STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

ORIGINAL

CASE NO. 14001 & 14002	Final Order
CASE NO. 14181	Continued to 11/7
CASE NO. 14047	Dismissed
CASE NO. 14238	Dismissed
CASE NO. 14122	Motion denied
CASE NO. 13859 & 14052	Application withdrawn/dismissed

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSIONER HEARING

BEFORE: MARK E. FESMIRE, CHAIRMAN
JAMI BAILEY, COMMISSIONER
WILLIAM C. OLSON, COMMISSIONER

November 6, 2008

Santa Fe, New Mexico

This matter came on for hearing before the New Mexico Oil Conservation Commission, MARK E. FESMIRE, Chairman, on Thursday, November 6, 2008, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico.

REPORTED BY: JOYCE D. CALVERT, P-03
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A P P E A R A N C E S

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FOR THE NEW MEXICO OIL CONSERVATION COMMISSION:

Mark A. Smith, Esq.

CHAIRMAN FESMIRE: Let's go on the record. At this time, let the record reflect that this is the regularly scheduled October meeting of the New Mexico Oil Conservation Division, the meeting date is November 6th, 2008. The record should reflect that the time is 9:05 a.m.

The record should also reflect that all three commissioners are present; Commissioner Bailey, Commissioner Olson, and Commissioner Fesmire. We, therefore, have a quorum.

And the first order of business before the Commission is the minutes of the September 11th and September 12th meetings. We'll start with minutes of the September 11th meeting.

Have the Commissioners had a chance to review those orders?

COMMISSIONER BAILEY: Yes, I have, and I move we accept them.

COMMISSIONER OLSON: I'll second that.

CHAIRMAN FESMIRE: All those in favor signify by saying "aye."

COMMISSIONER BAILEY: Aye.

COMMISSIONER OLSON: Aye.

CHAIRMAN FESMIRE: Aye.

The record should reflect that the minutes of the September 11th, 2008, Oil Conservation Commission meeting were unanimously adopted by the commissioners and will be signed by

the chairman and transmitted to the secretary.

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CHAIRMAN FESMIRE: The next order of business before the Commission is the minutes of the special meeting of the Oil Conservation Commission held on September 12th, 2008. Have the Commissioners had a chance to review the minutes as presented by the secretary?

COMMISSIONER BAILEY: Yes, and I move we adopt them.

CHAIRMAN FESMIRE: Is there a second?

COMMISSIONER OLSON: Yes. I'll second that.

CHAIRMAN FESMIRE: All those in favor signify by saying "aye."

COMMISSIONER BAILEY: Aye.

COMMISSIONER OLSON: Aye.

CHAIRMAN FESMIRE: Aye.

Let the record reflect the minutes as presented by the secretary were unanimously adopted by the Commission, signed by the Chairman and transmitted to the secretary.

* * *

CHAIRMAN FESMIRE: The next order of business before the Commission is the final order in Case No. 14001 and 14002. Case 14001 is the de novo application of Chesapeake Energy Exploration, LLC for statutory unitization of the Quail Queen Unit, Lea County, New Mexico, and Case No. 14002 is the application of Chesapeake Exploration, LLC for approval of a

waterflood project and qualification of the project area for the Quail Queen Unit for recovered oil tax rate pursuant to the Enhanced Oil Recovery Act in Lea County, New Mexico.

Have the Commissioners had a chance to review Order No. R-12952-B?

COMMISSIONER BAILEY: Yes, I have, and I believe it accurately reflects the decisions that we reached concerning that case.

CHAIRMAN FESMIRE: Commissioner Olson?

COMMISSIONER OLSON: I agree with Commissioner Bailey, and I'll second that.

CHAIRMAN FESMIRE: Okay. All those in favor of adopting the order as presented by counsel, signify by saying "aye."

COMMISSIONER BAILEY: Aye.

COMMISSIONER OLSON: Aye.

CHAIRMAN FESMIRE: Aye.

