



## **STATEMENT OF THE CASE**

**CHAPARRAL APPEALS** the ALJ's recommendation that a valid election was not made in accordance with Order No. 501237 as amended. Chaparral filed a pooling application that resulted in Order No. 501237 being issued. The order was corrected by Order No. 502761 adding additional respondents to Order 501237. The Griffin 2-36 well was timely drilled pursuant to the pooling order. The well was plugged in October 2005 as a dry hole. The Trust disputed the reasonableness of the costs of the Griffin 2-36. They were respondents in CD 200605771, a matter filed by Chaparral to have the Commission determine the reasonable costs for the Griffin 2-36 well . Order No. 534635 was issued adjudicating the costs of the Griffin 2-36 well as \$1,194,342 .21, to which no appeal was taken. In the spring of 2005, the Trust sent in funds to cover a portion of the estimated well costs for the Griffin 2-36. The costs for the Griffin 2-36 exceeded the estimated costs shown in Order No. 501237 as corrected by 502761. Chaparral has attempted to collect the rest of the funds for the Trust's share of the costs of the Griffin 2-36. The Trust has not made any payment beyond the original amounts it sent to Chaparral in the spring of 2005. The Trust claims it made no election for the Griffin 2-36 under the terms of Order No. 501237, as corrected, and thus is subject to the "deeming" provisions of the order . On May 21, 2007, Chaparral filed this cause to seek a determination of the validity of the elections by the Commission .

### **CHAPARRAL TAKES THE POSITION:**

(1) The Report of the ALJ is contrary to law and evidence. The Report fails to effect the means of prevention of waste and protection of correlative rights. The ALJ erred in his analysis that the Trust is required to make a written election, and failure to make a written election indicates that no election was made . This ignores existing case law, ignores existing common law regarding the conduct of the parties, and creates a situation which results in an absurdity. For example, under this conclusion by the ALJ, the Trust failed to elect and therefore is entitled to a cash bonus and the royalty. Is it the suggestion of the ALJ that Chaparral must now refund the dry hole costs paid by the Trust, even though the Trust willingly paid it. This creates a situation that is fraught with potential abuse. For example, is the ALJ suggesting that if the well was potentially a productive well, Chaparral could have refunded the dry hole costs to the Trust on the basis that they failed to make a written election? No one would even suggest such a result was possible .

(2) The ALJ erred in not reviewing, citing or examining the Corrected Report of the Appellate Administrative Law Judge, Randy Specht issued February 20,

2009. Said Report was well reasoned, a succinct analysis of the case law and facts, and should have at least been cited or distinguished in the ALJ's Report.

(3) The ALJ erred in completely ignoring the conduct of the parties insofar as it pertains to their status under the Pooling Order. If the ALJ finds that the Trust is subject to the Pooling Order, then the conduct of the parties both before and after the well was drilled is outcome determinative. This was ignored by the ALJ.

(4) Chaparral therefore requests that the Report of the ALJ be reversed, and that the Commission determine that an election to participate pursuant to the Pooling Order by the Trust was valid .

**THE ALJ FOUND:**

(1) The ALJ found that there is only one issue to be determined in this cause. The issue is did the Trust make an election to participate in the drilling of the Griffin 2-36 well under Order No. 501237. The ALJ is well aware this forum has no authority to determine whether or not Chaparral and the Trust have a written or oral contact between them. Determination of the existence of a contract between the parties is the province of the District Court in Canadian County. However, because the Trust has raised the idea a contract exists between itself and Chaparral, this ALJ will examine certain issues concerning contracts and how it may apply to the issue before this court. While this ALJ would not presume to infringe on the jurisdiction of the Canadian County District Court, the ALJ has to determine whether or not an agreement was made prior to the pooling order. If there was an agreement, then the Trust could not make an election. If there was no agreement binding the parties, then the Trust had the ability to make an election under the pooling order. Thus this Commission can then determine whether or not an election was made under the pooling order .

