

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 9th day of March, 2011. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

T&T APPEALS the Oral Report of the ALJ which denied their Motion to Dismiss the Eagle application based on their belief that the Commission had neither personal or subject matter jurisdiction to hear the cause. Briefs were filed after the Motion to Dismiss was heard with the ALJ rendering his Oral decision on January 12, 2011.

On March 27, 2007, Tower entered into a one-year lease agreement with Blackburn Properties, Inc. ("Blackburn") covering Tower's 157 gross acres in the subject unit. On November 14, 2007, Orca Resources, LLC ("Orca") filed CD 200707536 which sought to pool the working interests of various parties in the 640-acre unit established for the Misener-Hunton common source of supply. Blackburn was a named respondent in CD 200707535-T. Tower was not named as a respondent. By the time the application was recommended on March 27, 2008, the one-year primary term of the Tower/Blackburn lease had expired. On April 8, 2008, the Commission entered pooling Order No. 552381 in CD 200707536-T. Thereafter, Thistle acquired part of Tower's interest in the subject unit. On July 22, 2010, T&T filed petition CJ-2010-159 in Lincoln County District Court for quiet title action covering the working interest claimed by the subject parties. On September 27, 2010, Eagle filed the current application to interpret and clarify Order No. 552381, seeking to determine if the working interest of T&T was subject to pooling Order No. 552381. On October 27, 2010, the Lincoln County District Court found that the Commission has jurisdiction and authority to interpret and clarify pooling Order No. 552381 so as to make the determinations in connection with Cause CD 201004062-T, and entered an order staying the District Court case until the Commission made a ruling in this proceeding. Thereafter on November 4, 2010, T&T, appeared by special appearance, and filed this Motion to Dismiss the Eagle application which sought to interpret and clarify pooling Order No. 552381 and determine the continuing effectiveness of such order as to interests covered in Section 30, T15N, R4E, Lincoln County, Oklahoma.

T&T TOOK THE POSITION:

(1) Eagle's Application seeks to "change" or "amend" the contents of the Order No. 552381 by adding respondents, rather than interpret and clarify the Order,

which change or amendment represents a collateral attack on Order No. 552381 and thereby violates 52 O.S. Section 111.

(2) The Blackburn Lease was effective for a one year primary term. The Blackburn Lease expired by its own terms and expired prior to the commencement of any operations on the subject property under Pooling Order No. 552381 and prior to Pooling Order No. 552381 being issued by the Commission.

(3) Since it is unquestioned on the face of the application for pooling in CD No. 200707535 that T&T were not named as respondents and that Pooling Order No. 552381 did not list them as respondents, the OCC lacks jurisdiction to allow Eagle's attempt to back-door the inclusion of T&T and require them to be subject to a pooling order they were never a part of, without any due process in the original pooling, without any actual notice prior to the hearing on the pooling and without even being named. This is a basic element for securing jurisdiction, which cannot be met by Eagle at the Commission.

(4) The Commission lacks jurisdiction over T&T for the reasons stated, since, within the four corners of the pooling order, it is clear T&T were not, are not, and cannot now be bootstrapped into being subject to a pooling order without notice or due process. This is true, notwithstanding any language in paragraph 4(i) of the Application herein to the contrary, and the fact that the mineral interests of T&T became "open" or un-leased prior to Pooling Order No. 552381 issuing on April 8, 2008.

(5) Contrary to Eagle's allegation in paragraph 2 .6 of its Application T&T did not succeed to any respondent's working interest, nor did the oil and gas lease working interest pass by any operation of law.

(6) Eagle has an adequate legal remedy at law by filing a clean-up pooling and naming both T&T as respondents, rather than trying to capture their interests through a back-door maneuver without constitutional due process.

(7) The Commission, an agency of limited jurisdiction, has no jurisdiction to try title. See *Tucker v. Special Energy Corp.*, 187 P.3d 730, 733-734 (Okla. 2008), wherein the Court stated:

The Commission does not have the authority to determine the effect of its order on a legal title to property. *Nilsen v. Ports of Call Oil Co.*, 1985 OK 104, ¶14, 711 P.2d 98, 102; see also *S. Union Prod. Co. v. Corp. Comm'n*, 1970 OK 16, 465 P.2d 454. That is the proper role of the district court, as district courts have jurisdiction to resolve disputes over private rights.

Leck, 1989 OK 173, ¶7, 800 P.2d at 226. In this action to quiet title and receive an accounting, Plaintiffs have properly invoked the jurisdiction of the district court. Indeed, the Commission could not give the remedy Plaintiffs seek.

(8) It is abundantly clear from the record that T&T were not named as Respondents in the underlying Pooling action of ORCA before the Corporation Commission in CD No. 200707536. Minimum due process must be afforded T&T by way of actual notice and thereby an opportunity to be heard in conjunction with the underlying pooling proceeding for the Corporation Commission to have any jurisdiction over the interests of T&T. The record in CD No. 200707536 shows no notice was given to either T&T, as reflected both in the Exhibit "A", the respondents list, either as a named respondent or a curative party and T&T are not listed as respondents on the Exhibit "A" to the Pooling Order that issued in this Cause, so it stands to reason that Pooling Order No. 552381 has no force or effect as to T&T and their mineral interest. See *Cravens v. Corp. Comm'n*, 613 P.2d 442, 444 (Okla. 1980) in which the Oklahoma Supreme Court held:

It is generally held that administrative agencies may not deprive, nor may a statute empower them to deprive, a person of his constitutionally protected rights without notice and hearing...

See also *Union Texas Petroleum Corp, v. Corp. Comm'n, of Okla.*, 651 P.2d 652 (Okla. 1981) wherein the Oklahoma Supreme Court references a United States Supreme Court case and states at page 658:

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The opportunity to be heard is worthless without notification of the occasion requiring it, so that the affected individual may choose for himself whether to appear or default.