Let the record reflect that the order as presented by counsel was unanimously adopted by the Commission and will be signed by each one of the Commissioners and transmitted to the secretary.

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CHAIRMAN FESMIRE: The next order of business before the Commission is Case No. 14181, the Application of the New Mexico Oil Conservation Division for the Repeal, Adoption

and Amendment of Rules Issued Pursuant to the Oil and Gas Act, NMSA 1978 Section 70-2-1 through 70-2-38.

At the request of the Commissioners, the Commission will continue this case until tomorrow to allow the Commissioners one final chance to review the order as presented. It will be taken up tomorrow, November 7th, 2008, in this room at 9 o'clock. Is that acceptable to the Commissioners?

COMMISSIONER BAILEY: Yes, it is.

COMMISSIONER OLSON: Yes.

CHAIRMAN FESMIRE: So Case No. 14181 will be continued until tomorrow, November 7th, 2008, 9 o'clock a.m. in Porter Hall.

* * *

CHAIRMAN FESMIRE: The next issue before the Commission is Case No. 14047. It's the de novo Application of Celero Energy II, LP, for Expansion of the Waterflood Project in Chaves County, New Mexico. At the request of the applicant, this case will be dismissed. Madame Secretary, is that correct?

THE SECRETARY: Yes.

* * *

CHAIRMAN FESMIRE: The next order of business before the Commission is Case No. 14238. Pursuant to the provisions of the Oil and Gas Division Rule 19.15.14.1218(B) NMAC, the

Division Director sets for hearing before the Oil Conservation Commission the requests for approval of two Applications for Permit to Drill in the Blanco-Mesaverde Pool filed by MacElvain Oil and Gas Properties, Inc. in Rio Arriba County.

At the request of the only complainant in this case -- I guess, the only interested party on record -- the only interested party, I guess, this case will be dismissed.

Mr. Hall, you're the attorney in this case. Have you been so informed? Aren't you the attorney?

MR. HALL: No. It's Mr. Feldewert.

CHAIRMAN FESMIRE: Oh, it's Mr. Feldewert?

MS. MUNDS-DRY: It's actually me, Mr. Chairman.

CHAIRMAN FESMIRE: Let the record reflect that the attorney is Ocean Munds-Dry, and the other party in this case has withdrawn their objection. And this will be remanded back to the Aztec field office for handling as an Application for Permit to Drill. Is that your understanding?

MS. MUNDS-DRY: That's my understanding, Mr. Chairman. Thank you.

* * *

CHAIRMAN FESMIRE: Okay. The next case before the Commission is Case No. 14122. It's the de novo Application of Pecos Operating Company for Approval of a Non-Commercial Saltwater Disposal Well in Lea County, New Mexico.

What is scheduled to be heard before the Commission

today is a motion to dismiss H&M Disposal's untimely application of the subject application.

Are the attorneys present?

MR. HALL: Mr. Chairman, Commissioners, Scott Hall, Montgomery and Andrews law firm, Sante Fe, on behalf of H&M Disposal.

CHAIRMAN FESMIRE: Ms. Munds-Dry?

MS. MUNDS-DRY: Good morning, Mr. Chairman, Commissioners, Ocean Munds-Dry with the law firm of Holland and Hart, here representing Pecos Operating Company this morning.

CHAIRMAN FESMIRE: And is it the understanding of both parties that we're here today just to argue the motion to dismiss; that if the motion is not granted, the case will be continued to a later date?

MS. MUNDS-DRY: That is my understanding.

MR. HALL: That is correct.

CHAIRMAN FESMIRE: Mr. Hall, it's your motion, so I guess you go first.

MR. HALL: Actually, it's Ms. Munds-Dry's motion.

MS. MUNDS-DRY: It's my motion.

CHAIRMAN FESMIRE: I'm sorry. I apologize. It's been six weeks.

MS. MUNDS-DRY: You're a little rusty. That's all right.