(2) The Trust maintains it had a private oral agreement with Chaparral that took it outside of the pooling order. The major terms of which were testified to by Paul Copenbarger were brought out in a hearing on May 20, 2008. The terms Mr. Copenbarger agreed to during cross examination were 1) it was not in writing; 2), the cost exposure was limited to the AFE of January 2005; 3) the Trust did not have to make an election; and finally, the Trust would get its share of the forced acreage from non participants to the pooling. The Trust claims it had only to pay the dry hole costs as shown on the AFE attached to the proposal letter. The Trust says that was the limit of its liability for costs. Chaparral denies this "turnkey" type of term would be included in any contract it might have with any party. Taken at face value it would appear the parties do not have a meeting of the minds on this oral agreement. Although it was not stated, evidently the Trust and Chaparral had some discussions regarding

well costs between October 1, 2005 and the March 8, 2006 demand letter. It would appear the Trust took the position the costs were excessive/unreasonable for the drilling of the Griffin 2-36 well. Shortly after that letter, Chaparral filed for the determination of well costs specifically noting that it was a disagreement with the Trust that led to the filing by Chaparral for the well cost determination. The Trust's actions in this well cost hearing were not consistent with its current position concerning its election. The Trust did not seek to make only a special appearance. The Trust did not act as though they had a contract limiting their exposure for costs. The Trust instead acted as any other pooled party would be expected to act in a well determination hearing where the outcome will affect what they may owe for their share of costs.

(3) The ALJ fully understands why the Trust would have participated in the well determination hearing to protect their rights regarding unreasonable costs. If the Trust had a contract to only pay their share of the AFE dry hole costs, then their costs are fixed and they would have no real interest in what cost overruns Chaparral experienced beyond the AFE costs.

(4) The Trust also paid the estimated dry hole costs for "forced pooled acreage", which normally is offered only to participants who are pooled. This transfer of an interest in land without a written agreement is not explained by either party.

(5) Since it is apparent there was no meeting of the minds on terms for any oral agreement, nor was the Trust dismissed from the application for pooling, this ALJ finds there was no "private" agreement between the parties and thus the Trust had the ability to make an election under Commission Order No. 501237 as amended.

(6) Chaparral's position is the Trust elected to participate in the well. It points to the payment of dry hole costs, the lack of a dismissal during the pooling hearing, the payment of dry hole costs for "forced pooled acreage", the statements made by the Trust during a well cost determination hearing, and the response to the decision to plug the Griffin well. Chaparral asserts these positions are inconsistent with Trust's claim to have a private contract between the parties. Chaparral elected to accept the Trust's payment of dry hole costs as allowed in the language of Commission Order No. 501237. That language, in paragraph 6 .1 of Order No. 510237 states "or by securing or furnishing security for such payment satisfactory to the Operator, within 20 days". Chaparral certainly can decide what factors to consider as "satisfactory to the Operator". Chaparral's landman indicated his decision was based partially on the Trust's willingness to pay its share of costs and also the costs with the forced pooled acreage. The landman also based his decision on the good relationship he had with the Trust during the phone conversations. He also was giving the Trust the same deal he had given some of the other companies.

While he admitted it was not the customary way he did business, it was his call to make. He said he normally would follow up with a letter agreement, but did not in this instance.

(7) Chaparral asserts the statements and silence from the Trust, particularly during the well cost determination hearing point to its acknowledgement of being "pooled" by the order. The Trust did not advance the argument it was not a party to the pooling during that hearing. The application itself alleges "...a dispute has arisen as to the reasonableness and necessity of the cost of the operations. One of the participating parties pursuant to said pooling orders, Loyd G. Copenbarger, Jr. and Paul D. Copenbarger, Co-Trustees of the Copenbarger Trust, have alleged that the Applicant has incurred costs in excess of reasonable and necessary costs and expenses....".

(8) Chaparral also points to the response of the Trust to a letter sent in October 2005, after the Griffin well was drilled. The Trust responded to this letter to agree to plug the well. The letter contains the language "Per the terms of the pooling order...". That language does not exist in the pooling order governing the Griffin well. What affect this may have had on the Trust is unknown, however the Trust did respond as shown on Exhibit 6 as if it were a pooled party.

(9) Chaparral also shows the Trust was a respondent to the pooling. It was not dismissed during the hearing on the merits on February 7, 2005 as would be expected if there was a private oral agreement, JOA or other letter agreement.

(10) The Trust's primary counter arguments center on the terms of the pooling order itself. Paragraph 6 Relief Granted states "said owners must make their elections within 15 days...". Paragraph 8 Operator states "...all elections required in Paragraph 6 hereof shall be communicated to said Operator in writing at the address above as required in this order. All written elections must be mailed and postmarked within the election period set forth in Paragraph 6...". The Trust asserts because the letter of the order was not followed the Trust was not pooled.

(11) It appears from the testimony of the Chaparral witness, what happens between parties after the pooling order is issued can vary from what the pooling order states. Chaparral's witness testified that participating pooled parties, sometimes are given other elections not mentioned in the pooling order such as deferred payments and casing point elections.

