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

IN THE MATTER OF THE APPLICATION OF OXY USA WTP LP AND CANAAN RESOURCES DRILLING COMPANY, LLC TO REOPEN AND AMEND ORDER NO. R-20279 *NUNC PRO TUNC*

UNDERLYING MATTER:
IN THE MATTER OF THE APPLICATION OF CENTENNIAL RESOURCE PRODUCTION, LLC TO REOPEN CASE NO. 16265 TO ADD ADDITIONAL INITIAL WELLS UNDER THE TERMS OF COMPULSORY POOLING ORDER NO. R-20001, LEA COUNTY, NEW MEXICO

CASE NO. 16265 (REOPENED)

RESPONSE TO MOTION TO DISMISS

OXY USA WTP LP ("OXY") and CANAAN RESOURCES DRILLING COMPANY, LLC ("Canaan"), through undersigned counsel, hereby respond to the Motion to Dismiss filed by Centennial Resource Production, LLC ("Centennial").

I. STATEMENT OF FACTS

OXY and Canaan present the following statement of facts for purposes of their Response to the Motion to Dismiss, which are mostly from the record in this case, and which they believe to be undisputed:

1. Case 16265 was initiated by an Application filed by Centennial on June 12, 2018. Centennial requested an order creating a 240-acre spacing and proration unit and pooling all mineral interests in the Bone Spring formation underlying this acreage.

2. The first Order in the case, Order No. R-20001, was issued on October 1, 2018, following hearings on July 26, 2018 and August 9, 2018. Centennial's hearing exhibits show OXY USA WTP LP as an owner to be pooled in the case, and Centennial is correct that OXY did not enter an appearance at the July 26 or August 9 hearings.

3. Under Order R-20001, OXY's mineral ownership interest was pooled. Under the terms of Order R-20001, OXY became a "pooled working interest owner" to which the operator was required to

furnish an itemized schedule of estimated costs of drilling, completing and equipping the proposed wells. Order No. R-20001, ¶ (10).

4. Importantly, under the terms of Order R-20001, "[w]ithin 30 days ***from its receipt*** of estimated well costs for any well," OXY was entitled to pay its share of estimated well costs, in which case it would be liable for operating costs but not liable for risk charges. *Id.* ¶ (11) (emphasis added).

5. Following the issuance of Order No. R-20001, Centennial filed a second application on October 16, 2018 to reopen Case No. 16265 "to add additional initial wells pursuant to the terms of Order R-20001." This application sought no other changes to Order No. R-20001.

6. Centennial's Pre-Hearing Statement filed on November 8, 2018 also identifies no requested changes to Order R-20001 other than the addition of two more wells. No party other than Centennial appeared in the reopened case, which was heard on November 15, 2018. Centennial presented testimony by affidavit, and again that testimony sought only to add two additional wells and sought the same supervision charges and 200% risk charge for those two wells as was approved in Order R-20001 for the initial well.

7. The Division then issued Order No. R-20279, Amending Order No. R-20001. Although there was no request from Centennial, no notice to parties or owners, and no supporting testimony supporting any change to the terms of Order No. R-20001 in any respect other than the addition of the two additional wells as requested by Centennial, Order No. 20279 contained new terms for a pooled working interest owner to exercise its statutory right to participate in the wells subject to the Order, as contained in paragraph (13) of Order No. R-20279. That Order states in pertinent part: "Within 30 days from the date the schedule of estimated well costs for any well is *furnished*, any pooled working interest owner shall have the right to elect to pay its share of estimated well costs . . ." (emphasis added).

8. Centennial contends that it placed a schedule of estimated well costs in the mail on February 6, 2019 for delivery to OXY.

9. OXY's records, including the return receipt, indicate that it received the schedule of estimated well costs on February 12, 2019.

10. According to Centennial's Motion, OXY's assignee Canaan elected to participate on March 13, 2019, which would be 29 days after OXY's receipt of the schedule of estimated well costs, but more than 30 days after Centennial allegedly placed the schedule of estimated well costs in the mail.

11. Centennial has refused to recognize OXY and/or Canaan's exercise of the statutory right to participate in the well(s), asserting that under the terms of Order No. R-20279, Centennial "furnished" the schedule of estimated well costs at the time it placed the schedule of estimated well costs in the mail.

12. OXY and Canaan's Application requests not only an amendment of Order No. R-20279, but also a declaration that OXY and Canaan timely exercised their right to participate in the well. Application for Hearing ¶ (15).