In addition, in its holding in *Union Texas Petroleum*, the Supreme Court stated:

As to Union Oil of California, however, the holding of the recent case of *Cravens v. Corporation Commission*, 613 P.2d 442, (Okla. 1980), is controlling. The record contains no notice of a mailing to this entity and thus the record demonstrates the Commission attempted to proceed against Union's interest in the absence of

jurisdiction over the person of that entity. Accordingly, the order's attempt to adjudicate the rights of Union Oil of California is ineffective, and a nullity insofar as it purports to affect its interests.

Union Texas at 659.

(9) T&T represent that the absence of notice and opportunity to be heard is established by reference to the judgment roll in the underlying pooling proceeding. A review of the judgment roll reveals the pooling order upon which Eagle relies is facially void as to T&T and their minerals. See *Chancellor v. Tenneco Oil Co.*, 653 P.2d 204, 206-07 (Okla. 1982). This rule was expressly recognized by the Supreme Court in *Union Texas Petroleum*, supra, and recently in *Tucker v. Special Energy Corp.*, supra at p. 734, footnote 4 where the Court observed as follows:

...While a district court does have jurisdiction to consider whether a Commission order is facially void, *Chancellor v. Tenneco Oil Co.*, 1982 OK 122, ¶ 18, 653 P.2d 204, 206-207, Plaintiffs do not make that argument here. The district courts do not have jurisdiction to consider whether a Commission's order is void unless the face of the Commission record demonstrates that it lacked jurisdiction. *Fent v. Okla. Natural Gas Co.*, 1994 OK 108, ¶ 20, 898 P.2d 126, 135.

While the Commission may have jurisdiction to inquire into the continuing effectiveness of Order No. 552381 and to construe Order No. 552381's terms, the Oklahoma Corporation Commission does not have jurisdiction to find two non-named parties to a 2007 Pooling Application and the Order that issued are subject to such Order three years later, without notice or constitutional due process.

(10) Eagle's position and argument in this regard are neither novel nor unique and have previously been rejected by the appellate courts. For example, in *Miller v. Wenexco*, 743 P.2d 152 (Okla. App. 1987), the defendant (just as Eagle has in the District Court matter) asserted that the trial court should not proceed with plaintiff's action for quiet title and accounting because it would involve a judicial determination of the validity of a Commission pooling order and that such would be an impermissible collateral attack on the order which is prohibited. The argument was rejected by the trial judge, who then proceeded to quiet the title, and order an accounting for proceeds after finding an absence of Commission jurisdiction over the plaintiffs. Upon appeal, the

trial court's ruling as to its jurisdiction to inquire into the Commission jurisdiction was affirmed. In so ruling, the Court of Appeals stated:

Appellant contends the trial court erred in entertaining Appellees' causes of action because they constitute an impermissible collateral attack on the Corporation Commission order. The quiet title action filed by Appellees is a collateral attack attempting to avoid the legal effect of the Commission's pooling order. A collateral attack may not be launched on a Commission order that is facially invulnerable. The district court's power to inquire into the validity of Commission orders is legally limited to ascertaining from an inspection of the face of the proceedings, if the Commission had jurisdiction to issue, the order. The district court's inquiry into the presence of the requisite jurisdictional elements is confined to an inspection of the face of the proceedings; i .e. the application, the process by which the parties were notified and the Commission's order, a Commission order is deemed facially invalid only when the face of the record reveals the absence of at least one of the three requisite elements of agency jurisdiction, i.e., jurisdiction over the parties, jurisdiction over the subject matter, or jurisdictional power to issue the specific order in question. *Harry R. Carlile Trust v. Cotton Petroleum*, 732 P.2d 438 (Okla. 1986).

(11) Most recently, on October 8, 2010, in CD Nos. 200903407, 201000274 and 201000645 the Commission En Banc in a 3-0 decision reversed the ALJ and the Appellate Referee and found that "the original pooling order did not apply to the JMA interest." In this Cause the pooling order only covered the Harding & Shelton and Chesapeake interest. Chesapeake had a CLO lease and was subject to a vertical Pugh Clause which mandates partial lease expiration and release of non-producing formations at the end of the lease's primary term. The Commission En Banc then added " Partial expiration of the CLO lease does not make CLO the successor in interest to Chesapeake as to the non-producing formations." The Commission En Banc then went on to say that "Nothing in the CLO lease or the conduct of either CLO or Chesapeake shows that the Chesapeake pooling election as to the non-producing formations survived lease expiration as to those formations."

This very decision is on all fours with the T&T interests as they relate to the ORCA Pooling and the subsequent Application to Interpret, Clarify and

Determination by Eagle. Expiration of the Blackburn Lease does not make T&T the successor in interest to Blackburn and nothing survived the Blackburn Lease expiration.

(12) Then on October 12 in CD No. 201000783 in a very similar Cause the Commissioner En Banc in 3-0 decision once again reversed the ALJ and the Appellate Referee and found that "the original pooling order did not apply to the Dolomite interest." This Dolomite interest was acquired after the original pooling order and as was the case in the above referenced decision, Dolomite picked up an interest that was previously pooled and was leasehold from a CLO oil and gas lease. However, due to the vertical Pugh Clause only the one producing formation was held. Thus, the original pooling order did not include an interest that became open even after the pooling order issued.

