

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

**FILED**  
JUN 13 2011

COURT CLERK'S OFFICE - OKC  
CORPORATION COMMISSION  
OF OKLAHOMA

**APPLICANT:**                    **LORI WROTENBERY,**  
   **DIRECTOR, OIL AND GAS**  
   **CONSERVATION DIVISION,**  
   **OKLAHOMA CORPORATION**  
   **COMMISSION**

**RELIEF SOUGHT:**                **AMEND, CLARIFY OR VACATE**  
   **ORDER NO. 549096**

**CAUSE PD NO.**  
**201000038**

**LAND COVERED:**                **W/2 OF SECTION 16, AND**  
   **THE E/2 OF SECTION 17, AND**  
   **THE NE/4 OF THE NE/4 OF**  
   **THE NE/4 OF SECTION 20,**  
   **AND THE N/2 OF THE N/2 OF**  
   **THE NW/4 OF SECTION 21,**  
   **ALL IN TOWNSHIP 8 NORTH,**  
   **RANGE 24 EAST, LEFLORE**  
   **COUNTY, OKLAHOMA**

**REPORT OF THE OIL AND GAS APPELLATE REFEREE**

This Cause came on for hearing before **Michael Porter**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 17<sup>th</sup> and 18<sup>th</sup> days of November, and the 22<sup>nd</sup> day of December, 2010, at 8:30 a.m. in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

**APPEARANCES:** **Keith Thomas**, Assistant General Counsel, appeared for applicant, Lori Wrotenbery, Director, Oil and Gas Conservation Division, Oklahoma Corporation Commission ("Director"); **Richard Grimes**, attorney, appeared on behalf of MMHF, LLC ("MMHF"); **Harlan Hentges**, Attorney, appeared on behalf of Interveners Trustees of the Town of Bokoshe and Herman Tolbert (collectively "Bokoshe"); **Doug Schooley**, attorney, appeared on behalf of Oklahoma Department of Mines ("ODM"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") filed his Report of the Administrative Law Judge on the 17<sup>th</sup> day of March, 2011. The Amended Report of the Administrative Law Judge was filed on the 22<sup>nd</sup> day of March, 2011, to which Exceptions were timely filed by the Director and proper notice given of the setting of the Exceptions. Exceptions were filed on April 4, 2011, by Bokoshe.

The Appellate argument concerning the Exceptions were referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 13<sup>th</sup> day of May, 2011. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

### **STATEMENT OF THE CASE**

**THE DIRECTOR AND BOKOSHE FILED EXCEPTIONS** to the ALJ's Report of the Administrative Law Judge filed on March 17, 2011 and the Amended Report of the ALJ which was filed March 22, 2011. It was the recommendation of the ALJ that Commission Order No. 549096 be vacated.

This cause involves the use of produced water from oil and gas operations being used by MMHF to make a fly-ash slurry. The slurry is used to fill in an open pit mine in order to restore the surface to its original contours. This activity by MMHF involves the ODM and the Oklahoma Corporation Commission ("the Commission"). Order No. 549096 authorized MMHF to accept produced water that contained in excess of 5,000 parts per million ("ppm") of Total Dissolved Solids ("TDS") as long as it was blended with fresh water to bring the TDS to below 5,000 ppm prior to placing it in the fly-ash disposal pit. The Applicant, Director, filed this cause seeking an amendment, clarification or vacation of Commission Order No. 549096.

### **THE DIRECTOR TAKES THE POSITION:**

(1) In the present application the Director sought the entry of an order to amend and/or clarify certain issues in Commission Order No. 549096, or vacate said order if the operator of the facility located on the above described lands refused to agree to those amendments and clarifications.

(2) On November 17 and 18, 2010 and December 22, 2010 this cause came on for hearing before an ALJ on the protested hearing docket in Oklahoma City, Oklahoma. Witnesses were called by the Director, MMHF and Bokoshe.

(3) Tim Baker ("Baker"), Manager, Pollution Abatement Department, testified for the Director regarding a facility operated by MMHF on the above described lands. Baker told the Court that the MMHF facility was a strip mine pit that was being closed through the use of fly ash. Baker testified that MMHF had

obtained a series of Commission orders allowing them to use produced water to mix with the fly ash to create a slurry. Further, Baker stated that produced water is oil field waste and as such is regulated by the Commission.

(4) Baker stated that the Commission regulates the use of the produced water, but that the ODM regulates the MMHF facility. Baker stated the Commission filed the application seeking to have an order more accurately depicting the use of the produced water. Baker said the use of the water had been permitted under OAC 165:10-9-1 even though that rule is actually for commercial mud disposal. Baker told the Court that the orders permitting the use of produced water granted exceptions to provisions of OAC 165:10-9-1 that did not apply to the regulation of the MMHF facility. Baker said that the Commission wanted a Commission order to amend Order No. 549096 stating that the facility is to be regulated using the technical requirements found in individual existing cases at the Commission, but primarily regulated under 165:10-7-24 as waste stream management, so MMHF is permitted to use produced water for beneficial use at the facility. Further, Baker asked the order be amended to state that if the ODM or the United States Environmental Protection Agency ("USEPA") barred the MMHF facility from receiving produced water, the water could no longer be used for beneficial use, therefore, MMHF would no longer be allowed to use produced water on the facility.

(5) Additionally, Baker said the application seeks an order to clarify Commission Order No. 549096 stating: the MMHF Facility is not for disposal of produced water, but rather is for the disposal of fly ash; that MMHF is not to dispose of produced water on the ODM regulated site, but rather MMHF is permitted by the Commission to use the produced water for a beneficial use; the Commission jurisdiction does not extend to the ODM facility; the extent of the Commission jurisdiction is over the transportation of the produced water and the produced water itself until it is off-loaded at the ODM regulated facility for the purpose of creating a slurry with fly ash; and that it shall be noted that though previous Commission orders may have referred to produced water as "Fresh Water" because it was produced water with <5,000 ppm TDS, this water is a deleterious substance since it came from a well bore and as such all produced water is regulated by the Commission. Finally, Baker stated that in regard to the technical requirements of the facility the Director is seeking to clarify the use of produced water on the MMHF facility by stating that: 1) MMHF will still have to test all loads of produced water delivered to the facility and that water must be <5,000 ppm TDS or less; 2) MMHF will continue to keep a log documenting the origin of each load of produced water delivered to the facility; 3) MMHF is no longer permitted to have a pit for the purpose of blending produced water to achieve the <5,000 ppm TDS required level unless authorized by Commission order or by a Form 1014 pit permit; 4) semi-annual reporting is still required; 5) site security is still required; and 6) all provisions in the Commission orders that regulate the produced water received and used

by MMHF that are not herein amended or clarified remain unchanged. Finally, Baker told the ALJ that since MMHF had agreed to the clarifications and amendments requested, the Director did not believe that Order No. 549096 should be vacated.

(6) Subsequent to the hearing on the merits, the ALJ filed a Report on March 17, 2011, and an Amended Report on March 22, 2011. In his Report the ALJ acknowledged that the Commission regulates produced water, but does not regulate fly ash. The ALJ also stated that the MMHF facility is under the jurisdiction of the ODM and not the Commission.

(7) The ALJ stated that the Director was seeking to vacate all orders issued that permitted the MMHF facility. This statement is contrary to the record. The Director was seeking to amend, clarify or vacate Order No. 549096, the last order issued, because the Commission wanted to stop the blending of produced water in a pit permitted by the Commission and to rescind the permit authorizing use of the pit. Since MMHF had agreed to stop using the pit and agreed to the revocation of the pit's permit, the Commission was not seeking to have Order No. 549096 vacated.

