



The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 15<sup>th</sup> day of November, 2011. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

**STATEMENT OF THE CASE**

Linn appeals the ALJ's recommendation to grant McMurtrey's Motion to Produce.

McMurtrey filed its Motion to Produce on 10-24-11 requesting the Commission, pursuant to OAC 165:5-11-1, for an order requiring Linn, the operator of the captioned well, to produce for inspection and copying, but no later than five (5) days after service of an order of production, the following documents and well information related to the Taylor-Heath #1 well: (1) the Pay deck containing the names and addresses of working interest owners, overriding royalty interest owners and royalty owners in said well and in the Basal-Cherokee Sand common source of supply underlying said captioned land; and (2) the monthly production of oil, gas and water for the time period of January 1, 2010 through September 30, 2011. McMurtrey believes this information will be of assistance to the Commission in order to determine the issues. McMurtrey believes it is also necessary for McMurtrey to properly prepare for the upcoming merit hearing.

Initially McMurtrey had requested in their filed application on 10-21-11 that the Commission enter an order: (a) vacating Order No. 40711 as to the Basal-Cherokee Sand common source of supply; (b) establishing 160-acre drilling and spacing units for the production of gas and gas condensate from the Basal-Cherokee Sand common source of supply underlying Section 2, T26N, R12W, Alfalfa County, Oklahoma; and (c) designating the Taylor-Heath #1 well as the unit well for the SE/4 of Section 2 for the Basal-Cherokee Sand common source of supply.

The Commission, by Order No. 40711, dated October 9, 1959, established 640-acre drilling and spacing units for the production of gas and gas condensate from the Basal-Cherokee Sand common source of supply underlying the captioned land. Since the date of said order, McMurtrey alleged there had been a change in conditions or knowledge of conditions in the area which necessitated amending said order by deleting there from said common source of supply underlying said area. McMurtrey alleged that the Basal-Cherokee Sand is a prospective common source of supply lying within Section 2, T26N,

R12W, Alfalfa County, Oklahoma and it will be productive primarily of gas and gas condensate. Thus a 160-acres would be an appropriate drilling and spacing unit and that one well will adequately and effectively drain and recover producible hydrocarbons underlying such area. Further, McMurtrey believes the Taylor-Heath #1 Well located in the C NW/4 SE/4 of Section 2 should be designated as the unit well for the 160-acre unit comprising the SE/4 of Section 2 for the Basal-Cherokee Sand common source of supply.

### **REPORT OF THE ALJ**

(1) **ALJ Michael L. Decker** reported that the Motion to Produce concerned the pay deck containing the names and addresses of working interest owners, overriding royalty interest owners and royalty owners in the Taylor-Heath #1 well in the Basal-Cherokee Sand common source of supply. They also requested monthly production of oil, gas and water from the well for the time period of January 1, 2010 through September 30, 2011. In both instants the ALJ recommended that the Motion to Produce be granted. With regard to the addresses of the parties that are receiving payment, it is a very common request in the course of hearing a motion for the applicant seeking approval of the Commission, concerning an emergency application involving spacing or increased density, to have their land witness testify of the addresses that are obtained by the operator from the pay deck. The operator has the pay deck and the operator knows that the mineral interest owner is being paid and therefore this list is valid for notice. This is a common way that people justify the validity of their notice and this is a business record which is commonly used in that regard. It is therefore relevant and valid for McMurtrey to request copies of the pay deck. The applicant is trying to make sure that the people received proper notice at the correct addresses. As to those who have the right to share in production the requested information concerning monthly production of oil, gas and water for the time period of January 1, 2010 through September 30, 2011 is not protested by Linn and will be provided by Linn to McMurtrey.

### **POSITIONS OF THE PARTIES**

#### **LINN**

1) **Roger A. Grove**, attorney, appeared on behalf of Linn, objects to providing the pay deck containing the names and addresses of working interest owners, overriding royalty interest owners and royalty owners in the Taylor-Heath #1 well in the Basal-Cherokee Sand common source of supply because this is not the standard for establishing proper notice and the correct

addresses of mineral interest owners. The standard is to examine the court clerk public records to determine who the current proper owners are.

2) Mr. Grove stated he had done a number of title opinions where the operator will provide the pay deck of an existing well and he will find there are many people that sold their mineral interests years ago because they never bothered to notify the operator. The operator is only going to know if someone notifies them of a transfer of interest. The operator is not out checking the records in the county. As applicants they have a duty to hire a land person to check the record to determine the parties that are entitled to receive notice. What they are wanting Linn to do is to short circuit their responsibility. McMurtrey has stated that they are aware of some split ownership and that they are going to have to update some things. If they are going to do that then why do they need the information from Linn. If Linn's records show some people that don't own of record, then they are not entitled to notice. The rules are clear that the statute says that all parties that are entitled to share in production are entitled to notice. That is obviously owners of public record not of the internal records of the operator. McMurtrey's duty therefore to provide proper notice is to go out and check the court record and find out who the proper owners are and then give them notice. McMurtrey is trying to make the party that they are filing this application against, Linn, do all the work. They are trying to despace an existing well that has been producing for 50 years or so, the Taylor-Heath #1 well. This well was completed on December 6, 1957. So McMurtrey in effect is attacking the operator situation trying to form new spacing. However they want Linn to provide the information they need to provide proper notice, which is not appropriate.

