

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

ORIGINAL

COMMISSION MEETING

April 19, 2012

9:00 AM

1220 South Street Francis Drive

Santa Fe, New Mexico 87505

BEFORE: JAMI BAILEY, Division Director
ROBERT BALCH, Commissioner
SCOTT DAWSON, Commissioner
BILL BRANCARD, General Counsel
FLORINE DAVIDSON, Secretary

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A P P E A R A N C E S

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I N D E X

PAGE

NO WITNESSES

CERTIFICATE OF COMPLETION OF HEARING

24

EXHIBITS

MARKED/IDENTIFIED

1. Pre-Hearing Memorandum for Motion

22

2. Cimarex Response to Nearburg's Motion

22

1 MADAME CHAIR: Good morning. It's 9 o'clock
2 on Thursday, April 19th. This is the meeting of the Oil
3 Conservation Commission in Porter Hall in Santa Fe,
4 New Mexico. I am Jami Bailey, Chair of the Commission.
5 To my right is Scott Dawson, designee of the Commission
6 and Public Lands. To my left is Dr. Robert Balch,
7 designee of the Secretary of Energy Minerals Natural
8 Resources Department. To his left is Bill Brancard, who
9 is our counsel today. Then Lisa is our court reporter
10 and Florine Davidson is our Commission clerk. A quorum
11 is present because all three Commissioners are present
12 today.

13 Have each of the Commissioners had a chance to
14 read the minutes of the previous hearing?

15 MR. DAWSON: I have.

16 MR. BALCH: And I have.

17 MADAME CHAIR: Is there a motion to adopt
18 the minutes of the previous hearing?

19 MR. BALCH: I'll make that motion.

20 MR. DAWSON: I'll second.

21 MADAME CHAIR: All those in favor?

22 MR. DAWSON: Aye.

23 MR. BALCH: Aye.

24 MADAME CHAIR: Aye. Then I will sign on
25 behalf of the Commission.

1 Have the Commissioners had a chance to read the
2 draft and order of case 14805, which was the application
3 of the New Mexico Oil Conservation Division for
4 amendment of Rule 19.15.14.8 NMAC?

5 MR. DAWSON: I have.

6 MR. BALCH: And I have also.

7 MADAME CHAIR: Is there a motion to adopt
8 this order of the Commission which is an amendment of a
9 rule?

10 MR. BALCH: I'll make that motion.

11 MR. DAWSON: I'll second.

12 MADAME CHAIR: All those in favor?

13 MR. DAWSON: Aye.

14 MR. BALCH: Aye.

15 MADAME CHAIR: Aye. Then we will each sign,
16 and we can submit these documents to the Commission.

17 The next order of business is to hear arguments
18 in the motion for leave to file application for hearing
19 de novo filed by Nearburg Producing Company, LLC, to its
20 counsel on March 26th, 2012.

21 Are there appearances?

22 MR. HALL: Madame Chairman and
23 Commissioners, Scott Hall from Montgomery & Andrews law
24 firm of Santa Fe appearing on behalf of Nearburg
25 Producing Company.

1 MR. KELLAHIN: Madame Chair, my name is Tom
2 Kellahin of the Santa Fe law firm of Kellahin &
3 Kellahin. I'm appearing today in association with
4 Mr. John Cooney of the Modrall law firm in Albuquerque.
5 He and I collectively represent Cimarex Energy Company.
6 We are in opposition to the motion.

7 MADAME CHAIR: Mr. Hall, do you have
8 witnesses?

9 MR. HALL: No witnesses. Just a motion
10 hearing.

11 MADAME CHAIR: All right.

12 MR. HALL: If I may begin, Madame Chair,
13 with our arguments.

14 MADAME CHAIR: Please do.

15 MR. HALL: I come here to you today on
16 behalf of Nearburg Production. Nearburg wishes to have
17 from you the opportunity to present a case based on
18 technical evidence to protect its property rights.
19 Cimarex necessarily opposes this effort, but Cimarex
20 does acknowledge and does not dispute that under the
21 terms of an order that was entered in this case, order
22 number R-13494, and the Division's rules that Nearburg
23 could reapply to the Division at any time.