(8) The Director believes the ALJ's Report is contrary to the evidence. The ALJ agreed that there was no proof that MMHF was violating the Commission orders permitting the use of produced water on the ODM regulated facility, but refused to clarify and amend the use of produced water by MMHF on the facility. Testimonial evidence presented by the Director clearly showed that the requested technical requirements were desirable for the monitoring of the site so the Commission could ensure that the produced water was being put to beneficial use. Baker stated clearly and presented a list showing how the Director wanted to amend and clarify Order No. 549096. However, the ALJ ignored the need of amending and clarifying Order No. 549096 to state that Rule OAC 165:10-7-24 be incorporated into the regulation of the use of produced water by MMHF and that certain requested technical requirements be retained and binding on MMHF.

(9) As to the aforementioned, the ALJ Report is contrary to the rules. The ALJ stated Rule OAC 165:10-7-24 does not address reclamation, recycling, or reuse of produced water. The Director respectfully asserts that the ALJ erred in his interpretation of Rule OAC 165:10-7-24.

(10) Rule OAC 165:10-7-24(b) states: "(b) Waste materials and disposal options. Consistent with EPA's policy on source reduction, recycling, treatment and proper disposal, operators shall use waste management practices as listed in (c) of this Section which describes the various management practices for the following waste materials. For any of the following waste materials where

option (16) of subsection (c) is listed, option (16) shall be considered before any other option."

(11) Rule OAC 165:10-7-24(b)(1) states: "(1) Produced water: Options 1, 7, 9."

(12) Rule OAC 165:10-7-24(c) states: "(c) Disposal options and rule reference guide. The following waste disposal options are referenced in (b) of this Section."

(13) Rule OAC 165:10-7-24(c)(1) states: "(1) Reclaim and/or recycle."

(14) The testimony of Baker made it clear that this rule gives the Commission the authority to regulate the produced water used by MMHF under the listed waste stream management options. Baker told the ALJ that it was the intent of the Director that the produced water be recycled under the terms of the Commission orders and as allowed by OAC 165:10-7-24 for a beneficial use.

(15) The ALJ erred in his assertion that the application was defective in that it failed to give notice that the Commission was seeking to amend, modify, or supplement Commission Order Nos. 472170, 472171, 491749, and 491750.

(16) Title 52 O. S. §112 states in part: "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.

(17) The Director was not seeking to alter Order Nos. 472170, 472171, 491749, and 491750 in any way. The ALJ is correct in his statement that he is restricted to a determination of whether or not to recommend the amendment, clarification or vacation of Order No. 549096. The Director sought to amend, clarify or vacate only Order No. 549096. The requested relief only changes Order No. 549096. The Director specifically stated that the requested technical requirements mentioned in the previous orders permitting the use of produced water by MMHF were not to be vacated. All the Director is seeking is to amend Order No. 549096 to include Rule OAC 165:10-7-24 and to clarify the order as is delineated above.

(18) For the reasons stated above regarding the application to amend, clarify or vacate Order No. 549096, Director respectfully requests that the recommendations made by the ALJ in his report be modified. The Director believes that the any order issued by the Commission should not vacate Order No. 549096, but rather amend and clarify said order in a manner consistent with the request made by the Director.

**BOKOSHE TAKES THE POSITION:**

(1) The ALJ erred by holding that notice was not adequate for the Commission to address Bokoshe's application to vacate Order Nos. 472170, 472171, 491749, 49150 and 549096.

(2) The ALJ erred by not recommending that all orders pertaining to the facility be vacated because the Orders of the Commission establish that the subject facility is and always has been illegally located within three miles of an incorporated Town of Bokoshe and therefore, the subject facility violates the Commission's own rules and orders.

(3) The ALJ erred by finding or concluding that "A strip pit is being reclaimed" because the uncontroverted evidence of Bokoshe conclusively establishes that fly ash is being permanently placed on top of a pile that is 50 feet above the original contour of the land and was therefore, never a "strip pit."

(4) The ALJ erred in finding or concluding that the produced water "was used to fill in a strip mine pit," because the evidence conclusively establishes that the produced water is dumped into a pit that is on top of a mound of fly ash that is 50 feet above the original contour of the land, and therefore, obviously never a strip mine pit.

(5) The ALJ's report is fatally flawed because it is based on the finding or conclusion that "the beneficial use of produced water was to create an ash slurry to be used to reclaim an old strip mine." The uncontroverted evidence is that the fly ash is being used to build a mound of fly ash 50 feet above the original contour of the land and above the contour of surrounding land. Thus, the evidence conclusively establishes that produced water is being used to build a mound of fly ash, twenty acres in area and 50 feet in height, for which there is no logical, conceivable or even imaginable beneficial use.

(6) The ALJ's findings or conclusions establish there is no evidence of any need for any amount of water to be brought to the site, and the uncontroverted evidence establishes there is no beneficial use of water at the site.

(7) The ALJ erred because his finding or conclusion that "produced water is being recycled" conclusively establishes that the subject facility violates the Commission's own rule, OAC 165: 10-8-1 et seq, which prohibits the location of a recycling facility within three miles of the incorporated Town of Bokoshe.

(8) The ALJ erred in finding or concluding that "there are no commission rules that address reclamation, recycling, or reuse of produced water," because

the Commission Rule, OAC 165:10-8-1 is specifically for reuse and recycling of produced water.

(9) The ALJ erred by finding or concluding that produced "water running off the site" is not within the jurisdiction of the Commission.

(10) The ALJ erred in finding that "water has been delivered to the fly-ash facility that is within the parameters allowed by the initial permits, with the exception of waters authorized under Order No. 549096," because the uncontroverted evidence submitted by Bokoshe established that MMHF maintained two sets of books in order to prevent the Commission and the ODM from detecting illegal dumping.

(11) The ALJ erred in finding or concluding that the facility is not a "Disposal Facility" because the Commission Orders clearly and unequivocally state that this facility is a "Commercial Disposal Facility." It is not within the legal purview of an ALJ or even the Commission itself to say something "is a commercial disposal facility" and simultaneously say that it "is not a commercial disposal facility."

(12) The ALJ erred in not vacating all relevant orders because the ALJ's findings and conclusions establish that the facility is being operated as something other than a disposal facility when it is, by order of the Commission, authorized to operate only as a "commercial disposal facility."

(13) The ALJ erred in not vacating all relevant orders because the ALJ's findings and conclusions establish that the facility is being operated as an unpermitted recycling facility which, under Commission rule OAC 165:10-8-1 et seq, cannot be located within 3 miles of the incorporated Town of Bokoshe.

(14) The ALJ erred in finding or concluding that produced water is not being injected into underground formations because the AL's findings or conclusions and the uncontroverted evidence of Bokoshe conclusively establishes that the produced water enters a fractured water bearing shale.

(15) The ALJ's report is fatally flawed because the ALJ found, "The data suggests that shortly after the produced water was introduced, the TDS went up in some of the monitoring wells. The level allowed for the produced water is no more than 5000 ppm. Not a single data point showed this level of TDS. The fact the wells have stable TDS numbers after the initial rise seems to indicate the produced water is no longer having an affect (sic) on those wells. If the TDS had continued to rise, then that connection could be made." This finding or conclusion is fatally flawed, because the evidence and even the words of the ALJ conclusively establish that the quality of the groundwater was impacted by

disposal of produced water and that the impact has been maintained continuously until the present.