(12) Commission Order No. 501237 required respondents, including the Trust, to make a written election within 15 days from the signing of the order. All parties agree no written election was made within the 15 day limit. The order also required a party electing to participate in the drilling of the well to

pay their share of completed costs within 20 days. All parties agree the Trust paid only its share of the estimated dry hole costs and not its share of the completed well costs. Chaparral indicated it was satisfied the Trust met the provision in the order that allows the operator to consider "securing or furnishing security for such payment satisfactory to the Operator". This was based on the Chaparral landman's conversations with a representative of the Trust over the telephone. Chaparral did accept the funds from the Trust after the 20th day. The last written communication between the parties was the Trust's letter referring to the forced pooled acreage and a check for the share of the pooled acreage. It is noted these communications are dated on the 20th and 21<sup>st</sup> days after the signing Order No. 501237.

(13) The ALJ found that the evidence submitted shows the Trust did not make an election under the terms of Commission Order No. 501237 as amended. The Trust was not dismissed from the pooling hearing as might be expected if there was any type of agreement in existence between the parties. Thus the Trust was subject to the pooling order and eligible to make elections. The Trust took several actions that were in substantial compliance with portions of the pooling order as discussed above. In spite of the actions that made it appear the Trust was a pooled party, there was no written election by the Trust in compliance with the Commission's order. The Commission's order is specific as to how to make an election. Paragraph 8 states: "...and all elections required in Paragraph 6 hereof shall be communicated to said Operator in writing at the address above..." The order also directs the written elections must be mailed and postmarked within the election period and to the Operator within 15 days from the date of the order. The Trust took no action that would show substantial compliance with the requirement to make a written election as required by the terms of the pooling order. In spite of the actions that made the Trust appear to be a pooled party, there was no written election by the Trust.

(14) The ALJ recommended that the Commission find that the Trust made no valid election under the terms of Commission Order No. 501237 as amended.

## **POSITIONS OF THE PARTIES**

### **CHAPARRAL**

1) **David E. Pepper**, attorney, appearing on behalf of Chaparral, stated that this case concerns a well that commenced a pooling application in 2004. In 2005, Chaparral was prepared to move forward with the well. Chaparral proposed the well to the Trust in a letter dated February 1, 2005. The Trust sent a letter back to Chaparral confirming a conversation on January 19, 2005

which instructed the Trust to wait until the pooling order was issued to make their election. The pooling hearing was held on February 7, 2005 and the movant was listed as a respondent, they did not appear. An order was issued on February 17, 2005, Order No. 501237.

2) Chaparral's witness testified that on February 22, 2010 he had another conversation with the Trust and the Trust informed him that he wanted to participate and wanted his share in the force-pooled acreage. The Trust sent in their associated cost, around \$200,000, and received an invoice for their share in force-pooled acreage. The well was a dry hole and the Trust failed to pay his share of cost overruns stating the costs were excessive. Chaparral filed an application to adjudicate and determine the reasonableness of the well costs. The Trust's counsel, Charles Puckett, appeared at the hearing and filed a discovery motion alleging that as a pooled party, the Trust was entitled to such information. The motion was granted. The case was heard and the court ruled in favor of Chaparral finding the costs were reasonable. Chaparral filed a lawsuit in the District Court of Cleveland County seeking to collect the money.

3) The Trust then raised two issues. First, they had a private contract. Second, they didn't elect to participate under the pooling. Chaparral then filed this motion to adjudicate and determine that the election was made. The Trust then filed a Motion to Dismiss, which was granted on jurisdictional issues. It was appealed to Referee Randy Specht and the Referee's decision was appealed to the Commission. After the oral arguments, the Commission affirmed that part of Referee Specht's report as it related to jurisdiction and stayed everything else, pending the Cleveland County District Court case. The District Court of Cleveland County determined the Commission was the proper forum to determine the Trust's election. The Commission then lifted the stay and affirmed the Oil and Gas Appellate Referee's recommendation to deny the Trust's Motion to Dismiss for lack of jurisdiction and remanded the case to the ALJ for a hearing to allow additional evidence to be presented.

4) The case was tried before an ALJ. The ALJ found there was no election by the Trust to participate. Chaparral argues that the ALJ cited no case law, but cites the terms of the order which include the election shall be in writing within 15 days from the date of the order. Chaparral points out that there was an oral statement by the Trust that expressed its interest to participate which was confirmed by a letter dated March 10, 2005. Chaparral cites cases that hold in the event there is a dispute as to an election, the Commission has the authority and duty to look at the conduct of the parties after the election. Chaparral emphasizes *Kaneb Production Co. v. GHK Exploration Co.*, 769 P.2d 1388 (Okl. 1989). He states this case was remanded back to the Commission to examine the conduct of the parties concerning whether an election was made. Chaparral believes if ALJ Porter would have looked at the conduct of the parties, there would have been no question that this party participated under

the terms of the order. Chaparral believes the Trust is simply not wanting to pay the expense of drilling a dry hole.