24 Those remedies are always available to an
25 operator, the owner of an interest that may be affected

1 by the agency's action. It is just a posture at this
2 time, and we have already had an examiner hearing. The
3 next logical step would be a hearing de novo in front of
4 the Commission.

5 Cimarex, by the way, does not dispute that in
6 this case that the order was not received by me from the
7 Division after its issuance in December. But what
8 Cimarex is here to argue today is that equity, equitable
9 considerations prevent the Commission from proceeding
10 further in this case. And I would submit to you that is
11 wrong. We do not do equity at the Oil Conservation
12 Commission. We do the Oil and Gas Act. We administer
13 the statutory duties that the legislature has set forth
14 in the Oil and Gas Act.

15 And if I may approach the Commission, Madame
16 Chair?

17 MADAME CHAIR: Yes.

18 MR. HALL: What I've handed you is a copy of
19 the statutory duties which I think apply in this case
20 where a party is seeking to protect itself from
21 injection operations. And in this case those duties
22 fall under section 70-2-12. I've highlighted them for
23 you. Under subsection B7 and under subsection B15, the
24 Commission, the Division, is charged with seeing that
25 the disposition of water is regulated properly, and that

1 neighboring properties are not injured and are protected
2 by any oil and gas operations, including underground
3 disposal. So those are the duties that we do in lieu of
4 equity.

5 Because the Commission has clearly delineated
6 statutory duties, that's why in the past in analogous
7 situations the Commission has deferred to having a
8 hearing. It has tended not to allow matters to be
9 decided on procedural issues but rather on the merits,
10 and that is consistent with the caselaw that we have
11 cited to you. It is also consistent with some of the
12 Commission's prior actions in analogous cases that we
13 have cited to you as well.

14 In fact, this is a similar situation that Cimarex
15 itself found itself in, in case number 14418 in January
16 2011 when it was faced with the loss of a right to a
17 hearing de novo because the earlier Commission had been
18 dissipated and this Commission had not yet been
19 constituted, so it would have been deprived of hearing
20 it. At the time the acting director, who would have
21 been the acting Commission Chairman, entered an order to
22 preserve Cimarex's de novo appeal rights, and that was
23 in the Lynx Petroleum case having to do with proper
24 alignment of spacing units for a horizontal drilling
25 project.

1 What are the property interests that Nearburg
2 seeks to protect here? Well, it has an oil and gas
3 lease exactly where Cimarex's disposal well is located.
4 It certainly covers the Mora formation which it believes
5 to be expensive. And to my knowledge it may cover the
6 Cisco Canyon formation where Cimarex has commenced
7 injection operations.

8 In addition to that, some additional property
9 right Cimarex knows, as an operator as someone drilling
10 through the canyon formation, it has the common law
11 right of support. It has a right under its oil and gas
12 lease to use the adjoining interest, interest to which
13 it will drill for actual physical support to assure that
14 the drilling operation is successful and it's not
15 subject to sloughing of holes or water flows, loss of
16 circulation or penetration of excess water, water flows
17 into the drilling operation which would cause mud
18 problems.

19 Cimarex will, of course, dispute the viability of
20 the Mora formation. It contends that where Nearburg's
21 interests are and where its injection well is now
22 located, the Mora is not viable, it's nonexistent. But
23 I think everyone on this Commission knows from past
24 experience about the Morrow. It is highly channelized,
25 highly localized. And the fact that you may have a dry

1 hole within the same 160 does not condemn that entire
2 160 or the entirety of the 320-acre spacing unit that
3 would be dedicated to a Morrow well.

4 That's what we have hearings about. We would
5 bring geologists and the engineers before you to address
6 that issue further, not in the context of a motion. And
7 it should be noted, and in fact in its own pleadings
8 here so far Cimarex has acknowledged that there is
9 Morrow production within at least a mile of the acres
10 that we are talking about. We'd like to explore that
11 with you further at a full Commission hearing.