(16) The ALJ erred by failing to recommend that all relevant orders be vacated because the ALJ found that Bokoshe established that the produced water placed into the disposal pit seeps through the fly ash, flows off the site and is discharged into the waters of the United States in violation of the Clean Water Act.

(17) The AL's report is fatally flawed because the ALJ found "water seeping from structures on the site." The ALJ found the produced water is mixed with the water on the site and water seeping from the site, therefore, includes produced water. Thus the Commission's orders are permitting the dumping of produced water at a site from which the water seeps and enter the waters of the state and the United States.

(18) The ALJ erred in finding or concluding that "Seepage may be a natural occurrence" because the seepage is from a mound extending 50 feet above the original contour of the land. The mound, as shown by the uncontroverted evidence, was constructed entirely by MMHF and thus, it is impossible that there would be a "natural seepage" from an entirely man-made mound of fly ash.

(19) The ALJ erred because his finding or conclusion that "fly-ash is being disposed of" conclusively establishes that produced water is being dumped in a facility which violates Oklahoma law which prohibits "disposal" of fly ash except in a Solid Waste Disposal facility regulated by the Oklahoma Department of Environmental Quality ("ODEQ").

(20) The ALJ erred in finding or concluding that "it is in the best interests of the State of Oklahoma that a Memorandum of Understanding be entered into by the Commission and the ODM to formalize the informal communications regarding notices, responsibilities and reporting of MMHF's activities at the facility." The uncontroverted evidence establishes that violations of law at the subject facility have not been addressed by either the Commission or the ODM and a Memorandum of Understanding may serve only to institutionalize a practice that has heretofore sanctioned, enabled and perpetuated violations of the law and endangered the health and property of Oklahoma citizens.

(21) The ALJ erred by finding or concluding that "This unique cooperative effort between the Commission and ODM is a commendable activity," because: 1) there is no evidence and no substantial evidence to support this finding or conclusion; and 2) uncontroverted evidence conclusively establishes that this activity causes pollution of the air, groundwater and surface water in violation of federal law, state law and the Commission's own rules and orders.

(22) Premises considered, Bokoshe prays that their exceptions be sustained and that the Commission enter an Order vacating Order Nos. 472170, 472171, 491749, 491750 and 549096.

**THE ALJ FOUND:**

(1) This unique cooperative effort between the Commission and ODM is a commendable activity. Several environmental issues are being resolved by this effort. A strip pit is being reclaimed, fly-ash is being disposed of, and produced water is being recycled to avoid using fresh drinkable water. This is not to say there have not been some problems. Some of the problems are beyond the jurisdiction of the Commission such as fly-ash dust, truck traffic and water running off the site. The Commission regulates produced water. The evidence shows for the most part, water has been delivered to the fly-ash facility that is within the parameters allowed by the initial permits, with the exception of waters authorized under Order No. 549096. There have been instances where oversight of the handling of the produced water has been less than desirable and water allowed that was not within the permit guidelines.

(2) Bokoshe would like to have all the Commission orders vacated to stop produced water from coming into the reclamation site. The thrust of their request is a perception of excess water being brought to the site. While prohibiting produced water would stop the truck traffic bringing in produced water, it would not stop the trucks bringing in fly-ash. Nor would it prevent MMHF from bringing in other sources of water, be it fresh drinkable water, water out of lakes and rivers, water caught in rain barrels or other water brought in via trucks. Insofar as the Commission is concerned, the work would go on, the ash trucks and water trucks would continue to the site. Things would go on as they had when produced water was not used. This is an ODM facility and the Commission has no jurisdiction over the reclamation activities at this site. The evidence showed MMHF was bringing in an average of 1,000,000 barrels of produced water a year to the facility. One witness for MMHF indicated ODM estimated there was a need for at least 1,200,000 barrels of water annually. No evidence was submitted to show how much water is provided by rain or natural drainage to the site. There was no evidence to show the produced water brought to the facility was not used to mix with the fly-ash. Nor was there evidence showing the produced water was poured on the ground and allowed to run off the site.

(3) Bokoshe claims MMHF is using the facility as a disposal facility, but the evidence does not support that claim. The produced water is not being injected into underground formations, applied to the land, or kept in pits awaiting disposal. The evidence was clear it was mixed with fly-ash and converted to a slurry that was used to fill in a strip mine pit. A disposal facility would not be

re-using the water for another purpose. It is more like a re-use of the water similar to using the produced water to rework a well.

(4) There was evidence shown implying that the produced water was polluting surface and groundwater monitoring wells because the numbers were higher than background data. The evidence showed that wells on one side of a fault were "sweet" while the wells on the other side were "sour" before MMHF began operations. The historical data suggests ground water on one side of the fault had "high" saline content since the 1970s. The later data did not show their quality had been affected by MMHF's operations. The data suggests that shortly after the produced water was introduced, the TDS went up in some of the monitoring wells. The level allowed for the produced water is no more than 5000 ppm. Not a single data point showed this level of TDS. The fact the wells have stable TDS numbers after the initial rise seems to indicate the produced water is no longer having an effect on those wells. If the TDS had continued to rise, then that connection could be made.

(5) There is evidence of water seeping from structures on the site. This is an issue for the ODM to handle as the Commission does not regulate the site. The nature of the water seeping at facility structures is a high pH reading. Produced water normally does not have high pH values. Evidence was not presented to show a high TDS count for salts in the water that was seeping. The evidence did not clearly establish a receipt of excess water. Seepage may be a natural occurrence in structures constructed of re-worked shales as described by a witness.

(6) Several times the Commission explained the beneficial use of produced water was to create an ash slurry to be used to reclaim an old strip mine. There are several beneficiaries of the produced water; the party who generates the fly-ash has a place to dispose of the ash; the mine reclamation project contractor who is using the fly-ash to reclaim the old strip mine; the party accepting the produced water for use in the slurry operations; finally, the source generator of the produced water, most likely a well operator. Interestingly, evidence was presented that according to MMHF's records, 93% of the water received by MMHF at this facility was from Arkansas well operations. When the use of produced water first began after February 3, 2003, the produced water had to come from "association with oil and gas wells producing coal seam gas" per the Commission Order No. 472170. Then Order No. 491749 on June 30, 2004 allowed the use of water produced by oil and/or gas wells from any geologic zone or common source of supply with the restriction it meet the chemical restriction of 5000 ppm or less TDS. Order Nos. 472171 and 491750 dealt with exceptions to Rule 165:10-9-1.

(7) During the hearing, the Commission indicated all orders pertaining to this matter should be vacated and replaced with an order incorporating the use

of Rule 10-7-24 (waste management practices reference chart) along with the continued use of various provisions of Rule 10-9-1, as applicable. Rule 10-7-24 provides a reference for the disposal of wastes under the jurisdiction of the Commission. Produced water is listed as a waste material. Under Rule 165:10-7-24 (b)(1) there are three management practices for handling produced water. Rule 165:10-7-24 (c)(1), (c)(7), and (c)(9) indicate the disposal options for produced water. Only Rule 165:10-7-24 (c)(1) is applicable to the situation at the facility. Unfortunately, there are no Commission rules that address reclamation, recycling, or reuse of produced water that match the situation at this fly-ash facility. Thus, this ALJ can not recommend the use of Rule 165:10-7-24 to regulate the use of produced waters at the fly-ash facility for reclamation or recycling as an amendment to Order No. 549096.