II. ARGUMENT

A. OXY and Its Assignee Canaan Have Standing in This Case.

Under the Oil and Gas Act, pooling orders ". . . shall make definite provision as to any owner, or owners, who elects not to pay his proportionate share in advance for the prorata [sic] reimbursement solely out of production to the parties advancing the costs of the development and operation, which shall be limited to the actual expenditures required for such purposes not in excess of what are reasonable, but which shall include a reasonable charge for supervision and may include a charge for the risk involved in the drilling of such well . . . ." § 70-2-17(C) NMSA 1978. As discussed above, OXY is a working interest owner in the designated spacing and proration unit whose interest was pooled by Order R-20001 and subsequently Order R-20279. OXY assigned all of its wellbore interest in the three wells covered by those Orders to Canaan. This case concerns OXY and Canaan's exercise of their statutory right to elect to pay the costs of a well following compulsory pooling and the statutory requirement that Division Orders respecting that right "shall make definite provision" as to that right.

That same subsection of the Oil and Gas Act specifically gives the Division authority to address disputes over well costs: "In the event of any dispute relative to such costs, the division shall determine

the proper costs after due notice to interested parties and a hearing thereon." § 70-2-17(C) NMSA 1978. OXY and Canaan submit this this matter is a "dispute relative to costs" due to Centennial's refusal to recognize OXY's and Canaan's right to participate in the wells, resulting in Centennial's assertion that it is entitled to the risk premium of 200% of the actual well costs under the terms of the Orders.

The Division's rules regarding adjudications do not specifically address adjudication of disputes over well costs under Section 70-2-17(C), or the exercise of interest owners' right to participate in a well under that section. Rather than initiating a separate new case, and due to the fact that this dispute is limited to OXY/Canaan versus Centennial as well as the simplicity of the relief sought by OXY and Canaan, they chose to seek adjudication of their rights through the instant application to reopen existing Case No. 16265 and to amend Order No. R-20279. This seems to be an appropriate procedure, since the key issue in the case is the two different words used in the Orders regarding the procedure to exercise the statutory right to participate in a well under Order R-20001 versus Order R-20279.

Under the Division's rules, 19.15.4.8(A) NMAC, any ". . . other person with standing may file an application with the division for an adjudicatory hearing. The director, upon receiving a division examiner's recommendation, may dismiss an application for an adjudicatory proceeding upon a showing that the applicant does not have standing." Whether this case is viewed as an adjudication of a dispute over costs under section 70-2-17(C) or as a compulsory pooling case, OXY and Canaan have standing.

Standing to be a party in an adjudicatory proceedings is governed by 19.15.4.10 NMAC. Under that Rule, "The parties to an adjudicatory proceedings shall include: (1) the applicant; and (2) a person to whom statute, rule or order requires notice . . . who has entered an appearance in the case; and (3) a person who properly intervenes in the case." Viewing this case as an exercise of the Division's

jurisdiction to hear a "dispute relative to costs" as provided in the statute, OXY and Canaan would have standing as the applicants in this case. Viewing this case as a compulsory pooling case, OXY and Canaan are parties entitled to notice under 19.15.4.12(A)(1)(a) NMAC as owners of mineral interests subject to compulsory pooling and have standing on that basis. Alternatively, given the nature of this case and the relief sought, OXY and Canaan could be viewed as intervenors. It also should be noted that there is nothing in the Division's rules on adjudications regarding reopening existing cases and who would have standing to do so. For these reasons, OXY and Canaan have standing to request that the Division adjudicate this dispute, and the Division should not dismiss OXY and Canaan's Application for lack of standing.

B. OXY and Canaan's Application is Not a Collateral Attack on the Order.

Centennial argues that OXY and Canaan had a full and fair opportunity to litigate the issues raised in their Application, that OXY and Canaan should have appeared in the prior hearings, and that the Application should be dismissed as a "collateral attack." This argument lacks merit because OXY had no notice that the matter in dispute was even an issue until, after OXY and Canaan made what they thought was a timely election to pay costs, Centennial asserted the position that the election was not timely.

As discussed above in paragraph 4, the original Order R-20001 in this case incorporated long-standing standard language used in OCD orders that the 30-day period to elect to pay costs and avoid risk charges runs from the date the scheduled of estimated costs is received. OXY was familiar with this language and standard practice, and had no reason to appear in the initial hearing in Case No. 16265 to litigate this issue. Furthermore, based upon the facts asserted in paragraphs 5-7 above, OXY had no reason to appear in the second hearing on the reopening of the case to litigate this issue because it had no reason to suspect that the wording of Order R-20001, would be changed, or even that the change in Order R-20279 from "received" to "furnished," would change how the 30-day election period would run. The wording change from "received" to "furnished" did not put OXY on notice that there was any need to appear and litigate this issue, for as discussed below, the word "furnished" has not been recognized as

meaning either "received" or "placed in the mail" under the Oil and Gas Act, Divison rules, or existing case law.