12 There is a dispute between the parties over the
13 effects of the disposal operation. Cimarex has given us
14 a preview of the case it will present before a
15 Commission. It characterizes the canyon formation as
16 highly porous, widespread, able to take significant
17 volumes of water on a vacuum. And it says there are
18 already injectors within two and a half miles of
19 Cimarex's acreage it may drill. But the problem is
20 there are presently none, except for the new Secours
21 well, there are none as close as 1320 feet, as close as
22 this 160-acre tract where Cimarex has recently begun
23 injecting and where Nearburg wishes to drill.

24 The problem with that is the closer in proximity
25 injection operations are to a drilling project the more

1 likely it is that the driller, the operator will
2 encounter problems. So it's one thing to point to
3 injectors that are two and a half miles away. In this
4 case we're talking about an injection well that's at
5 least 1,000 feet away from a Morrow drilling location.

6 These are the things that Nearburg wishes to be
7 able to present to the Commission at a hearing on the
8 merits where technical land geologic and engineering
9 evidence can form the basis of a Commission order. That
10 is consistent, we think, with the Commission's
11 enumerated duties under the Oil and Gas Act, and that's
12 what we were asking the Commission to do, defer to a
13 hearing on the merits. Do not let this matter be
14 decided on procedural issues.

15 MADAME CHAIR: Do you have any questions?

16 MR. DAWSON: Do you know how close the
17 nearest canyon producing well is from the salt water
18 disposal well proposed, SWE?

19 MR. HALL: I do not.

20 MR. DAWSON: No further questions.

21 MADAME CHAIR: Commissioner Balch, do you
22 have any questions?

23 MR. BALCH: I have no questions at this
24 time.

25 MADAME CHAIR: I don't either.

1 Mr. Kellahin?

2 MR. KELLAHIN: Mr. Cooney is going to do the
3 arguments.

4 MR. COONEY: Madame Chair, Members of the
5 Commission, I'm John Cooney of the Modrall Sperling Firm
6 in Albuquerque, and I would like to present argument to
7 our opposition of the motion to basically ignore
8 Rule 19.15.4-23, which states in no uncertain terms that
9 a request for a hearing de novo before the Commission
10 must be made within 30 days from the date the Division
11 issues the order by a written application for a hearing
12 de novo. That was not filed.

13 We're here today because Nearburg failed to file
14 that application. We're told in the motion that the
15 Nearburg office, Mr. Hall's office, did not receive a
16 notice of the order having been issued, but there's no
17 proof of that. All we have is the statement and motion.
18 There's no detail similar to what you would see in the
19 motion for excusable neglect to file a notice of appeal
20 to a district court proceeding as to how the mail was
21 received, who's responsible for it, why it wasn't
22 received, anything of that nature.

23 We believe that the evidence is that the order
24 was posted on the Division website. The only evidence
25 before the Commission today is evidence offered by

1 Mr. Hall concerning what was listed on the website in
2 2012 not in 2011. Beyond that, a simple phone call, it
3 had been several weeks. The order was issued six weeks
4 after the hearing in October. The well files of the
5 Commission would show the application by Cimarex
6 pursuant to the order granted by the Division to drill,
7 to work this well into the salt water disposal well.
8 There are numerous ways Nearburg could have, and we say
9 should have, found out about the issuance of the order
10 by the Division.

11 But we think that all may be somewhat beside the
12 point because of the expressed language of the rule
13 which says that the application must be filed within
14 30 days. This started back in August of last year when
15 Cimarex filed an administrative application to divert
16 this well, the SWE well. COG and Nearburg protested.
17 COG withdrew its protest. The hearing was held
18 October 27th, 2011. Nearburg put on no witnesses. At
19 the conclusion of the hearing the Examiner asked
20 Mr. Hall what Nearburg was complaining about, what was
21 the basis of the protest.

22 Mr. Hall said, and I'm quoting from page 33 of
23 the transcript of the October 27th Division hearing, "I
24 think Nearburg wants you to be satisfied that the canyon
25 interval has no future potential for production. They

1 didn't want to entirely disregard that possibility but
2 they want you to be satisfied that there is no chance
3 that producible reserves will be lost."

4 So here we have Cimarex putting on evidence,
5 technical evidence, before the Division in October,
6 Nearburg showing up offering no evidence, and stating
7 its concern was possible productive capacity in the
8 canyon. All of this was evaluated by the Division and
9 the order was entered December 21st granting Cimarex's
10 application.

