

**BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA**

FILED
MAY 09 2011

COURT CLERK'S OFFICE — OKC
CORPORATION COMMISSION
OF OKLAHOMA

APPLICANT: CHESAPEAKE OPERATING, INC. AND)
CHESAPEAKE EXPLORATION, L.L.C.)

CAUSE CD NO.
201003066

RELIEF SOUGHT: POOLING)

LEGAL DESCRIPTION: SECTION 24)
TOWNSHIP 21 NORTH,)
RANGE 25 WEST OF THE IM)
ELLIS COUNTY, OKLAHOMA)

APPLICANT: MEWBOURNE OIL COMPANY)

CAUSE CD NO.
201003652

RELIEF SOUGHT: POOLING)

LEGAL DESCRIPTION: SECTION 24)
TOWNSHIP 21 NORTH,)
RANGE 25 WEST)
ELLIS COUNTY, OKLAHOMA)

REPORT OF THE OIL AND GAS APPELLATE REFEREE

These Causes came on for hearing before **Michael Norris**, Administrative Law Judge ("ALJ") for the Corporation Commission of the State of Oklahoma, on the 20th and 21st day of October, 2010, at 8:30 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Richard K. Books**, attorney, appeared on behalf of applicant, Chesapeake Operating, Inc. and Chesapeake Exploration, L.L.C. ("Chesapeake"); **Richard A. Grimes**, attorney, appeared on behalf of Mewbourne Oil Company ("Mewbourne"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The ALJ filed his Report of the Administrative Law Judge on the 11th day of February, 2011, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 21st day of March, 2011. After considering the arguments of counsel and the record contained within these Causes, the Referee finds as follows:

STATEMENT OF THE CASE

MEWBOURNE APPEALS the ALJ's recommendation that the application of Chesapeake filed in Cause CD No. 201003066 and the application of Mewbourne filed in Cause CD No. 201003652 be granted with Chesapeake as the initial unit operator and Mewbourne as alternate operator with certain conditions.

The issue in these Causes is the designation of an operator from the combined applications of Chesapeake and Mewbourne for the drilling of a horizontal well in the Pennsylvanian Virgil Series and the Pennsylvanian Missouri Series. The evidence demonstrates very similar activities, equal ownership (50/50), distinct drilling and completion methods and very competent operators. The parties are very closely qualified in each of the areas which greatly increases the difficulty of designating an operator.

MEWBOURNE TAKES THE POSITION:

(1) Mewbourne takes exception to a portion of the Initial Report of the ALJ. This protest focuses upon the issue of the designation of unit operator. Historically, the Commission has decided such disputes by using a balancing test. The Commission will weigh the relative advantages or disadvantages applicable to the contesting parties in regard to operations. A generally well known set of factors are compared to ultimately decide which company is most qualified to act as operator. However, those factors have never been equally weighed. Ownership of working interest rights has always been given the greatest weight. Typically, well costs are considered as one of the remaining important factors, with the experience factor of the individual protestant generally following in order. Timing of leasehold acquisition and of well proposals, often denominated as "preparedness" is another factor which is considered. Finally, the ability of a party to operate wells can be a factor, although that factor is less likely used between experienced companies. While individual cases may bring up other factors which are specific to a cause, the foregoing analysis is usually employed by the Commission in its ultimate resolution of the protest.

(2) The evidence presented to the ALJ revealed that both Mewbourne and Chesapeake own a 50% working interest in Section 24. Clearly, that fact required the ALJ to complete the balancing test described above. Mewbourne strongly disagrees with the methodology used by the ALJ in performing that test.

(3) Both Mewbourne and Chesapeake are experienced operators in the drilling of horizontal wells. Neither party disputed the experience or ability of the other to operate. The "ability" factor which is rarely employed in operator disputes, was not ever asserted as an issue in this protest. In fact, the ALJ found on page 16 of his report that both Mewbourne and Chesapeake have equal expertise; equal operating personnel; equal available facilities; and, equal documented exploration activities. That finding should have resulted in no change in the balancing scale so as to tilt operations toward either party.