### **THE TRUST**

1) **Ronald M. Barnes**, attorney, appeared on behalf of the Trust, stated that this land has been owned by his client's family for a long period of time. The Trust claims that there was no negotiation between the parties and that Chaparral failed to give the Trust any paperwork to sign after the agreement. The Trust explains that Chaparral basically told his client to wait until the pooling order and then elect to participate. The Trust argues that there is no evidence in writing within the 15 day period of time that his client elected to participate. The Trust thought it was proceeding under a private agreement. However, there was no evidence of this agreement, so attention must be turned to the order to determine whether or not the Trust made an election. The Trust argues since Chaparral keeps stating there was no agreement and the Trust has no written evidence that can be presented, the pooling Order must be examined.

2) The Trust argues *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 687 P.2d 1049 (Okla. 1984) does not apply to the case at bar. The Trust argues the court never states that a written election must be made, it simply said an election had to be made. The Trust agrees with this holding because it believes an election can be made in a number of ways. The Trust points out however the order at issue states: "All elections required in Paragraph 6 hereunder shall be communicated to said operator in writing..." The Trust also discusses *Samson Resources Co v. Oklahoma Corp. Com'n*, 742 P.2d 1114 (Okl. 1987) and states Samson had verbally communicated they wanted to participate. In addition, they followed up with a letter indicating their desire to participate and desire for a JOA. The court ultimately held Samson made no election and they were already participants under that particular pooling order.

3) The Trust didn't draft this order, Chaparral did. The Trust states that orders should say specifically how one can elect so there is no ambiguity. The Trust argues that if an individual doesn't respond in writing within 15 days there is no agreement and this is how the cash bonus comes about. Thus, the individual would get their money back and pay the bonus because it's part of the order.

4) Chaparral's position is that the last letter for plugging was pursuant to the pooling order. The Trust stated Chaparral's witness agreed the pooling order didn't have any plugging language in it and it is not part of the pooling

order. The Trust argues that if there was no agreement and the order is applicable, then there was no election deemed to have been taken.

## **RESPONSE OF CHAPARRAL**

1) Chaparral points out there was in fact written evidence relative to the pooling order, the written letter marked as Exhibit 2 from the Trust. This letter confirms in writing the participation. Chaparral points out Mr. Barnes never tried to distinguish *Kaneb Production Co. v. GHK Exploration Co.*, 769 P.2d 1388 (Okla. 1989) from the other cases mentioned in the argument. Mr. Pepper argues that courts have determined the Commission can look at the conduct of the parties to make sure someone doesn't take advantage of another party.

2) Mr. Pepper also points to *Samedan Oil Corp. v. Corporation Com'n of State of Okl.*, 755 P.2d 664 (Okla. 1988). In this case Samedan elected to participate, but then refused to pay and tried to get out of participating. The thrust of his argument was he was a non-participant, therefore he didn't have to pay under the terms of the order. The court rejected this argument. Mr. Pepper argues this is similar to the case at bar because the Trust, although it was clear he participated, is now trying to utilize select provisions of this order to avoid an unsuccessful well. Chaparral also points out that if the Trust really thought they weren't a pooled party, the cost determination would have no affect on the Trust and they wouldn't have appeared at the cost determination hearing with a lawyer.

## **CONCLUSIONS**

**The Referee finds that the Report of the Administrative Law Judge should be reversed in part and affirmed in part.**

### **I.**

## **PRIVATE AGREEMENT**

1) The Referee finds that the ALJ's recommendation that there was no "private" agreement between the Trust and Chaparral and therefore the Trust had the ability to make an election under the pooling Order No. 501237 should be upheld. The Trust, which owns 190 acre mineral interest in the unit, was named a respondent in the pooling proceedings and was not dismissed. This finding and recommendation by the ALJ that there was no "private" agreement between the Trust and Chaparral was not appealed by the Trust or Chaparral.

## II.

### ELECTION

1) On February 17, 2005 the Commission issued pooling Order No. 501237 which was subsequently corrected by Order No. 502761, pooling the interest and adjudicating the rights and equities for the oil and gas owners in the Cottage Grove, Layton, Prue, Skinner, Tonkawa, and Red Fork common sources of supply for the 640 acre drilling and spacing unit consisting of Section 36-14N-10W, Canadian County, Oklahoma. Order No. 501237 provided for estimated costs for the initial well completed for production of \$1,141,532.00 and completed as a dry hole of \$680,448.00.