(8) The application in this matter asks that Order No. 549096 be amended, clarified or vacated. Orders Nos. 472170, 472171, 491749, and 491750 required the use of produced water of 5000 ppm or less of TDS. Order No. 549096 amended those orders to allow produced water in excess of 5000 ppm if the water were blended with fresh water to reduce the TDS to less than 5000 ppm. No notice to any party was given that other Commission orders would be amended, clarified or vacated. Title 52 O.S. §112 requires notice before the Commission may repeal, amend or modify, or supplement a Commission order. Since there was no notice given regarding Order Nos. 472170, 472171, 491749, and 491750, to preserve the due process rights of MMHF, this ALJ is restricted to a determination of whether or not to recommend amendment, clarification, or vacating of Order No. 549096 only.

(9) After taking into consideration all the facts, circumstances, testimony and evidence presented in this cause, it is the recommendation of the ALJ that Commission Order No. 549096 be vacated. Vacating this order will have no effect on the prior orders it sought to amend. The evidence clearly showed the blending pit authorized to assist compliance with this Order No. 549096 is no longer used for that purpose. Evidence was given the blending pit was in fact no longer in use and was to be used to water livestock. No evidence was shown to indicate or imply MMHF intended or needed to blend produced water exceeding TDS of 5000 ppm in the future. Therefore, there is no need to continue Order No. 549096.

(11) Although not a part of the requested relief, it is the opinion of the ALJ that it is in the best interests of the State of Oklahoma that a Memorandum of Understanding be entered into by the Commission and the ODM to formalize the informal communications regarding notices, responsibilities and reporting of MMHF's activities at the facility.

**STATEMENT OF THE CASE ON MOTION TO DISMISS  
INTERVENORS/APPLICANTS' EXCEPTIONS TO THE AMENDED  
REPORT OF THE ALJ**

**MMHF REQUESTS** the Commission to Dismiss the Exceptions to the Amended Report of the ALJ filed on April 4, 2011 on behalf of the Board of Trustees of Bokoshe, Oklahoma and Herman Tolbert. The ALJ filed his written Report of the ALJ on March 17, 2011. Apparently, the mailing of that report to one party of record was returned to the Commission. As a result, the ALJ filed an Amended Report of the ALJ on March 22, 2011 which was mailed to current addresses for all parties. Rule 165:5-13-5(a)(2) provides that any person adversely affected by a Report of the ALJ from a hearing on the merits shall have 10 days in which to file exceptions to the Report of the ALJ to perfect exceptions. Written exceptions must be filed within 10 days after filing of the Report of the ALJ. Rule 165:5-1-6(a) provides that in computing time periods required by Commission Rules the day of the act from which the period of time begins to run shall be omitted and the last day of the designated period shall be included. Under the Rules cited above any exceptions to the Amended Report of the ALJ filed on March 22, 2011 had to be filed no later than April 1, 2011, which was a Friday. The filing of Exceptions on April 4, 2011 was untimely; hence MMHF moves the Commission to dismiss the Exceptions to the Amended Report of the ALJ filed on April 4, 2011 on behalf of the town of Bokoshe and Herman Tolbert.

**POSITIONS OF THE PARTIES**

**MMHF**

1) **Richard Grimes**, attorney, appeared on behalf of MMHF, stated it is undisputed that Bokoshe's exceptions to the March 22, 2011 Amended Report of the ALJ were filed out of time. Bokoshe's exceptions should have been filed by or on Friday, April 1, 2011 however Bokoshe's exceptions were filed on Monday, April 4, 2011. MMHF believes that the Bokoshe's exceptions should be dismissed according to the Commission procedural rules.

2) OCC Rule 165:5-13-5(a)(2) provides for 10 days for parties to file written exceptions to an ALJ Report. Rule 165:5-1-6(a) provides the day of the actual filing of the ALJ Report is omitted with the last day of the designated period of time being included.

3) MMHF cites the case of *Van Horn Oil Company v. Oklahoma Corporation Commission*, 753 P.2d 1359 (Okl. 1988) wherein a party who lost on a Motion

to Continue still had 5 working days within which to appeal. The Commission en banc acted upon a request of a record party for extra time. The Commission en banc, by its own motion, then waived the 5-day rule; thus allowing the Oral Appeal to be heard. This case noted that the Corporation Commission is a functional court of record where its rules become law and hence unwaivable. The Supreme Court noted the existence of that circumstance yet said that the waiver would only apply to rules of substance. The Supreme Court acknowledged the Commission had the right to create a method by which the Commission could waive its rules of procedure.

4) MMHF notes though the Supreme Court was referring to now codified rule 165:5-1-6(b), Extension of Time. This rule states "the Commission may, in its discretion upon its own motion or upon motion of any person, after notice and hearing, order the period extended if the order therefor is made prior to expiration of the period originally prescribed or as extended by the previous order." MMHF submits that the expiration of time referred to under the present case at bar is the 10 days for a party to file written exceptions to an ALJ Report. MMHF notes that the statutory time limits cannot be extended by the Commission.

5) The *Van Horn* case is not the same circumstances as herein. Bokoshe could have made a motion to the Commission to waive its 10 day time period for exceptions prior to or on April 1, 2011 yet Bokoshe did not.

6) Bokoshe needed additional time within which to file their appeal. Rule 165:5-1-6(b) provides the method by which the Commission can waive the ten day period. Bokoshe didn't seek that. There was no motion filed by the Commission in the ten day period. There was no motion filed by Bokoshe within the ten day period. There certainly was no notice and hearing of such motion. That's the method by which the Commission can exercise its discretion to waive this procedural rule. It wasn't done. There's been no response to filing of Bokoshe's motion. There has been no explanation given as to why the ten day timeframe wasn't complied with and even if there was, it wouldn't matter because the only method by which the Commission can exercise effectively its admitted discretion is by its own rule. You would be forced to say that I am going to disregard two rules. I will disregard the rule on the filing of the appeal within 10 days and I will disregard the rule that says how you go about extending that. You can't do it. Quite simply this appeal by Bokoshe cannot be considered.

**DIRECTOR**

- 1) **Keith Thomas**, Assistant General Counsel, appeared for the Director, stated that this is not the standard appeal of either a pooling or spacing but a very complicated case.
- 2) The Director points out the ODM, a sister agency, regulates the MMHF site. The Director desired to have an order that more accurately depicts the use of the produced well on the MMHF facility. The Director agrees the use of water had been permitted to regulate oil field waste.
- 3) The Director points out the site is not being used for commercial disposal pits. The Director notes also the produced water is not being disposed on the site. The Director notes no oil field waste has ever been disposed on the site.
- 4) The Director notes there is no specific Commission rule that fits the specific circumstances on this site. Per 52 O.S. Section 139 the Commission issued orders to allow certain protections to be in place for this site. The Director realized there would need to be exceptions made to certain technical requirements in order to allow the use of produced water on this unique site.
- 5) The Director filed this application for several reasons: 1) to seek an order stating that the MMHF facility be regulated under 52 O.S. Section 139; 2) to seek an order to state it would also be regulated under Rule 165:10-7-24 as waste stream management; 3) seek an order to state that MMHF may use produced water ONLY if ODM explicitly approves in writing the use of produced water; and 4) additionally the EPA agency must lift its Cease and Desist Administrative Order prior to MMHF receiving and/or using produced water.
- 6) The Director notes by doing this the MMHF facility will be able to use produced water for beneficial use. However, the Director points out that there would be no beneficial use of the produced water on the MMHF site unless the stipulations above are requested.
- 7) The Director seek an order to clarify Order No. 549096 to state: 1) that the MMHF facility is for the disposal of fly ash, rather than for the disposal of produced water; 2) that MMHF is not to dispose of any produced water on its ODM regulated site; and 3) that MMHF will be allowed to use the produced water for the stated beneficial use per Rule 165:10-7-24.
- 8) The Director notes that ODM has jurisdiction over the MMHF facility site, not the Corporation Commission. The Director further states the Commission's limited jurisdiction is only over the transportation of the

produced water until it is unloaded at the ODM regulated facility for the purpose of creating a slurry with fly ash.

