

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

APPLICATION OF CIMAREX ENERGY
COMPANY OF COLORADO FOR
APPROVAL OF A WATER DISPOSAL WELL,
EDDY COUNTY, NEW MEXICO

CASE NO. 14752
ORDER NO. R-13494-B

ORDER OF THE COMMISSION

This matter came before the Oil Conservation Commission ("Commission") on a Motion for Leave to File Application for Hearing De Novo filed by Nearburg Producing Company LLC ("Nearburg"). The Commission having heard oral arguments at a public hearing on April 19, 2012, and having considered the written submittals, enters this Order.

1. Nearburg requests that the Commission allow the filing of a de novo appeal more than two months after the statutory deadline for the filing. Case No. 14752 involves an application by Cimarex Energy Company ("Cimarex") to inject produced water at a specified location. A hearing on Case No. 14752 was held before the Oil Conservation Division ("Division") on October 27, 2011 and an Order was entered on December 21, 2011 granting Cimarex's application.

2. Under the Oil and Gas Act, NMSA Section 70-2-13, "any 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". See also 19.15.4.23(A) NMAC. On March 26, 2012, more than two months after the deadline to seek Commission review, Nearburg filed a Motion for Leave to File Application for Hearing De Novo ("Motion").

3. The Commission held a hearing on the Motion on April 19, and also considered pleadings filed by both Nearburg and Cimarex. At the hearing, both Nearburg and Cimarex presented arguments.

4. Nearburg argues that it entered an appearance in the Case below and was therefore entitled to notice of the Division's Order. 19.15.4.24 NMAC. In the Motion, Nearburg claims that it "is unable to verify receipt by mail of the order and the Division is unable to verify that it was sent". Nearburg states that it only became aware on March 20, 2012 that the Order had been entered. No affidavits or other evidence was presented to support the claim that notice was not provided.

5. Cimarex does not dispute Nearburg's claim that Nearburg was not timely notified. However, Cimarex does claim that Nearburg failed to exercise due care by not monitoring for the issuance of the Order. The OCD website, under "Frequently Asked Questions", states that orders are issued three to six weeks after a hearing. Cimarex states that the Order was available on the Division website the week after it was entered. Cimarex also claims that it acted in reliance on the Order, and the lack of an appeal, to expend over \$1.2 million on drilling and development activities that were authorized by the Order. Those activities involved several additional filings with the Division which were also available for viewing on the Division website.

6. The courts have determined that the only time they can entertain an appeal that is not timely filed is when there are "unusual circumstances beyond the control of the parties". *Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, ¶18, 148 N.M. 692, 242 P.3d 259 (quoting *Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994)). An example of "unusual circumstances beyond the control of the parties" is "error on the part of the court". *Schultz*, 2010-NMSC-034 ¶23. Such error occurred in the *Trujillo* case where two pro se parties appeared before a Magistrate Court judge who told them that he would call the parties back to announce his decision. The Judge did not call the parties back and instead entered an order. However, Serrano did not receive the order until after the appeal deadline had passed; he filed an appeal immediately but it was several weeks after the deadline. *Trujillo*, 117 N.M. at 275. The Supreme Court determined that "[o]nly the most unusual circumstances beyond the control of the parties...warrant overlooking procedural defects", and remanded to determine if the actions of the magistrate court caused the late filing. 117 N.M. at 278.

7. Nearburg does not cite any cases where the courts have allowed appeals more than two months after a deadline. In *Chavez v. U-Haul Co.*, 1997-NMSC-051, 124 N.M. 165, 947 P.2d 122, the Supreme Court reviewed two untimely appeals. In one case, involving an appeal that was faxed to the court on the final day of the appeal period but arrived 58 minutes after the court closed, the Court allowed the appeal. But in the other case, where the appeal was filed thirty days late, the appeal was dismissed. "On these facts, the need for efficient administration of justice outweighs the right to an appeal". 1997-NMSC-051, ¶ 26.

8. The Commission finds that Nearburg had entered an appearance in the Division proceedings and was therefore entitled to be sent a copy of the Division Order. The status of Nearburg is supported by the Division Order and by the transcript of the hearing. There is not, however, substantial evidence to support Nearburg's claim that it did not receive timely notice of the Division's Order. The only evidence is the claims made in Nearburg's pleadings.

9. However, even assuming that Nearburg did not timely receive a copy of the Division's Order, the Commission finds that, in this situation, the filing of a Motion for Leave to File an Application more than two months after the deadline is not justified by "unusual circumstances beyond the control of the parties". Unlike *Trujillo*, where the pro se parties relied on the Judge's statement that he would recall the parties to announce


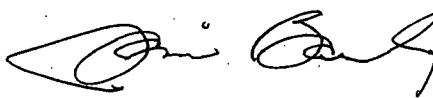
his decision, the parties here knew that the Division would issue an Order directly and would post the Order on the Division's website. The Division's website is well known to operators and attorneys in the oil and gas field. The failure of Nearburg and their counsel to check the website or contact the Division for three months are activities that were well within their control.

10. The Commission concludes that it lacks the discretion to excuse such a lengthy delay in filing an appeal. Even if the Commission could find "excusable neglect" (a test which applies to Rule 60(B) motions and not to an untimely appeal), the Commission would have to consider the prejudice to the other party, which in this case has expended considerable amounts in reliance on the Division Order, and would be unable to find excusable neglect. See *Kinder Morgan CO2 Company, L.P., V. State of New Mexico Taxation and Revenue Department*, 2009-NMCA-019 (2008).

NOW THEREFORE the Commission denies the Motion for Leave to File Application for Hearing De Novo filed by Nearburg.

Done in Santa Fe, New Mexico, this 14th day of May, 2012.

STATE OF NEW MEXICO
OIL CONSERVATION COMMISSION


ROBERT BALCH, Member
SCOTT DAWSON, Member
JAMI BAILEY, Chair

SEAL