Moreover, Centennial's argument that this case should be dismissed as a "collateral attack" has nothing to do with OXY and Canaan's exercise of their right to seek an adjudication of a "dispute relating to costs" before the Division, as provided by statute. That dispute did not exist until Centennial asserted its position that OXY and Canaan failed to timely elect to pay their share of well costs. Furthermore, as discussed below, this case also involves the interpretation of the word "furnished" as used in Order No. 20279, not necessarily an attack on the Order itself.

C. An Amendment of Order No. 20279 *Nunc Pro Tunc* Is an Appropriate Remedy

Centennial argues that amendment of the Order *nunc pro tunc* is not appropriate under case law because such an amendment "is not to be used to supply some omitted action of the court or counsel, but may be utilized to supply an omission in the record of something really done but omitted through mistake or inadvertence." *Mora v. Martinez,* 1969-NMSC-30, ¶ 3, citing *State v. Hatley,* 72 N.M. 377 (1963). OXY and Canaan contend, however, that the change in language from "received" to "furnish" as it relates to the 30-day election period under the terms of Order R-20001, ¶ 11 versus Order R-20279, ¶ 13 is exactly the type of mistake or inadvertence that can be corrected by amending the Order *nunc pro tunc.* Alternatively, the Division could simply rule that "furnished" as used in Order R-20279 simply means "received," because there was no intention to change past practice in that regard. As discussed above, there is nothing in the case pleadings, case notices, or any other part of the case record that indicates that the Division intended to change the long-standing practice that the 30-day election period to run from the date the cost schedule is "received" to the date it was "mailed." There is no testimony or other evidence to provide grounds for such a change. OXY and Canaan contend that that an amendment of the Order *nunc pro tunc* is entirely appropriate to provide clarity and to eliminate any uncertainty created by the use of the word "furnish" in Order No. 20279.

D. The Motion to Dismiss Fails to Substantiate that "Furnish" Means "Mail."

Centennial's final argument essentially asks for a ruling on the merits as a matter of law, and is not grounds for dismissal. That said, Centennial's arguments are not well supported, and if the Division is inclined to rule on this issue as a matter of law, it should rule that the change from the term "received" in Order No. 20001 to "furnished" in Order No. 20276 was not intended to change the long-standing practice that the 30-day election period runs from the time that a schedule of estimated costs is received.

None of the cases cited in Centennial's Motion provides any support for Centennial's position that "furnished" means the date of mailing of the schedule of estimated well costs. They simply identify the existence of the "mail rule," which is that when a statute or rule expressly provides for service by mail, without saying more, timeframes may run from the time that a document is placed in the mail (or, under various rules and statutes, the mailing date plus three days. *See Schultz v. Pojoaque Tribal Police Dept.,* 2010-NMSC-034, ¶¶ 16-17). These cases are not applicable here because the Division's Orders make no reference to either service by mail or to the "mail rule," and longstanding practice has been to use the date of receipt as the beginning of the applicable time frame.

The first case cited by Centennial, *Schneider National, Inc. v. State Taxation and Revenue Dept.,* is entirely inapposite to the interpretation of the word "furnished" as used in the Division's orders. That case involved an interpretation of section 7-1-26(B)(2003)(since amended) regarding the time to file an action in district court to dispute the denial of a tax refund claim. The pertinent part of the statute required an action to be filed "within ninety days after either the mailing or delivery of the denial." *Id* ¶ 9. The court held that the statute addressed two discrete modes of "delivery," delivery by mail or personal delivery. In the case of mailing, the relevant period ran from the date the document was placed in the mail, and the use of the term "delivery" in the statute applied only if the notice was delivered by a means other than mailing. *Id* ¶ 10. The case stands for the proposition that when mailing as a means of service is explicitly used in a statute, it means placed in the mail and not delivery of the mail; it does not address whether "furnished" means "placed in the mail" or "received."

The second case cited in the Motion, an unpublished federal court case, interprets Rule 1-076, NMRA, which provides "[a]n appeal from the Human Rights Commission shall be taken within ninety (90) days from the date of service on the parties to the administrative proceeding of (1) the commission's order." In interpreting what "service" means, the court referred to Rule 1-005 NMRA, which provides explicitly for service by delivery or mail under the Rules of Civil Procedure. In the case of service by mail, Rule 1-005 states that service is "complete upon mailing," and in the case of "delivery," the rule addresses various means of delivery. Rule 1-005(B) and (C) NMRA. This case is inapposite to our case because the Rules of Civil Procedure that do not apply to the Division's administrative rules or orders, and because nothing in the Division's Rules or Orders pertaining to this matter explicitly adopts the "mail rule."

Moreover, in cases involving appeal timeframes, New Mexico appellate courts have held that appeal timeframes in statutes and rules should be construed liberally to allow for consideration of cases on the merits. *Schultz v. Pojoaque Tribal Police Dept.,* 2010-NMSC-034, ¶ 19. Applying that principle here, even if the Division were to conclude that "furnish" means mailing, when OXY and Canaan, relying on historical practice that the timeframe to elect to pay the costs of a well runs from receipt of a schedule of estimated costs, undeniably elected to pay the costs within what they thought was the applicable timeframe, the Division should recognize that election as valid.

