

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

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CORPORATION COMMISSION
OF OKLAHOMA

<u>APPLICANT:</u>	WICKLUND PETROLEUM CORPORATION)	
)	
<u>RELIEF SOUGHT:</u>	HORIZONTAL SPACING)	CAUSE CD NO.
)	201000456-T
)	
<u>LEGAL DESCRIPTION:</u>	WEST HALF OF SECTION 2,)	
	TOWNSHIP 23 NORTH, RANGE)	
	4 WEST, GARFIELD COUNTY,)	
	OKLAHOMA)	

**REPORT OF THE OIL AND GAS APPELLATE REFEREE ON AN
ORAL APPEAL OF A MOTION TO STAY ISSUANCE OF FINAL
ORDER AND TO REOPEN CAUSE**

This Motion came on for hearing before **Curtis Johnson**, Deputy Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 24th day of May, 2011, at 9:00 a.m. in the Commission's Courtroom, Kerr Building, Tulsa, 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: **William H. Huffman**, attorney, appeared on behalf of applicant, Wicklund Petroleum Corporation ("Wicklund"); **J. Fred Gist**, attorney, appeared on behalf of Plymouth Exploration, LLC ("Plymouth"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") issued his Oral ruling on the Motion to Stay Issuance of Final Order and to Reopen Cause to which oral 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 3rd day of June, 2011. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

1) **PLYMOUTH APPEALS** the ALJ's recommendation to deny Plymouth's Motion to Stay Issuance of Final Order and to Reopen Cause. Wicklund filed this application in this cause on February 5, 2010, seeking an order that would establish a 320 acre horizontal well unit comprised of the W/2 of Section 2, T23N, R4W, Garfield County, Oklahoma; for the Mississippian common source of supply. The case was heard as an uncontested matter on March 8, 2010. The Corporation Commission issued Interim Order No. 574267 in this cause on March 23, 2010. In said Interim Order, the Corporation Commission created, on an interim basis, a 320-acre horizontal drilling and spacing unit comprised of the W/2 of said Section 2 for said common source of supply.

2) Interim Order No. 574267 provides:

14. Termination: This order shall be in effect for a period of twelve (12) months from the date of issuance and shall automatically expire at the end of the twelve (12) month period unless: (1) Operations for a horizontal well are being conducted, in which case the order shall expire thirty (30) days after completion of operations; (2) Form 1002A has been filed with the Commission;(3) The order has been previously voided by written request of the applicant; (4) A request seeking an extension of time has been submitted.

(3) On May 11, 2011 Wicklund filed a Scheduling Form scheduling an unopposed hearing on the merits for May 16, 2011. On May 16, 2011 Wicklund appeared before the ALJ requesting the Commission to issue a final order in the cause establishing a 320 acre horizontal well unit for the Mississippian common source of supply.

(4) On May 27, 2011 the Corporation Commission issued a Final Order in this matter. The Report of the Commission Findings and Order No. 585819 granted Wicklund horizontal spacing for the W/2 of Section 2 granting a 320 acre horizontal well unit. The order found that the relief requested was necessary to prevent or assist in preventing the various types of waste of oil or gas prohibited by and in accordance with OCC-OAC 165:5-7-6 and OCC-OAC 165:10-3-28.

(5) Plymouth asserts that since no horizontal well has been commenced in the W/2 of said Section 2 for said common source of supply the Interim Order

had not been extended and therefore expired on its own terms and it is of no force and effect. Plymouth asserts at the new hearing date of May 16, 2011 no witnesses were called and no evidence was presented. Although new wells have been drilled in the intermediate area, no evidence of the drilling and production and other development in the area was presented in this cause since March 8, 2011. Plymouth states that clearly any final order issued by the Commission in the captioned Wicklund case is not supported by substantial evidence. In addition since the Interim Order expired the Commission would not have jurisdiction to issue a final order. The failure of Wicklund to provide any notice of the hearing in said cause on May 16, 2011 after being notified of the application filed by Plymouth in CD 201102160-T on May 2, 2011 is in violation of the minimum standards of due process required by the U.S. and Oklahoma constitutions.