(13) In the Report of the Oil and Gas Appellate Referee in CDs Nos. 200902361, 200903079 and 200903080 the Appellate Referee found that the interests of Sempra/PEC Minerals and JMA, were not pooled by an old pooling order because Sempra, the mineral owner at the time was not named. The Appellate Referee went on to state in Paragraph 3 of the "Issues Concerning Interests Pooled" "There is a distinct difference between having somebody named in a pooling and having that interest subject to the pooling. Unpooled interests cannot be "added" to an existing pooling order by amendment." The Appellate Referee then went on to state in paragraph 4, "In the present case, however, the Sempra interest was not named in the original pooling application that resulted in pooling Order No. 488878 and was not noticed. It was an unpooled interest and was missed in the pooling proceeding that resulted in Order No. 488878. If an interest is missed in the pooling order and was never pooled it will have to be pooled into the unit by a pooling application, notice and hearing and not by amendment based on a change of condition." The Appellate Referee then went on to affirm the ALJ's ruling that Harding & Shelton's request to add the Sempra interest to the pooling order by amendment be denied, and found that the Sempra interest now owned by JMA can be pooled under the JMA pooling application. The decision of the Appellate Referee was upheld by the Commission.

This decision is also on all fours with the T&T interests as they relate to the ORCA Pooling and the subsequent Application to Interpret, Clarify and Determination by Eagle. Expiration of the Blackburn Lease does not make T&T the successor in interest to Blackburn and nothing survived the Blackburn Lease expiration.

When a party is not named, they cannot be added by amendment to the old pooling order, but a new pooling should be filed. That solution is available to Eagle, and has always been available to Eagle .

(14) The pooling order, through which Eagle claims rights in T&T's minerals, is facially void as to T&T, and their minerals. T&T were never given notice, neither were they afforded due process, nor an opportunity to be heard in conjunction with the pooling proceeding.

THE ALJ FOUND:

(1) This matter came on for a hearing on a Motion to Dismiss which was filed by T&T alleging the Commission does not have personal jurisdiction or subject matter jurisdiction to hear the cause. This Motion was filed on November 4, 2010, and was heard on November 9, 2010. The briefs and reply briefs were filed after the hearing on the Motion.

(2) Basically, the facts of the case are on March 27, 2007, Tower entered into a lease agreement with Blackburn covering Towers' 155.69 acres in this subject unit and it had a one year term. On November 14, 2007, Orca filed a pooling application in Cause CD 200707536-T, which application sought to pool the working interests of various parties in the 640 acre unit established for the Misener-Hunton common source of supply in the subject unit. Blackburn was the current holder of the working interest under the lease. Therefore, Blackburn was properly named as a Respondent in the Pooling application. Blackburn entered an appearance in the cause and protested the same. Tower was not named as a respondent in the pooling, because the mineral interest of this party at the time of the filing of the application was subject to a lease. On January 11, 2008, the Pooling application was heard and recommended and on March 27, 2008, the primary term of the lease between Tower and Blackburn expired. On April 8, 2008, the Commission entered a Pooling Order No. 552381 in CD 200707536-T and then after that Thistle acquired an interest in the subject unit from Tower.

(3) On July 22, 2010, T&T filed a petition in Lincoln County District Court initiating a quiet title action in Cause CJ-2010-159, covering the working interest claimed by subject parties in the unit. On September 27, 2010, Eagle filed CD 201004062-T, an Application Seeking To Interpret and Clarify Order No. 552381, which sought to determine if T&T's working interest in the Unit was subject to Pooling Order No. 552381. On October 27, 2010, after hearing arguments of counsel, the District Court in CJ-2010-159 found that the Commission had jurisdiction and authority to interpret and clarify Pooling Order No. 552381 so as to make the determinations in connection with such pooling order as requested in this Cause. The District Court entered an order staying such cause until the Commission makes a ruling in this proceeding.

(4) On November 4, 2010, T&T appeared by special appearance and filed a Motion to Dismiss the Application based upon the fact that the Commission does not have personal jurisdiction and or subject matter jurisdiction to hear the cause. T&T argued that since they were not provided notice of the original Pooling, which was CD 200707536-T, the Commission lacked personal jurisdiction over them to hear the Application to Interpret and Clarify Pooling Order No. 552381, which is CD 201004062-T. T&T did not contend that they were not properly or sufficiently served with notice of CD 201004062-T. Nor did T&T argue that the publication filed in Lincoln and Oklahoma Counties were improperly published in CD 201004062-T. The ALJ must contend that this argument fails. T&T was served with sufficient and proper notice of the Application to Interpret and Clarify the Pooling Order in CD 201004062-T to give the Commission personal jurisdiction over T&T.

(5) Both parties were listed as respondents in this cause. Neither party alleged not receiving the application. This application was properly published in both Lincoln and Oklahoma Counties. Both parties had proper notice of the application, which gave the Commission personal jurisdiction over them. The ALJ found that Tower and Thistle were provided with sufficient and proper notice to give the Commission personal jurisdiction over both of them to interpret and clarify pooling Order No. 201004062-T.

(6) The ALJ agrees with Eagle that T&T presented substantial arguments concerning the merits which clearly shows that T&T had waived any rights to protest the Commission's jurisdiction over them. The ALJ found that T&T had voluntarily submitted to the Commission jurisdiction by their substantive arguments so presented.

(7) The ALJ found that T&T's filed Motion to Dismiss went far beyond its argument of personal jurisdiction. These arguments touch on the very merits of the case. Thus, T&T, by their own actions herein, have effectively waived their rights to personal jurisdiction of the Commission.

(8) The ALJ contends that the Commission has continuing jurisdiction to review and clarify its orders. Thus, the Commission does have subject matter jurisdiction to delve into the continuing effectiveness and to construe the terms of pooling Order No. 552381. Even T&T admitted this same fact in their Brief in Support of the Motion to Dismiss on page 4, paragraph 16, stating "The Commission may have jurisdiction to inquire into the continuing effectiveness of Order No. 552381 and to construe Order No. 552381's terms."