9) The Director notes that some previous Commission orders may have reflected produced water as fresh water due to it having <5000 ppm TDS. The Director points out that this produced wellbore water at the point of delivery is still considered a deleterious substance; hence, all produced water is regulated by the Corporation Commission.

10) The Director stated that MMHF would still need to test each load of produced water delivery to its ODM regulated site, with each load being less or equal to 5000 ppm TDS. The Director notes that MMHF must keep a log documenting the origin of each load of produced water delivered to the facility. The Director notes that MMHF, unless authorized by the Commission, cannot have a pit for the purpose of blending produced water to achieve the 5,000 ppm or less required level. The Director notes that MMHF will be required to file semi-annual reports with required site security in place. The Director notes that all provisions that regulate received and/or used produced water by MMHF that are not herein amended or clarified, shall remain unchanged.

11) The Director notes that MMHF agreed to our requested clarifications and amendments. The Director was in agreement with MMHF that Order No. 549096 should not be vacated.

12) The Director notes the ALJ agreed with the Director that the Commission does not regulate fly ash, but does regulate produced water. The ALJ also agreed that the MMHF site falls under the jurisdiction of a sister agency, ODM.

13) The Director believes that Bokoshe wrongly addresses the Commission for Exceptions #3, #5, #6, #14 and #19 which relate to reclamation of mine, strip pit and appropriate nature of the MMHF site. The Director believes these issues should be addressed by either sister agencies, ODM or DEQ. The Director agrees that ODM is the arbiter with jurisdiction over mines, that can determine whether MMHF is either properly closing a strip mine pit or reclaiming a strip mine pit. The Director believes Bokoshe's Exception #4 that produced water is dumped into a pit that is on top of a mound of fly ash is incorrect. However, this is also under the ODM's jurisdiction for determination, not the Commission. The Director believes the produced water is actually being off-loaded onto a cell used for blending water with fly ash.

14) The Director believes the ALJ erred in his belief that the Director was seeking to vacate all four previous orders that permitted MMHF's facility, as such is contrary to the record. The applicant was seeking to amend, clarify or vacate Order No. 549096, the last order issued, because the Commission

wanted to stop the blending of produced water in a pit permitted by the Commission and to rescind the permit authorizing use of the pit and to have an order that more accurately stated which Commission rules would apply to the facility. Since MMHF had agreed to stop using the pit and agreed to the revocation of the pit's permit the Commission was not seeking to vacate Order No. 549096. The other four orders were not mentioned in the application. The simple explanation for this is because it was never the intent of the applicant to vacate those orders. The applicant sees this particular use of produced water by MMHF as being a beneficial use of oil field waste.

15) The Director believes the ALJ's report is contrary to the evidence. The ALJ agreed there was no proof of rule violations by MMHF on the ODM regulated site. The Director presented a list of specific amendments to clarify Order No. 549096, plus that any new order would affirm the previously issued orders and also clarify unclear issues. The Director notes the ALJ declined to clarify and amend the use of produced water by MMHF on the site, despite evidence showing such was desired for site monitoring to insure the produced water was being put to a beneficial use.

16) The Director disagreed with the ALJ's not incorporating Rule 165:10-7-24 stating that it does not address reclamation, recycling or reuse of produced water. The Director notes the ALJ found there was no certain rule that dealt with how produced water was used on the MMHF site facility. The Director believes the ALJ erred in his reading of Rule 165:10-7-24, Waste Materials and Disposal Options. The Director believes the rule states that produced water is one of the materials that can be disposed under these waste stream management practices. The Director asserts that reclaim and/or recycle is one of these options.

17) The Director disagrees with the ALJ's decision that Rule 165:10-7-24 does not apply here. The Director note that 52 O.S. Section 139 gives the Commission the authority to interpret Rule 165:10-7-24 and issue orders consistent with that interpretation. Per the listed waste stream management options, we believe Rule 165:10-7-24 gives the Commission the authority to regulate MMHF's use of produced water. The Director pointed out the intent of application was that the produced water be recycled under the terms of Commission orders and as allowed by Rule 165:10-7-24 for a beneficial use.

18) The Director believes the new order must clearly state MMHF's use of produced water falls under Rule 165:10-7-24 due to the way the produced water is being handled. The produced water in this case is not being disposed via soil farming or inside a salt water disposal well. The Director believes the ALJ missed the intent of the rules here. The ALJ stated in his Report: "The produced water is not being injected into underground formations, applied to land or kept in pits awaiting disposal. The evidence was clear it was mixed with fly ash and converted to a slurry that was used to fill in a strip mine pit.

A disposal facility would not be re-using the water for another purpose...." The Director believes the use of produced water by MMHF for a beneficial purpose is exactly the intent of the rule because the water is being recycled per Rule 165:10-7-24.

19) The Director noted that Bokoshe cited Rule 165:10-8-1 dealing with recycling on their Exceptions #7, #8 and #13. The Director notes this rule was not cited in its the application or any of the previous orders and is not a factor in the Director's requested relief.

20) The Director believes the ALJ erred in his decision that the application was defective, failing to give notice of Commission's modifying the four previous Orders No. 472170, No. 472171, No. 491749 and No. 491750.

21) The Director does not believe that 52 O.S. Section 112 has been violated here. The Director submits that MMHF knowingly waived its right to notice of changes to the previous orders when MMHF agreed to the proposed amendments and clarifications to Order No. 549096. The Director further does not believe that 52 O.S. Section 112 applies in this situation because the Director was not seeking to alter the previous orders in any way. The Director only sought to amend the last order, Order No. 549096 which clearly states it is amending all four previous orders which were incorporated into Order No. 549096. The Director believes since Order No. 549096 amended those four previous orders that the current application to amend and clarify the first order is proper.

22) The Director notes the requested relief only affects how the MMHF facility site would now fall under Rule 165:10-7-24 from this point forward. Any new order would reaffirm MMHF's facility regulation as directed by the previous orders but would vacate the portion of Order No. 549056 that allowed for a blending pit and amend that Order No. 540096 to include Rule 165:10-7-24 and the requested technical requirements mentioned in previous orders that allowed MMHF to use produced water were not to be vacated.

23) The Directors notes the issue of Bokoshe being an incorporated town within 3 miles of the facility is moot. Such was not raised in previous orders or at any of the hearings. The Director notes due to the produced water here being put to a beneficial use per Rule 165:10-7-24, this provision would not apply to an ODM regulated facility. The Director submits that the stipulation concerning the distance from an incorporated town is not found in Rule 165:10-7-24. The Director urges the court to focus on the Commission rules and the jurisdiction of the Commission.

24) The Director notes that Bokoshe's Exception #6 stating there is no need for additional water on the site, is for ODM to delve into as ODM regulates the MMHF site facility. The Director believes any produced water delivered to

the MMHF site regulated under ODM must be put to a beneficial use per Rule 165:10-7-24. Should there be seeping water, as claimed by Bokoshe, we agree with the ALJ that such issue would fall under the jurisdiction of ODM to address.

25) The Director believes Bokoshe is confused as to which agency regulates fly ash. The Director notes that Exception #19 discusses the appropriate nature of fly ash disposal yet this is under the jurisdiction of ODM, not the Commission.