(6) Plymouth filed its application in Cause CD 201102160-T requesting that the Commission issue an order establishing Section 2 as a 640 acre horizontal well drilling and spacing unit for the Mississippian common source of supply.

(7) Plymouth requests that the captioned cause be reopened for further hearing and consolidated for hearing with the application filed by Plymouth in Cause CD 201102160-T, to hear additional evidence regarding whether or not the requested horizontal spacing should be granted. Plymouth requests that the Commission or the assigned ALJ reopen the record and conduct a hearing of the cause on such date as the Commission may determine.

REPORT OF THE ALJ

(1) **ALJ Curtis Johnson** reported that this matter concerns horizontal spacing and the motion before the ALJ was a motion to stay the issuance of an order in that horizontal spacing cause and to reopen the cause which was filed by Plymouth. The present Wicklund case was filed on February 5, 2010, and then an interim order was heard and recommended on March 8, 2011. Interim Order No. 574267 was then issued, and that was under the old horizontal spacing rules that required interim orders to be filed in a case. Order No. 574267 expired on its own terms. However, the base application was never dismissed and Wicklund requested that the record be opened on the base application with evidence being taken. Wicklund recommended a final order be issued under the new horizontal spacing rules.

(2) On May 20, 2011 Plymouth filed a motion to stay issuance of the final order and to reopen cause. This was for the purpose of putting on additional information regarding a well that had been drilled in the offsetting unit. It was

alleged that this new well would give more information concerning the proper size of the horizontal drilling unit.

(3) The ALJ stated that the Wicklund original base application was never dismissed with the proper 15 days notice being originally given. Plymouth never entered an appearance in the original cause.

(4) The ALJ stated that he believed the notice was proper in the original Wicklund base application. If this new well in the offsetting section could shed new light or give new information, it would constitute a change in knowledge of condition and Plymouth then could file a base application to change the spacing from 320 to 640.

(5) However, the ALJ did not see any reason to grant the motion to reopen as it would further continue or delay Wicklund's base application which had been pending for some time. No appearance had ever been entered and no interest was ever shown by Plymouth in this cause. Thus, the ALJ denied Plymouth's motion to stay issuance of final order and to reopen cause.

POSITIONS OF THE PARTIES

PLYMOUTH

1) **J. Fred Gist**, attorney, appearing on behalf of Plymouth, stated that you really have two cases that are involved, the present Wicklund application that was filed well over a year and a half ago in February of 2010 and a new case that was filed by Plymouth that seeks horizontal spacing for the same formation but covers all of Section 2—640 acres. The first application by Wicklund covers only the W/2 of Section 2. There has been no evidence taken in that case since March 8, 2010 and that was in an uncontested case where Wicklund obtained an interim Order No. 574267 that was issued on March 23, 2010.

2) Wicklund never took any action on that interim order and by its own terms it expired. Wicklund had a year to drill a well and they didn't do anything. This could be deemed to have basically terminated the case because Wicklund did nothing for obviously over a year.

3) After Plymouth filed their new case that covers the whole Section 2 and sent notice to all of the owners in the Section 2, including Wicklund, upon

receipt of our notice Wicklund then files a scheduling form, and does not give any notice to any of the parties. Plymouth wasn't a party because at the time Plymouth didn't own anything in the W/2 so they weren't a respondent in the Wicklund case.

4) Wicklund did not give any additional notice and filed what's called a scheduling form. The interim order provided that the case would be opened in June of 2011 and it was never reopened. It was continued without a date.