(9) The ALJ notes that Eagle pointed out in their Answer Brief in Response to Brief in Support of Motion to Dismiss on page 10, that Eagle had explicit rights to bring their action under 52 O.S. Section 112. 52 O.S. Section 112 provides:

"any person affected by any legislative or administrative order of the Commission shall have the right at any time to apply to the Commission to repeal, amend, modify or supplement the same."

(10) The Oklahoma Supreme Court has held that Section 112 gives the Commission authority to clarify its orders. See *Forest Oil Company v. Oklahoma Corporation Commission*, 807 P.2d 774, 780 (Okl. 1990); *Tenneco Oil Company v. Oklahoma Corporation Commission*, 775 P.2d 296, 297, 298 (Okl. 1989); and *Cabot Carbon Company v. Phillips Petroleum Company*, 287 P.2d 675, 679 (Okl. 1955). Further, the Supreme Court has held the "power to clarify a previous order is continuous in nature and flows from the entry of the original order." See *Forest* case, *supra*; *Tenneco* case, *supra*; *Cabot* case, *supra*; and *Nilsen v. Ports of Call Oil Company*, 711 P.2d 98, 102-103 (Okl. 1985).

(11) The Commission has authority and jurisdiction to determine whether a prior pooling order continues to be effective as to the specific interest and that such authority and jurisdiction are incidental to the Commission's authority to determine if the subsequent pooling proceeding should be approved or denied. *Buttram Energies, Inc. v. Corp. Comm'n of Okla.*, 629 P.2d 1252, 1254 (Okl. 1981). Therefore, with the support of 52 O.S. Section 112 and these Supreme Court cases, the ALJ concludes the Commission does have subject matter jurisdiction to hear the cause. The ALJ recommends the denial of T&T's filed Motion to Dismiss.

POSITIONS OF THE PARTIES

T&T

1) **Eric R. King**, attorney, appearing on behalf of T&T, stated that the primary issue for the Commission is whether a party can go back and retroactively pool a party who was not named in a prior pooling?

2) On March 27, 2007 Tower entered into a one year oil and gas lease with Blackburn Properties, Inc. Tower's lease was recorded on April 16, 2007 reflecting that it expired on March 27, 2008, unless drilling rig capable of drilling to total depth was on location. On November 14, 2007 Orca filed its pooling and names lessee Blackburn who had taken this lease from Tower, the lessor/mineral owner. The hearing was heard on January 11, 2008 and on March 27, 2008 Tower's lease with Blackburn expired under its own terms. On April 8, 2008, pooling Order No. 552381 issued. On April 23, 2008, the pooling election period expired. On June 2, 2008 Tower, T&T filed notice of the expired lease noting that pooling Order No. 552381 did not apply to them.

3) It is T&T's position and the case law requires that the Commission can review the judgment role of the original pooling. However, if the Commission goes outside this judgment role then the Commission will have exceeded its authority. See *SKZ v. Petty*, 782 P.2d 939 (Okl. 1989). From the judgment role the Commission should determine whether or not Tower was named, whether or not Tower was given notice of the hearing and whether or not Tower was served with a copy of the order. If the answer to all three is negative, which is what the Commission will find from that judgment role, then Tower should be dismissed from the present application.

4) A pooling is not effective until the pooling order issues and based on the timeline the pooling order issued on April 8, 2008. The lease and the Blackburn interest expired on March 27, 2008, some 13 days prior to the issuance of the pooling order. Tower was not named as a respondent in the pooling. The police power granted the Commission is limited and cannot be used to divest Tower of its interest without constitutionally protected due process. Tower was not a party to nor a successor in interest to anyone. Tower is the lessor of Blackburn and Blackburn's interest lapsed or expired by operation of law before the pooling order issued. Tower was not afforded any opportunity to elect and they are not listed on the Exhibit A.

5) T&T thinks the ALJ erred in finding that T&T waived their jurisdictional contentions. T&T notes that only personal jurisdiction can be waived by a party. T&T further points out that all other elements of jurisdiction may be raised at any time. T&T notes that these jurisdiction challenges were raised when T&T filed this Motion to Dismiss. See *SKZ v. Petty*, supra.

6) T&T believes that Eagle is actually asking the Commission to determine which party had title to the right to drill on T&T's mineral interest. T&T does not find this determination to be related to the conservation statute mandates of protection of correlative rights and prevention of waste. Hence, this issue of title is outside of the Commission's limited jurisdiction and is for the District Court.

7) T&T notes that there have been three causes before the Commission relating to the issues presented in T&T's Motion to Dismiss: 1) Causes CDs 200903407, 201000274 and 20100645 involving Harding & Shelton and JMA where a CLO lease was taken on a nonproducing zone that had expired; 2) Cause CD 201000783 involving JMA and Dolomite where the central issue was whether the original pooling order applied to Dolomite's interest acquired by a lease obtained from CLO after the original pooling order; and 3) Causes CDs 200902361, 200903079 and 200903080 involving Harding & Shelton and JMA where the question was as to the 50% interest of Sempra/PEC later released by JMA that was not subject to the prior pooling order.

8) T&T reiterates in the present cause T&T's interest was not named in the original pooling application that resulted in pooling Order No. 552381. T&T asserts that when an interest is missed in a pooling application/order, i.e. never pooled, the missed party must be pooled into the unit by a new pooling application, with proper notice and hearing--not by amendment based on a change of condition.