(4) The one area in which the ALJ was presented significant differences between Mewbourne and Chesapeake was well costs. Mewbourne proposed its well to Chesapeake with an AFE showing \$2,919,400.00 as completed well costs for the initial horizontal well. That was the estimated cost recommended by Mewbourne at the hearing. Chesapeake proposed its well to Mewbourne with an AFE showing \$4,149,400.00 as completed well costs. At the hearing Chesapeake presented a revised AFE showing completed well costs of \$3,956,685.00 (the lower amount resulting from Chesapeake's arbitrary decision to take out their normal 20% contingency amount and substitution of a 5% contingency amount). Even using Chesapeake's lower AFE, its proposed well costs are \$1,000,000.00 higher than those of Mewbourne. That fact clearly should have decided this case. However, the ALJ inexplicably assigns no weight to that factor. In a most perplexing ruling, the ALJ only notes that Chesapeake's higher costs are the result of the difference in completion technology (Chesapeake is using liner and cement while Mewbourne is using an open hole completion technique). However, he never factors in such irrefutable element in his decision.

(5) Both parties undertook to justify their choice of completion technology and put on evidence in that regard. However, the ALJ found no basis for criticism of either choice. He did not rule that either technique was inappropriate. Yet he never factors in the \$1,000,000.00 difference in costs. By his recommendation Mewbourne must pay \$500,000.00 extra to have Chesapeake complete a well with a technique it does not find to be superior to that proposed to be used by Mewbourne.

(6) The ALJ ultimately justifies his conclusion by finding that "bona fide exploration activity" tilts the scale to Chesapeake. He found Chesapeake has more wells in the area and proposed their well first. Upon that set of facts he recommends Chesapeake as operator.

(7) If "wells in the area" means anything, such facts go to establish ability or experience of a given party. This ALJ has already found that neither Mewbourne nor Chesapeake can be distinguished based on those factors.

(8) Chesapeake's well proposal preceded Mewbourne's by 35 days. If that factor is enough for an ALJ to counterbalance a \$1,000,000.00 difference in well costs, then this Commission needs to rethink the template it provides to an ALJ for use in deciding an operational dispute. This Commission is obligated to avoid waste, including economic waste. The fact of well proposal dates just does not overcome the waste issue presented herein.

THE ALJ FOUND:

(1) It is the ALJ's recommendation that the application of Chesapeake and Mewbourne be approved with Chesapeake as the initial unit operator and Mewbourne as alternate operator with certain conditions.

(2) The order shall provide for a commencement period of 180 days for the initial well. Chesapeake will be the designated operator for the first 60 days (as requested by Chesapeake), which will start from the day the order issues. In the event Chesapeake has not commenced operations for the drilling of the initial well within 60 days, then Mewbourne will become the designated unit operator on the 61st day. If Chesapeake timely commences, pursuant to the order to issue, then it will continue to be the designated unit operator for the initial and any subsequent wells. Similarly, in the event Mewbourne becomes the operator pursuant to the conditions described herein, then it will continue as operator for the initial and subsequent wells for unit development.

(3) The designation of an operator was a difficult choice. Both parties meet the factors normally considered in these causes. The parties have equal ownership; expertise in the drilling of horizontal wells; experienced operating personnel; available facilities and documented exploration activity.

(4) The parties presented extensive testimony concerning the costs in their respective AFEs. This testimony indicated that these costs were comparable except for the well completion methods. Chesapeake's methodology is substantially more costly than that of Mewbourne. Chesapeake offered evidence and exhibits that its method results in better production and greater ultimate recovery. Mewbourne offered the same indicating its production and ultimate recovery were similar to Chesapeake's. Chesapeake's experts believe that the extra completion cost of \$1 million is justified and Mewbourne's experts for Mewbourne dispute that assertion.

