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

APPLICATION OF CIMAREX ENERGY COMPANY OF COLORADO FOR APPROVAL OF A WATER DISPOSAL WELL, EDDY COUNTY, NEW MEXICO

CASE NO. 14752

CIMAREX MEMORANDUM BRIEF IN SUPPORT OF ITS RESPONSE TO NEARBURG'S MOTION FOR LEAVE TO FILE AN APPLICATION FOR HEARING DE NOVO

This Memorandum for Cimarex Energy Company of Colorado "Cimarex," is submitted in support of its objection to Nearburg Producing Company LLC "Nearburg" motion for leave to file an application for hearing de novo.

THE FAILURE TO MONITOR THE DIVISION WEBSITE IS AN INADEQUATE EXCUSE FOR FAILING TO TIMELY APPEALAN ORDER OF THE DIVISION WHERE THE WORK AUTHORIZED BY THE ORDER HAS BEEN PERFORMED IN RELIANCE ON ITS FINALITY

The failure of a party to monitor the Division's docket does not constitute excusable neglect that would justify an extension of the 30-day jurisdictional deadline for filing an appeal with the Commission. A final order was entered in this case on December 21, 2011 after a hearing on the merits. Nearburg was represented by experienced counsel who regularly appears before the Division and should have known that the Division would enter its order on what was essentially an uncontested hearing within an eight weeks of the hearing.

The Division has also informed the public on its website in its "Frequently Asked Questions" when to expect the order to be entered:

> How long does it take for an order to be issued after a case is heard?
> (Return to Questions)
> It varies from three to six weeks depending on the difficulty of the case.

Order No. R-13494 was entered just beyond the normal six-week period on December 21, 2011 and was available on the Division's website. Moreover, if Nearburg would have looked at the Division's online well file, it would have known that Cimarex was proceeding with diligence to re-enter the well and prepare it for SWD injection as demonstrated by the following papers filed with the Division:

> **January 19, 2012** C-101 Application for Permit to Re-Enter
> **February 6, 2012** C-144 Permit for Closed-Loop System
> **March 6, 2012** Letter from OCD Director approving disposal interval
> **March 9, 2012** OCD approval of APD
> **March 19, 2012** C-103 and C-105

Nearburg chose not to introduce any evidence or call any witnesses at that hearing. It failed to monitor the Division's docket to see if an order had been entered and has not submitted any evidence in support of its claim that it did not receive the order or why it failed to check the docket or the online well file. Nor has it offered any evidence to demonstrate why the Order was erroneously entered. As a result of its inaction, Nearburg should not be allowed to pursue a de novo appeal.

A mere claim of lack of notice is insufficient basis to extend the deadline for filing an appeal where there are intervening equities in which a party has acted in reliance on the Division's order. As noted in Cimarex's response to Nearburg's motion, it would be severely prejudiced if an appeal were allowed since it has expended over $1.2 million dollars in reliance on the Division's Order No. R-13494 authorizing Cimarex to utilize the Secrest, et al No. 1 well for SWD injection.

Allowing Nearburg to pursue an untimely appeal of an Order by the Division entered after an evidentiary hearing where Nearburg did not present any evidence or cross examine any witnesses, is also contrary to the spirit of the Commission's rules

concerning appeals to the Commission. The right of de novo appeal is not a license to sit back and simply observe a Division hearing and prosecute an appeal to the Commission if it disagrees with the result. Having chosen not to present evidence at the Division hearing, and having failed to establish that it has technical evidence which supported it opposition to Cimarex's SWD well, Nearburg has not shown why it should be allowed an opportunity to appeal to the Commission after Cimarex has expended over $1.2 million in reliance of the finality of the Division's order.

It is well established under federal law that "lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure." Fed. R. Civ. P. 77(d); *See Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967), *cert. denied*, 390 U.S. 997, 88 S. Ct. 1202 (1968) (counsel's claim of neglect caused by his waiting for a notice from the clerk which never came "is not a basis for a plea of excusable neglect.) *Accord, Lathrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (10th Cir. 1971), *cert. denied*, 404 U.S. 840, 30 L. Ed. 2d 73, 92 S. Ct. 132 (1971) (clerk's apparent failure to mail counsel of record a copy of the trial court's order denying timely filed post-trial motions insufficient basis for extending the time for appeal). Nearburg's assertion, (for which no evidence in support has been submitted) that it failed to receive notice of the Division's order is insufficient grounds for allowing it to appeal from an Order of the Division that it chose not to challenge before the Division.