9) T&T believes these three separate Commission rulings above are as true today as they were when the orders were rendered. T&T submits that these rulings establish a form of Commission precedent that an interest cannot be subject to a pooling order unless properly added via a separate application and afforded options to elect. T&T submits to the Court that the Appellate Referee has succinctly answered these issues being heard today. T&T believes the Commission should not reward Eagle's sloppy land work with a denial of T&T's Motion to Dismiss.

10) T&T believes that Eagle was aware that the primary term of the Blackburn lease would expire before their pooling order was entered. T&T notes that the lease at issue expired 13 days before pooling Order No. 552381 was processed.

11) T&T notes that Eagle's land man was aware of the terms of Blackburn's lease with T&T yet chose to ignore this fact, without rechecking the records prior to creation of pooling Order No. 552381. T&T finds there to be an easy fix to the issues here. T&T believes that Eagle should have reopened the cause prior to pooling Order No. 552381 being entered so Eagle could add T&T as a respondent once Eagle knew the lease had reverted back to T&T.

12) In the present cause, T&T believes a solution for these issues here would be for Eagle to file a new pooling application to afford T&T the opportunity to make an election.

13) T&T thinks that Eagle is wanting the Commission to retroactively slide T&T under the original pooling Order No. 552381 without providing T&T with due process to make an informed election thereto. T&T believes this cannot be done by the Commission.

14) T&T differs with the ALJ's conclusion that the District Court's order held that the Commission had jurisdiction and authority to interpret and clarify pooling Order No. 552381 and determine that T&T can be retroactively pooled who was not named in the prior pooling. T&T believes the Court upon review of the above orders will find that the District Court did not make any statement like that to support the ALJ's belief.

15) T&T disagrees that the Commission can add a party to be subject to a pooling order where the party was never listed. T&T asserts the Commission has no power to amend the pooling order and judgment role after the order has become final. T&T believes that such action would be a prohibited collateral attack upon the Commission's own order. T&T asserts the relief sought by Eagle here is improperly brought before this court.

16) T&T believes that Eagle's relief cannot be granted by the Commission. T&T asserts that T&T should be dismissed from the purview of Pooling Order No. 552381 and the purview of the present case, with Eagle's application being allowed to proceed to merit hearing as to all the other parties who were subject to and named in the original Pooling order No. 552381.

17) T&T disagrees with Eagle's position that a pooling order constitutes a final determination of the rights and obligations of the prior (and subsequent) working interest holders, including any mineral interest owner who re-acquires their working interest from said owner's lessee by virtue of an expired oil and gas lease during the pendency of a pooling proceeding.

18) T&T believes the ALJ wrongly concluded that the pooling order could take T&T's title via the original pooling order despite T&T's name being omitted from the pooling application. T&T reiterates at the time the pooling order issued T&T owned the open mineral interest. T&T would submit that this issue is a title question, which does not fall within the Commission's jurisdiction.

19) T&T respectfully request that the ALJ's decision on the Motion to Dismiss be reversed with T&T dismissed from Eagle's pooling application so that Eagle can afford T&T due process notice and option to elect into a new pooling application.

CLAREMONT

1) **John R. Reeves**, attorney, appearing on behalf of Claremont, stated that T&T's arguments focus on several issues: 1) T&T's arguments focus mostly on the merits; 2) does the Commission have all three elements of jurisdiction over T&T; and 3) did the Commission obtain jurisdiction over Blackburn's working interest which is now claimed by T&T.

2) Claremont does not think the Court should entertain T&T's arguments that pertain to the merits at this Motion to Dismiss hearing. Claremont believes these arguments relate to the hearing where pooling Order No. 552381

was created. Claremont submits that T&T can present these nonjurisdictional arguments at the merit hearing before the ALJ.

3) Claremont disagrees with T&T's position that due to T&T not being named in pooling Order No. 552381 that the Commission has no jurisdiction over T&T. Claremont notes that T&T mentioned their special appearance in reference to the subject matter jurisdiction.

4) Claremont notes that T&T admits only to the first element of jurisdiction, i.e. over the person. Claremont believes the Commission has both subject matter jurisdiction and the ability to render the judgment sought by Eagle; hence, all three elements of jurisdiction have been met.

5) Claremont believes the Commission has jurisdiction to interpret, construe, clarify or supplement a pooling order. See: 52 O.S. Section 112; *McDaniel v. Moyer*, 662 P.2d 309 (Okla. 1983); *Nilsen v. Ports of Call Oil Co.*, 711 P.2d 98 (Okla. 1985); and *Cabot Carbon Company v. Phillips Petroleum Co.*, 287 P.2d 675 (Okla. 1955).

6) Claremont also notes the Commission has authority to determine if an order is a unit pooling order. See: *Amoco Production Company v. Corp. Comm'n of Okla.*, 751 P.2d 203 (Okla. 1988).

7) Claremont believes that the Commission has the ability to determine whether or not an election to not participate transfers by operation of law the exploratory rights, the working interest and the drilling rights under the order as well as whether the order was effective as to a party's interest in the applicable unit. See: *SKZ v. Petty*, supra; *Amoco Production Company v. Corporation Commission*, supra; *Ranola Oil Co. v. Corp. Comm'n of Okla.*, 752 P.2d 215 (Okla. 1988); and *Inexco Oil Co. v. Okla. Corp. Comm'n*, 767 P.2d 404 (Okla. 1988).

8) Claremont believes the District Court has no power to construe or clarify the rights arising under a pooling order. See: *Chancellor v. Tenneco Oil Co.*, 653 P.2d 204 (Okla. 1982).

9) Claremont further notes the Commission has the authority to determine that rights arising and vesting under a pooling order remain vested. See: *Buttram Energies, Inc. v. Corp. Comm'n of Okla.*, 629 P.2d 1252 (Okla. 1981); and *Crest Resources v. Corp. Comm'n*, 617 P.2d 215 (Okla. 1980).