3) Even if Linn provides them with the pay deck and names and addresses, they still have a duty to go out and check the court records as to who the proper parties are. In fact their application states that they have made a bona fide effort to reach and notify and locate the whereabouts of each respondent or their heirs, executors, administrators, trustees, successors, devisees or assigns, if any. The application states that McMurtrey has conducted a diligent and meaningful search of the local county, assessor records, county treasurer records, county deed records regarding the property involved for return addresses on recorded instruments, county probate records and city and county telephone directories and other sources of such information to locate the whereabouts and mailing address of each respondent. If McMurtrey has done all that then why do they need the pay deck. The only party they listed in their application is Linn.

4) The second aspect of Linn's objection is that the pay deck also includes the quantum of interest owned by the various parties. That is certainly nothing that needs to be provided to McMurtrey.

5) Discovery is to obtain relevant information concerning the issues in the case. The issues in this case are whether or not the 640 acre spacing should be changed to 160 acre spacing. Notice is not an issue in terms of the relevant issues to be determined by the Commission. Notice is an element of the case that has to be proven to vest this Commission with jurisdiction but it's certainly not an element of the case in terms of an issue regarding the proper spacing of the common source of supply in Section 2.

6) Therefore, Linn thinks that the request for the pay deck goes beyond relevant information as it doesn't relate to an issue in the case. Even if they are entitled to the listing of the parties that are entitled to production they shouldn't get the pay deck which includes additional information other than the names and addresses of the parties. McMurtrey has the duty to go out and check the records and they certainly don't have the right to the quantum of interest that is shown on the pay deck.

**MCMURTREY**

1) **Gregory L. Mahaffey**, attorney, appeared on behalf of McMurtrey, stated that the purpose of discovery in any case is to facility speedy trial. McMurtrey doesn't want to get to the protest docket and have people come from out of town and have Mr. Grove say that McMurtrey missed an overriding royalty interest; a production payment owner; or a back-in owner. There are many times when a landman who is supposed to do due diligence missed a mineral owner interest or missed an override owner.

2) Pay decks are not proprietary. In fact pay decks are a common element of what the landman will use in stating that he has given proper notice. Usually the pay deck is some of the best evidence of who owns what, because it is who you are paying the revenue to.

3) McMurtrey believes that the applicants represent 100% of the mineral owners. They have hired a local lawyer in Alva and he has checked the title. McMurtrey has hired another landman who is checking the title but they want to compare that to the Linn pay decks. McMurtrey disagrees with Mr. Grove, Linn, that the quantum of interest is not relevant. McMurtrey suspects that when there is a trial, Linn will say that they have a certain quantum of interest that is opposed to this spacing and McMurtrey will say that they have a certain quantum of interest, Usually the quantum of interest by the opposing parties is an influence on the ALJ. In looking at correlative rights the court is influenced by how many people are supporting this application for spacing and how many people are opposed to it.

4) If the quantum of interest issue is an important issue to Linn, then McMurtrey is more interested in the names and addresses of the parties than the quantum of interest.

5) If there is a production payment, a net profit's interest or nonconsent interest those are things that are not able to be discerned from the record ownership. They could have had a workover operation and have somebody that's gone nonconsent. There are different things that could be in the pay deck that may or may not be of county court record.

6) Mr. Mahaffey has made frequent requests in other cases concerning the providing of the pay deck which have consistently been granted by the Commission. If this well has been producing as long as it has, then the operator's pay deck is a valuable source of information. While McMurtrey doesn't think the quantum of interest is proprietary, if that is an objection by Linn then McMurtrey would not be opposed to not providing that and requests Linn to only provide the names and addresses of the parties that payments have been made to. McMurtrey has hired a landman to do some title work, but McMurtrey doesn't want to get to trial and have Linn's landman say that their record check does not comply with the pay deck and therefore dispute notice. Linn's landman at the protested hearing will most likely either confirm or dispute McMurtrey's notice relying on the Linn pay deck. Therefore, McMurtrey wants to have that information that is contained in Linn's pay deck.