5) The uncontested Wicklund case was presented on May 16, 2011 and there was no additional evidence taken by the ALJ. Wicklund asked to incorporate by reference testimony that had been presented in the case on March 8, 2010, over a year before. So we have an old case, an old record. Wicklund asks the Commission to issue a final order in the case which by all rights ought to be dead/expired, because they got an interim order and never drilled the well. The order says it expired. It did expire with no additional notice. But they present a request for a final order.

6) Plymouth saw that the case had appeared on the docket on May 16th, pursuant to a scheduling form. Plymouth then filed this motion asking to stay the issuance of a final order and reopen the Wicklund case.

7) What should happen is there ought to be a hearing in which the Wicklund case and the Plymouth case are consolidated and all the parties have an opportunity, all the owners in the entire section have an opportunity, and not just the owners in the W/2, to be heard on what would be the appropriate size spacing for development, 640 acres or 320 acres.

8) All Plymouth was asking for was to preserve the status quo, don't issue an order in this case until the Commission has heard evidence that is more recent than March of 2010. Because there has been new development in Section 3, that evidence could be pivotal for determining the size of units. All of that information should be available to the Commission before they issue an order in this cause. Therefore, the main reason for Plymouth's filing was a matter of judicial economy. If the Wicklund case is not dead on its own by virtue of the expiration of the interim order, then it should be reopened and consolidated with the Plymouth case with an actual evidentiary hearing so that an order can be issued based on substantial evidence not on old evidence.

9) Although Plymouth had their motion pending, Wicklund presented an order to the Commission and the Commission signed that order which purports to be a final Order No. 585819 in the Wicklund cause. However, Plymouth believes their motion to reopen is still valid and the Commission would have the jurisdiction to stay the effectiveness and issuance of this order. Plymouth asks the Commission to stay the issuance of this order or it could be vacated, cause reopened and allow Plymouth to proceed.

10) As the ALJ points out Plymouth still has a remedy to vacate this order but it seems inefficient to have an order issue one moment and then ask to vacate it just a few days later. It makes more sense to let all the owners have ample notice, have an opportunity to be heard and present the most recent and pertinent evidence.

WICKLUND

1) **William H. Huffman**, attorney, appearing on behalf of Wicklund, stated that the order had issued in this particular cause and when this motion hearing was held before the ALJ on May 24, 2011 the ALJ specifically asked about the status of the order and he was told that the order had been submitted as it was being processed at that particular time. Wicklund submitted the order timely after the hearing on May 16, 2011. The final order was issued on May 27, 2011.

2) Plymouth was never a respondent in the Wicklund case, so they aren't entitled to notice. No respondent in the Wicklund case protested the case, filed any kind of response to the case or made any appearance in the case. Plymouth owns no interest in the W/2 of the section so they are not entitled to notice under the Commission rules.

3) OCC-OAC 165:5-9-1(e) states "**Default.** Any named respondent who fails to file response within the time specified shall be deemed in default, and the Commission or the Administrative Law Judge may proceed to hear the cause without further notice to a person in default." Thus no one is required to give any further notice to the parties if they don't file a response. If you look at the subsequent pleadings, and OCC-OAC 165:5-9-2(b)(1)(B) it states: After the record in the cause has been opened on the merits or a prehearing/scheduling agreement has been filed or a prehearing/scheduling order has been issued, notice shall be given by the movant by serving, at least five (5) days prior to the date set for hearing, by regular mail, a copy of the motion and notice to all parties of record." When the present cause was opened on the record nobody appeared. There were no parties of record in this particular Wicklund case and therefore notice was proper.

4) In *Forest Oil Corporation v. Corporation Commission of Oklahoma*, 807 P.2d 774 (Okl. 1990) provides that working interest owners are the only parties who can conceivably be damaged as a result of spacing and constitutional rights or personal rights may not be asserted vicariously.

5) Plymouth owns no interest in the W/2 which they have admitted to. Thus they do not have any rights according to the *Forest* case. Thus Plymouth has no rights according to the *Forest* case that could conceivably be damaged. By saying you didn't give notice to all of these other people that's like trying to vicariously assert those parties' jurisdictional rights and Plymouth doesn't claim that they represent any of those other parties.

