5 CHAIRWOMAN RILEY: The 23rd?

6 COMMISSIONER BALCH: Uh-huh.

7 CHAIRWOMAN RILEY: Does that work for you?

8 COMMISSIONER MARTIN: Yeah.

9 COMMISSIONER BALCH: I'm open right now.

10 CHAIRWOMAN RILEY: We can make that work.

11 COMMISSIONER MARTIN: So 19 and 20 and
12 possibly the 23rd?

13 CHAIRWOMAN RILEY: (Indicating.)

14 COMMISSIONER BALCH: Yeah.

15 COMMISSIONER MARTIN: Okay.

16 CHAIRWOMAN RILEY: Does that need a motion,
17 to set that date?

18 MR. BRANCARD: Well, it's your authority to
19 set the hearing date, but if we could get a nonobjection
20 from the parties, that would be helpful.

21 COMMISSIONER BALCH: 19th and 20th --
22 probably the 20th of July. I'm without my calendar in
23 front of me. I have to say I would be available that
24 day, subject to looking at my calendar.

25 MR. FELDEWERT: Yeah. We can make that

1 work.

2 COMMISSIONER BALCH: All right.

3 CHAIRWOMAN RILEY: We'll set it for those
4 days.

5 So that concludes our discussion on Case
6 15855.

7 Do we have any other business to discuss
8 today?

9 MR. BRANCARD: I guess the question is the
10 next meeting date --

11 COMMISSIONER BALCH: June --

12 MR. BRANCARD: -- which would be June 21.
13 And I don't know if it was Mr. Feldewert, but somebody
14 was trying to schedule a hearing in a case.

15 Is that your case?

16 MR. FELDEWERT: Yes.

17 CHAIRWOMAN RILEY: A different case?

18 MR. FELDEWERT: Well, it was the cases at
19 the last Commission hearing and we left it to your
20 discretion to find hearing dates.

21 MR. BRANCARD: And you and the parties
22 indicated one of those cases was not going to settle --

23 MR. FELDEWERT: Yes.

24 MR. BRANCARD: -- so it needed a hearing.

25 MR. FELDEWERT: Yes. If you're asking me

1 which one, I can't tell you.

2 COMMISSIONER BALCH: Do we have something
3 on June 21?

4 MR. BRANCARD: Right now we have nothing on
5 June 21, so --

6 CHAIRMAN RILEY: We have nothing.

7 COMMISSIONER BALCH: We could also set this
8 for June 21 if we wanted. It doesn't have to be July.

9 MR. BRANCARD: It doesn't have to be July.

10 MR. FELDEWERT: I think it involved
11 Matador's appeal of the approval of XTO's James Ranch
12 Unit. I think that was it.

13 MR. BRANCARD: Could be.

14 CHAIRWOMAN RILEY: The issue I have on June
15 21st is just that Mr. Brancard and Ms. Davidson both are
16 out of town.

17 COMMISSIONER BALCH: Do we want to change
18 that regular hearing date week before or --

19 When are you out of town?

20 MR. BRANCARD: Florene won't be here the
21 week before.

22 CHAIRWOMAN RILEY: So it has to be the week
23 of --

24 COMMISSIONER BALCH: We could do the 26th
25 or 27th, something like that.

1 MR. BRANCARD: When are you back, Florene?

2 MS. DAVIDSON: Yes [sic].

3 CHAIRWOMAN RILEY: She'll be back the 22nd,
4 right?

5 MS. DAVIDSON: Right.

6 COMMISSIONER BALCH: And you as well?

7 MR. BRANCARD: Yes. The 28th is fine.

8 COMMISSIONER BALCH: The 28th is not fine
9 for me.

10 MR. BRANCARD: What are you looking at?

11 COMMISSIONER BALCH: Well, only in the
12 morning, it's fine, but we have a retreat in Albuquerque
13 on the 28th and 29th. It starts in the afternoon on the
14 28th. So 27th would be better --

15 MR. BRANCARD: 27th, I'm only here in the
16 morning.

17 COMMISSIONER BALCH: -- or the 26th.

18 MR. BRANCARD: 26th, I'm available.

19 CHAIRWOMAN RILEY: I can make the 26th
20 work.

21 COMMISSIONER BALCH: Okay.

22 CHAIRWOMAN RILEY: Mr. Feldewert, does that
23 work for you?

24 MR. FELDEWERT: You know, we are not the de
25 novo applicant. Jim Bruce is the de novo applicant, but

1 the 26th, I can make work.

2 COMMISSIONER BALCH: If we set it, they
3 shall come. Maybe.

4 CHAIRWOMAN RILEY: Okay. June 26th. So
5 we're changing June 21st to June 26th? So are you also
6 proposing then that we hear the hearing -- that we just
7 set the hearing that day or leave --

8 COMMISSIONER BALCH: Leave that one for
9 July.

10 MR. FELDEWERT: The Delaware? This case
11 will be in July? I'm sorry. Case Number 15855 would be
12 on July 20th, right?

13 CHAIRWOMAN RILEY: Yes.

14 COMMISSIONER BALCH: I presume you want
15 ample time to prepare for that type of case?

16 MR. LARSON: (Indicating.)

17 MR. BRANCARD: So we can set a deadline of
18 filing any kind of written arguments a week before that?
19 Will that work?

20 MR. LARSON: A pre-hearing brief?

21 MR. BRANCARD: Yeah.

22 CHAIRWOMAN RILEY: Are there any other
23 calendar items to be discussed?

24 Do we have any other business?

25 MR. BRANCARD: No, Madam Chair.

1 CHAIRWOMAN RILEY: Do I have a motion to
2 adjourn?

3 COMMISSIONER MARTIN: I so move.

4 COMMISSIONER BALCH: Second.

5 CHAIRWOMAN RILEY: This meeting is
6 adjourned. Thank you-all.

7 MR. FELDEWERT: Thank you.

8 MR. LARSON: Thank you.

9 (Case Number 15855 concludes, 10:56 a.m.)

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF NEW MEXICO
2 COUNTY OF BERNALILLO

3

4 CERTIFICATE OF COURT REPORTER

5 I, MARY C. HANKINS, Certified Court
6 Reporter, New Mexico Certified Court Reporter No. 20,
7 and Registered Professional Reporter, do hereby certify
8 that I reported the foregoing proceedings in
9 stenographic shorthand and that the foregoing pages are
10 a true and correct transcript of those proceedings that
11 were reduced to printed form by me to the best of my
12 ability.

13 I FURTHER CERTIFY that the Reporter's
14 Record of the proceedings truly and accurately reflects
15 the exhibits, if any, offered by the respective parties.

16 I FURTHER CERTIFY that I am neither
17 employed by nor related to any of the parties or
18 attorneys in this case and that I have no interest in
19 the final disposition of this case.

20 DATED THIS 28th day of May 2018.

21

22

23 MARY C. HANKINS, CCR, RPR
24 Certified Court Reporter
New Mexico CCR No. 20
Date of CCR Expiration: 12/31/2018
Paul Baca Professional Court Reporters

25