(5) Mewbourne asserted the fact that Chesapeake utilized a different contingency percentage in its AFE's depending on if it is prepared for an uncontested cause or a protested matter. Chesapeake uses a 20% contingency

for uncontested causes and a 5% contingency in protested matters. Mewbourne takes issue with this procedure. Chesapeake defends this practice stating that most of its competition utilizes 5% and Chesapeake changes the contingency so you're able to have comparable AFE's for a protested case. Chesapeake wants to compare apples to apples. Chesapeake noted that the percentage is clearly denoted on each AFE and is its standard practice. This issue is not germane to the designation of an operator. However, this practice may cause questions in future uncontested matters.

(6) Both parties elicited testimony concerning cost comparisons, production studies, return on investment and well development. The parties demonstrated that both are experienced and competent entities. It is noted that Mewbourne expended a substantial amount of time to demonstrate that its meticulous analysis and overview procedures result in very efficiently produced wells. Mr. Owens did an excellent job in explaining these ongoing evaluations intended to ensure that Mewbourne continues to produce quality wells.

(7) There is a wealth of history and decisions establishing the major factors considered by the Commission in the designation of an operator. The importance of these factors and their consideration are documented in "A Primer on Forced Pooling of Oil and Gas Interests in Oklahoma", 50 Okl. B. J. 648 (1979) by Charles Nesbitt.

(8) Regarding the most important consideration from the Primer, working interest ownership, each of the parties own 50 percent. With the ownership factor being equal, the second factor in importance obviously becomes the primary concern. This is bona fide exploration activity. The evidence supported that Chesapeake has more wells and/or activity in this area. In this particular unit Chesapeake demonstrated that it proposed its well in this section prior to Mewbourne. Further, Chesapeake has additional wells in the surrounding sections and more proposed wells there than Mewbourne. Chesapeake prevails on this factor.

POSITIONS OF THE PARTIES

MEWBOURNE

1) **Richard A. Grimes**, attorney, appearing on behalf of Mewbourne, stated that the philosophy of the Commission is not to retry the case for the ALJ. Though there are appeals where one party believes the ALJ misinterpreted the facts or did not heavily weigh them, this is not such a case. What is of concern is how the ALJ made his decision based on the facts. Historically, the Commission has resolved operator fights by applying a

balancing test to determine which side has the scale tipped in its favor. This test is composed of a number of factors consistently considered and considers unique factors as an individual case may warrant. Here, there are no additional factors beyond the test's basic framework to be considered.

2) The unit involved is 50% owned by each company. Additionally, Mewbourne and Chesapeake have comparable drilling abilities and experience especially as it pertains to drilling horizontal wells in the Cleveland. What was seemingly an issue, but became a non-issue, was the companies' different completion techniques. Mewbourne has always drilled and completed its wells with an open-hole completion and Chesapeake has almost completed its wells using liner and cement. Despite extensive testimony by both parties as to the preferability of the method they employ, the ALJ did not find one completion technique more appropriate than the other. Rather, the ALJ acknowledged both sides did a good job in convincing him that the two techniques were appropriate.

3) Despite the parties' acreage and drilling abilities being equal, and the fact that neither parties' completion technique is inappropriate, the ALJ based his findings in favor of Chesapeake on the issue of bona fide exploration activity. The ALJ supported this by acknowledging Chesapeake proposed its well in the section before Mewbourne and because Chesapeake has more wells and proposed wells in the surrounding sections. Had all other factors been equal this may have been an appropriate decision. However, the analysis starts with ownership. If ownership is equal then the parties' abilities to operate is weighed. Where the parties' ability to operate is equal, as here, the next factor to be weighed is well costs.

4) Mewbourne's well cost is \$2.9 million whereas Chesapeake's well cost is \$3.9 million. The reason for the \$1 million difference is the completion techniques the parties employ because Mewbourne's open-hole completion is cheaper than Chesapeake's liner and cement completion. Nobody disputes this \$1 million difference. What is of moment is that the ALJ says virtually nothing about this cost discrepancy and it was not taken into consideration. In fact, most of the ALJ's discussion pertaining to the cost differential relates to Chesapeake's modified well cost as a consequence of this being a contested proceeding which is not an issue on appeal to be decided by the Appellate Referee.

