

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

FILED
FEB 25 2011

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CORPORATION COMMISSION
OF OKLAHOMA

<u>APPLICANT:</u>	NEW DOMINION, LLC)	
)	
<u>RELIEF SOUGHT:</u>	CONFIRM POOLING ORDER NO. 500663 AS TO CERTAIN RESPONDENTS)	CAUSE CD NO. 201004890-T
)	
<u>LEGAL DESCRIPTION:</u>	S/2 SECTION 15, TOWNSHIP 11 NORTH, RANGE 6 EAST, POTTAWATOMIE COUNTY, OKLAHOMA)	
)	
)	

**REPORT OF THE OIL AND GAS APPELLATE REFEREE ON
AN ORAL APPEAL OF MOTION TO RECONSIDER POOLING
ORDER NO. 581610 AND MOTION TO CONSOLIDATE WITH
CAUSE CD 201000867**

These Motions came on for hearing before **Kathleen M. McKeown**, Administrative Law Judge for the Oklahoma Corporation Commission, at 9 a.m. on the 4th day of January, 2011, in the Commission's Courtroom, Kerr Building, Tulsa, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Ron Barnes**, attorney, appeared for applicant, New Dominion, LLC ("New Dominion"); **Charles A. Adams**, attorney, appeared for Don W. Tucker ("Tucker"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") issued her Oral Ruling on the Motions to which Oral Exceptions were timely lodged and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions were referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 24th day of January, 2011. After considering the arguments of counsel and the record contained within Cause, the Referee finds as follows:

STATEMENT OF THE CASE

TUCKER APPEALS the ALJ's recommendation to deny Tucker's Motion to Reconsider Pooling Order No. 581610 and Motion to Consolidate with Cause CD 201000867.

Pooling Order No. 500663 issued the 2nd day of February, 2005 which order pooled the 320-acre horizontal laydown Misener-Hunton common source of supply underlying the S/2 of Section 15, T11N, R6E, Pottawatomie County, Oklahoma. Pooling Order No. 500663 listed certain parties as deceased and/or address unknown. Notice of hearing in the original Cause CD 200408866-T was published in Oklahoma County and Seminole County rather than Pottawatomie County. On November 12, 2010 New Dominion filed an application to confirm pooling Order No. 500663 as to certain respondents. New Dominion wished to confirm the parties listed on Exhibit "A" who were address unknown except for respondent Mark Hartman Branning who executed a division order for the well drilled pursuant to pooling Order No. 500663 and who was receiving his royalty revenues from the subject well. New publication of the notice of hearing was made in Cause CD No. 201004890-T to confirm pooling Order No. 500663 as to the unknown parties from Cause CD 200408866-T as well as Mark Hartman Branning now located. Order No. 581610 issued on December 29, 2010 which confirmed pooling Order No. 500663 as to the parties listed on Exhibit A and all of the provisions of pooling Order No. 500663 including the effective date remained in full force and effect.

On March 2, 2010 Don W. Tucker filed Cause CD 201000867 which sought to pool the S/2 of Section 15, T11N, R1W, Pottawatomie County, Oklahoma. Tucker asserted that pooling Order No. 500663 was invalid for lack of due process in locating Opal Betty West, an unknown/unlocatable respondent in Cause CD 200808866-T. The initial hearing occurred on May 5, 2010. At the outset of the matter New Dominion made an oral motion to dismiss the application in Cause CD 201000867 which was granted by the ALJ. Oral appeal was timely made and the cause was set for hearing before the Oil and Gas Appellate Referee and the matter was heard on May 27, 2010 with the Oil and Gas Referee affirming the ALJ's dismissal of Cause CD 201000867 as an impermissible collateral attack. A timely appeal was filed at the Commission sitting en banc which was heard on August 24, 2010. The Commission en banc voted 3:0 to reverse, the ALJ and Appellate Referee and to remand Cause CD 201000867 to the ALJ for further hearing on the merits pursuant to Order No. 579022 issued on September 29, 2010.

On November 15, 2010 when New Dominion filed the pooling application in Cause CD 201004890-T to confirm pooling Order No. 500663 no notice was given to Tucker. Tucker initially protested Cause CD 201004890-T, but after

being assured that all interests owned by Tucker were dismissed from the purview of the pooling application Tucker withdrew his protest.

The hearing on remand in Cause CD 201000867 has been continued and has not yet been heard.

Tucker then on December 29, 2010, filed this Motion to Reconsider Pooling Order No. 581610 and Motion to Consolidate with Cause CD 201000867.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

ALJ KATHLEEN M. MCKEOWN reported that she had recommended the confirmation Cause CD 201004890-T on December 6, 2010 as an uncontested matter. Tucker was not a named party in this application. Thus, Tucker's interests were unaffected by pooling Order No. 581610 that issued.