6) The final order has issued in this cause. Also there is the pending Plymouth application for a 640 acre drilling and as the ALJ set forth, if that's the case, they can have their hearing, can present their evidence and if the Commission deems it proper, then they can change the spacing to 640 acres. Thus they are going to get their hearing and get their opportunity to present their evidence. Therefore there isn't going to be any change in judicial economy. The circumstances are that they are going to have a hearing and any new evidence they claim is available could be presented at that particular time.

RESPONSE OF PLYMOUTH

1) Plymouth does however own an interest in this section. The Commission has to take judicial notice of the fact that you have got two competing applications. The Commission has to apply minimum standards of due process and they have to issue an order based on substantial evidence. The people that own the W/2 that were respondents in the present case had over a year and no activity was held under that order. Just common sense dictates that the Commission after that period of time, since March 8, 2010, the Commission ought to combine these cases and hear new evidence so that the proper size unit can be established.

CONCLUSIONS

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

1) The Referee finds ALJ Johnson's recommendation to deny Plymouth's Motion to Stay Issuance of Final Order and to Reopen Cause to Take Further Evidence is supported by the facts and circumstances adduced before the ALJ and free of any abuse of discretion on the part of the ALJ. The ALJ heard the motion as an experienced jurist and has considered the arguments and facts presented. The Referee, upon review, can find no reason to vary that determination.

2) The Referee notes that the granting of a Motion to Reopen is discretionary on the part of the Commission. OCC-OAC 165:5-17-1(a) provides:

Within ten (10) days after an order of the Commission is entered, any person may file a motion for rehearing, or a motion to set aside or to modify the order, or for any other form of relief from the order. However, a motion to reopen the record after an order has been entered shall not be considered a proper motion to seek relief from the order. The motion shall specifically state:

(1) The parts or provisions of the order sought to be set aside or modified or from which relief is sought.

(2) The specific modifications or other relief sought by the motion.

(3) the specific grounds relief relied upon for relief.

3) Plymouth's motion to reopen was filed, argued and the oral appeal to the motion lodged before Order No. 585819 was entered on May 27, 2011. Up until that order becomes final, the Commission has the power to reopen and set aside the spacing order.

4) As stated by the Supreme Court in *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309 (Okl. 1988):

Oklahoma jurisprudence treats a motion to modify a Commission order differently from that of a district court. Commission orders automatically become final after 30 days. Once an order has become final, its vacation is beyond that agency's power. The Commission is without authority even to review and modify the order unless statutory notice of a hearing concerning the proposed modification is given to all interested parties. Even during the 30 day-period before an order becomes "final"—in the sense of passing beyond the reach of appellate review—the Commission may act upon a motion to rehear, modify or reconsider its order but is not required to do so. It

is well established that the Commission has no power to entertain a rehearing or reconsideration request of a decision after an appeal from it has been made to this court. Extant case law compels us to hold that, insofar as Rule 24 may be construed to empower the Commission to entertain a request to modify an appealable order after the lapse of 30 days from that order's issuance, its provisions plainly conflict with 12 O.S. 1981 §991(a) and are hence unauthorized by law. (footnotes omitted)

5) There is no abuse of discretion shown on the part of the ALJ in denying Plymouth's motion. The ALJ, who heard the hearing on the merits, was the best one to determine if the record was in need of supplementation. OCC-OAC 165:5-13-3(p) states in relevant part:

(P) Reopening the record. Any person may file and serve, by regular mail, on all parties of record a motion to reopen the record for further hearing or to offer additional evidence. The Commission, at any time prior to final order in the cause, may, upon such motion or upon the motion of the Commission order the record to be reopened for the purpose of taking testimony and receiving evidence which was not or could not have been available at the time of the hearing on the merits or for the purpose of examining its jurisdiction.