5) The significance of the cost discrepancy is that Mewbourne, owning 50% of the working interests, will be asked to pay \$500,000 more for Chesapeake to drill the well than it would have to pay were it doing the drilling. The instant case is a prime example of why cost should be the second most important factor in an operator fight once you get past experience. Though there are instances where one company is better able to drill the well than is the other company, this is not such a case. In fact, these companies took the

witness stand and expressed enough credit to the other company as to establish that their abilities to drill were not in question. Despite the cost differential the ALJ did not give it weight in deciding the case.

6) It is undisputed that Chesapeake' well proposal preceded Mewbourne' by 35 days. This should not be considered an appropriate basis upon which to establish that Chesapeake is more prepared to drill than Mewbourne considering Chesapeake had not even staked its location before trial. Additionally, no witness could identify the specific location intended to be used by Chesapeake. Moreover, Mewbourne had already staked its intended location and had already presented its location exception application before it had begun the protested pooling. Accordingly, it does not follow that the ALJ gave deference to the factor of Chesapeake' preparedness. Seemingly the ALJ gave Chesapeake initial operations because of its level of preparedness even though there was no suggestion that Mewbourne was unprepared. Rather, neither Chesapeake's nor Mewbourne' preparedness was at issue.

7) In order to make an operations determination it is paramount that the ALJ balance the factors considered in making an operation decision including a consideration of the parties' operation costs. In looking to the parties' bona fide exploration activities, each side has ample experience drilling horizontal Cleveland wells. The Cleveland is a wide-spread sand that traverses this area on a large regional basis and not just in the nine-unit section. Insofar as Mewbourne operates more in the township itself, and because the Cleveland is wide spread, Mewbourne has more operations than Chesapeake. Despite Mewbourne having more operations in the general area, that is not a basis upon which to decide the case because both parties have the ability and experience to drill the well at issue. Even if all other factors were equal, Mewbourne disputes bona fide exploration activity as a methodology for deciding the case.

8) Reversing the ALJ is proper in this case because his finding that the job could be done efficiently for \$1 million less must be considered and he seems to have ignored this in making his decision. The ALJ's reliance on Charles Nesbitt's primer is misplaced because the Commission has an established methodology for deciding cases like the instant case. It is not as if the primer suggests ignoring a \$1 million difference and instead looks to bona fide exploration activity. Rather, such is a guideline that Charles Nesbitt thought may be an appropriate method to be used by the Commission in deciding cases. Since the Commission is the body to decide this case it needs to consider the fact that there is no justification for \$1 million difference in cost for exactly the same efficiency in a well.

CHESAPEAKE

1) **Richard K. Books**, attorney, appearing on behalf of Chesapeake, stated that the ALJ neither ignored the \$1 million difference nor did the ALJ justify the \$1 million difference for the same efficiency. Chesapeake believes its completion technique is vastly superior, that it is more productive and that it prevents waste. Mewbourne disagrees. The ALJ did not decide which completion technique should be used because he is not in the business of making such decisions. Chesapeake put evidence in the record that it drills wells cheaper per foot than Mewbourne and the \$1 million difference is a consequence of the completion technique. If the ALJ takes the lesser AFE, regardless of whether it is a better completion, then he is picking the completion. By extending Mewbourne's argument, it ultimately suggests that the party whose AFE is less should prevail regardless if its well prevents waste or if it is less productive.

2) Both parties agree that there is little to pick at in the ALJ's report. Since ownership is equal, other factors need to be assessed in making a decision. Chesapeake has other wells or proposed wells in the nine-unit area whereas Mewbourne does not. In terms of risk dollars, Chesapeake is taking risks in its various operations in the nine-unit area and Mewbourne is not taking such risks since it does not have any other wells or proposed wells in that area. Even if Mewbourne has taken like risks in other parts of the state, the test is who is developed in the area at issue and that is Chesapeake not Mewbourne. Another consideration is the support given by other parties. Here, the working interest owners are divided 50/50 and six mineral owners support Chesapeake but none support Mewbourne.