26) The Director notes that when MMHF and the Director came to agreement, the Commission was no longer seeking to vacate Order No. 549096. The Director sought to amend Order No. 549096. In Order No. 549096 it states that it is amending all previous orders—the four previous orders were amended by Order No. 549096. The Director believes that MMHF's use of produced water under the circumstances is a beneficial use of oil field waste.

27) The Director is simply seeking to amend and clarify Order No. 549096 to stop the blending of produced water in a permitted pit; to rescind the permit authorizing the use of this pit; and to have an order that more accurately states which Commission rules are applicable to the current MMHF facility site.

28) For the above reasons/arguments, the Director requests the ALJ's Report be modified in a manner consistent with Director's request.

### **RESPONSE OF BOKOSHE**

1) Bokoshe stated that this case is about a unique facility wherein the Commission has granted numerous exceptions to its substantive Commission rules. Bokoshe agrees there are no specific rules that relate to the MMHF site.

2) Bokoshe had a 3-step plan to protest the MMHF site/this application: 1) to expose Bokoshe's situation; 2) to identify which agency/who is responsible; and 3) to seek to hold them accountable.

3) Bokoshe seeks to determine in our untimely appeal whether or not the OCC is responsible for the situation in Bokoshe. Should the Corporation Commission decide to do nothing, Bokoshe will seek to hold the Commission responsible for the MMHF's site problems. Further, Bokoshe asks the Court to consider all of the evidence here today and the official record in the context of Bokoshe's above mentioned 3-step plan.

4) Bokoshe submits that MMHF is using fly ash and salt water/frac water to build a mound of industrial waste 20 acres wide and 50 feet high above an underground coal mine, which is located next to the property of Intervenor Herman Tolbert and also one mile away from the incorporated Town of Bokoshe.

5) Bokoshe notes having a huge mound of industrial waste on top of an underground coal mine next to a community is a ridiculous and indefensible operation. As a matter of Oklahoma history it is utter foolishness. A huge mound of industrial waste on top of an underground mine next to an inhabited community is what made Picher, Oklahoma an uninhabitable superfund site. There is no reason to think that the result would be any different in Bokoshe.

6) If the Corporation Commissioners approve of this operation, Bokoshe believes they will be the first. No one has approved this. No Oklahoma statute authorizes it. No Commission rules addresses an operation like this. Further there is not even a Commission order that authorizes this operation.

7) Bokoshe submits the operation is not permitted because the MMHF operation does not operate as was described in the original permits. Bokoshe believes that as of today not one person has approved this operation, not the legislature or any of the former Corporation Commissioners. Bokoshe contend that the current Corporation Commissioners will be the first and only officials to authorize the use of saltwater and frac water to build a mound of industrial waste on top of an underground mine next to a populated community. Bokoshe notes that even in the private sector no one else approves of this. Bokoshe points out that there is no other facility like this in the State of Oklahoma. Bokoshe notes that MMHF disposes of 1 million barrels a year for approximately \$1 a barrel with virtually no cost. Bokoshe notes no other private entity in the State of Oklahoma is doing this.

8) Bokoshe believes that MMHF is attempting to avoid judgment, using procedural wrangling to prevent Bokoshe from being heard. Bokoshe points out that MMHF did not come today prepared to defend themselves on the appeal or on their operations.

9) Bokoshe urges the Commissioners to take responsibility for stopping this disaster of building a mound of industrial waste on top of an underground coal mine next to a populated community. Should the Corporation Commission refuse, then Bokoshe will continue to seek to hold the people responsible for this disaster.

**RESPONSE OF MMHF**

1) MMHF notes to the Court that it did not object to the ALJ's decision nor to the Staff's arguments here today. MMHF objects to Bokoshe's appeal being filed out of time for both procedural reasons and substantive reasons insofar as it relates to the ODM matters.

2) MMHF notes that no County Clerk filed documents reflect that the Town of Bokoshe is an incorporated town. MMHF notes that the ALJ did not address this point in his written report though it was in the record. MMHF notes that Bokoshe did not counter back with evidence to prove they were an incorporated town. This matter of incorporation is mentioned in Bokoshe's written appeal to the Amended ALJ Report. MMHF notes their objection to this misstatement for the record.

3) MMHF notes that a reviewer must assess the official record as is, without going outside of that record for additional statements or facts or arguments that are not shown in the actual record. MMHF believes it to be inappropriate for the Commission to listen to or ascertain facts outside of the scope of the record.

4) MMHF notes that Bokoshe's appeal directly focuses upon the ODM regulated facility. This site is an ODM regulated facility for reclamation of a mine by use of fly ash mixed with water. The Commission has very limited jurisdiction per Order No. 549096 which modified Order Nos. 472170, 472171, 491749 and 491750.

5) MMHF notes that most of Bokoshe's arguments are against ODM yet Bokoshe appeals to the Commission to resolve matters related to a ODM site. MMHF does not understand why Bokoshe has not brought their concerns to the ODM, who approved this site for fly ash mixed with produced water. MMHF believes that Bokoshe did not read the Commission rules of procedure. If Bokoshe had read the rules, Bokoshe would have filed a timely appeal by fax or in person over mailing it. MMHF notes that Bokoshe refused to debate the Motion to Dismiss prior to the appeal hearing today. Bokoshe knows their appeal is out of time and should not be considered.

6) A review of the Orders in this case will show the "limit" of the Commission's authority in the approved ODM facility. Order No. 549096 is a final order resulting from amendment of Order Nos. 472170, 491749 and 472171, as amended by Order No. 491750. The Order No. 549096

subsequently modified all of the previous orders, with all past obligations subject to the amendment, remaining in place.

### **SECOND RESPONSE OF DIRECTOR**

- 1) The Director stated that Bokoshe discussed a mound of fly ash waste over an underground coal mine on the MMHF site facility which is under ODM jurisdiction. The Director notes that ODM is the agency that determined the suitability of the MMHF facility, not the Corporation Commission. The Commission does not regulate the closing of a coal mine pit.
- 2) The Director submits if Bokoshe is seeking relief due to objections about the MMHF site, then Bokoshe should seek this relief at the ODM.
- 3) The Director notes the Commission has the duty of regulating oil field waste, its treatment and the waste stream management of oil field waste per Rule 165:10-7-24.
- 4) The Director notes that MMHF made proper applications due to the Commission have jurisdiction over produced water to the point it's delivered. The Director notes that all of the referenced orders relating to the MMHF site facility were properly approved final Commission orders.

### **SECOND RESPONSE OF BOKOSHE**

- 1) Bokoshe believes the Director has no knowledge of what actions Bokoshe has taken in regard to these issues with other agencies. Bokoshe did go to DEQ about the water concerns wherein DEQ contacted EPA who then shut down MMHF's site, resulting in ODM issuing a Cease and Desist order.
- 2) Bokoshe notes that all of these other agencies have stopped allowing MMHF, except the Corporation Commission, from accepting produced water.
- 3) Bokoshe has given a very factual description of a 20 acre wide, 50 feet high mound of fly ash and salt/frac water only to be told by the parties here that such is rhetoric.. Bokoshe observes that none of the parties here today have disagreed with Bokoshe's factual description of the mound of industrial waste on the MMHF site facility though.

4) Bokoshe asserts that fly ash, oil, gas and saltwater are toxic, deleterious substances and are considered to be industrial waste. Bokoshe believe the record shows there is clearly a 50 or 25 foot mound on top of an underground coal mine. Bokoshe urges the Corporation Commission to grant the application the Intervenors submitted to vacate all five orders and to prevent this from going any further.