11 Now we're told, well, it's different. Now we're
12 worried about we may want to drill a well someday in the
13 Morrow. We haven't decided whether we will or we won't.
14 We're not sure where it may be drilled. We haven't
15 applied for permission to drill it. We think maybe it
16 has productive potential, and we think maybe there will
17 be some interference with the drilling if and when we
18 should decide to drill a Morrow well. And there's no
19 proof offered that there would be such interference of
20 the drilling other than Mr. Hall's testimony here this
21 morning, his statements about all the creative horrors
22 that could occur if a well is drilled through, which
23 happens, I believe the Commission also knows very
24 frequently, if a deeper well is drilled through a
25 formation into which salt water is being injected.

1 So we have no technical evidence, no evidence at
2 all presented in October, no monitoring of the
3 Division's records website, well files, contact with the
4 Division -- inquiry with the Division, I'm sorry,
5 inquiry to the Division. And then somehow on March
6 20th, several months after the Division order was
7 entered, after Cimarex spent \$1.5 million to convert
8 this well into an SWD well and after Cimarex has begun
9 producing SOLs in the vicinity which it drilled, relies
10 on being able to dispose of the salt water in this
11 disposal well, and Cimarex is now disposing the well
12 into a vacuum in the canyon. They're not applying
13 pressure. It's going into the vacuum. And now we're
14 told about this, oh, gee, maybe we want to drill a
15 Morrow well someday, somewhere, and we're worried that
16 this might interfere with it although we don't have much
17 proof of that.

18 We don't think that the rule permits the
19 Commission to find excusable neglect on the basis of
20 this record that's before you this morning.
21 Furthermore, we don't believe that the rule even
22 provides for extension of time to file an appeal de novo
23 based on excusable neglect. This is different from an
24 appeal from a judgment and a district court. The
25 New Mexico Rules of Civil Procedure specifically provide

1 that although a notice of appeal has to be filed within
2 30 days after the entry of a judgement the Court may
3 extend the time for filing the notice of appeal if it
4 finds that there was excusable neglect in not filing it
5 on time. That's the basis of the cases cited by
6 Mr. Hall, which we don't think are applicable to begin
7 with because there's no similar provision in the rule
8 permitting appeals de novo.

9 And secondly, the circumstances in those cases
10 were wildly differently. An appeal filed a couple of
11 days late, an appeal filed because the USPS didn't
12 deliver the notice on time, a pro se litigant filing
13 58 minutes late. And the Court in each of those
14 circumstances finding that there was excusable neglect
15 under the provisions of the applicable rule of civil
16 procedure, which is not applicable to the filing of
17 appeals de novo before the Commission.

18 Now, one of the New Mexico cases cited by
19 Nearburg, the Chavez vs. U-Haul case, actually supports
20 our position. That's the one where the pro se party
21 didn't have a lawyer, didn't understand the rules, filed
22 his appeal 58 minutes late. And the Court said, well,
23 that's excusable. Another party by that case was
24 represented by a lawyer and filed the appeal 30 days
25 late. And the Court said, well, we don't find that

1 there was excusable neglect there. The person had a
2 lawyer, the lawyer should have known what was going on
3 and should have kept himself apprised. And, therefore,
4 that appeal was dismissed, the one by the client who was
5 represented by the attorney.

6 We have cited a couple of federal cases to the
7 Commission dealing exactly with the situation of the
8 argument, well, gee, I didn't get a notice. And the
9 Courts in both of those cases saying, well, your
10 obligation is to keep track of what's going on in your
11 case and if you don't and the time goes by that's not
12 excusable neglect. And that's what we have here today.

13 Now, Mr. Hall also stated that under the
14 provisions of the Division's order issued December 21st
15 that Nearburg can now come in and say, well, wait a
16 minute, I am an adjacent owner, offsetting owner, or
17 whatever, and I want to have a full hearing before the
18 Commission. The order doesn't say that. In fact, the
19 order contains many rigorous requirements imposed upon
20 Cimarex to safely operate and utilize the salt water
21 proposal well.