Mr. Chairman, Commissioners, our motion is fairly

straightforward, and I won't take up too much of your time. As you read in the motion, I'm sure, this matter was heard before the Division on May 15th. An order was entered by the Division on August 4th. Our office obtained the order -- where it is regularly kept upstairs -- on August 6th. So we know at that point, at least, it was available for pickup or for publication.

As you know, under the statutes, under 70-2-13, any interested party or affected party has 30 days to appeal that decision as of the date of the order from the Division. Mr. Hall's client, H&M, did not file their application for hearing de novo until 45 days after the order was entered. Therefore, we request the application be dismissed because it was untimely. And that's really the crux of our argument.

CHAIRMAN FESMIRE: Mr. Hall?

MR. HALL: Mr. Chairman, Commissioners, I don't think it's disputed in this case that the order was not placed in the mail to counsel of record for these cases. The Division has a rule -- it's Rule 1222 -- which requires that orders be placed in the mail to counsel of record within ten days of their issuance. And that's just what -- that's what happened. That's all.

The order was obtained when I came over here on one of the regular Examiner Hearing dates and checked the out-basket and found the order at that time with some other

orders that had accumulated there. We felt that we acted with diligence. We were aware of the 30-day provision of the statute and the day we obtained the order, filed our application for hearing de novo.

The simple straightforward argument of Pecos Operating in this case is that you have no choice but to apply the 30-day provision of the statute in the rule in a critical and unyielding manner. I would submit to you that's incorrect. I think this Commission is well aware it regularly exercises its discretion to modify its orders. The Division retains jurisdiction over all of its orders to issue subsequent orders to cure any defects that may occur. I think that would be appropriate in this case.

In addition, Mr. Chairman, we've briefed whether the 30-day provisions of the statute must be applied in a rigid, mandatory manner, and we think the answer to that is "no." The guidance for the Commission is found under the Uniform Statute and Rule Construction Act, a seldom cited act. And what it does is it provides courts and agencies guidance on how they are to construe their own rules in a uniform manner. And if you will look at the provisions of that act, it provides -- if I may approach, Mr. Chairman?

CHAIRMAN FESMIRE: You may.

MR. HALL: I'll provide you with a memorandum. This is the original. What the Uniform Construction Act --

MS. MUNDS-DRY: Mr. Hall, do you have another copy?

MR. HALL: I'm sorry.

MS. MUNDS-DRY: Thank you.

MR. HALL: What the Uniform Construction Act tells us --

CHAIRMAN FESMIRE: Can you give us some time to read this?

MR. HALL: Go ahead.

CHAIRMAN FESMIRE: Mr. Hall, proceed please.

MR. HALL: What I would suggest to you is what the Uniform Rule Statute Construction Act tells us is that you may not take one isolated excerpt from the Oil and Gas Act and apply it with exclusivity; rather, you must apply all of the statutes within the context of the overall purposes of the Oil and Gas Act. And that requires you to reconcile the 30-day provision with the Commission and the Division's other statutory mandates.

And I would suggest to you those in this case directly implicate the agency's duties to make sure that the disposition of produced water is done in such a manner so that there's no escape of water from strata, and adjoining properties are not damaged. That's what I think you have to do here.

We have also pointed out that in -- it is the agency's consistent practice to provide a full and fair hearing

for virtually anybody who comes before it. Everybody gets a fair hearing before this agency. So what we're asking you to do in this case is to cure an administrative error to allow H&M a full and fair hearing on the substantive issues of the Pecos Operating application and their C-108 application to the agency.

What we would ask you to do is enter an A Order, simply moving the effective date of the original order issued in this case to August 18th or beyond, which would make the application for hearing de novo timely and would allow H&M to present its concerns to this Commission.

CHAIRMAN FESMIRE: Ms. Munds-Dry, any rebuttal?

MS. MUNDS-DRY: Mr. Chairman, granted I've just received this memorandum as you did, but my initial reaction to it is Mr. Hall is now forcing you to look at the substance of his claims for appeal, since I don't think you've seen that, and you have no idea what statutory provisions would be indicated to look at here.

