

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

CASE NOS. 13,142, 13,237, 13,226 and 13,389 (Continued)

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CONTINUED CASES  
TRANSCRIPT OF PROCEEDINGS

Oil Conservation Division  
1220 S. St. Francis Drive  
Santa Fe, NM 87505

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

ORIGINAL

September 9th, 2004

Santa Fe, New Mexico

These matters came on for hearing before the Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, September 9th, 2004, 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.

\* \* \*

STEVEN T. BRENNER, CCR  
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## I N D E X

April 26th, 2004  
 Commission Hearing  
 CASE NOS. 12,459 and 12,601 (Continued)

	PAGE
CONTINUANCE OF CASE 13,142	3
CONTINUANCE OF CASE 13,237	3
CONTINUANCE OF CASE 13,226	4
CONTINUANCE OF CASE 13,339	5
DISCUSSION OF GENERAL RULEMAKING FOR PRACTICE BEFORE THE COMMISSION, AND RULEMAKING FOR ADOPTING RULES	6
REPORTER'S CERTIFICATE	20

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## A P P E A R A N C E S

## FOR THE COMMISSION:

DAVID K. BROOKS, JR.  
 Assistant General Counsel  
 Energy, Minerals and Natural Resources Department  
 1220 South St. Francis Drive  
 Santa Fe, New Mexico 87505

\* \* \*

## ALSO PRESENT:

WILLIAM F. CARR  
 MICHAEL J. CONDON  
 MICHAEL H. FELDEWERT  
 J. SCOTT HALL  
 W. THOMAS KELLAHIN  
 CAROL LEACH  
 PAUL R. OWEN

\* \* \*



1 myself on this one.

2 CHAIRMAN FESMIRE: The next cause is Cause Number  
3 13,226 --

4 MR. BROOKS: I'm sorry, in view of Commissioner  
5 Chavez's statement I think perhaps I should also state in  
6 the previous case involving Maralo, I would not be  
7 qualified to act as Commission counsel in that case, for  
8 the record. I'm sorry.

9 CHAIRMAN FESMIRE: Commissioner Bailey and  
10 myself, though, agree to the continuance, and it will be  
11 continued until November 10th, 2004.

12 \* \* \*

13  
14 CHAIRMAN FESMIRE: The next cause before the  
15 Commission is Case Number 13,226, Application of OXY USA  
16 WTP Limited Partnership for rescission of the approval of  
17 an application for permit to drill and for compulsory  
18 pooling in Eddy County, New Mexico.

19 Counsel has asked that this case be continued to  
20 October 14th, 2004. Is there any objection from the  
21 Commission?

22 COMMISSIONER BAILEY: No.

23 COMMISSIONER CHAVEZ: No objection.

24 CHAIRMAN FESMIRE: That case will be continued  
25 also.

1 \* \* \*

2  
3 CHAIRMAN FESMIRE: The next case is Cause Number  
4 13,339, Application of Loco Hills GSF for approval of its  
5 Stage I and II abatement plans and best management  
6 practices plan and an exemption to Division Rule 50, in  
7 Eddy County, New Mexico.

8 Counsel has asked that this case has been  
9 dismissed. Counsel is present. Counsel, do you wish to  
10 make a statement?

11 MR. CARR: No, I do not.

12 CHAIRMAN FESMIRE: Commissioners, do you have any  
13 objection to dismissing this case?

14 COMMISSIONER BAILEY: No.

15 COMMISSIONER CHAVEZ: No objection.

16 CHAIRMAN FESMIRE: Have you have a chance to  
17 review the order dismissing the case?

18 COMMISSIONER CHAVEZ: Yes.

19 COMMISSIONER BAILEY: Yes.

20 CHAIRMAN FESMIRE: Is there any objection to  
21 signing this order?

22 COMMISSIONER BAILEY: No objection.

23 COMMISSIONER CHAVEZ: No objection.

24 CHAIRMAN FESMIRE: Let the record reflect that  
25 the order as been signed and the case has been dismissed.

\* \* \*

1  
2  
3           CHAIRMAN FESMIRE: The next issue that the  
4 Commission would like to take up concerns rulemaking,  
5 general rulemaking for practice before the Commission, and  
6 rulemaking for adopting rules, two different issues that  
7 I'd like to address today.