She notes also that Tucker's appearance was entered as only an interested party, not a protesting party.

In Tucker's combined Motion to Reconsider pooling Order No. 581610 and Motion to Consolidate with CD 201000867, Tucker alleges 1) arguments dealing with the validity of the original pooling order; and 2) arguments concerning Tucker's belief that Order No. 581610 in CD 201004890-T denies Tucker the right to share proportionately in any pooled acreage.

The ALJ notes that the arguments mentioned concerning reconsidering the pooling order confirmation were known at the time of the December 6th hearing. These arguments should have been raised at the uncontested merit hearing on December 6th.

POSITIONS OF THE PARTIES

TUCKER

- 1) **Charles A. "Andy" Adams**, attorney, appearing on behalf of Tucker, stated Tucker initially protested the pooling application in CD 201004890-T due to a potential lease of Charles Michael Branning being listed, which Tucker had alleged to have an interest in. The Branning lease was later dismissed so Tucker through agreement with New Dominion, dropped their protest.
- 2) Tucker later realized that New Dominion by their application here was attempting to confirm pooling Order No. 500663 that issued out of Cause CD

200408866-T. This is where the legal arguments the ALJ mentioned previously come into play.

3) Order No. 500663 was void ab initio, due to notice being published in the wrong County. This is the very same order that Tucker fought in another Cause, CD 201000867, which resulted in Order No. 579022, issuing on September 29, 2010, which remanded the cause.

4) First, nothing from nothing leaves nothing. A voided order is as if it never occurred. It is similar to the difference between a divorce and an annulment. If an order is void ab initio from the very start, a confirmation of a voided order results in the issuance of a voided order.

5) Second, when Order No. 500663 was remanded back to the ALJ by Order No. 579022 this is what Tucker refers to as piecemeal litigation. We now have a subsequent filing by New Dominion to pool the remaining unknown and locatable parties.

6) Third, due to the multiple pooling orders here, there is a lack of judicial economy which generates confusion. Tucker asserts that by having the merit ALJ reside over these proposed consolidated causes, judicial economy would occur due to only one pooling order being issued.

7) Fourth, Tucker points out this also relates to a property issue in the 320-acre unit. 79% of this unit was leased with 21% or 67 acres being unknown, unlocatable respondents. Tucker points out that if Tucker prevails in Cause CD 201000867 and opts to participate in the well, Tucker would be entitled to their proportionate share of this remaining 67 acres. Tucker asserts they are being denied this by virtue of the piecemeal litigation referenced above.

8) Tucker points out that Tucker does not have to have standing to bring this motion. The Commission sua sponte on its own motion can determine this issue.

NEW DOMINION

1) **Ron M. Barnes**, attorney, appearing on behalf of New Dominion, stated that poolings only affect named parties in a particular cause. Tucker is not a named party in this cause and hence has no standing to argue here.

2) New Dominion asserts a party to have standing must have an interest in the matter. Tucker has no interest here. For a motion to be heard the party filing same must have standing to do so.

- 3) New Dominion notes that Tucker did enter an appearance. Standing is not a requirement to enter an appearance. Whatever rights Tucker had they waived as they did not protest the merit uncontested confirmation hearing.
- 4) New Dominion notes that Tucker brings up a prior case, CD 201000867, that was remanded back to the initial ALJ. There, Tucker's claimed interest concerned a party that was not named in the present cause so that case has no bearing on the matter today.
- 5) New Dominion notes that Tucker merely changed its mind and argues now something that Tucker had not thought of before.
- 6) New Dominion notes this is Tucker's motion on matters where Tucker owns no interest in the related pooling Orders. Pooling Order No. 581610 has no affect on Tucker's alleged or actual claims of interest in Cause CD 201000867. The ALJ properly denied Tucker's motions here. Pooling Order No. 581610 is a valid final order.

RESPONSE OF TUCKER

- 1) Tucker believes it can argue this Motion to Reconsider as a third-party intervener, an amicus curiae, to this Court. Standing is not required for such. Further, Tucker's property interest here would be his potential proportionate share of 67 forced pooled acres. This would deprive Tucker of a substantial amount of money should Tucker be prevented from being in this pooling.

CONCLUSIONS

The Referee finds the Oral Report of the Administrative Law Judge to deny Tucker's Motion to Reconsider Pooling Order No. 581610 and Motion to Consolidate with Cause CD 201000867 should be affirmed, but with one modification.

- 1) The Referee finds that the ALJ's recommendation to deny Tucker's Motions based on the fact that the arguments made by Tucker for reconsidering the pooling Order No. 581610 do not involve anything that was unknown at the time of the pooling order confirmation uncontested hearing on December 6, 2010. These legal arguments could have been raised at the uncontested confirmation hearing but were not presented by Tucker at said hearing. Tucker entered an appearance at the uncontested hearing but did not protest said hearing.