But keep in mind the Division has ongoing jurisdiction over this matter, and under that order, it's clearly in there. So if there are issues -- and we're familiar with what Mr. Hall's client is seeking to have amended in that order -- we believe those are all issues that can be taken care of at the Division level, anyway.

And let's not forget another thing: They had a fair

and impartial hearing at the Division level already. And there's one other point that I think is important, and I don't know -- and I don't think we can dispute the order was not mailed as required in the rules -- but all attorneys who practice regularly before the Division and Commission know to check the outbox. We do so regularly, or we have people from our office do so regularly. I don't know what happened here. I'm not suggesting that Mr. Hall, you know, blew it off in any way, but we certainly had it available to our office and received it on August 6th.

So I guess my point is that we need to make a distinction between what Mr. Hall is arguing here in terms of forcing you to look at the substance of what they seek to appeal rather than the procedural issues under your rules, which require them to appeal by 30 days.

So I think it's just a distinction that I can hopefully articulate for you that we need to look at here. And not to forget that they did already have a hearing where these issues were addressed. And if the Division does have ongoing jurisdiction, to certainly take care of any issues that they wish to address with the Division.

CHAIRMAN FESMIRE: Commissioner Bailey?

COMMISSIONER BAILEY: It's undisputed that OCD did not mail. Rule 1222 requires the Division to mail. I think due to the Division's error, that we do need to look at this

case.

CHAIRMAN FESMIRE: Mr. Olson?

COMMISSIONER OLSON: Well, I think I would agree with Commissioner Bailey. It seems like the rules require there be some type of notice even though it was ten days after the order is affected, which gives plenty of time for someone to appeals. In this case, if that did not happen, I think that's prejudicing the protesting party if they didn't have an opportunity to get proper notice as required by rule.

CHAIRMAN FESMIRE: Ms. Munds-Dry, you're not arguing that Mr. Hall or his client had access of the Division decision prior to --

MS. MUNDS-DRY: No. We're not aware that they did. We can't refute that.

CHAIRMAN FESMIRE: I think I would have to agree with the other Commissioners. It's an OCD -- it looks like from the arguments made today, the OCD did not comply with Rule 1222, and I don't think we can import any detriment to Mr. Hall's client in that respect.

So normally we would deliberate on this, but I think the Commission is of one mind, and with the permission of the Commissioners --

COMMISSIONER OLSON: I might ask a question first. I noticed in the applicant's pre-hearing statement on the motion that there's a note at the bottom that this is the second

time -- that statement from them and the footnote is that this is the second time that H&M failed to comply with the Division's rules. I saw in the order, I guess, that there had been a motion to dismiss at the prior Division hearing, but it didn't really say what or why. It just said that there was a motion that was not accepted.

MS. MUNDS-DRY: Mr. Chairman, Commissioner Olson, H&M actually objected to the C-108 filed by Pecos 23 days after they received notice. And as you are probably aware, they have 15 days to respond. So we did actually, at that time, also file a motion to dismiss and ask that this application be continued to be processed administratively, but again, that did go to hearing after all.

COMMISSIONER OLSON: And why was the motion overruled?

MS. MUNDS-DRY: You know, I wasn't at that hearing, so I unfortunately can't tell you, Commissioner Olson.

COMMISSIONER OLSON: Okay.

CHAIRMAN FESMIRE: Okay. The Chair would accept a motion for the disposition of the motion with the Commissioners.

COMMISSIONER OLSON: I'll make a motion that we overrule the motion to dismiss the hearing.

CHAIRMAN FESMIRE: Counsel, is that an adequate way to address this?

[Chairman Fesmire confers with counsel, Mr. Smith.]

CHAIRMAN FESMIRE: Mr. Hall, counsel does raise a question: Rule 1222(b) is the provision that you're arguing here today; is that correct?

