

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

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

<u>APPLICANT:</u>	CONCORDE RESOURCES CORPORATION)	
)	
<u>RELIEF SOUGHT:</u>	VACATE SPACING ORDER NO. 540665 AND CONFIRM SPACING ORDER NO. 349015)	CAUSE CD NO. 201103290-T
)	
<u>LEGAL DESCRIPTION:</u>	SECTION 12, TOWNSHIP 9 NORTH, RANGE 15 EAST, MCINTOSH COUNTY, OKLAHOMA)	
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REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Curtis M. Johnson**, Deputy Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 26th day of October, 2011, at 8:30 a.m. in the Commission's Courtroom, Robert S. Kerr Office Building, 440 S. Houston, Suite 114, Tulsa, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **William H. Huffman**, attorney, appeared on behalf of applicant, Concorde Resources Corporation ("Concorde"); **Michael D. Stack**, attorney, appeared on behalf of Redbud E&P, Inc., successor in interest to Mahalo Energy (USA), Inc. ("Redbud"); 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 10th day of February, 2012, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 6th day of April, 2012. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

CONCORDE filed exceptions concerning the ALJ's recommendation that 640 acre spacing established by Order No. 540665 should be confirmed for Section 12 and that the Hartshorne common source of supply should be vacated from Spacing Order No. 349015. The ALJ contends this is proper even though Concorde did not get notice of the hearing that resulted in the issuance of Order No. 540665. The basis for this decision rests upon the fact that it is not clear if Concorde even owned an interest in the unit at the time the spacing application was filed. This issue is currently being litigated in District Court. However, even if the District Court determines that Concorde owned an interest in the unit before the spacing application was heard and recommended, the ALJ contends Concorde should still be bound by Spacing Order 540665 under the equitable doctrines of judicial estoppel and laches.

Concorde argues the Redbud Spacing Order No. 540665 which issued on June 15, 2007, is void because they did not receive notice of the Redbud's 640 acre Spacing Application. Furthermore Order No. 349015 is in full force and effect because it was not vacated by Order No. 540665. Order No. 540665 sought to vacate Order No. 101228 which created 320 acre spacing for the Bartlesville, Cromwell, Hartshorne, Atoka, Wapanucka and Hunton. Redbud mistakenly believed that Order No. 101228 spaced all of Section 12 on a 320 acres basis for the Hartshorne common source of supply, however, this Order only spaced the E/2 of Section 12 on a 320 acre basis. The W/2 of Section 12 was spaced on a 160 acre basis for the Upper Booch, Lower Booch, and Hartshorne by Order No. 349015. Therefore, when Order No. 540665 was issued spacing Section 12 on a 640 acre basis and vacating only Order No. 101228, this created a spacing conflict in the Hartshorne formation in the W/2 of Section 12. Redbud and Concorde then filed competing pooling applications utilizing 640 acre Spacing Order No. 540665. Redbud was the prevailing party for operations in the pooling order which issued. Redbud subsequently drilled and completed the Conner #2-12H well, a horizontal Hartshorne well, in September of 2008. This well has been producing for over three years and the royalties have been paid pursuant to the pooling order which relied upon Spacing Order No. 540665. Concorde now seeks to vacate Spacing Order No. 540665 because they did not receive notice of that application.

Redbud argues Concorde did not need to be provided notice because Concorde did not own any interest in Section 12 at the time the spacing application was filed, because their leases had expired. The Conner-Pyle #1 well was drilled in the SW/4 of Section 12 in 1981 or 1982. Concorde took new leases in the SW/4 of Section 12 in 1990. In 2008 Concorde began producing the Booch formation in the Conner-Pyle #1 well. Concorde alleges they paid shut-in royalty while the well was not producing. Redbud contends these leases have

expired. The validity of Concorde's original leases in Section 12 is subject to ongoing District Court litigation.

CONCORDE TAKES THE POSITION:

(1) The Report of the ALJ is contrary to law, contrary to the evidence and fails to protect the owners in the common sources of supply.

(2) The ALJ stated that Concorde is bound by laches and estoppel to Order No. 540665.

(3) The evidence presented and affirmed by Mahalo, now Redbud E&P, Inc. ("Redbud") was that no notice was given to Concorde of the pendency of Cause CD 200703170-T, which resulted in Order No. 540665. The Commission file in Cause CD 200703170-T reflects that Concorde was neither a respondent or given notice of the pendency of the application.