## **CONCLUSIONS**

### **I.**

**THE REFEREE FINDS THAT MMHF'S MOTION TO DISMISS BOKOSHE'S EXCEPTIONS TO THE AMENDED REPORT OF THE ADMINISTRATIVE LAW JUDGE SHOULD BE GRANTED AS THEY WERE NOT PERFECTED (TIMELY FILED) PURSUANT TO OCC-OAC 165:5-13-5(a)(2).**

1) OCC-OAC 165:5-13-5(a)(2) provides:

**Appeal to the report from the hearing on the merits.** Any person adversely affected by a report of an Administrative Law Judge from the hearing on the merits shall have ten (10) days in which to appeal the report to the Commission en banc. To perfect an appeal, a written appeal or exceptions must be filed within ten (10) days after filing of the Report of the Administrative Law Judge. The Appellant shall serve copies of the appeal and notice of hearing for the appeal to all parties of record and the Administrative Law Judge below. Such service shall be made not later than five (5) days after the expiration of the ten (10) day period for filing the appeal.

2) The ALJ filed his written "Report of the Administrative Law Judge" on March 17, 2011. However, the mailing of that Report to one party of record was returned to the Commission. As a result, the ALJ filed an "Amended Report of the Administrative Law Judge" on March 22, 2011. That Amended Report was mailed to current addresses for all parties. According to the above quoted rule April 1, 2011, would be the last day that an appeal could be filed by Bokoshe. OCC-OAC 165:5-13-5.

3) OCC-OAC 165:5-1-4(j) states that documents submitted for filing must be addressed to the Court Clerk and all documents shall be deemed received upon the date file stamped by that office. OCC-OAC 165:5-1-6(a) provides:

(a) **Computation of time.** In computing any period of time prescribed by statute or by the rules of this Chapter, the day of the act, event, or default from which the designated period of time begins to run shall be omitted and the last day of the designated period shall be included, unless the last day falls on a Saturday, Sunday, or legal holiday or official agency closing, in which case the period is extended to include the next day which is not a Saturday, Sunday, or legal holiday or official agency closing.

4) The ALJ's Amended Report was filed on March 22, 2011 and on the same date a copy of the Report of the ALJ and a standard letter was mailed to Harlan Hentges, Bokoshe's attorney. The standard letter stated:

This report will be filed as of the date of this letter with the Court Clerk's office. Under the provisions of OCC-OAC 165:5-13-5(a)(2), you will have ten days thereafter in which to file an appeal and notice of hearing with the Court Clerk's office in Tulsa or Oklahoma City if you so desire.

5) In this particular instance Bokoshe's Exceptions to the ALJ's Amended Report were filed on April 4, 2011 which was outside the time allowed by the rules. See also OCC-OAC 165:5-13-4(c).

## II.

### **THE REFEREE FINDS THE REPORT OF THE ADMINISTRATIVE LAW JUDGE SHOULD BE AFFIRMED BUT MODIFIED.**

1) The Director filed this application seeking an order stating that the MMHF facility is to be regulated under the authority of 52 O.S. Section 139,

but it is also to be regulated under OCC-OAC 165:10-7-24 as waste stream management, so MMHF is permitted to use produced water for beneficial use at the facility. Further the Director is seeking an order stating that MMHF may use produced water on the facility only if OMD exclusively approves, in writing, the use of produced water. Additionally, the United States Environmental Protection Agency ("USEPA") has to lift its cease and desist administrative order prior to MMHF receiving and using produced water.

2) The Director is seeking an order to clarify Commission Order No. 549096 stating:

a) The MMHF facility is not for disposal of produced water, but rather is for the disposal of fly ash;

b) The MMHF facility is not to dispose of produced water on the ODM regulated site, but rather MMHF is permitted by the Commission to use the produced water for beneficial use as stated in OCC-OAC 165:10-7-24;

c) The Commission jurisdiction does not extend to the ODM facility;

d) The extent of the Commission jurisdiction is over the transportation of the produced water and the produced water itself until it is off loaded at the ODM regulated facility for the purpose of creating a slurry with fly ash;

e) and that it shall be noted that though previous Commission orders may have referred to produced water as "fresh water" because it was produced water with less than 5,000 ppm TDS this water is a deleterious substance since it came from a wellbore and as such all produced water is regulated by the Commission. The Director is seeking to clarify the use of produced water on the MMHF facility by stating that: MMHF will still have to test all loads of produced water delivered to the facility and that water must be less than 5,000 ppm TDS or less; MMHF will continue to keep a log documenting the origin of each load of produced water delivered to the facility; MMHF is no longer permitted to have a pit for the purpose of blending produced water to achieve the less than 5,000 ppm TDS required level unless authorized by Commission order; semi-annual reporting is still required; site security is still required; and all provisions of the Commission orders that regulate the produced water received and used by MMHF that are not herein amended or clarified remained unchanged. Since MMHF agreed to the clarifications and amendment requested, the Director clearly is not seeking to vacate Order No. 549096.

3) In the present application the Director seeks the entry of an order to amend and/or clarify certain issues in Commission Order No. 549096, or vacate said order if the operator, MMHF, of the facility located in the above described lands refused to agree to these amendments and clarifications. Commission Order No. 549096 allows produced water to be used as a part of a project commenced by MMHF to dispose of fly ash at a facility. The MMHF fly

ash slurry disposal facility is permitted by the ODM and the facility is under the jurisdiction of the ODM. Commission Order No. 549096 amended Order No. 472170, as amended by Order No. 491749, and Order No. 472171, as amended by Order No. 491750, to authorize the use of produced water with TDS of greater than 5,000 MG/L produced from oil and/or gas wells from any geologic zone or common source of supply for the fly ash slurry disposal. The Order further provided that any water with TDS greater than 5,000 MG/L shall be blended with fresh water so as to reduce the TDS to 5,000 MG/L or less and tested prior to placing such water in the fly ash disposal pit. Commission Order No. 472181 authorized MMHF to construct, maintain and operate a commercial produced water disposal operation in conjunction with their fly ash disposal facility in LeFlore County, Oklahoma.

4) The ALJ on page 26 of his Report states:

During the hearing, the Commission indicated all orders pertaining to this matter should be vacated and replaced with an order incorporating the use of Rule 10-7-24(Waste management practices reference chart) along with the continued use of various provisions of rule 10-9-1, as applicable.

5) The Director states that the ALJ erred when he stated that the Director was seeking to vacate all orders issued that permitted the MMHF facility. The Director states that this statement by the ALJ in his Report is contrary to the record. The Director was seeking to amend, clarify or vacate Order No. 549096, the last order issued, because the Commission wanted to stop the blending of produced water in a pit permitted by the Commission and to rescind the permit authorizing the use of the pit and to have an order that more accurately stated which Commission rules would apply to the facility. Since MMHF has agreed to stop using the pit and agreed to the revocation of the pit's permit, the Commission was not seeking to have Order No. 549096 vacated. The other four orders were not mentioned in the application. The simple explanation for this is because it was never the intention of the Director to vacate those orders. The Director sees this particular use of produced water by MMHF as being a beneficial use of oil field waste. The Referee would agree with the Director's position concerning this particular issue.

6) The ALJ agreed that there was no proof that MMHF was violating the Commission orders permitting the use of produced water on the ODM regulated facility, but refused to clarify and amend the use of produced water by MMHF on the facility. Testimonial evidence presented by the Director showed that the requested technical requirements were desirable for the monitoring of the site so the Commission could insure that the produced water was being put to a beneficial use. The Director presented evidence showing

how the Director wanted to amend and clarify Order No. 549096 and stated that rule OCC-OAC 165:10-7-24 should be incorporated into the regulation of the use of produced water by MMHF and that certain requested technical requirements cited in the previous orders should be retained and remain binding on MMHF. Any new order would affirm the previously issued orders, but clarify certain issues that remain unclear.