One can see by the use of the word "may" that a motion to reopen is "permissive" only and not "mandatory". It does not require the Commission to reopen the hearing.

6) The reopening of a cause is discretionary on the part of the Commission. The Referee sees no abuse of discretion on the part of the ALJ in refusing to entertain additional evidence at this time. Plymouth was never a respondent in the present Wicklund case. No respondent in the present case protested the case, filed any kind of response to the case or made any appearance in the case. Plymouth owns no interest in the W/2 of Section 2. OCC-OAC 165:5-9-1(e) provides:

Default. Any named respondent who fails to file response within the time specified shall be deemed in default, and the Commission or Administrative Law Judge may proceed to hear the cause without further notice to a person in default.

OCC-OAC 165:5-9-2(b)(1)(B) states:

(B) After the record in the cause has been opened on the merits or a prehearing/scheduling agreement has been filed or a prehearing/scheduling order has been issued, notice shall be given by the movant by serving, at least five (5) days prior to the date set for hearing, by regular mail, a copy of the motion and notice to all parties of record.

The Wicklund case was opened on the record on May 16, 2011. There were no parties of record in this particular cause and the ALJ concluded that notice was proper. See *Forest Oil Corporation v. Corporation Commission of Oklahoma*, 807 P.2d 774 (Okl. 1990).

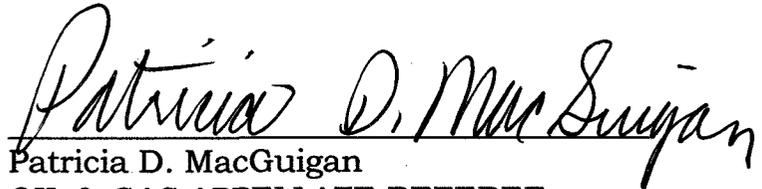
7) Thus, Plymouth owns no interest in the W/2 and has no rights that could be conceivably damaged. The base application of Wicklund was never dismissed and no one entered an appearance in the cause. If there have been new wells drilled in the immediate area which would provide new evidence concerning development in the area and the size of a spacing unit then this Order No. 585819 when final can be modified or vacated by a showing by Plymouth that there has been a change in conditions or a change in knowledge of conditions. Plymouth has a present application pending for 640 acre spacing and could then proceed and have the opportunity to present their evidence to change the spacing to 640 acres.

8) In *Mustang Production Company v. Corporation Commission*, 771 P.2d 201, 203 (Okl. 1989) the Oklahoma Supreme Court held:

The standard to be applied by the Corporation Commission when hearing an application to modify or vacate a prior, valid order is well known in Oklahoma. A prior, valid order may only be modified or vacated upon a showing by an applicant that there has been a change in conditions or change in knowledge of conditions. *Phillips Petroleum Company v. Corporation Commission*, Okl., 461 P.2d 597, 599 (1969). The applicant must make this showing by substantial evidence. *Phillips*, supra; *Anderson-Prichard Oil Corp. v. Corporation Commission*, 205 Okl. 672, 241 P.2d 363 (1951); Okla. Const. Art. IX § 20. Without this showing, any attempt to vacate or modify a prior, valid order constitutes a prohibited collateral attack on that earlier order. *Application of Bennett*, Okl., 353 P.2d 114, 120 (1960).

9) As stated above the reopening of a cause before an order becomes final is discretionary on the part of the Commission and in the present case there is evidence to support the granting of the Wicklund application and the resulting Order No. 585819. The Referee sees no reason to vary the determination of the ALJ that any evidence concerning development in the area could be presented by a Plymouth application to modify Order No. 585819. For the above stated reasons, the Referee finds that the ALJ's Oral Decision should be affirmed.

RESPECTFULLY SUBMITTED THIS 28th day of June, 2011.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Cloud
Commissioner Anthony
Jim Hamilton
ALJ Curtis Johnson
William H. Huffman
J. Fred Gist
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