8           I have called all of the attorneys that I was  
9 aware of that practice before the Commission. What we  
10 would -- and I haven't cleared this with the other  
11 Commissioners, so one of the things I would like to discuss  
12 is perhaps creating a committee consisting of one attorney  
13 from the Division, the Commission secretary, and perhaps  
14 two attorneys practicing before the Commission and the  
15 Division to explore the issue of modifying and creating a  
16 comprehensive set of rules for practice before the Division  
17 and the Commission and creating a comprehensive set of  
18 rules for rulemaking within the Division and the  
19 Commission.

20           The first thing I'd like to do is ask the  
21 attorneys present, is there any comment on whether or not  
22 this is necessary, and if so, how you would like to see it  
23 done? I'm going to ask for comment then, right off the  
24 bat.

25           Mr. Hall, would you --

1 MR. HALL: Is it your intention to set standards  
2 for attorneys practicing before the Division?

3 CHAIRMAN FESMIRE: I hadn't specifically thought  
4 about standards, but that might be something that we need  
5 to address in the Rules.

6 MR. HALL: What precipitated the Commission's  
7 concern about this subject matter?

8 CHAIRMAN FESMIRE: The specific precipitating  
9 event was a discovery dispute that we had recently, that we  
10 found that we didn't have rules to cover, and that's one of  
11 the things that we'd like to cover in these rules.

12 MR. HALL: Whether there ought to be discovery at  
13 all?

14 CHAIRMAN FESMIRE: That's the threshold  
15 question --

16 MR. HALL: Okay.

17 CHAIRMAN FESMIRE: -- and that's what I'd like to  
18 discuss today. My opinion is that there should be; but,  
19 you know, I thought I'd turn to people who've actually  
20 practiced before the Division and the Commission and find  
21 out what their thoughts on the issue were.

22 MR. HALL: Michael and I briefed that in a case a  
23 couple of years ago. There's quite a bit of extensive  
24 briefing in that Commission's records. I can make that  
25 available to you all, just to flesh out the issue as it

1 came up in one case.

2 CHAIRMAN FESMIRE: I would love to have that.

3 MR. HALL: Yeah, I'll get that to you. And the  
4 Commission's decision in that case, the Pendragon case, was  
5 that the Commission did not want to see discovery expanded.

6 MR. CONDON: Although some discovery was allowed.  
7 And maybe we shouldn't use Pendragon as the seminal case in  
8 this discussion, because that was one of the more  
9 contentious cases the Division and the Commission probably  
10 heard in the last few years.

11 But it does, I think, illustrate the need for a  
12 comprehensive set of both procedures for, you know, filing  
13 and conducting the hearings and, you know, dealing with  
14 issues such as discovery, which probably don't come up in  
15 the average case.

16 By the way, I'm Michael Condon with the Gallegos  
17 law firm. I don't know that I've met all of you. He  
18 called me this morning on his way to Albuquerque. He had  
19 to take horses for his daughter down to the State Fair, and  
20 he asked me if I could come over here and sit in on this,  
21 so I'm here for that purpose. But I think it's a good  
22 idea.

23 CHAIRMAN FESMIRE: Mr. Carr, do you have any  
24 comment on it?

25 MR. CARR: I'm aware of one case years ago where

1 there was -- depositions were allowed and Gene took them --

2 MR. CONDON: Uh-huh.

3 MR. CARR: -- and we were sort of out in never-  
4 never land, trying to figure out what to do at that time.  
5 We generally have resolved discovery disputes, but if you  
6 really look at the statute and you're trying to enforce  
7 something of that nature, what we're really required to do  
8 is have you take it to the District Court, as I recall, and  
9 there is really nothing beyond -- that I'm aware of --  
10 beyond these general statutory provisions, and it might be  
11 wise to sort that out.

12 You know, we started several years ago on a  
13 compulsory pooling committee with the shell order --

14 MR. BROOKS: That's an inside joke between me and  
15 Bill.

16 MR. CARR: It had nothing to do with Shell Oil  
17 Company, although for a couple of meetings I thought it did  
18 and could never find the case.