There is no Commission rule or statue that tolls the time for appeal when a party claims it failed to receive notice of the agency's decision. However, Section 39-1-2 NMSA 1978 requires notice to be given to all counsel of record prior to the entry of judgment and a judgment entered without such notice is subject to being vacated. *Maples v. State*, 110 NM 34, 37, 791 P.2d 788, 791 (1990). While the court in *Maples* stated in *dicta* that the equitable principles underlying the statute "may apply in an appropriate case to an appeal from an administrative hearing" the intervening equities in this case preclude its application. The Court in *Maples* held that the appeal from an order of the worker's compensation administration was untimely, noting that "Maples' attorney also

could have called the workers' compensation office weekly to determine if the decision had been filed; he could have called the office of his opposing counsel, who apparently received notice of the filing within a few days of the filing date after he received the late notice."

In *D'Antonio v. Garcia*, 2008 NMCA 139, 145 N.M. 95, 194 P.3d 126, the Court of Appeals held that a statute requiring the State Engineer to hold a hearing after a decision is made by a hearing examiner can be waived when a party fails to meaningfully participate in the initial hearing process. Similar to Nearburg's conduct here, the party arguing for the opportunity to pursue an untimely appeal failed to present any evidence opposing the grant of summary judgment by the hearing officer. The Court of Appeals held that "[c]onsidering Defendant's inaction, we see no reason to read Section 72-2-16 to absolutely require a post-decision hearing before a final order can be entered against him when Defendant did nothing but vitiate the process intended to support the meaningful resolution of his dispute. If we were to do so, we would effectively be encouraging litigants protesting compliance orders issued by OSE to intentionally frustrate the administrative process by consciously failing to participate, and we would therefore be permitting such litigants to indefinitely postpone the finalization of the compliance order via their non-participation. We will not do so."

DESPITE ITS FAILURE TO TIMELY ACT, NEARBURG HAS REMEDIES AND THE DIVISION HAS PROVIDED SAFE-GUARDS

What is at stake for Nearburg's failure to timely file for a do novo hearing? Nothing, because the disposal order is simply a permit, a license to inject subject to a multitude of safe-guards (see declaratory paragraphs 2-14 of Order R-13494) including the right of an offsetting owner, who can demonstrate that the disposal well is causing damage, to seek an order to require Cimarex to stop injection. *Snyder Ranch, Inc., v. Oil Conservation Commission*, 110 NM 637, 798 P.2d 587, 590 (1990). Cimarex's disposal order should remain effective because intervening equities has rendered Nearburg's objections, which are only theoretical anyway, moot since the well was drilled and Nearburg still has a remedy for injunction or damages if there is an actual problem.

CONCLUSION

The mere failure to receive a copy of an order of the Division is insufficient grounds for extending the time for filing a de novo appeal to the Commission. Having failed to present any evidence: (1) opposing the order entered by the Division; or (2) supporting its claim of excusable neglect, the Motion for Leave to File an Application for Hearing De Novo must be denied. Given the intervening equities, if Nearburg is allowed to pursue an appeal, it should be required to post a supersedeas bond to cover the costs Cimarex incurred in re-entering the well and preparing it for use in SWD.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 13 2012, I served a copy of the foregoing documents by:

[ ] US Mail, postage prepaid
[ ] Hand Delivery
[ ] Facsimile
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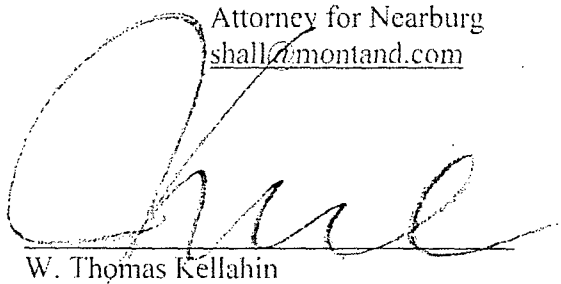

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