3) Another test looked to is the moving party. Here, Chesapeake was the first to propose, first to file and it could get the job done in 60 days even though it is assuming risk in other nine-unit area sections. Alternatively, Mewbourne is unable to do the job in 60 days, is adamant about having 180 days and is unwilling to have an equal order. Mewbourne's argument is that it has been in Ellis County for 30 years and that it leased before Chesapeake. Even still, it was Chesapeake that first proposed, was first to file, that can drill in 60 days and that agrees to do so. Despite the fact that Mewbourne says it is ready to go, it is not. This is evident by the fact that Mewbourne demanded 180 days whereas Chesapeake needs only 60 days.

4) The Chesapeake drilling engineer has done 60 horizontal wells and 15 Cleveland horizontal wells. He testified to Chesapeake's operations and to the fact that the drilling costs at issue here are identical to those operations. Cost typically refers to those situations where two parties are undertaking the same operation. Accordingly, if two parties are undertaking the same operation it is relevant to look at one AFE if it is drastically different than the other so as to

prevent wasteful spending. However, the Commission has not traditionally selected the operation to be performed by the operator or where it is to be performed. What Mewbourne is asking is that the cheaper operation be preferred even though it will not prevent waste.

5) Even though testimony from both drilling engineers indicates that the drilling phase is very similar and that drilling costs are almost identical, Chesapeake's engineer testified that the completions are very different. Mewbourne essentially does its completion in one day where it fracs the whole well and hope it cracks somewhere. Alternatively, Chesapeake uses several stages where each stage uses clusters of fractures in hopes of getting five fractures per stage. If eight stages are used this results in 40 fractures which Chesapeake believes is a superior technique.

6) Chesapeake has employed this completion technique in other sections of the nine-unit area indicating that it believes this completion technique yields better results. Further, a study conducted by Mr. Bruce Heath, Chesapeake's reservoir engineer, revealed that Chesapeake's completion technique results in twice as much oil and gas recovery and it prevents waste for the additional \$1 million cost. Even though Mewbourne's technique results in greater initial rates, it drops substantially. Waste prevention is not concerned with waste so much as it is about recovery.

7) Mr. Bishop testified for Mewbourne that the fact Mewbourne took the first lease is important and should be a big factor. Additionally, the fact that Mewbourne has been in Ellis County for 30 years should be an important consideration. Despite the fact that Mewbourne took its lease first, it did not propose or file except in reaction to Chesapeake and at trial it needed 180 days. Mr. Bishop further testified that due to Mewbourne's lack of a nonoperating working interest in the nine-unit area that it has less information about the immediate vicinity. Based on this testimony, the ALJ believes that the fact Mewbourne took the first lease in this section should not be given as much importance as Chesapeake's proposal first, pooling first and drilling within 60 days. Chesapeake urges, and Mr. Bishop testified, that if risk dollars is defined as money spent drilling a well that Mewbourne has done nothing in the nine-unit area whereas Chesapeake has because it has drilled two wells in which it is paying 100% of the risk dollars.

8) Mewbourne's geologist testified that the nature of the Cleveland sand is heterogeneous, that it has thin beds and that the porosity and the permeability comes and goes. This testimony is significant because Chesapeake's technique will result in up to 40 fractures which will help communicate in this zone. Accordingly, if Chesapeake gets a good completion, it should get a better well. Mewbourne's engineer testified to his belief that Mewbourne's completions would be just as good because it gets better rates but did not focus on recovery or waste prevention. He further testified to the economics,

the time value of money and budget. Taken together this testimony indicates Mewbourne' s budgetary criteria to invest an additional \$1 million is not satisfied. This is problematic first because whether the cost meets Mewbourne' s criteria for time value of money should not be dispositive. Chesapeake is willing to take such a risk and invest and Mewbourne' s unwillingness to do so should not be a basis upon which to name it operator. Second, this is wrong because Chesapeake' s well will prevent waste.