10) Claremont believes the Commission has authority to determine if a pooling order remains in full force and effect as to the working interest covered by a pooling order. See: *Nilsen v. Ports of Call Oil Co.*, supra.

11) Claremont notes the Commission has authority to find that a pooling order constitutes a final determination of working interest owner or owners of the right to drill in a drilling and spacing unit.

12) Claremont notes the case of *Harding & Shelton v. Sundown Energy, Inc.*, 130 P.3d 776 (OK CIV APP 2006) where a mineral owner had executed a lease to a named party Arco in the pooling application. Arco was requested to relinquish their lease with the working interest reverting back to the mineral owner, who promptly signed a new lease with another party for the same thing. The party who leased after Arco then filed a new pooling application. Claremont submits that the arguments had in the *Harding & Shelton v. Sundown* case are nearly the same as had in the present case.

13) Both the Commission and the Court of Appeals held the mineral owner was bound by the pooling order. Claremont notes that the *Harding & Shelton v. Sundown* case is only persuasive since it is not a supreme court case.

14) Claremont points out another Commission case filed by Harding & Shelton where Harding & Shelton filed a new application to clarify Commission pooling order No. 289640 where the Supreme Court reversed the Court of Appeals and affirmed the Commission's Order No. 289640 noting the 1985 pooling order. See *Sundown Energy, L.P. v. Harding & Shelton, Inc.*, 245 P.3d 1226 (Okl. 2010).

15) The Court of Civil Appeals in the first Harding & Shelton case noted the 1985 pooling order determined "the rights and obligations of mineral owners "in the affected common source(s) of supply, because to hold otherwise would cast the established rights and obligations of any holder of a mineral interest in the previously pooled common source(s) into chaos every time there was a change in ownership of mineral or leasehold rights in any pooled formation."

16) Claremont believes this part of the case is crucial. In that prior case the Court of Appeals said that Harding & Shelton, when they acquired this working interest, did so subject to the prior pooling order. When the Commission obtained jurisdiction, they obtained it over the working interest that was held by Arco. That working interest then reverts back to the mineral owner when the lease is released subject to the Commission's pooling jurisdiction and then the working interest is then conveyed to Harding & Shelton under a new lease subject to the Commission's pooling jurisdiction in the prior pooling order, even though Harding & Shelton was never named as a respondent.

17) Claremont notes that in the present cause Blackburn was named in Eagle's pooling application due to Tower leasing to Blackburn. Claremont believes the Commission gained jurisdiction over the Blackburn-Tower working interest by the filing of the pooling application. By law, Claremont notes that the mineral owner could not be named in the pooling application when it was filed due to the mineral owner does not meet the statute definition of working interest owner. They had no right to drill here, i.e. an improper party. Hence, the operator had no choice but to list Blackburn as the proper party due to the lease Blackburn had with Tower.

18) Claremont notes that while the Commission still had jurisdiction over Blackburn, the lease expired with it reverting back to the mineral owner. However, Tower's working interest was still subject to the Commission jurisdiction. Claremont notes that only two parties are involved here, unlike the *Harding & Shelton v. Sundown* case.

19) Claremont points out that T&T's arguments are improper, as they are the same thing which the Supreme Court rejected in the second *Harding & Shelton* case. See: *Chancellor v. Tenneco Oil Co.*, supra.

20) Claremont notes that T&T barely mentioned the *Harding & Shelton v. Sundown* cases in their arguments, probably due to the fact that there was nothing that T&T could use. Claremont believes the above cases alone would give rise to denying T&T's Motion to Dismiss.

21) Claremont notes the Commission has no jurisdiction over CLO interests.

22) Claremont notes that T&T mentioned the privity issue, which Claremont feels should be for the merit hearing. Claremont notes that T&T cited Kuntz, *The Law of Oil and Gas*, Section 15.2; and *Dierks v. Walsh*, 218 P.2d 922-923 (Okl. 1950) in support of T&T's belief that T&T was not in privity with lessee Blackburn. However, Claremont disagrees with T&T's analysis. Claremont notes that the *Harding & Shelton v. Sundown* case did not use the argument of privity, which Black Law defines as "mutual or successive relationship to the same rights of property...the lessee with the lessor." Claremont points out that the Kuntz article made no reference to privity either. *Dierks v. Walsh*, 212 P.2d 920 (Okl. 1950) stated "to make a person a privy to an action, he must have acquired an interest in the subject matter of the action either by inheritance, succession or purchase from a party either after the suit is brought in which the title or right is involved or after the judgment was rendered or must hold the property subordinately."

23) Regardless of T&T's words, Claremont submits that Tower and Blackburn are in privity. Further, Claremont reiterates that once the

Blackburn lease expired, Tower regained their working interest after the pooling was filed, subject to the Commission's jurisdiction.

24) The issue here is did the Commission obtain jurisdiction over the working interest of Blackburn, now claimed by T&T.

EAGLE

1) **Michael D. Stack**, attorney, appearing on behalf of Eagle, stated that Eagle was surprised that T&T felt that Orca purposely excluded them from their pooling application. Eagle notes the reason why T&T was not included was due to T&T being an improper party, i.e. a mineral interest owner who had leased to a 3rd party Blackburn. Orca listed Blackburn for notice per the Commission rules.

2) Eagle believes the Commission has jurisdiction over both T&T and T&T's lease. Eagle thinks that T&T is implying that Eagle must file for a new pooling application and go through the process from scratch to allow T&T into the already drilled well.

3) Eagle would urge the Commission to look at first the *Harding & Shelton* case where it states "the prior pooling order constitutes a final determination of the rights and obligations of any present or future holders of a mineral interest in the affected common source of supply because to hold otherwise would cast the established rights and obligations of any owners of a mineral interest in the previous pooling common sources of supply into chaos..." Eagle believes the *Harding and Shelton v. Sundown* case is directly on point.