Lastly, Centennial asserts that the Division has interpreted 19.15.4(B) NMAC [sic], concerning notices of adjudicatory hearings, such that the 20-day notice period runs from the date a notice is mailed. However, Centennial provides no citation to support that the Division has made such an interpretation, and no explanation how a provision regarding notices of hearing relates to rules or orders concerning the "furnishing" of a schedule of estimated costs. OXY and Canaan would further note that if Centennial is referring to 19.15.4.9(B) NMAC concerning notices of adjudicatory hearings, that is a markedly different situation than the statutory right of an interest owner to pay costs. Section 19.15.4.9(B) governs the Division's publication of matters to be heard in adjudicatory hearings, not notice to a person who has a specific property right and the right to make a specific election governing that right. Moreover, these

notices are now done electronically rather than by first class mail, so the "mail rule" would not be at issue. Alternatively, Centennial may be referring to 19.15.4.12(B) NMAC, relating to individual notices of an adjudicatory hearing. That rule is explicit regarding the "mail rule," stating "[t]he applicant shall *send* a notice 19.15.4.9 NMAC requires by certified mail, return receipt requested . . . at least 20 days prior to the application's scheduled hearing date . . . ." (emphasis added). That rule has no bearing on whether "furnished" means mailed or received.

Undersigned counsel has been unable to find any New Mexico statute, Division Rule (or other rule, for that matter), or New Mexico case law interpreting the word "furnished" to mean either mailing or actual receipt. Indeed, in that regard, use of the word "furnished" has no clear meaning and appears to be an unfortunate choice of a word for purposes of the instant case. For example, Black's Law Dictionary defines "furnish" to mean "to supply; provide; provide for use." In the context of this case, these terms appear to be much closer to actual receipt than placement in the mail. Since the Oil and Gas Act requires that a Division order governing the statutory right to elect to pay costs and avoid risk charges require the Order to make "definite provision" as to the means of making that election, unless Centennial or the Division can find clear legal authority that "furnish" means "mailing," then the Division should interpret "furnish" to mean "receipt" so that the Order is sufficiently "definite" to allow an interest holder to make a timely election.

Neither the Division's rules nor the language in its Orders identify the mode of "furnishing" a schedule of estimated costs, *i.e.,* by mail or other means of delivery. By using the word "received," as used in Order R-20001, the mode of delivery is irrelevant, and timeframe is governed from actual receipt of a schedule, regardless of the mode of delivery. With standard practice being to send such notices by certified mail with a return receipt, as Centennial did in this case, it has been relatively easy to ascertain when a notice has been "received" for purposes of running timeframes. There is nothing in the record of this case, or in other proceedings that undersigned counsel has been able to find, that suggests that the Division intended to depart from prior practice by changing the wording of its orders from "receipt" to "furnished."

As discussed above, there appears to be no Division rule governing the time frame for an election to participate in a well. The applicable rule, 19.15.13.8.B(3) states: "As to an interest owner who elects not to pay its share of well costs associated with a specific well in advance, as provided in the applicable order . . . ." In the instant case, OXY and Canaan clearly elected to pay (on conversely, did not "elect not to pay"). Importantly, in the same part of the rule, 19.15.13.10.B NMAC, the times for a pooled working interest owner to elect to participate in an infill well proposed by an operator, or vice versa, run from the pooled working interest owner's or operator's *receipt* of a proposal. This rule language is consistent with the long-standing rule language as used in Order No. 20001 as well as industry practice, and is a better guide to how the Division should rule in this case than the rules relating to notices of adjudicatory hearings.

III. CONCLUSION

For the reasons set forth above, OXY and Canaan clearly have standing to seek adjudication of this matter, and their Application should not be dismissed for lack of standing. Because OXY and Canaan had no notice that there was a need to adjudicate the issues raised in this matter in prior hearings, and because OXY and Canaan also have a statutory right to seek adjudication of a dispute relative to costs, the Application is not a "collateral attack" on the Order such that this Application should be dismissed. Because there appears to be no basis or reason why the Division would depart from past practice that the time for election to pay costs runs from receipt of a schedule of costs, and the use of "furnish" rather than "received" is in the nature of a mistake or inadvertent change, amendment of the Order *nunc pro tunc* is an appropriate remedy. Alternatively, the Division could simply rule that "furnish" means "received" and recognize that OXY and Canaan made an effective election to pay the well costs and avoid the risk charge.

RESPECTFULLY SUBMITTED

Gallagher & Kennedy, P.A.

By_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following counsel of record this 10th day of July, 2019 via e-mail:

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