9) Mewbourne' s engineer does not believe the extra \$1 million would be justified by Mewbourne' s management. Chesapeake is willing to risk the additional costs for additional recovery and to prevent waste whereas Mewbourne is not. This is what the ALJ is referring to in his report with respect to development. To accept Mewbourne' s argument that it should be operator because it has a lesser AFE would not be recognition of what is a better completion technique. Presumably that decision will not be made because that is not the business of the Commission unless it relates to protection of correlative rights.

10) The fact that Chesapeake has evidence of twice as much oil and gas production by employing its technique as opposed to Mewbourne' technique provides economic justification for it being operator. Mewbourne' s completion technique may be cheaper but that is because it uses a different technique and that technique yields different results. Here, there is evidence that drilling costs are almost identical and there is unrebutted testimony that Chesapeake drills wells cheaper per foot than Mewbourne. The ALJ did not ignore the \$1 million difference nor did he select a method the operator must use. The ALJ' s decision was seemingly made based on the evidence that the higher AFE would recover more costs.

11) Despite the fact that Mewbourne has been in Ellis County for 30 years, it only made its proposal in response to Chesapeake' s proposal. Likewise, Mewbourne only filed because Chesapeake filed. Mewbourne is unable to commit to drilling as quickly as Chesapeake is able to do so. Mewbourne has not spent any drilling dollars in the nine-unit area nor has it risked drilling dollars in connection with the nine-unit area as is evident by the fact it does not have any working interests there and thus lacks additional information about the operations in the immediate vicinity. Accordingly, ALJ Norris should be affirmed.

RESPONSE OF MEWBOURNE

1) Mr. Grimes stated that opposing counsel incorrectly suggests Mewbourne' s completion technique is akin to putting fluid in the ground to see

what it will fracture. Mewbourne's engineer has studied 600 horizontal wells, including non-Mewbourne wells. The purpose for the engineer studying these wells is to best understand how to drill and complete wells. The techniques employed by Mewbourne are the product of years of study to determine the best methodology. In contrast, Mr. Heath's study was three years old, little effort was taken to update it and he did not even look at Mewbourne wells. Despite the fact that Mewbourne's wells outrank other operators in its ability to complete wells using the open-hole completion, Mr. Heath ignored that and used wells provided by Chesapeake in his study.

2) This is an appeal of the ALJ's finding as to how he applied the facts to the law and not his findings of fact. The ALJ found that the AFE costs were comparable except for well completion methods where Chesapeake's completion methods are substantially more costly than Mewbourne's. Evidence indicated that Mewbourne's and Chesapeake's production and ultimate recovery are similar. The dispute lies in whether Chesapeake's extra completion cost of \$1 million is justified and Mewbourne disputes Chesapeake's purported justification. ALJ Norris tried the case and found no distinction between the two completion techniques and such a distinction should not be determined now because the issue is whether the facts were appropriately applied to the law.

3) Mewbourne's well is identical to that proposed by Chesapeake. It is not as if Mewbourne is proposing a vertical well and Chesapeake is proposing a horizontal well. The only difference between the two wells is the extra \$1 million cost of Chesapeake's completion technique. Therefore the issue is of efficiency and waste. To spend an extra \$1 million for a well the ALJ found to be just as efficient promotes waste. It is not as if Mewbourne is gerrymandering an AFE for a 400-foot lateral well to compare it to Chesapeake's 4000-foot lateral well. Rather, Mewbourne and Chesapeake are talking about the same well except Mewbourne can drill and complete it more efficiently and with less waste. What is more is other operators in this area are using open-hole completion. Chesapeake has made a decision to use liner and cement without even considering open-hole completion as a method for comparing efficiencies.