22 The right of someone to come in and ask that the
23 permit, SWD permit, the order be revoked is limited to a
24 situation where that person, like Nearburg, can come in
25 and prove that some condition of the order has been

1 violated. There's no suggestion by Nearburg that any
2 such thing has taken place here.

3 There's also the situation of our having relied,
4 Cimarex having relied upon the Division's order. We're
5 entirely blameless in this situation. We put on our
6 case. Nearburg did. The only problem in October was
7 productive -- supposed productive capacity in the canyon
8 of which none exists in this area. They don't claim
9 that here today.

10 We spent \$1.5 million converting this well.
11 We're using it. Now Nearburg wants a do over. Now
12 Nearburg wants to come before the Commission to say,
13 gee, we wish we had paid more attention. We wish we had
14 put on different technical evidence at the October 27th
15 hearing, and please give us a chance to do so even
16 though your rule says we don't have it.

17 For that reason we believe that the Commission
18 should charge Nearburg with the duty of following the
19 progress of the case and advising itself when the
20 Division entered the order with protest. We believe the
21 Commission should charge Nearburg with the duty of
22 coming before the Commission and demonstrating with
23 proof what they did to determine whether or not the
24 Division order had been entered and what they didn't do.
25 And we believe that the since Cimarex has, in good

1 faith, relied upon the issuance of the Division order
2 and expended substantial sums that the motion for leave
3 to ignore the Commission's rule about a 30-day limit on
4 de novo applications should be denied.

5 Thank you.

6 MADAME CHAIR: Do you have any questions?

7 MR. DAWSON: I don't have any questions.

8 MR. BALCH: No, no questions.

9 MADAME CHAIR: Counsel?

10 MR. BRANCARD: Mr. Cooney, let's assume for
11 a second that the allegations from Nearburg are correct,
12 and they were a party below, they were entitled to
13 notice, and they did not receive the notice or the
14 order. Okay? What is your response to the case of
15 Trujillo vs. Serrano, which seems to deal with this
16 situation fairly directly?

17 In that case you have parties before a magistrate
18 court, okay. The judge takes the case under advisement
19 but tells the parties he was going to bring the parties
20 back to issue an order. Instead, the order just gets
21 issued. By the time the party, I believe it's Serrano,
22 gets the order it's past the deadline, by the time it's
23 mailed to them.

24 MR. COONEY: My response -- I'm sorry.

25 MR. BRANCARD: And so from that there seems

1 to be this standard that was in fact continued to be
2 quoted in the cases since then when there are unusual
3 circumstances beyond the control of the parties the
4 Court will allow. And particularly unusual
5 circumstances, they focus on when the body that was
6 supposed to provide notice didn't do so is one case of
7 unusual circumstances. How does this case differ from
8 that standard and that case?

9 MR. COONEY: Well, sir, I don't read the
10 Trujillo case that broadly. And the circumstances which
11 occurred in the Trujillo case did not occur here. What
12 happened there was the magistrate advised the parties
13 that no order would be issued until he had called the
14 parties back for a further hearing.

15 The Division didn't do anything like that. It
16 didn't say on October 27th, well, listen up, Cimarex and
17 Nearburg, we're not going to do anything until we have
18 another hearing and tell you what we're going to do.
19 Those were the circumstances in the Trujillo case which
20 the Court found constituted excusable neglect. They're
21 considerably different from what occurred here.

22 We relied on this order. The Division, we
23 believe, put it on its website. We have no proof of why
24 the order was not received or whether it was received.
25 We don't know how they learned about it on March 20. If

1 they learned about it on March 20, why could they have
2 not learned about it before the 30 days had run from
3 December 31st. We don't know why they didn't check the
4 Division's well files. We don't know why they didn't
5 call up the Division and say, we had a hearing
6 October 27th, what happened. And we don't think the
7 Trujillo case is applicable.

8 If the Trujillo case were applicable, as you
9 suggest it would be, then there would never be -- or
10 every litigant would be able to plead excusable neglect
11 for failure to file the notice of appeal on time because
12 the state district court or federal district court rules
13 provide for issuance of notice when an order is entered.
14 And the cases have held that it is the litigant's duty
15 to keep track of that. And for some reason they don't
16 get it, it's not excusable neglect unless they exercise
17 due diligence in trying to follow what was going on in
18 their case.