4) Eagle agrees the cause will hang on the jurisdictional question. Eagle believes the Commission has jurisdiction over T&T; has subject matter jurisdiction; and jurisdictional authority to enter the order. See: *Nilsen v. Ports of Call Oil Co.*, supra.

5) Eagle contends this cause has nothing to do with trying title as such is for District Court. The arguments in this cause revolve around pooling Order No. 552381. Eagle submits that only the Commission can make the determination requested by Eagle here and grant or deny the requested relief. Eagle asserts the merits case is not at issue today, only a jurisdiction question on a Motion to Dismiss.

RESPONSE OF T&T

- 1) T&T reiterates that the main issue was whether Blackburn's ownership claim terminated upon the expiration of the oil and gas lease between Blackburn and T&T.
- 2) T&T believes there is misunderstanding about the three aspects of jurisdiction in these arguments. The distinction lies in how Blackburn/T&T were listed in both the pooling Order No. 552381 and the current application of Eagle.
- 3) T&T notes that at the time the Orca pooling order issued T&T was not listed as a respondent to that pooling application. T&T was the current party that owned that interest due to the expired Blackburn lease hence the Commission had no personal jurisdiction over T&T. Yet T&T observed that Eagle listed T&T as a respondent in the present application.
- 4) T&T notes that Tower was neither named nor given notice by due process in the Orca pooling that resulted in pooling Order No. 552381, thus never given the opportunity for an option to make an election to participate. However, T&T notes that Eagle listed T&T in their present application when Tower was never in the original pooling application.
- 5) T&T asserts that the Commission is looking from the outside inward and attempting to condemn T&T's interest without due process being accorded to T&T.
- 6) T&T has yet to receive an explanation as to why T&T was not given notice of pooling Order No. 552381 and given the opportunity to make a timely election. T&T was denied due process.
- 7) T&T submits that where an oil and gas lease expires prior to the pooling order issuing there is no case law to support Eagle's position nor the ALJ's position. T&T notes that Eagle has not presented any Supreme Court cases that require a never named party who was never given notice and never afforded an election to be subjected to a pooling order. T&T submits this does not comply with constitutional due process.
- 8) T&T only mentioned the three appellate referee cases to remind the Court of past Commission rulings in the hope that the Commission would be consistent on similar issues.

9) T&T was not trying to circumvent the pooling authority of the Commission in taking the Blackburn lease. A review of the record will show that the lease was taken far in advance of the filing date of the Orca pooling application.

10) T&T reminds the court that when the Blackburn lease was taken on March 27, 2007 for a one year term the Orca pooling that resulted in Order No. 552381 had not yet been filed. the Orca pooling filed in CD 200707536-T was had on November 14, 2007, nearly 7 months after the Blackburn-T&T lease transaction was consummated. T&T does not understand how either Claremont or Eagle could believe that T&T made this lease in order to avoid the pooling power of the Commission.

11) T&T notes that Eagle emphasized the *Harding & Shelton v. Sundown* case in support of their arguments that T&T's Motion to Dismiss should be denied. T&T acknowledges that the pooling interest was under lease at the time the pooling application was filed; however by the time the pooling order issued the Blackburn lease had expired, resulting in T&T, who was never listed in the pooling application, gaining their property back. T&T found that the *Harding & Shelton v. Sundown* case did not apply and thus did not see much need to really discuss it in their arguments.

12) T&T would agree partly that the *Harding & Shelton v. Sundown* case held that the Harding & Shelton interest was still subject to the pooling order; however, T&T believes the present lease terminating 13 days prior to the pooling order issuing is the distinction here which makes *Harding & Shelton v. Sundown* inapplicable.

13) T&T did mention the *Dierks v. Walsh* case, supra. T&T owned their property, it wasn't gained via inheritance, succession or purchase.

14) T&T would ask the Commission who owns this expired lease of Tower that Tower leased to Blackburn for a one year term? T&T owns this property.

15) T&T submits that T&T was not subject to pooling Order No. 552381 due to the lease expiring prior to pooling order issuing 13 days after the Blackburn lease expired.

16) T&T does not see how a re-release of a lease back to the property owner now T&T would today make T&T subject to pooling Order No. 552381. T&T asserts that it was Blackburn that was a respondent to this pooling order, not T&T.

17) T&T is concerned about their correlative rights here. How can T&T elect to participate in Eagle's application when T&T was never listed in pooling Order No. 552381. T&T notes T&T never received notice of that pooling

application due to the property tied up in a one year lease. T&T notes that Blackburn probably received notice of the pooling application since they were listed as a respondent. T&T notes that Orca failed to verify the county records prior to the issuance of pooling Order No. 552381 to make sure to catch any open interests or that all their listed parties were still intact. Orca took no action to correct their mistake here.

18) T&T reminds the court that T&T filed proper notice of their expired Blackburn lease at the county records which should have put Orca on notice that there were unpooled interests out there. Orca did nothing.

19) T&T further believes that Eagle wrongly places reliance on the *Harding & Shelton v. Sundown* case as T&T does not believe it is applicable under the present circumstances.

20) T&T respectfully requests the court to allow T&T a chance to be a part of the Orca's pooling order, with proper application, notice and hearing had in the future since T&T had no due process originally.

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 that the Commission does have jurisdiction in the current matter over T&T should be affirmed.