(4) Evidence was presented that Concorde owned oil and gas leasehold covering the proposed unit but also operated a well that was physically located in the proposed unit. Mahalo/Redbud witness admitted that due diligence was not exercised by Mahalo. He admitted Mahalo assumed the lease had expired due to the lack of production but did not inquire as to shut-in payments with the Concorde lessors.

(5) The Court of Civil Appeals has addressed the issue of the validity of the Concorde oil and gas leases and as to one mineral owner, Smith, Smith & Smith, by their acceptance of shut-in royalties, is estopped from denying Concorde's title. There is no question or dispute that Concorde had an interest at the time of the spacing proceeding and was entitled to notice of the pendency of the proceeding.

(6) Personal jurisdiction is a required element to issuing a valid order. Any order issued without meeting the three jurisdictional requirements is void and can be attacked at any time. A void order is a nullity. Laches is no defense to a void order.

(7) Mahalo/Redbud initially filed to vacate Order No. 349015 which created 160 acre drilling and spacing units. In this cause, through a response and request for affirmative relief, Mahalo/Redbud seeks to vacate the order but fails to give proper notice. No publication of the notice requesting the vacation of the order was given as required by 52 O.S. Section 87.1 and the Commission rules.

(8) Based upon the above, the Report of the ALJ should be reversed and Order No. 540665 vacated, with the application of Concord being granted.

THE ALJ FOUND:

(1) After taking into consideration all the facts, evidence, exhibits, and arguments, it is the recommendation of the ALJ, in Cause CD No. 201103290-T seeking to vacate Spacing Order No. 540665 and confirm Spacing Order No. 349015 for Section 12, T9N, R15E, McIntosh County, Oklahoma, that Spacing Order No. 540665 should be confirmed and the Hartshorne common source of supply should be vacated from Order No. 349015.

(2) The ALJ recommends that Concorde should be bound by Order No. 540665 as a result of the doctrines of judicial estoppel and laches, whether Mahalo was or was not required to provide Concorde with notice of the hearing on this Order. "Judicial estoppel is an equitable doctrine designed to bar a party who has knowingly and deliberately assumed a particular position from assuming an inconsistent position to the prejudice of the adverse party...the rule applies to inconsistent positions assumed in the course of the same judicial proceeding or in the subsequent proceeding involving identical parties and questions." *Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695, 699, (Okl. 2001) (citing *Messler v. Simmons Guns Specialties, Inc.*, 687 P.2d 121, (Okl. 1984).

(3) "[T]he doctrine [of judicial estoppel] 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 Ins. Co.*, 107 P.3d 595, (Okl. 2005).

(4) "[A]n indispensable element of judicial estoppel is that the party taking the inconsistent position must have been successful in maintaining its prior factual position." *Parker v. Elem*, 829 P.2d 677,680 (Okl. 1992).

(5) As was noted by Mr. Stack in his brief, in the present case, Concorde knowingly and deliberately took the position that Spacing Order 540665 was a valid order when it filed Cause CD No. 200704890-O/T resulting in Pooling Order No. 548316. Its application pooled the 640-acre Hartshorne common source of supply in Section 12, T9N, R15E, McIntosh County, Oklahoma. In Concorde's own application and notice of hearing it stated: "Section 12, T9N, R15E, McIntosh County, Oklahoma, a **640-acre** drilling and spacing unit for the Red Fork, Bartlesville, Savanna and **Hartshorne** common source of supply created by **Order No. 540665**." (emphasis added)

(6) Now Concorde is attempting to take an adverse position to the valid order it previously used in filing before the OCC. Furthermore, Concorde's conflicting positions arise within the course of a "subsequent proceeding

involving identical parties and questions." *Barringer v. Baptist Healthcare of Oklahoma*, supra at 699.

(7) Moreover, Concorde's adverse position is prejudicial to Redbud/Mahalo because Redbud/Mahalo relied on the spacing and pooling order to drill and produce a 640-acre horizontal Hartshorne well in the S/2 of Section 12.