19 As we got into that and are still in that  
20 process, everything you think you've resolved seems to lead  
21 to another question, and this may be like that; it may be a  
22 road we start down and right now, on the front end, just  
23 hitting it cold, can't really anticipate where it's going  
24 to go.

25 But there are some things that I think could be

1 clarified. And as the greatest violator of all rules, it  
2 would still be nice to have rules that set some time-frames  
3 and some requirements, because it's a little loose and it  
4 also, because of that, means that you often back up against  
5 the hearing date when you have a client who's got something  
6 they really need to go forward with, and I think if the  
7 rules were set, at least it would be easier to go back and  
8 explain to your client why it didn't start early enough  
9 time-frame.

10 CHAIRMAN FESMIRE: Right. One of the things that  
11 -- one of the other events that precipitated this was, we  
12 had an attorney request a continuance the day before a  
13 hearing, and the witnesses from the other side, who had had  
14 to travel a long way were already here, and I'd like to  
15 have something that, you know, they can count on, not  
16 getting a continuance within X days in front of a hearing,  
17 you know, barring, you know, some sort of agreement between  
18 the parties.

19 So those are the kind of things that we would  
20 like to address, and I thought I would bring it up in front  
21 of what's basically the oil-and-gas bar in Santa Fe and see  
22 if we felt that there was a need for it. And I think the  
23 consensus is that there is a need for it.

24 Commissioner Bailey, do you have any comment on  
25 that?

1           COMMISSIONER BAILEY: I have seen cases  
2 continued, I've seen confusion, I've seen witnesses who  
3 show up at their own expense. It seems to me like a little  
4 order so that they're -- everyone knows what the rules are,  
5 level out the playing ground.

6           CHAIRMAN FESMIRE: Commissioner Chavez?

7           COMMISSIONER CHAVEZ: I agree, and I think  
8 sometimes there's been some questions about what could be  
9 presented as evidence or what is to be presented. It's not  
10 considered evidence, issues of who can ask questions of a  
11 witness, and I think sometimes it gets confusing for  
12 everybody.

13          MR. KELLAHIN: Mr. Chairman?

14          CHAIRMAN FESMIRE: Yes, sir.

15          MR. KELLAHIN: I think the question is if the  
16 Commission feels this is necessary, we're certainly here to  
17 help you examine and study that issue. I've done this for  
18 32 years, and we've had all kinds of varieties of ways to  
19 get through these. And if Mr. Carr would come out of  
20 retirement, I'm happy to serve in addition.

21           (Laughter)

22          CHAIRMAN FESMIRE: Well --

23          MR. CARR: I'm trying to do what I've always  
24 done; I just don't seem to get anywhere.

25          CHAIRMAN FESMIRE: Well, with the concurrence of

1 the other Commissioners, what I would like to do and what  
2 I'm proposing now is that we set up a four-member  
3 committee, that the committee consist of Ms. Davidson,  
4 because, frankly, even your experience pales in comparison  
5 to hers, and Mr. Brooks, and then two attorneys from this  
6 group, or folks who aren't here that you would like to  
7 volunteer, but --

8 MR. KELLAHIN: I volunteer Mr. Carr.

9 CHAIRMAN FESMIRE: Well, we were going to do  
10 that, because he's got to leave here pretty quick, but he's  
11 already volunteered. Is there anyone that -- would you  
12 like to --

13 MR. KELLAHIN: Certainly, Mr. Chairman, I'd be  
14 happy to do it.

15 CHAIRMAN FESMIRE: Okay. What we'll do is, we'll  
16 make the -- barring any objection from the Commission --

17 COMMISSIONER BAILEY: And I think it's great.

18 COMMISSIONER CHAVEZ: Good idea, let's do it.

19 CHAIRMAN FESMIRE: -- we'll make those four  
20 people the committee.

21 I would request that at the January meeting of  
22 the Commission -- it has yet to be set, but it's the first  
23 Thursday in January -- we would like a preliminary report  
24 from the committee outlining the areas where they rules are  
25 necessary and a brief description of the proposed rules.

1           And then at the July meeting, we'll set that as  
2 the deadline for the final proposed rules to be brought  
3 before the Commission for public comment.

4           MR. BROOKS: Well, Mr. Chairman, I can't promise  
5 to get a consensus on a committee that includes both Mr.  
6 Carr and Mr. Kellahin.