2) The Referee hereby adopts the timeline presented by Randolph S. Specht, Oil and Gas Appellate Referee in his Corrected Report of the Oil and Gas Appellate Referee on an Oral Appeal of a Motion to Dismiss for Lack of Jurisdiction over Lloyd G. Copenbarger, Jr., Paul V. Copenbarger and Audrey R. Copenbarger, Co-Trustees of the Copenbarger Trust. Such timeline is presented in the Referee's Report on page 4 through page 7. The Corrected Appellate Referee's Report was issued on February 20, 2009. Thereafter a request for oral arguments before the Commission en banc was granted, and oral arguments were heard on April 28, 2009, to review the Oil and Gas Appellate Referee's recommendation regarding the Trust's Motion to Dismiss. The Commission on May 4, 2009, issued Order No. 567441 holding in abeyance the subject cause until the outcome of CJ-2006-587 in the District Court of Canadian County. In the district court proceeding, the Trust alleged that the Trust never participated pursuant to the pooling Order No. 501237. The District Court of Canadian County ruled that the Corporation Commission was the proper forum to determine the Trust election. On April 2, 2010, by Order No. 575288, the Commission affirmed the Oil and Gas Appellate Referee's recommendation to deny the Trust's Motion to Dismiss for lack of jurisdiction, and remanded the case to the ALJ for a hearing to allow additional

evidence to be presented concerning the election. On July 1, 2010, the matter was heard before the ALJ.

3) The Trust signed the February 1, 2005 letter (Exhibit D presented at the Motion to Dismiss hearing; on remand to the ALJ Exhibit 1) which indicates the Trust's desire to participate in the Griffin #2-36 well, and that the election to participate would be made after the pooling order was issued. On February 22, 2005 four days after the pooling order issued, the Trust had a telephone conversation with Chaparral during which the Trust elected to participate in the well. At that same time, the Trust also expressed a desire to share in forced pooled acreage, and the Trust later elected to share in that forced pooled acreage. These admissions and events established that the Trust elected to participate under the pooling Order No. 501237.

4) Four days after the pooling Order 501237 issued, the Trust called Chaparral and elected to participate. The evidence is clear that the Trust elected to participate within the required time period. Chaparral had the discretion to accept an oral election to participate under pooling Order No. 501237. See *Centurion Oil, Inc. v. Stephens Production Company*, 857 P.2d 821 (Okl.App. 1993). The Court of Appeals in the *Centurion* case states:

¶8 There is no doubt the Corporation Commission has exclusive jurisdiction to determine whether an owner has properly elected to participate under a Commission-issued forced pooling order. 52 O.S. 1991 § 111 [52-111] and 112 [52-112]; *Tenneco Oil Company v. Oklahoma Corporation Commission*, 775 P.2d 296 (Okl. 1989); *Samson Resources Company v. Oklahoma Corporation Commission*, 742 P.2d 1114 (Okl. 1987); *GHK Exploration Company v. Tenneco Oil Company*, 847 F.2d 650 (10th Cir. 1988). The substance of this proposition of error is not really an attack on the Commission's jurisdiction, but is more an attack on the finding in the dismissal order that Stephens was a participant in the well.

¶9 The Corporation Commission has jurisdiction to construe and clarify its previous orders to determine compliance with those orders under the authority of 52 O.S. 1991 § 112 [52-112]. *Tenneco*, at 298. In determining whether an owner has made a proper election to participate under a pooling order, the Commission may consider events and conduct of the parties that occur after the period for making the election has run. *Samson*, supra; *Kaneb Production*

*Company v. GHK Exploration Company*, 769 P.2d 1388, 1392 (Okl. 1989).

¶10 The question is whether the Commission's finding that Stephens had made a proper election under the Pooling Order is supported by the evidence. When reviewing the sufficiency of the evidence which supports the Commission's findings of fact, this Court's review is restricted to determining whether the findings and conclusions are sustained by the law and substantial evidence. *Samson*, 742 P.2d, at 1116; Okla. Const., Art. 9, Sec. 20. This review does not include weighing the evidence on appeal but only determining whether the supporting evidence possesses substance and relevance. *Id.*