MR. HALL: That's the ten-day rule?

CHAIRMAN FESMIRE: I assume.

MR. HALL: I better look at it. Yes. Rule 1222.

CHAIRMAN FESMIRE: And is that a jurisdictional provision, or is that a general provision?

MR. HALL: Right, and I did consider that, whether the 30-day provision under the statute is jurisdictional limitation. And I just -- my interpretation of that statute, there is no such language on the face of it, so I don't think that's a mandatory reading of that.

I think, again, because it doesn't expressly say that, you still have to construe it within the context of the entire act and make sure that all of the statutes are given affect.

CHAIRMAN FESMIRE: So the argument is that the Commission still has jurisdiction to make the rulings that you request?

MR. HALL: Yes.

CHAIRMAN FESMIRE: Is that adequate? Ms. Munds-Dry, do you have a response to that?

MS. MUNDS-DRY: No. I think Mr. Hall's right. I

think it's not clear from the statute that you don't have jurisdiction. I'd like to argue that you don't, but I don't think it's fair. And I don't think it's fair for me to say that it's clearly there.

CHAIRMAN FESMIRE: The Chair appreciates your integrity.

With that, there's a motion before the Commission to overrule the motion to dismiss. All those in favor, signify by saying "aye."

COMMISSIONER BAILEY: Aye.

COMMISSIONER OLSON: Aye.

CHAIRMAN FESMIRE: Aye. I'm sorry. It's been a long time.

Let the record reflect that the motion to dismiss is denied by a unanimous vote of the Commission.

Anything else in this case?

MS. MUNDS-DRY: Nothing further.

CHAIRMAN FESMIRE: Thank you very much.

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CHAIRMAN FESMIRE: The next case before the Commission is Case No. 13859, the de novo Application of the New Mexico Oil Conservation Division for a Compliance Order against Pronghorn Management that is in conjunction with the Case No. 14052.

It's my understanding, Madame Secretary, that the

counsel for Pronghorn has withdrawn the application in those cases. Is that correct?

THE SECRETARY: That's correct.

CHAIRMAN FESMIRE: Okay. We will -- in fact, we have already dismissed those cases, have we not?

THE SECRETARY: Yes.

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CHAIRMAN FESMIRE: And that concludes everything on the agenda today. Do the Commissioners have anything else we need to address?

COMMISSIONER BAILEY: No.

COMMISSIONER OLSON: No.

CHAIRMAN FESMIRE: The record again should clearly reflect that the case on the rules -- which one is that? Case No. 14181 has been continued to tomorrow morning at 9 o'clock a.m. in this room.

Is there a motion to dismiss? Motion to adjourn?

COMMISSIONER BAILEY: I so move.

COMMISSIONER OLSON: I'll second that.

CHAIRMAN FESMIRE: All those in favor say "aye."

COMMISSIONER BAILEY: Aye.

COMMISSIONER OLSON: Aye.

CHAIRMAN FESMIRE: The Commission meeting is adjourned at 9:35 a.m.

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REPORTER'S CERTIFICATE

I, JOYCE D. CALVERT, Provisional Court Reporter for the State 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 in the final disposition of this proceeding.

DATED this 6th day of November, 2008.

Joyce Calvert

JOYCE D. CALVERT
New Mexico P-03
License Expires: 7/31/09

STATE OF NEW MEXICO)
)
COUNTY OF BERNALILLO)

I, JOYCE D. CALVERT, a New Mexico Provisional Reporter, working under the direction and direct supervision of Paul Baca, New Mexico CCR License Number 112, hereby certify that I reported the attached proceedings; that pages numbered 1-18 inclusive, are a true and correct transcript of my stenographic notes. On the date I reported these proceedings, I was the holder of Provisional License Number P-03.

Dated at Albuquerque, New Mexico, 6th day of November, 2008.

Joyce D. Calvert
Provisional License #P-03
License Expires: 7/31/09

Paul Baca, RPR
Certified Court Reporter #112
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