2) The Referee finds that the ALJ's Oral Report should be modified to show that while Tucker was not a party named in the New Dominion application in Cause CD 201004890-T, Tucker had standing under 52 O.S. Section 112 to seek relief from the Commission through these motions.

3) The Referee finds that Tucker had standing to seek reconsideration/modification of pooling Order No. 581610 and to consolidate the present cause with CD 201000867. The Commission and case law consider 52 O.S. Section 112 to be a separate standing statute which may also generate standing to seek relief from the Commission for any person affected by a Commission order applying for relief from that order. *Marshal Oil Corporation v. Adams*, at 688 P.2d 37 (Okl. 1983).

4) 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. Such application shall be in writing and shall be heard as expeditiously as possible after notice of the hearing thereon shall have been given in the manner provided by Section 14 of this act.

5) As stated by the Supreme Court in *Forest Oil Corporation v. Corporation Commission*, 807 P.2d 774 (Okl. 1990):

Under Section 112, any person affected by a Corporation Commission order has standing to apply to the Commission for relief.

* * *

We have held that Section 112 gives the Corporation Commission authority to clarify its orders. The power to clarify a previous order is continuous in nature, and flows from the entry of the original order. Section 112 provides that any person "affected by" a Corporation Commission order has the right to request the order's amendment, modification, or a supplement to the order. Absent evidence that the Legislature intended a special or technical definition, words used in a statute are given their ordinary and common meaning. In its

legal sense "affect" means to act injuriously upon persons or estate. It may also mean to concern, change, increase or diminish. In *United States v. Public Util. Comm'n*, 151 F.2d 609, 615 (D.C.Cir. 1945), the District of Columbia Court gave a broad meaning to the word "affected" used in two statutes allowing consumers to challenge Public Utility Commission rulings. The court found that the term had been chosen to expand the privilege of complaint. The code language at issue in *Public Util. Comm'n* is almost identical to that of Section 112. Both the provisions under consideration in *Public Util. Comm'n* and Section 112 provide that any person "affected by" a ruling of the respective agency may apply for relief. Like the language in *Public Util. Comm'n*, Section 112's reference to parties "affected by" orders of the Corporation Commission must be given a broad meaning to encompass those parties whose positions are altered by the regulatory commission's orders. (footnotes omitted) .

6) Thus, under 52 O.S. Section 112, Tucker does have standing to seek a Motion to Reconsider Pooling Order No. 581610 to show a change in conditions or knowledge of conditions necessitating the repeal, amendment or modification of Order No. 581610, and a Motion to Consolidate with Cause CD 201000867.

7) However, the ALJ's recommendation to deny said motions was correct in the Referee's view because the legal arguments to stay the effectiveness of Order No. 581610 and consolidation with Cause CD 201000867 were known at the time of the uncontested confirmation hearing in the present cause and Tucker failed to present said issues. Thus, Tucker has failed to show a change in condition or knowledge of conditions necessitating the reconsideration, modification and staying of the effectiveness of Order No. 581610 or consolidation of the hearing in this cause with Cause CD 201000867.

8) The right to reconsider or modify previous orders of the Commission is expressly "predicated upon proper proof of a need thereof." *Wood Oil Company v. Corporation Commission*, 239 P.2d 1021, 1022 (Okl. 1950). The Supreme Court in the *Wood Oil Company v. Corporation Commission* case stated at 239 P.2d at 1023:

The exercise of the authority to modify the previous order necessarily involves a changed factual situation

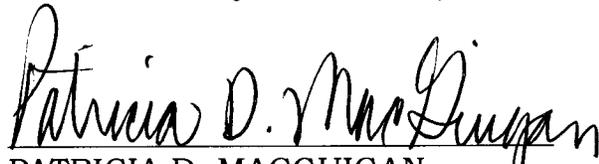
from that which obtained at the time of making the order sought to be modified.

...Otherwise the modification would constitute an attempt to change the original order in a manner not authorized by law.

The Motion to Vacate and Modify Order No. 19890 did not specify any substantial change of condition of the area nor did the evidence reveal such change. The contentions urged in support of the motion were known and could have been urged at the hearing on which the original order was based. Plaintiffs now say that the order sought to be vacated was inequitable, unjust and unconscionable, but such complaints could properly have been urged only on appeal. 52 O.S. Section 1941, Section 111. Plaintiff has consented to the order and it has become final.

9) Thus, the Oral Report of the ALJ should be affirmed and modified as set out above.

RESPECTFULLY SUBMITTED THIS 25th day of February, 2011.


PATRICIA D. MACGUIGAN
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Cloud
Commissioner Anthony
Jim Hamilton
ALJ Kathleen M. McKeown
Ron M. Barnes
Charles A. Adams

Office of General Counsel
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