4) Bona fide exploration activity has nothing to do with completion technology. Mewbourne is running 13 horizontal wells simultaneously. Mewbourne knows what it is doing and Chesapeake knows what Mewbourne is doing. The ALJ found that Mewbourne knows what it is doing and that Chesapeake knows what Mewbourne is doing. Because Mewbourne can do the same job for \$1 million less than Chesapeake, Chesapeake should not be named operator.

CONCLUSIONS

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

1) The Referee finds that the ALJ's recommendations in his Report are supported by the weight of the evidence and free of reversible error. The ALJ recommended that Chesapeake would be the initial unit operator for the first 60 days of the commencement period of 180 days for the initial well. In the event Chesapeake has not commenced operations for the drilling of the initial well within 60 days from the date of the order to issue in these causes then Mewbourne will become the designated unit operator on the 61st day. If Chesapeake timely commences pursuant to the order to issue then they will continue to be the designated unit operator for the initial and any subsequent wells. Similarly in the event Mewbourne becomes the operator pursuant to the conditions described by the ALJ then Mewbourne will continue as operator for the initial and subsequent wells for unit development.

2) The ALJ is the initial finder of fact. It is the ALJ's duty as the finder of fact to observe the demeanor of the witnesses, assess their credibility and assign the appropriate weight to their opinions. *Grison Oil Corporation v. Corporation Commission*, 99 P.2d 134 (Okl. 1940); *Palmer Oil Corporation v. Phillips Petroleum Company*, 231 P.2d 997 (Okl. 1951).

3) In regard to the weight to be given opinion evidence, the Supreme Court stated in *Palmer Oil Corp. v. Phillips Petroleum Co.*, supra at 1005:

At the hearing herein the testimony adduced was chiefly that of petroleum engineers and geologists who testified on the basis of both personal surveys made and of an interpretation of the accumulated data in the hands of the Commission. The testimony of these experts was in direct conflict but that of each was positive upon the issue. Under the circumstances the objection is necessarily addressed to only the weight of the evidence. Under the holding of this court and that of courts generally, *Chicago, R. I. & P. Ry. Co. v. Pruitt*, 67 Okl. 219, 170 P. 1143; 22 C.J. 728, sec. 823, 32 C.J.S., Evidence, § 567, p. 378, the weight to be given opinion evidence is, within the bounds of reason, entirely for the determination of the jury or of the court, when trying an issue of fact, it taking into consideration the intelligence and experience of the witness and the degree of attention he gave to the matter. The rule should have peculiar force herein

where by the terms of the Act the Commission is recognized as having peculiar power in weighing the evidence. Since the evidence before the Commission was competent and sufficient if believed, to sustain the order we must, and do, hold that the order is sustained by the evidence and that the contention is without merit. *Ft. Smith & W. Ry. Co. v. State*, 25 Okl. 866, 108 P. 407; *Bromide Crushed Rock Co. v. Dolese Bros. Co.*, 121 Okl. 40, 247 P. 74.

4) The Referee notes that the Commission has always focused on a number of different factors in the award of operations. Charles Nesbitt in his article Nesbitt, *A Primer On Forced Pooling of Oil and Gas Interests in Oklahoma*, 50 Okl.B.J. 648 (1979) set forth a good review of the factors considered and the importance that the Commission attaches thereto. Mr. Nesbitt states:

DESIGNATION OF OPERATOR

A deceptively important provision of the pooling order is the designation of the operator of the proposed well. In most cases the applicant already owns the majority interest in the spacing unit, and is routinely named operator. However, there are notable exceptions where a spirited battle occurs between lessees over operations. The working interest ownership of non-participating pooled owners inures to the operator, at least in absence of a claim by other participants to share therein. A lessee who is promoting the proposed well for a carried interest, or similar remuneration, has a significant financial stake in being designated operator.

Several factors are considered in the selection of the operator, the most important being working interest ownership. All other things being equal, the owner of the largest share of the working interest has the best claim to operations. However, this is not always true, and other factors can outweigh majority ownership.