### **RESPONSE OF LINN**

1) Mr. Grove stated that McMurtrey's primary concern is the element of surprise that Linn would raise a defect in notice. McMurtrey is apparently having title checked by their landman. If McMurtrey wants to file their amended application listing who they believe are the owners based on their review of the record, Linn will agree that they will provide McMurtrey with the names and addresses of anybody that McMurtrey missed that Linn has listed in the pay deck. Linn however still feels that it is not Linn's duty to provide McMurtrey with the names and addresses of people from their own pay deck that McMurtrey can find by looking at the court records.

2) Linn still feels that it is not their obligation to provide McMurtrey with the names and addresses up front. If McMurtrey is doing the work then let them file an amended application and then Linn will agree to provide them with names that McMurtrey has missed that Linn has in their own records.

**RESPONSE OF MCMURTREY**

1) Mr. Mahaffey states that record addresses listed are sometimes not current, whereas the pay deck would have current addresses showing the names and addresses of people that received payment from the operator Linn.

**CONCLUSIONS**

**The Referee finds that the Oral Report of the Administrative Law Judge should be affirmed.**

1) The Referee finds that the ALJ's recommendation to grant the Motion to Produce is in accordance with the weight of the evidence, prior interpretations of the Commission's discovery rules and free of reversible error. McMurtrey's request for production of documents does go toward the information and data that McMurtrey must present to establish jurisdiction and a prima facie case for its spacing application. However, that does not detract from McMurtrey's right to pursue discovery under the Commission rules, if its actions comply with those rules.

2) McMurtrey is requesting the pay deck containing the names and addresses of working interest owners, overriding royalty interest owners and royalty owners in the Taylor-Heath #1 well and in the Basal-Cherokee Sand common source of supply underlying Section 2. The monthly production of oil, gas and water for the time period of January 1, 2010 through September 30, 2011 for the Taylor-Heath #1 well was also requested by McMurtrey but was not protested by Linn and will be provided by Linn to McMurtrey.

3) Using the pay deck to establish the names and addresses of working interest owners, overriding royalty interest owners and royalty owners is a very common practice at the Commission by land witnesses concerning drilling and spacing units. This method is used to justify the validity of notice in these proceedings.

4) OCC-OAC 165:5-11-1(b)(3) provides in relevant part:

(3) An order pursuant to this subsection may require production of any document not privileged which constitutes or contains evidence relevant to the subject matter of the cause, or may reasonably lead to such evidence. Business records shall not be deemed privileged as such; but confidential business records and information will be protected from disclosure

except where directly relevant to the issues in the cause.

In the case of *Boswell v. Schultz*, 175 P.3<sup>rd</sup> 390 (Okl. 2007), the Supreme Court determined:

The purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aid in their concealment.

In State ex rel. *Protective Health Services v. Billings Fairchild Center, Inc.*, 158 P.3<sup>rd</sup> 484 (Okl.App. 2007), the Court of Appeals determined:

Civil trials no longer are to be conducted in the dark. Discovery, consistent with recognized privileges, provides for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5<sup>th</sup> Cir. 1978). "The aim of these liberal discovery rules is to 'make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'"...

That is simply what is sought here and the request is in conformance with the Commission's own discovery rule, OCC-OAC 165:5-11-1(b)(3). Clearly under the legal rules concerning discovery, a party may discover any document that is not privileged which constitutes or contains evidence relevant to the subject matter of the cause, or may reasonably lead to such evidence.

5) It is clear that the data sought by McMurtrey constitutes a request for discovery regarding matters that are not privileged and are relevant to the subject matter involved in the pending McMurtrey application. The request is in accordance with Commission's discovery rules and the Oklahoma Discovery Code. See 12 O.S. Section 3226. It is relevant regarding the notice requirement of mineral owners that have the right to share in production.

6) The information sought is not proprietary information or confidential information. This is the type of data that is of public record or within a company's files that is normally agreed to be divulged upon request for production of documents and it is used by land men to verify proper notice being given to mineral owners. Some of the best evidence would be who the operator is paying the revenue to. The Referee agrees with McMurtrey that where there is a production payment or nonconsent interest, those are things

you really can't tell from record ownership. There are different things that could be in the Linn pay deck which are not of record. The Taylor-Heath #1 well has been producing for over 40 years and the best evidence would be the operator's pay decks. The quantum of interest is not proprietary. The Referee understands that McMurtrey is going to hire people to check the title, but at the hearing McMurtrey does not want to have their witness state who the owners are and then have the Linn witness state that their pay deck does not show the same interest and therefore dispute the notice by McMurtrey.

7) For the above stated reasons the Referee finds the Oral Report of the ALJ should be affirmed.

**RESPECTFULLY SUBMITTED THIS 1<sup>st</sup> day of December, 2011.**

  
PATRICIA D. MACGUIGAN  
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy  
Commissioner Anthony  
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