7           (Laughter)

8           MR. CARR: We're going to do like always,  
9 whatever Ms. Davidson tells us.

10          (Laughter)

11          MR. KELLAHIN: We promise not to bite the hand  
12 that feeds us.

13          (Laughter)

14          COMMISSIONER BAILEY: Who gets to draw on whose  
15 map?

16          (Laughter)

17          COMMISSIONER BAILEY: Who gets to draw on whose  
18 map?

19          MR. KELLAHIN: As always, I get to draw on Mr.  
20 Carr's map. He never prepares one, so it's always....

21          CHAIRMAN FESMIRE: And I'd like the rules to be  
22 basically two sets of rules: a set of procedural rules for  
23 practice before the Division and the Commission, and the  
24 proposed set of rules on rulemaking, how we're going to  
25 specifically make Commission rules and the procedure that

1 we'll follow on that.

2 And Mr. Brooks, does that follow along with what  
3 you have in mind?

4 MR. BROOKS: Yes, we will undertake to do it.

5 As I noted to you earlier this morning, I believe  
6 that we recently did revise the rulemaking rules fairly  
7 extensively. However, there are a couple of issues we did  
8 not comment on, such as -- one question I received recently  
9 was, what is the rule with regard to public comment? And  
10 the answer is, there is no rule. And as I understand under  
11 New Mexico law, unlike federal law, there is no provision  
12 for public comment unless a statute or an agency rule  
13 provides for public comment. What we've always done is set  
14 a public comment period by order or by notice, but there is  
15 no rule and, as far as I'm aware, no statute which provides  
16 for public comment. So when you say what is the right to  
17 public comment on our rules, there really isn't anywhere  
18 you can go to find that out.

19 The other one, for instance, is that this issue  
20 has come up of who can appear and who can cross-examine at  
21 rulemaking hearings, and obviously there's some basis for  
22 thinking that should be different and more relaxed at  
23 rulemaking hearings than at evidentiary hearings, but  
24 there's no rule on the subject that we have adopted.

25 On the procedural rules, of course, we also did

1 look -- we took a hard look at and substantially revised  
2 the notice rules, the rules on notice of hearings,  
3 recently, and I believe those are probably now adequate.  
4 However, you indicated that there is no rule on pretrial  
5 procedures, so that's a whole area that we need to look at.

6 And I think that's what I'm aware of as of now.

7 Of course also in the area of pretrial  
8 procedures, there is a long-standing tradition at OCD of  
9 the Chair acting for the Commission on pretrial matters.  
10 However, it's never been formalized in the rule and  
11 arguably should be if that's something that everybody feels  
12 is appropriate for the Chair to do in the absence of the  
13 Commission meeting.

14 MR. HALL: You know, there is a New Mexico  
15 Administrative Procedures Act, but to my knowledge I don't  
16 think it applies to any state agency --

17 CHAIRMAN FESMIRE: No.

18 MR. HALL: -- and there's a statutory prohibition  
19 against agencies adopting it. I don't know why, but -- and  
20 I think it would be a big leap to adopt it APA for this  
21 agency.

22 CHAIRMAN FESMIRE: That may be something that  
23 we'd need to look into. But you're right, I don't know why  
24 it's in place, because I know of no agency that uses them.

25 MR. KELLAHIN: Mr. Chairman --

1 CHAIRMAN FESMIRE: Sir.

2 MR. KELLAHIN: -- the question -- I know Mr.  
3 Chavez has had a lot of experience in deciding things, and  
4 Commissioner Bailey has done this for years. I think it  
5 would help the committee to have them meet with us and  
6 simply talk about how they perceive our presentations. The  
7 objective is to present these in a way that you as deciders  
8 want to present, and we can crank out any number of  
9 varieties of these things. It would be nice to know the  
10 kinds of things that are helpful to you when we ultimately  
11 get to hearing. Do you want these extensive prehearing  
12 statements filed with exhibits and a summary of testimony?  
13 Does anybody ever read those? Do they matter? Are they  
14 helpful? Those kind of things, to just sit down with the  
15 committee, either individually or collectively, and let us  
16 pick your brains.

17 MR. BROOKS: Okay, I would note on that that it  
18 would really have to be individually unless it's noticed as  
19 a meeting of the Commission, because whenever you have two  
20 Commissioners together you have a quorum and you're subject  
21 to the New Mexico Open Meetings Act.

22 MR. KELLAHIN: Well, maybe we could do it  
23 individually.

24 MR. BROOKS: We could meet with them one at a  
25 time.

1 CHAIRMAN FESMIRE: Commissioner Bailey?

2 COMMISSIONER BAILEY: Sure.

3 COMMISSIONER CHAVEZ: I'm for it, that would be  
4 good.

5 CHAIRMAN FESMIRE: Do we need a motion to create  
6 this committee or --

7 MR. BROOKS: Well, I think you could do it as  
8 Division Director. The Commission could do it as the  
9 Commission, or you could do it as just Division Director,  
10 because creating committees on rulemaking has traditionally  
11 been a Division function.

12 CHAIRMAN FESMIRE: Well, with the concurrence of  
13 the Commission, I'll go ahead and write a letter to the  
14 proposed members of this committee.

15 And with that, that's all I have on the issue.  
16 Commissioner Bailey?

17 COMMISSIONER BAILEY: No, that sounds great to  
18 me.

19 CHAIRMAN FESMIRE: Commissioner Chavez?

20 COMMISSIONER CHAVEZ: Nothing further.

21 CHAIRMAN FESMIRE: Okay.

22 MR. CONDON: Will there be a procedure for those  
23 of us who are interested but not on the committee to get  
24 notice of things -- I mean, I know that there are the  
25 hearings. Is that going to be the limit of our

1 participation as noncommittee members?

2 CHAIRMAN FESMIRE: No, my intention is that under  
3 the guidelines of the rules we set up for rulemaking, that  
4 these rules will be adopted that way. And I think by rule  
5 that we currently have in place, we've got to have some  
6 public comment. And I haven't studied that, but I intend  
7 to make -- you know, after the Commission begins the  
8 process of adopting them, we will ensure that there will be  
9 public comment.

10 Boy, that was a lawyer answer, wasn't it?

11 CHAIRMAN FESMIRE: Yes, ma'am.

12 MS. MCGRAW: Kate McGraw from R.W. Byram. What's  
13 going to happen making rules in the interim? Are there any  
14 rulemaking procedures contemplated between now and July?

15 CHAIRMAN FESMIRE: I believe there will be, yes,  
16 but I don't think that they're going to be rules that are  
17 going to be as contentious as some coming down the line. I  
18 think the procedures we have in place will be adequate for  
19 what we have planned through the first half of next year.

20 Anything else we need to cover on that issue?

21 Mr. Kellahin, did you --

22 MR. KELLAHIN: No, sir.

23 CHAIRMAN FESMIRE: No? Okay.

24 Commissioner Bailey, anything else you want to  
25 cover?

1 COMMISSIONER BAILEY: I have nothing else.

2 CHAIRMAN FESMIRE: Commissioner Chavez?

3 COMMISSIONER CHAVEZ: Nothing.

4 CHAIRMAN FESMIRE: Okay, so there apparently  
5 being no further business before the Commission today, the  
6 Chair will entertain a motion to adjourn.

7 COMMISSIONER BAILEY: I move we adjourn.

8 COMMISSIONER CHAVEZ: I second.

9 CHAIRMAN FESMIRE: Adjournment having been moved  
10 and seconded, this meeting of the Commission is adjourned.

11 Thank you all.

12 (Thereupon, these proceedings were concluded at  
13 9:30 a.m.)

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CERTIFICATE OF REPORTER

STATE OF NEW MEXICO )  
 ) ss.  
COUNTY OF SANTA FE )

I, Steven T. Brenner, Certified Court Reporter and Notary Public, HEREBY CERTIFY that the foregoing transcript of proceedings before the Oil Conservation Commission was reported by me; that I transcribed my notes; and that the foregoing is a true and accurate record of the proceedings.

I FURTHER CERTIFY that I am not a relative or employee of any of the parties or attorneys involved in this matter and that I have no personal interest in the final disposition of this matter.

WITNESS MY HAND AND SEAL September 9th, 2004.



STEVEN T. BRENNER  
CCR No. 7

My commission expires: October 16th, 2006