¶11 The Commission found Stephens had substantially complied with the terms and intent of Pooling Order No. 328652 by paying its proportionate costs to Centurion. It further found Centurion had accepted the costs, and confirmed Stephens' participation election by "treating Stephens as a participant in the well for over one year." The record contains evidence that Centurion deposited Stephens' check into a Centurion bank account, sent Stephens a partial set of drilling reports, offered to market Stephens' gas from the well, never mailed any bonus payments to Stephens as it had to other non-participants in the well, and never told Stephens or Stephens' attorneys that Centurion did not consider Stephens a participant in the well. The Corporation Commission has jurisdiction to determine whether the correspondence between Centurion and Stephens constituted a proper election under the forced pooling order and whether Stephens' failure to prepay costs or provide security within 20 days is something Centurion could and did waive. *GHK Exploration Company*, 847 F.2d, at 653. Our review indicates the Commission's finding that Stephens is a participant, is supported by substantial evidence and is sustained by the law.

See also, *Kaneb Production Company v. GHK Exploration Company*, 769 P.2d 1388 (Okl. 1989) where the Supreme Court stated:

¶17 Kaneb actually contended before the Commission that it (Moran) did not elect to participate under the pooling order. GHK contended that it did. In Order 299201 the Commission made no findings or conclusions as to whether Moran's actions constituted an election to participate under the pooling order, or the effect, if any, of the parties' conduct on the relevant provisions of the pooling order. Thus, those questions are not yet ripe for appellate review at this time and are left for Commission determination on remand.

5) The validity therefore of the Trust election to participate under the pooling Order No. 501237 does not depend on strict and perfect compliance with paragraph 6.1 and paragraph 8 of pooling Order No. 501237. The substantial evidence is that the Trust unequivocally elected to participate under the terms of the pooling order and that Chaparral unequivocally accepted that election.

6) Further, the Trust elected to plug and abandon the well under the pooling order on October 3, 2005 after receiving an election letter from Chaparral to the Trust recommending that the Griffin #2-36 well be plugged and abandoned "per the terms of the pooling order".

7) The Trust cites the case of *Samson v. Oklahoma Corporation Commission*, 742 P.2d 1114 (Okl. 1987) for the proposition that when a written election is required and specific period for such election is stated in the order, the Supreme Court has said it means what it says and in the present case therefore the Trust failed to make a written election in the form and manner required in the pooling order. In the *Samson* case the court was faced with whether a proper election to participate was made by Samson under the terms of a pooling order that required the election to be in writing. In the *Samson* case Samson was a participant in an existing well that had already been pooled once. Upon discovery that 40 acres had been missed, TXO Production Corporation ("TXO") filed a second pooling to pick up the 40 acres missed in the first pooling. Before the election period under the second pooling order had run Samson obtained a farmout of the 40 acres from W.O. Petit ("Petit") who was named in the pooling. Thereafter within the 15 days from the issuance of the pooling order Petit sent to the operator under the pooling order the following certified letter:

In response to your forced pooling order covering the above captioned section, this is to advise that I have

farmed out my interest to Samson Resources Company, 2700 First National Tower, Tulsa, Oklahoma 74103, who has informed you they will participate with my interest.

Four days after the election period had run Samson sent TXO a letter stating:

This letter is to confirm my earlier phone conversation wherein I informed you of her acquisition of W.O. Petit's interest in the captioned unit....Please forward a revised Exhibit "A" to the Operating Agreement covering the captioned unit.

8) It was TXO's position that Samson failed to properly elect to participate. The pooling Order No. 226092, dated October, 13, 1982, stated:

That each owner of the right to drill in said drilling and spacing unit to said common sources of supply covered hereby, who has not agreed to develop said unit as a unit, other than the Applicant, shall elect which of the alternatives set out in paragraph 3 above such owner accepts, said election to be made to Applicant, in writing, within 15 days from the date of this Order...

The Supreme Court in the *Samson* case stated:

The undisputed facts reveal that the Petit letter was mailed on the last day the Petit interest could elect to participate. Samson did not mail any notice to TXO by that date. About October 27, 1982 Samson entered into a verbal agreement with Petit to acquire his interest and the land and common sources of supply. Although there is no question concerning whether or not Samson acquired Petit's interest, and apparently no question about Samson's desire to participate, the letter received by TXO was not sufficient to accomplish the election. The letter admits that Petit has no present ownership in the 40 acres so he has no right as owner to elect. The letter makes no claim that Petit is acting on behalf of Samson, and in fact the implication in the letter is otherwise. The letter does

not bind Petit, nor does it bind Samson. Even though there is some testimony indicating that Petit was acting on behalf of Samson, there is a substantial basis of facts from which the Commission could reasonably determine that this letter did not constitute an election for either Samson or Petit. Therefore, we must affirm the Corporation Commission's Order No. 254810.

