

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

**APPLICATION OF COLGATE OPERATING, LLC
FOR COMPULSORY POOLING
EDDY COUNTY NEW MEXICO**

**Commission Case No. 21744
Order No. R-21679**

**ORDER OF THE COMMISSION DENYING COLGATE OPERATING, LLC'S
MOTION TO DISMISS**

THIS MATTER came before the New Mexico Oil Conservation Commission ("Commission") at the April 15, 2021 regular meeting concerning Colgate Operating, LLC's ("Colgate") Motion to Dismiss Magnum Hunter Production, Inc. and Cimarex Energy Co.'s ("Cimarex") Application *De Novo*, filed on March 3, 2021.

After review of the Motion, the subsequent pleadings and hearing the oral arguments of the Parties, the Commission finds that there is good cause to deny Colgate Operating, LLC's Motion to Dismiss.

I. Commission Findings of Fact.

Upon review of the pleadings and oral arguments of the Parties, the Commission finds as follows:

- a. The Commission maintains jurisdiction over the above-captioned matter pursuant to 19.15.4.23 NMAC and the Oil & Gas Act, §§ 70-2-1 through -38 NMSA.
- b. The procedural history from the Oil Conservation Division indicates that Colgate filed its application for compulsory pooling on December 8, 2020. In its application, Colgate represented that it conducted the statutorily mandated efforts to obtain voluntary agreement from all interest owners in the formation to be pooled.
- c. Colgate and Cimarex agree that Cimarex was an interested party for purposes of the Division-level proceedings. Cimarex acknowledged it received timely notice from the Division concerning the Division-level compulsory pooling matter.
- d. On January 7, 2021, Colgate proceeded with its case through the underlying Division pooling hearing in the form of affidavits. No other persons or entities presented evidence at the Division pooling hearing.
- e. On January 19, 2021, Colgate entered its appearance in the Division matter.

- f. On January 20, 2021, the Division issued Order No. R-21575, granting Colgate the relief sought through its application.
- g. On January 29, 2021, Cimarex filed its Motion to Stay Order No. R-21575. In support of its Motion, Cimarex attached a copy of the then as-yet unfiled Application to Reopen the matter. In its Motion to Stay, Cimarex argued that Colgate violated the Oil & Gas Act by failing to seek good faith, voluntary resolution of the pooling issue with Cimarex and therefore Colgate represented false information to the Division.
- h. On February 8, 2021, Cimarex filed its Application to Reopen the case. In its Application, Cimarex detailed Colgate's failure to negotiate in good faith with Cimarex to reach a voluntary agreement between them concerning pooling. Cimarex further argued that Colgate's alleged misrepresentations undermined the entire pooling proceeding and to the detriment of interested parties beyond just Cimarex. In support of its positions, Cimarex provided what the Commission understands to be new documentary evidence not presented by Colgate at the Division-level hearing.
- i. On February 8, 2021, the Division issued Order No. R-21575-A, denying Cimarex's Motion to Stay and Application to Reopen the case.
- j. On February 17, 2021, Cimarex filed with the Commission its Application *De Novo*, seeking a hearing *de novo* on the pooling issue decided below by the Division.
- k. On March 4, 2021, Colgate filed a Motion to Dismiss Cimarex's Application *De Novo*. As grounds for the Motion, Colgate argued two points: that Cimarex was never a party-of-record at the Division level and that Cimarex failed to exhaust its administrative remedies by failing to file an entry of appearance. Colgate maintained that analysis of 19.15.4.10(2) NMAC requires that an interested party entitled to notice, which includes Cimarex, file an entry of appearance, lest the party fail to become a party-of-record. It appears Colgate abandoned the latter position, based on the hearings held on its Motion to Dismiss. Colgate elaborated on its statutory construction argument in its Reply, filed on March 22, 2021, and argued similar caselaw to that of Cimarex.