2) The application in this matter is explicitly authorized by 52 O.S. Section 112. Under Section 112, a party affected by a Commission order has standing to apply to the Commission for relief. *Forest Oil Corporation v. Corporation Commission of Oklahoma*, 807 P.2d 774, 780 (Okl. 1990). 52 O.S. Section 112 also gives the Commission authority to clarify its orders. *Id.* at 780-781, citing *Tenneco Oil Company v. Oklahoma Corporation Commission*, 775 P.2d 296, 297-98 (Okl. 1989), *Cabot Carbon Company v. Phillips Petroleum Company*, 287 P.2d 675, 679 (Okl. 1955). The Oklahoma Supreme Court has further held that the "power to clarify a previous order is continuous in nature and flows from the entry of the original order." *Id.*, citing *Nilsen v. Ports of Call Oil Company*, 711 P.2d 98, 102-103 (Okl. 1985). The Commission also has the authority and jurisdiction to determine whether a prior pooling order continues to be effective as to a specific interest and that such authority and jurisdiction are incidental to the Commission's authority to determine if a subsequent pooling proceeding should be approved or denied. *Buttram Energies, Inc. v.*

Corporation Commission of Oklahoma, 629 P.2d 1252, 1254 (Okl. 1981). Thus, the Commission has the jurisdiction to determine whether Pooling Order No. 552381 was and is effective as to the working interest or drilling rights now claimed by T&T in the horizontal well unit involved herein.

3) Clearly the Commission in the present cause has proper jurisdiction to hear this cause as it has: 1) jurisdiction over the parties involved; 2) jurisdiction over the subject matter; and 3) jurisdiction and power to issue the specific order in question. *Gulfstream Petroleum Corporation v. Layden*, 632 P.2d 376, 378 (Okl. 1981). See also *Abraham v. Homer*, 226 P. 45 (Okl. 1924). T&T were properly named as respondents in this matter and no objection as to service of notice has been lodged herein by either party.

4) In *Harding & Shelton Inc. v. Sundown Energy, Inc.*, 130 P.3d 776 (2006 OK. CIV. APP. 12) the Court held:

When considering whether to grant or deny an application to pool common sources of supply, the Corporation Commission possesses "incidental" authority to determine whether a prior pooling order was still effective as to the applicant's interest. *Buttram Energies Inc. v. Corporation Commission of State of Oklahoma*, 1981 OK 59 ¶7, 629 P.2d 1252, 1254.

* * *

In the present case, Applicants, as successor lessees of 480 acres of the 640 acre unit previously pooled, sought to both re-pool the formations covered by the 1985 pooling order, and to pool previously unpooled formations underlying the same 640 acres. The prior pooling order constitutes a final determination of the rights and obligations of **any present or future holders of a mineral interest** of in the affected common source(s) of supply, because to hold otherwise would cast the established rights and obligations of any holder of a mineral interest in the previously pooled common source(s) into chaos every time there was a change in ownership of mineral or leasehold rights in any pooled formation. Applicants must be held to have obtained their lease(s) subject to

the terms of the prior pooling order. (emphasis provided)

See also *Sundown Energy, L.P. v. Harding & Shelton, Inc.*, 245 P.3d 1226 (Okl. 2010).

5) In Cause CD No. 200707535-T which resulted in Pooling Order No. 552381 the Commission obtained jurisdiction over the working interest or drilling rights now claimed by T&T by joining Blackburn to such cause and properly serving Blackburn with notice thereof. Blackburn actively protested Cause CD No. 200707535-T and there is no question that Blackburn submitted the working interest or drilling rights it then held (now claimed by T&T) to the Commission's jurisdiction in such cause. Clearly an interest may be bound by a pooling order and while the owners of that interest may change through various trades or agreements, once the interest itself is pooled, it is bound by that order.

6) In Cause CD 200401114, (Harding and Shelton and Consolidated American Resources, LLC) which was a pooling in Section 20, T16N, R18W, Dewey County, Oklahoma, the Appellate Referee stated:

Moreover, the Commission has always determined that the pooling order attaches to, and affects, the working interest in the separate tracts without reference to the title of the present owner. In other words, pooling is more in the nature of an in rem concept. As such, the pooling order pools the working interest and makes that working interest, once vested, subject to the pooling order regardless of how the individuals transfer their interest thereafter. To hold otherwise, "would permit parties adverse to the pooling application to defeat it by simply transferring their property to another at or about the time the pooling hearing was held and/or to standby and, if the well be a producer, elect to participate. Again, this was never the intent of the pooling statute. *Chancellor v. Tenneco Oil Company*, 653 P.2d 204 (Okl. 1982).

7) *SKZ, Inc. v. Petty*, 782 P.2d 939 (Okl. 1989) states:

When free from such vitiating infirmity, a pooling order is res judicata, but terms of a prior pooling order may be modified by the Commission upon a showing of a change in or knowledge of conditions necessitating the

repeal, amendment or modification of the order. Failure to make such a showing renders any modification of a prior order subject to the prohibition on collateral attacks set forth in 52 O.S. 1981 Section 111.

* * *

See also *Inexco Oil Company v. Oklahoma Corporation Commission*, 767 P.2d 404, at 406 (Okl. 1988); *Crest Resources and Exploration Corporation v. Corporation Commission*, 617 P.2d 215, at 218 (Okl. 1980).

8) Therefore, based upon the above stated reasons, law and authority, the Motion to Dismiss the subject cause should be denied.

RESPECTFULLY SUBMITTED THIS 22nd day of April, 2011.


PATRICIA D. MACGUIGAN
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Cloud
Commissioner Anthony
Jim Hamilton
ALJ Curtis Johnson
Michael D. Stack
Steve R. McNamara
Brian T. Inbody
Eric R. King
Michael Massad
John R. Reeves
Office of General Counsel
Michael L. Decker, OAP Director
Oil Law Records
Court Clerks - 1
Commission Files