(8) Lastly, Concorde, the party taking the inconsistent position, was successful in maintaining the prior position because, even though it was not named operator, the order bestowed a benefit upon them and owners in the unit by allowing a well to be drilled, completed and produced in the 640-acre Hartshorne unit. Both mineral owners and working interest owners have been receiving production from the Conner #2-12H well since 2008. Thus, the ALJ agrees the doctrine of judicial estoppel should be applied to prevent Concorde from asserting its current position given the conflict with its previous position.

(9) As additional support for this decision, the ALJ also relied upon the doctrine of laches which "is an equitable defense to stale claims." *Sullivan v. Buckhorn Ranch Partnership*, 119 P.3d 192, (Okl. 2005). The court has discretion to use this doctrine as justice so requires. *Id.* "The party invoking the laches defense must show unreasonable delay coupled with knowledge of the relevant facts resulting in prejudice...the elements of laches are simply not met when there is an absence of knowledge and affirmative acts to mislead." *Id.*

(10) The ALJ agrees with Mr. Stack's argument that "[t]he present case is a stale claim. There was unreasonable delay when Concorde waited four years to file the present action. Concorde was aware of the 640-acre Hartshorne drilling and spacing unit when it filed its pooling, Cause CD No. 200704890-0/T, in 2007. Concorde was aware in 2008 that a horizontal Hartshorne well was drilled in the S/2 of Section 12. Therefore, Concorde had knowledge of the relevant facts involving this action in 2007 yet waited until 2011 to file its action before the OCC. Moreover, the delay has resulted in prejudice to Redbud/Mahalo because it has relied on the Hartshorne 640-acre drilling and spacing unit and the 640-acre pooling to drill, produce and pay revenue on the Conner #2-12H well. Lastly, there were zero affirmative acts to mislead on the part of Redbud/Mahalo that would have inhibited Concorde from pursuing this action at an earlier date. For these reasons, the ALJ agrees the doctrine of laches should be applied to prevent Concorde from further pursuing this stale claim.

(11) As further support for the recommendation of the ALJ, to confirm the 640 spacing and vacate the 160 acre spacing for the Hartshorne common source of supply. OCC-OAC 165:5-7-6 (f) provides "[w]here two or more orders have issued spacing a common source of supply and such spacing orders have resulted in there being a conflict...as to size of the unit...then the applicant seeking to vacate, alter, amend, or change one of the prior spacing orders shall

either file an application to construe and modify the conflicting orders..." Concorde had made such a request of the Commission, so the Commission must determine which spacing is more appropriate for the Hartshorne.

(12) As support for this conclusion that 640 acre spacing is more appropriate for the Hartshorne common source of supply, the ALJ refers to Exhibits 18 and 19, Redbud's Hartshorne Isopach Map and Redbud's Estimated Ultimate Gas Drainage Area Map. The Hartshorne Isopach illustrates that almost all of the Hartshorne in this area is spaced on a 640 acre basis. Therefore, under the common theme of development of a formation, 640 acre spacing would appear to be more appropriate for the Hartshorne within Section 12. Furthermore, Estimated Ultimate Gas Drainage Area Map shows the Conner #2-12 H well will drain reserves from the SE/4, SW/4 and the NW/4 of Section 12. If spacing is restricted to 160 acre units, the interest owners in the NW/4 will have lost reserves to a well they would not be allowed to benefit from because the wellbore is only located in the S/2 of Section 12. This would result in the violation of the correlative rights of interest holders in the NW/4 of Section 12. Furthermore, Redbud's engineering witness testified if gas prices increase the drainage estimate for the Conner #2-12 well will also increase, which could even result in this well draining reserves from the NE/4 of Section 12. Therefore, the ALJ recommends that Spacing Order No. 540665 should be confirmed and the Hartshorne common source of supply should be vacated from Order 349015.

(13) Thus, the ALJ recommends that CD No. 201103290-T which seeking to vacate Spacing Order No. 540665 and confirm Spacing Order No. 349015 for Section 12, T9N, R15E, McIntosh County, Oklahoma; that Spacing Order No. 540665 should be confirmed and the Hartshorne common source of supply should be vacated from Order No. 349015.

POSITIONS OF THE PARTIES

CONCORDE

1) **William H. Huffman**, attorney, appeared on behalf of Concorde, stated the legal description of the land in question is Section 12, T9N, R15E, Macintosh County, Oklahoma. Concorde argues that Mahalo's Spacing Order No. 540665 is void because they did not receive notice of the Spacing Application. As a result, Concorde argues that Spacing Order No. 349015 is in full force and effect because it was not vacated by Order No. 540665.