7) The ALJ stated in his Report on Page 26 that OCC-OAC Rule 16:10-7-24 does not address "reclamation, recycling, or reuse of produced water that matched the situation at this fly-ash facility."

Rule OCC-OAC 165:10-7-24(b) states:

(b) Waste materials and disposal options. Consistent with EPA's policy on source reduction, **recycling**, treatment and proper disposal, operators shall use waste management practices as listed in (c) of this Section which describes the various management practices for the following waste materials. For any of the following waste materials where option (16) of subsection (c) is listed, option (16) shall be considered before any other option. (Emphasis added)

Rule OCC-OAC 165:10-7-24(b)(1) states:

(1) Produced water: Options 1, 7, 9.

Rule OCC-OAC 165:10-7-24(c) states:

(c) Disposal options and rule reference guide. The following waste disposal options are **referenced in** (b) of this Section: (Emphasis added)

Rule OCC-OAC 165:10-7-24(c)(1) states:

(1) Reclaim and/or **recycle**. (Emphasis added)

8) The Director and the ALJ agree that there is no specific rule that regulates the use of produced water with fly ash but the Director disagrees with the ALJ's conclusion that Rule OCC-OAC 165:10-7-24 does not apply. 52 O.S. Section 139 gives the Commission the authority to interpret rule OCC-OAC 165:10-7-24 and issue orders consistent with that interpretation. This rule gives the Commission the authority to regulate the produced water used by MMHF under the listed waste management options. It is the intent of the Director that the produced water be recycled under the terms of the Commission orders and as allowed by OCC-OAC 165:10-7-24 for a beneficial use. The new order should clearly state that the use of produced water by MMHF falls under OCC-OAC 165:10-7-24 because the facility is not a produced water disposal facility, but rather MMHF is putting the produced water to a beneficial use.

9) The ALJ in his Report on page 25 states in his Conclusions and Recommendations:

The produced water is not being injected into underground formations, applied to the land or kept in pits awaiting disposal. The evidence was clear it was mixed with fly-ash and converted to a slurry that was used to fill in a strip mine pit. A disposal facility would not be re-using the water for another purpose. It is more like a re-use of the water similar to using the produced water to rework a well.

10) Thus the ALJ recognized that the facility is not a disposal facility. The use of produced water by MMHF for a beneficial purpose is the intent of the rule OCC-OAC 165:10-7-24 as the produced water is being recycled for a beneficial purpose per OCC-OAC 165:10-7-24. The Referee agrees with the conclusion of the Director concerning the interpretation and use of OCC-OAC 165:10-7-24. The rules and regulations enacted by the Commission pursuant to the powers delegated to it have the force and effect of law and are presumed to be reasonable and valid. *Toxic Waste Impact Group, Inc. v. Leavitt*, 755 P.2d 626 (Okla. 1988).

11) The ALJ stated in his Report that the Director's application was defective because it failed to give notice that the Commission was seeking to amend, modify, or vacate Commission Order Nos. 472170, 472171, 491749 and 491750. However, the Referee agrees with the Director that 52 O.S. Section 112 does not apply because the Director was not seeking to alter Order Nos. 472170, 472171, 491749 and 491750. Thus, the ALJ was correct in his statement that he is restricted to a determination of whether or not to recommend the amendment, clarification or vacation of Order No. 549096. Order No. 549096 states that it is amending all previous orders. Those

previous orders were incorporated into Order No. 549096 and since Order No. 549096 amended those orders, this application to amend and clarify the latest order is proper. Any new order would reaffirm the regulation of the facility as directed by the previous orders, but would vacate the part of Order No. 549096 that allowed for a blending pit and amend Order No. 549096 to include rule OCC-OAC 165:10-7-24. The Director stated that the requested technical requirements mentioned in the previous orders permitting the use of produced water by MMHF were not to be vacated.

12) The Referee agrees with the Director that any order issued by the Commission should not vacate Order No. 549096, but rather amend and clarify said order in a manner consistent with the request made by the Director. As requested by the Director the Referee agrees that any order to issue should include the following requests/issues:

1) It shall be stated in the requested order that any reference in previous Commission orders that refer to produced water as "Fresh Water", even if it is produced water with <5,000 ppm TDS, it shall be noted that this water is a deleterious substance since it came from a well bore and as such all produced water is regulated by the Commission.

2) The order being requested by Applicant shall state that the Commission authorizes MMHF to receive produced water at the facility and use produced water on the facility if the ODM and the USEPA allow them to do so.

3) MMHF will still have to test all loads of produced water delivered to the facility and that water must be <5,000 ppm TDS or less, OCC-OAC 10-9-1(f)(6)(C), under acceptable materials.

4) MMHF will continue to keep a log documenting the origin of each load of produced water delivered to the facility OCC-OAC 10-9-1(f)(6)(D), under acceptable materials.

5) MMHF is no longer permitted to have a pit for the purpose of blending produced water to achieve the

<5,000 ppm TDS required level unless authorized by Commission order or by a Form 1014 pit permit.

6) OCC-OAC 10-9-1(g) is amended to require a semi-annual report to be filed by February 1<sup>st</sup> and August 1<sup>st</sup> of each year.

7) Site security is still required, OCC-OAC 10-9-1(f)(4).

8) All of the Exceptions to OCC-OAC 165:10-9-1 granted by Commission order are still valid.

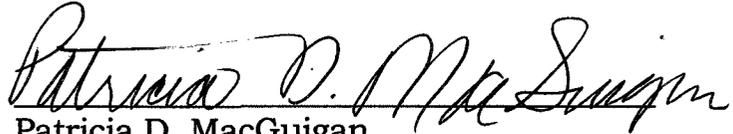
9) All provisions in the Commission orders that regulate the produced water received and used by MMHF that are not herein amended or clarified remain unchanged.

13) The Referee finds that the Director has satisfied its burden of persuasion and its burden of production by the weight of the evidence. In administrative hearings, the applicant seeking relief has two burdens: 1) the burden of persuasion (that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose); and 2) the burden of production (a party's obligation to come forth with evidence to support its claim). *Director, Office of Workers Compensation Program, Department of Labor v. Maher Terminals, Inc.*, 512 U.S. 267, 272, 275 (U.S. 1994). The Commission must base its rulings on evidence that would convince a reasonable man that the granting of the application was proper. *El Paso Natural Gas Company v. Corporation Commission of Oklahoma*, 640 P.2d 1336 (Okl. 1981); *Kuykendall v. Corporation Commission*, 634 P.2d 711 (Okl. 1981); and *Landowners Oil, Gas and Royalty Owners v. Corporation Commission*, 415 P.2d 942 (Okl. 1966).

14) For the reasons stated above, the recommendations made by the ALJ in his Report should be modified. Any order that issues by the Commission

should not vacate Order No. 549096, but rather amend and clarify said order in a manner consistent with the requests made by the Director as stated above.

**RESPECTFULLY SUBMITTED THIS 13th day of June, 2011.**

  
Patricia D. MacGuigan  
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy  
Commissioner Cloud  
Commissioner Anthony  
Jim Hamilton  
ALJ Michael Porter  
Keith Thomas  
Richard Grimes  
Harlan Hentges  
Doug Schooley  
Office of General Counsel  
Michael L. Decker, OAP Director  
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