Second in importance is actual bona fide exploration activity. This is not a simple race to the courthouse, with the earliest applicant getting the nod,

but involves such matters as when a well was first proposed and by whom, whether the proposed well is part of a multi-well exploration program, whether a rig has been contracted for, and so on.

Other factors having a bearing on the final selection include the number of wells operated in the vicinity, the extent of developed and undeveloped lease ownership, the availability of operating personnel and facilities, a comparison of proposed costs of drilling and operating the well, and, rarely, the relative experience and competence of the contenders for operating rights.

As noted in said article, the ownership position of the parties and the actual bona fide exploration activity are the two factors of most importance.

5) The Referee notes that the ALJ addressed the factors usually considered by the Commission under the Nesbitt article. Mewbourne and Chesapeake have equal ownership (50/50), with six mineral owners supporting Chesapeake. The ALJ found that both parties have "expertise in the drilling of horizontal wells, experienced operating personnel, available facilities and documented exploration activity."

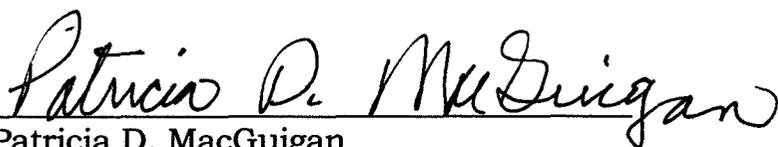
6) The ownership factor being equal in the present case, the second factor listed by Nesbitt is the bona fide exploration activity in the area. Chesapeake has more wells and activity in this area than Mewbourne. Chesapeake proposed their well in Section 24 prior to Mewbourne. Mewbourne made the present filing in response to Chesapeake's proposal. Mewbourne has not had any wells in the nine section area and has no working interest there, and therefore has less information about the immediate vicinity. Chesapeake is also willing to drill the proposed well within 60 days, while the testimony was that Mewbourne requested 180 days to commence drilling.

7) The testimony from Mewbourne's and Chesapeake's drilling engineers indicated that the drilling phase is very similar and the drilling costs almost identical. However, the completion techniques are very different. Chesapeake's methodology uses several stage of fracing where each stage uses clusters of fractures in hope of getting 5 fractures per stage. If 8 stages are used this results in 40 fractures which Chesapeake believes is a superior technique that costs an additional \$1 million than Mewbourne's Packers Plus system which fracs the entire lateral and flows the well back essentially in one day. Both Chesapeake and Mewbourne offered exhibits and evidence that both their methods resulted in better production and greater ultimate recovery.

8) The Referee notes that the ALJ is the one who observes the witnesses and assesses their demeanor and its effect on the award of operations. From experience the Referee knows that often during the presentation of the case the trier of fact will ascertain which owner should be named the operator based on the trier of fact's perceptions established by the witnesses in their presentation of their operations request. From the evidence before him the ALJ determined that Chesapeake is the primary mover in the unit and area and should be named operator. The Referee finds that the ALJ was presented with a close call concerning the award of operations. However, the ALJ had the opportunity to make his determination and determined that Chesapeake prevailed on the second most important Nesbitt factor and that Chesapeake should therefore be designated operator of the proposed well. Thus, the Referee recommends that the ALJ's award of operations to Chesapeake be affirmed.

9) It is also reasonable in the present circumstances that Chesapeake only be given the first 60 days of the initial 180 day period for commencement of the well which will start from the day the order issues. In the event Chesapeake has not commenced operations for the drilling of the initial well within 60 days then Mewbourne will become the designated unit operator on the 61st day. Whoever ends up the initial operator will be the operator for any subsequent wells.

RESPECTFULLY SUBMITTED THIS 9th day of May, 2011.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Cloud
Commissioner Anthony
Jim Hamilton
ALJ Michael Norris
Richard K. Books
Richard A. Grimes
Office of General Counsel
Michael L. Decker, OAP Director
Oil Law Records
Court Clerks – 1
Commission Files