- 2) Concorde states prior to Spacing Order No. 349015, an operator drilled a well in the SW/4 of Section 12, which was completed as a Booch producer. Concorde states they subsequently purchased this particular well.
- 3) Concorde contends after putting their signs on this well, there was a question as to whether the shut-in royalties had been paid at that particular time. Concorde states four new oil and gas leases were then issued as a precaution on Section 12.
- 4) Concorde states Section 12 was originally spaced by Concorde on a 160 acre basis in the W/2 pursuant to Spacing Order No. 349015. Concorde contends that the SW/4 of Section 12 compromises their four oil and gas leases.
- 5) Concorde asserts there has been a lawsuit, *Concorde Resources Corp. v. Kepco Energy, Inc*, 2011 OK CIV APP 39, 254 P.3d 734, concerning whether Concorde's ownership in the four oil and gas leases are valid. Concorde states they have appealed the district court's summary judgment finding the leases had expired. Concorde claims that the Court of Appeals has ruled at least one of the four leases is valid.
- 6) Concorde contends that when Mahalo made a request to the Commission for a Spacing Order covering Section 12, Concorde was not listed as a respondent and was never given notice.
- 7) Concorde cites *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 1986 OK 16, 732 P.2d 438, which stated "In short, courts may not presume publication service alone to be constitutionally valid when the judgment roll or record of an administrative proceeding fails to show that the means of imparting better notice were diligently pursued but proved unavailable." Concorde contends their name and address were on the well, their name and address were on the oil and gas leases, and their name and address were on the 1073 Forms. Concorde claims "they had it to where a blind man could have found them."
- 8) Concorde states that Mahalo's witness, Mr. Duffield, stated that when a well is physically on the property, typically he would have made an inquiry as to whether shut-in royalties had been paid. Concorde asserts that Mahalo's witness, Mr. Duffield, then stated that in this case Mahalo did not make this inquiry because they did not see or believe there was production from the well.
- 9) Concorde states that in order for the Commission to have jurisdiction, the Commission must have: subject matter jurisdiction, authority to issue the type of order or relief requested, and personal jurisdiction. Concorde cites *Martin v. American Farm Lines*, 1990 OK CIV APP 22, 790 P.2d 1134, which states that a judgment is facially void when on the face of the judgment roll there is an absence of personal jurisdiction.

10) Concorde asserts that Spacing Order No. 540665 lacked personal jurisdiction as to them and as a result the Order is void. Concorde states that because the Order is void, it is a nullity and does not exist.

11) Concorde cites *Prudential Ins. Co. of America v. Board of County Com'rs of Garvin County*, 1939 OK 293, 92 P.2d 359, stating the case holds when a judgment is void, the nature and time of the attack is immaterial. Concorde alleges that a void Order can be vacated at any time. Concorde further cites *B&C Investments, Inc. v. F&M Nat. Bank & Trust*, 1995 OK CIV APP 106, 903 P.2d 339, stating laches is not a defense to a void judgment, because a void judgment can be vacated at anytime.

12) Concorde states that Mahalo has argued that Concorde, by utilizing the Spacing Order they are now trying to vacate, has accepted the Order and is now estopped from seeking relief. Concorde asserts that this argument is false because the Order was void from the beginning and therefore there was no Order to accept.

13) Concorde alleges that the ALJ did not adequately address the issue that Mahalo's Spacing Application never requested to vacate Concorde's Spacing Order No. 349015, which spaced the SW/4 of Section 12. Concorde states the Commission Rules are clear that if an Order is to be vacated, a party must set out what Order is to be vacated, as well as notice to the owners. Concorde asserts that these steps were not properly taken to vacate Order No. 349015.

14) Concorde reasserts that Mahalo failed to give proper notice to Concorde, and as such Mahalo's Spacing Order, citing *Pettis v. Johnston*, 1920 OK 224, 190 P. 681, is a "dead branch on the judicial tree and can be lopped off at any time."

REDBUD

1) **Michael D. Stack**, attorney, appeared on behalf of Redbud in support of the ALJ's findings to vacate Spacing Order No. 349015 and confirm Spacing Order No. 540665.