- l. Cimarex filed its Response on March 12, 2021. In its Response, Cimarex detailed why it did not file an entry of appearance until the day preceding issuance of Order No. R-21575. Further, Cimarex argued that it was a party-of-record at the Division level hearing by, like Colgate, providing a statutory interpretation argument of the adjudication rules. Cimarex also relied heavily on the party-of-record test set forth in *New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-5, explaining that Cimarex met the requirements to be a party-of-record at the Division level.
- m. Cimarex went on to argue that the Commission retains the power to determine who is a party-of-record, citing to several cases in support of its position. Cimarex also presented arguments sounding in equity, in particular citing to both the New Mexico Rules of Civil Procedure and the Rules' provisions allowing for relief from unjust final judgments. Similarly, Cimarex argued for excusable neglect in failing to file an entry of appearance prior to the Division hearing.
- n. Finally, Cimarex argued that Colgate effectively engaged in fraud by filing the original pooling application that contained material misrepresentations of fact.
- o. On March 25, 2021, the Parties appeared before the Commission on both Cimarex's Application *De Novo* and Colgate's Motion to Dismiss. After hearing oral arguments of the Parties, the Commission instructed the Parties to file a supplemental brief and continued the matter to the April 15, 2021 scheduled meeting.
- p. Colgate reiterated its statutory interpretation argument concerning the Division's adjudication rules, arguing again that the Rules are clear on who is, and who is not, a party-of-record. Colgate also cited to a mix of New Mexico and Federal caselaw concerning permitting procedures of various permitting entities, arguing that such procedures should be informative for the Commission because the cases show Cimarex would not be a party of record under those other agency rules.
- q. Likewise, Cimarex argued a statutory interpretation theory for the Oil & Gas Act and the Division rules. Cimarex also addressed concerns that a Commission ruling in its favor would open the floodgates for *de novo* litigants, a fear advanced by Colgate during oral argument on March 25, 2021.
- r. Finally, the Parties again provided oral argument to the Commission on April 15, 2021.

II. Commission Conclusions.

Upon reviewing of the pleadings and oral arguments of the Parties, the Commission makes the following conclusions:

- a. 19.15.4 NMAC and §§ 70-2-1 through -38 NMSA apply to the facts presented to the Commission.
- b. 19.15.4.1 NMAC *et. seq.* does not define “party-of-record” for purposes of adjudication under said Rules and for purposes of this *de novo* application.
- c. Neither does the Oil & Gas Act provide a definition for “party-of-record.”
- d. While the Commission appreciates the Parties’ respective statutory construction arguments, the Commission finds that the *New Energy* case provides the necessary analytical framework to overcome the absence of a definition of a “party-of-record.”
- e. The *New Energy Case* provides a four-prong test for determining whether a person or entity is a party-of-record in an administrative matter:
 - i. did the purportedly aggrieved party submit any evidence or argument in writing;
 - ii. did the party examine witnesses at the underlying hearing;
 - iii. did the purportedly aggrieved party enter an appearance prior to the closing of the record and fail to supply acceptable excuses for the untimely entry of appearance;
 - iv. did the purportedly aggrieved party move to reopen the record for the case or offer to submit any new evidence?
- f. The Commission finds that Cimarex did submit evidence and argument in writing to the Division, both prior to and after the Division issued Order No. R-21575. In particular, Cimarex’s proffered evidence that was new to the Division through its Motion to Stay Order No. R-21575 and its Application to Reopen.
- g. Cimarex did not examine witnesses at the underlying Division hearing. Colgate presented no live or in-person testimony at the Division hearing as Colgate submitted all evidence *via* affidavit.
- h. Cimarex entered its appearance prior to the entry of Division Order No. R-21575. In subsequent pleadings, Cimarex offered several excuses for its delayed entry of appearance. The Commission does not find Cimarex’s COVID excuses compelling.

Cimarex is a sophisticated oil and gas company that routinely participates in Division and Commission meetings and hearings.

- i. The Commission does find Cimarex's accusations of material misrepresentation by Colgate to be not only compelling but also concerning given that misrepresentations in pleadings undermine both the administrative and judicial legal systems, specifically as to the integrity of any particular case. Cimarex supported its misrepresentation allegation with documentary evidence.
- j. Cimarex did move to reopen the Division case after entry of Order No. R-21575 and, in so doing, supplied evidence previously unseen by the Division.
- k. The Commission further finds that Cimarex meets the requirements of the *New Energy* case to be deemed a party-of-record. Additionally, the Commission finds that, in passing the *New Energy* test, Cimarex likewise meets the requirements found in 19.15.4.10 NMAC's and subsequently those of §§ 70-2-25 and 70-2-13 NMSA.
- l. Finally, the Commission finds that Cimarex, for exclusive purposes of its Application *De Novo*, is a party-of-record as a matter of law and fact.

III. Order.

The Commission also finds that in order to prevent waste, protect correlative right and in the interests of justice and fundamental fairness, it is in the best interest of the public and the parties that Colgate's Motion to Dismiss is DENIED.

IT IS SO ORDERED.

DONE at Santa Fe, New Mexico, on this 30th day of April 2021.

**STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION**

A handwritten signature in black ink, appearing to read 'AS', is written over the printed name of the chair.

ADRIENNE SANDOVAL, M.E., CHAIR