As indicated above, the Samson case is clearly distinguishable from the present case. In the present case Order No. 501237 lists the Trust as a respondent and the Trust was not dismissed at the time of the hearing. The Trust responded to a letter in which Chaparral requested the Trust to wait until the pooling order issued to make its election to participate in the Griffin 2-36 well. The Trust expressed its interest to participate in any working interest recovered from other mineral owners which may become available due to forced pooled acreage gathered under the pooling Order No. 501237. The pooling order issued on February 17, 2005. Only four days after the issuance of the pooling Order No. 501237 the Trust had conversations with Chaparral's representative with regard to the Trust election to participate. There was never any uncertainty that the Trust was going to participate in the Griffin 2-36 well by Chaparral. Further, the Trust participated in the forced pooled acreage. On October 1, 2005 Chaparral sent an election letter to the Trust recommending the Griffin 2-36 be plugged and abandoned "per the terms of the pooling order" and the Trust elected to plug and abandon the well on October 3, 2005. Chaparral had the discretion to accept an oral election to participate under the pooling order and therefore the Trust validly elected to the participation in the well within the 15 day period under Order No. 501237. See *Centurion Oil Inc. v. Stephens Production Company*, supra, 857 P.2d 821.

### III.

#### **PAYMENT METHOD SATISFACTORY TO OPERATOR**

1) The Referee also finds that the Trust made satisfactory arrangements with Chaparral to pay its cost of participation under the pooling Order No. 501237. Chaparral has the option under the pooling order of accepting completed for production costs, "or by security or furnishing security for such payment satisfactory to the operator." Chaparral obviously was satisfied with the Trust's initial payment of dry hole costs along with a promise to pay completed for production costs. The March 9, 2005 letter (Exhibit F in the Motion to Dismiss hearing; and on remand before the ALJ Exhibit 3), from the

Trust is certainly evidence of the satisfactory arrangements to pay the cost of participation. Chaparral treated the Trust as a participant at all relevant times thereafter. The Trust timely advanced to the operator Chaparral substantial dry hole costs in excess of \$204,000 for its approximate 30% unit working interest. It further benefitted from the pooling by electing to take even more forced pooled acreage, approximately 8.40%. The Trust paid an additional substantial sum in excess of \$57,000.00 for those estimated dry hole costs upon being billed by Chaparral. The Trust participated as a working interest owner in the well. It received well information. It benefitted from Chaparral's procurement of materials and services for drilling of the unit well. It benefitted from Chaparral's payment of the vendors and creditors who provided material or services to the unit well.

2) Chaparral obviously was satisfied with the Trust's partial payment within the 20 day period and considered that such payment constituted security that was satisfactory to Chaparral under the terms of Order No. 501237. *Samedan Oil Corporation v. Corporation Commission*, 755 P.2d 664 (Okl. 1988) stated:

The Commission found that Lincoln Rock was satisfied with Samedan's election as sufficient security for payment of well costs. The Commission noted that the purpose of Section 6 is to provide a method whereby the operator may satisfy itself that non-operating participants in the well are capable of paying their share of well costs. The security provision is used to ensure that the operator, in drilling the well, is not required to expend its own money to pay for well costs attributable to another party.

See also the unpublished opinion of *EOG Resources, Inc. v. Chaparral Energy, Inc. and Corporation Commission of the State of Oklahoma*, (Okl.App. Case No. 99,577, April 6, 2004).

3) The evidence reflects that Chaparral accepted the Trust election to participate and that the payment of only its share of the dry hole costs on the Griffin 2-36 well plus the additional cost of the Trust's share of the force-shared acreage was satisfactory to Chaparral under the terms of Order No. 501237.

#### IV.

### **PARTICIPATION BY THE TRUST IN THE COST DETERMINATION PROCEEDING**

1) The Trust asserts that it had to participate in the hearing on the determination of the reasonableness of costs because if it were ultimately determined to be subject to paying any of those costs, as Chaparral asserts, then the Trust would have waived objection to them if it did not participate in the hearing held for that purpose. However, the Trust admitted to the Commission that it was subject to the force pooling order.

2) The Chaparral application in CD 200605771, in the cost determination proceeding, stated that the basis for the filing of the cost determination on the Griffin 2-36 well was as follows:

2.4 A dispute has arisen as to the reasonableness and necessity of the cost of the operations. One of the participating parties pursuant to said pooling orders, Loyd G. Copenbarger, Jr. and Paul D. Copenbarger, Co-Trustees of the Copenbarger Trust, have alleged that the Applicant has incurred costs in excess of reasonable and necessary costs and expenses.