19 MADAME CHAIR: Any other questions?

20 MR. BRANCARD: No.

21 MADAME CHAIR: Do we simply go into
22 executive session at this point then?

23 MR. BRANCARD: Yes.

24 MADAME CHAIR: In accordance with New Mexico
25 Statute 10-15-1 and the OCC Resolution on open meetings,

1 I would like to hear if the Commissioners would like to
2 go into executive session to deliberate the motion that
3 is before us?

4 MR. DAWSON: I will make that motion.

5 MR. BALCH: And I will second.

6 MADAME CHAIR: All those in favor?

7 MR. BRANCARD: You need to, just for the
8 record, do a roll call.

9 MADAME CHAIR: Commissioner Dawson, do you
10 vote to go into executive session?

11 MR. DAWSON: I vote to go into executive
12 session.

13 MADAME CHAIR: Commissioner Balch?

14 MR. BALCH: I vote to go into executive
15 session.

16 MADAME CHAIR: And I also do too.

17 [Executive session was held between 9:31 AM to 9:42 AM.]

18 MADAME CHAIR: Do I hear a motion from a
19 Commissioner to come back into session and back on the
20 record?

21 MR. DAWSON: I will motion.

22 MR. BALCH: And I will second.

23 MADAME CHAIR: And all those in favor?

24 MR. DAWSON: Aye.

25 MR. BALCH: Aye.

1 MADAME CHAIR: Aye. We have come back into
2 session after deliberating only on the motion for leave
3 to file application for hearing de novo in case number
4 14752. The decision of the Commission is to deny the
5 motion for leave to file application for hearing
6 de novo, that that order will be drafted up by our
7 counsel and signed at the next Commission meeting which
8 is in May.

9 MR. COONEY: Thank you.

10 MR. HALL: Thank you for your time.

11 MADAME CHAIR: Is there any other business
12 before the Commission today?

13 MR. BRANCARD: You're all aware of when the
14 next hearing is?

15 MR. BALCH: 14th of May through the 18th.

16 MR. BRANCARD: And I'm just a little
17 concerned about the room. You may have an overflow
18 crowd.

19 MADAME CHAIR: Well, we had standing room
20 only for the previous times this came up.

21 MR. BRANCARD: Has the Commission ever had
22 the hearings in another location?

23 MADAME CHAIR: There was one session that
24 was held at the land office in Porter Hall because of
25 issues connected with Porter Hall, and it was for only

1 one meeting day and the rest of the 17 days were
2 conducted here in Porter Hall.

3 MR. BALCH: There is that large auditorium
4 in --

5 MR. BRANCARD: The Reynold's building?

6 MR. BALCH: -- the Reynold's building.
7 Maybe we don't necessarily want to have a bigger
8 audience.

9 MR. BRANCARD: Well, since you've noticed it
10 for this location you should probably start it here. If
11 you think at some point in the hearing it would be
12 better off to move it you can always reconvene one of
13 the following days in some other location.

14 MADAME CHAIR: We'll make that determination
15 at the hearing. Okay. If there's no other business, do
16 I hear a motion to adjourn this meeting of the
17 Commission?

18 MR. BALCH: I will make that motion.

19 MR. DAWSON: And I will second it.

20 MADAME CHAIR: All those in favor?

21 MR. DAWSON: Aye.

22 MR. BALCH: Aye.

23 MADAME CHAIR: Aye. Thank you very much.

24 [Exhibits 1 and 2 attached.]

25 [The hearing adjourned at 9:45 AM.]

REPORTER'S CERTIFICATE

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I, Lisa Reinicke, New Mexico Provisional Reporter, License #P-405, working under the direction and direct supervision of Paul Baca, New Mexico CCR License #112, Official Court Reporter for the US District Court, District of New Mexico, do hereby certify that I reported the foregoing proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings and was reduced to printed form under my direct supervision.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest whatsoever in the final disposition of this case in any court.



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Ex count: