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

IN THE MATTER OF THE APPLICATION OF OXY USA WTP, LLC AND CANANN 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)

MOTION TO DISMISS

For its motion to dismiss the application herein Centennial Resource Production, LLC ("Centennial"), states:

A. Introduction.

By its application, OXY USA WTP, LLC ("OXY") seeks to reopen and amend Order R-20279 through application of a *nunc pro tunc* procedure to retroactively change the provisions of Orders R-20279 and R-20001.

Pertinent facts relating to this matter are:

1. OXY did not enter an appearance in the initial Case No. 16265, nor in the reopened proceeding to amend the Order R-20001. These cases were presented to the Oil Conservation through affidavit.

2. OXY did not appeal or otherwise challenge the provisions of Order R-20001 or Order R-20279.

3. OXY is not a "party of record adversely affected shall have the right to have the matter heard de novo before the commission upon application filed with the division within thirty days from the time any such decision is rendered." NMSA 1978 § 70-2-13.

B. By not becoming a party of record at the initial hearing and hearing to amend Order R-20001, OXY has no standing to now amend the language of Division's Orders, and its attempt to amend the order is a collateral attack on the Orders.

"A collateral attack is 'an attempt to avoid, defeat, or evade [a judgment], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking' the judgment." Lewis v. City of Santa Fe, 2005-NMCA-032 ¶ 10, 137 N.M. 152, 108 P.3D 558 (Quoting Lucus v. Ruckman 59 N.M. 504, 509, 287 P.2d 68, 72 (1955)). Collateral estoppel fosters judicial economy by preventing ultimate facts and issues actually and necessarily decided in a prior adjudication. See, Shovelin v. Central New Mexico Elec. Co-op., Inc. 115 N.M. 293, 297, 850 P.2d 996, 1000 (1993). With respect to administrative adjudicative determinations, preclusive effect is appropriate if rendered under conditions, such as in this case, in which the parties have had "the opportunity to fully and fairly litigate the issue at the administrative hearing." Id. at 298, 850 P.2d at 1001.

In this case OXY had the opportunity to fully and fairly litigate the issue it now brings before the Division, but chose not to participate in the hearing process.

C. *Nunc Pro Tunc cannot be used to amend the Order R-20279 since there is no clerical error or omission in the Order.*

Mora v. Martinez, 1969-NMSC-30, ¶ 3, 451 P.2d 992, 993 (N.M. 1969) gives a very good application of the meaning of *nunc pro tunc* and its application:

> … that nunc pro tunc has reference to the making of an entry now, of something which was actually previously done, so as to have it effective as of the earlier date. It 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. State v. Hatley, 72 N.M. 377, 384 P.2d 252 (1963). See, generally,

> Bouvier's Law Dictionary 2385 (3d rev., vol. III, 1914), and Black's Law Dictionary 1218 (DeLuxe 4th ed. 1951). In the instant case, the action taken was obviously not in conformity with any recognized usage of the term 'nunc pro tunc.'

Here, OXY seeks to amend decretory Paragraph 13 of Order R-20279:

> (13) 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 to the operator in lieu of paying its share of reasonable well costs out of production as hereinafter provided. Payment shall be rendered within 90 days after expiration of the 30-day election period and any such owner who pays its share of estimated well costs as provided above for any well shall remain liable for operating costs but shall not be liable for risk charges to the extent computed based on costs of such well. Pooled working interest owners who do not elect to pay their share of estimated well costs,or who do not render timely payment to the operator, as provided in this paragraph shall thereafter be referred to as "non-consenting working interest owners."

There is no mistake, clerical error, or inadvertence in the wording of Paragraph 13. Had OXY participated in the hearing process resulting in Order R-20279, it could have requested or argued for a language change to change the word "furnished" to the requested language that the thirty-day period commences on receipt of the schedule of estimated well costs.

D. The term "furnished" starts on the day that the schedule of estimated well costs was mailed to OXY, and therefore, OXY did not timely elect to participate in drilling the wells.

Centennial submits that the word "furnished" is the date of mailing of the schedule of estimated well costs. The schedule of estimated well costs was mailed on February 6th, 2019. The 30-day period expires on March 8th, 2019. OXY or its assignee elected to participate on March 13th, 2019. The election was not timely.

In Schneider Nat., Inc. v. State, Taxn. and Revenue Dept., 144 P.3d 120, 123–24 (N.M. App. 2006), the New Mexico Court of Appeals held that under NMSA 1978, Section 7–1–26(B)(1), the statue of limitation for filing suit for a tax refund, applies and mandates filing within ninety days of mailing, if mail is used, or delivery, if delivery is used. The court reasoned that the only reasonable interpretation is that "delivery" applies to personal delivery, as opposed

to receipt after mailing. It said that the Department could mail or deliver a notice. Under the statute, if a notice is mailed, the action must be filed within ninety days of mailing.

Similarly, Vigil v. City of Espanola, CIV.08-0980 JB/RLP, 2009 WL 1300746, at *10–12 (D.N.M. Feb. 18, 2009), in an unpublished opinion, Federal District Court Judge Browning who is known for his precise and lengthy decisions gave a number of instances where the date of mailing controlled over receipt of time sensitive pleadings.

> The Court believes that rule 1–076 uses "service" as that term is defined elsewhere in the New Mexico Rules of Civil Procedure. Indeed, there is nothing in rule 1–076 that would command a different definition of "service" within its context. Accordingly, "service ... of the commission's order" under rule 1–076 falls under rule 1–005, which allows mail service of "every order required by its terms to be served." N.M. R. Civ. P. 1–005. Given that rule 1–005 governs rule 1–076, it follows that rule 1–005's recognition that service by mail is complete upon mailing applies in the context of rule 1–076, the rule governing appeals from the Human Rights Commission.
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> The operation of legal deadlines in analogous contexts, such as appeals from administrative agencies, further strengthen the proposition that "service" of the commission's order is measured from the date of mailing. In the context of appeals from administrative agencies, the clock begins running on the operative deadlines when the agency takes action. The deadlines are not dependent on when the involved parties find out that action has been taken.
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> ….While the rules for appealing magistrate, metropolitan court, administrative, and Human Rights Commission orders reflect distinctions in the court or agency activity that triggers the deadline—i.e., filing, service, or the date of the final decision or order—the deadline always depends on the action of the agency or court. In light of the operation of rule 1–076 and the fact that it both applies to appeals from Human Rights Commission and tracks the language of 28–1–13A, the Court finds that "service" in the context of this case applies in the sense conveyed in rule 1–005. Consequently, service by mailing is appropriate, and service by mail is complete on the date of mailing.

OXY has only itself to blame for its inattention from the very beginning to its decision to participate in drilling the wells. "Furnished" as used in the order commences on the date of mailing.

This conclusion is consistent with the Division's interpretation of the NMAC, § 19.15.4 (B), requiring a 20-day notice for adjudicatory hearings, that the time starts on the date of

mailing. Applying this standard, the day of mailing starts the time within which a non-consenting working interest owner must elect to participate under the compulsory pooling order at issue in this case.

WHEREFORE, for the foregoing reasons the application should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing was served to counsel of record by electronic mail this 1st day of July, 2019, as follows:

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