3) Mr. Charles Puckett, as the attorney for the Trust, entered a general appearance, not a special appearance, and admitted in the hearing on the merits on the Chaparral cost determination application in CD 200605771 that the Trust was subject to the pooling order in that hearing.

4) Exhibit M is the transcript of proceedings in the Chaparral well cost determination case in CD 200605771 heard on December 14, 2006. In that transcript of the cost determination case on page rdh-5, lines 11 through 23, Chaparral witness Mark Dixon testified:

Q. Respondent in this particular case, the Copenbarger Trust, did they make an election?

A. Yes, they did.

Q. What was their election?

A. To participate.

Q. And did they pay their share of what was then the dry hole costs?

A. Correct.

Q. Subsequent to the drilling of the well is (sic) [has] the Copenbarger Trust raised an objection about the ultimate cost of the well?

A. Yes.

The Trust never challenged these statements that the Trust was under the pooling order and had made an election to participate in the Griffin 2-36 well.

5) Further in cross examination, the following exchange between the Trust attorney Mr. Puckett and Chaparral's witness Mr. Dixon appeared as shown on page rdh-12, lines 10 through 23:

Q. And what are the dry hole costs as reflected in that AFE?

A. \$680,448.

Q. And is that the exact, same amount as set in the pooling order?

A. Yes.

Q. And was the pooling order submitted to the Copenbarger Trust for their election to participate or not participate in the Griffin well?

A. Yes.

Q. And was an AFE submitted along with that order to the Copenbarger Trust?

A. Yes.

On page rdh-75 of the transcript of the cost determination case on line 3, the Trust attorney admitted:

This is a Testamentary Trust in California and they are not in the business, but they did get forced pooled.

The Trust's active participation in the well cost determination proceeding was an admission that it had elected to participate in the well pursuant to the pooling Order No. 501237.

6) Once the Trust received notice of the well cost determination proceedings, it could have objected being named as a respondent to that application, which it did not. Also in response to the well cost determination proceeding, the Trust could have filed its own application to determine whether it elected under the pooling order, but it did not. Instead, the Trust actively participated in the well cost determination hearing and the Trust attorney admitted it was forced pooled. The Trust cannot now assert that it has not elected to participate under the pooling order. The Trust admits that it was forced pooled and if it had not elected to participate why would it be concerned with the well costs determination proceeding. If as the Trust claims it had to participate in the cost determination hearing because it might ultimately be determined that it was subject to paying those costs, why didn't the Trust so state at the hearing.

## V.

### JUDICIAL ESTOPPEL

1) The doctrine of judicial estoppel is described in *Harding & Shelton, Inc. v. the Prospective Investment and Trading Company, Ltd.*, 123 P.3d 56 (Okl.App. 2005):

This doctrine provides a party who knowingly assumed a particular position dealing with matters of fact is estopped from assuming an inconsistent position to the prejudice of the adverse party. This rule ordinarily applies to inconsistent positions assumed in the course of the same judicial proceeding or in subsequent proceedings where the parties and questions are identical. *Capshaw v. Gulf Insurance Company*, 107 P.3d 595 (Okl. 2005).

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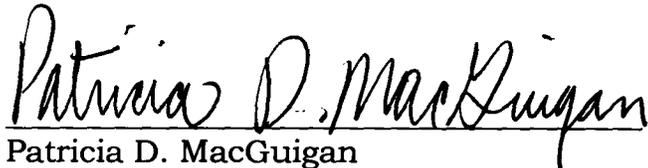
2) The Referee finds that the Trust accepted the benefits of Order No. 501237 by its actions and conduct as listed previously, and also as well as

sharing in the forced pooled acreage under the pooling order, and therefore cannot claim the invalidity of their election under the pooling order.

**CONCLUSION**

1) The Referee finds that when one considers the conduct of the Trust and Chaparral one must conclude that the Trust made a valid election under pooling Order No. 501237 and satisfied the terms of the pooling order and the intent of the Commission in entering the order. Therefore the Referee recommends that the ALJ's conclusions that the Trust made no valid election under the terms of Commission Order No. 501237 as amended should be reversed.

**RESPECTFULLY SUBMITTED THIS 25th day of January, 2011.**

  
Patricia D. MacGuigan  
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy  
Commissioner Cloud  
Commissioner Anthony  
Jim Hamilton  
David E. Pepper  
Ronald M. Barnes  
ALJ Michael Porter  
Office of General Counsel  
Michael L. Decker, OAP Director  
Oil Law Records  
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