2) Redbud states the original well drilled in the SW/4 of Section 12, known now as the Connor well, was drilled into the Booch common source of supply in 1981. Redbud states Concorde acquired the well and took new leases in 1990. Redbud states Concorde then waited four years before filing a Form 1073 Notice of Transfer of Well Operatorship.

- 3) Redbud asserts this particular well did not begin producing until July 2008, 26 years from date of drilling. Redbud states this well was never drilled into and never produced from the Hartshorne formation.
- 4) Redbud states Order No. 101228 spaced only the E/2 of Section 12 on a 320 acre basis on November 16, 1973. The W/2 was spaced on a 160 acre basis by Order No. 349015 on July 31, 1990.
- 5) Redbud states they mistakenly only deleted Order No. 101228, believing it covered the entire Section 12.
- 6) Redbud states on June 15, 2007, Spacing Order No. 540665 established the 640 acre Spacing Order for Section 12. Redbud further states they filed a pooling order June 8th or 9th of 2007 for a Hartshorne horizontal well.
- 7) Redbud states a second pooling was filed after the realization that Concorde had acquired a 7.5 acre interest in Section 12.
- 8) Redbud asserts Concorde then filed their own pooling in CD No. 200704890 on July 19, 2007. Redbud states Concorde utilized Order No. 540665 when requesting its pooling order. Redbud cites Concord's pooling application as stating that Concorde requests that the Commission issue a Pooling Order adjudicating the rights of oil and gas owners in Section 12 for the Hartshorne created by Order No. 540665. That is the 640 acre order they are now saying should not be in place. They are saying now that the 160 acre order should be in place. Concorde also admitted at the pooling hearing that they were aware the Hartshorne was spaced on both 640s and 160s. Concorde agreed when it filed its application that they planned to drill a Hartshorne horizontal well to protect their interest in the unit.
- 9) Redbud contends the Pooling Orders were then consolidated together, with Redbud gaining status as the operator.
- 10) Redbud states they then drilled a well, the Connors #2-H. Redbud claims Concorde initially participated in the well, paying roughly \$117,000. Redbud states Concorde then cancelled the check before it could be cashed. Redbud states bonus money was paid to Concorde for nearly four years with no objection.
- 11) Redbud asserts that Concorde's current lawsuit, Concorde Resources Corp. v. Kepco Energy, Inc., supra, has been remanded back to the district court and that a final decision is pending. Redbud contends that if the court finds that the leases had in fact expired, Concorde will not have been entitled notice.

- 12) Redbud, citing *Union Texas Petroleum, A Div. of Allied Chemical Corp v. Corporation Com'n of State of Okl*, 1981 OK 86, 651 P.2d 652 and *Anson Corp v. Hill*, 1992 OK 138, 841 P.2d 583, states that an order is a valid order to anyone who received notice. Redbud claims that one party being missed does not void the order as to those who did receive notice.
- 13) Redbud asserts that because Concorde filed a pooling application using Redbud's spacing number with hopes to drill a Hartshorne 640 acre well, and now is seeking to oppose the order it previously filed before the Commission, Concorde should be estopped pursuant to the doctrine of judicial estoppel.
- 14) Redbud states Concorde's conflicting positions arise within the course of subsequent proceedings involving identical parties and questions. Accordingly, Redbud states the ALJ was correct in finding that the doctrine of judicial estoppel should be applied to prevent Concorde from changing its current position from its previous position.
- 15) Redbud asserts that Concorde's claim should be barred by the equitable defense of laches. Redbud agrees with the ALJ that there was an unreasonable delay on the part of Concorde by waiting four years to file the action when the President of Concorde testified he was aware of Spacing Order No. 540665 entered on June 15, 2007, and the conflict in spacing the Hartshorne on 320 acre spacing in the E/2 of Section 12 and 160 acre units in the W/2 of Section 12. Spacing Order No. 540665 establishing a 640 acre unit did not delete Spacing Order No. 349015 as to the 160 acre units in the Hartshorne.
- 16) Redbud states Concorde's delay in filing their action has resulted in prejudice to Redbud because of Redbud's reliance on the spacing and pooling orders to drill the Conner #2-12H well.
- 17) Redbud claims there were zero affirmative acts to mislead on the part of Redbud that inhibited Concorde from pursuing this action at an earlier date.
- 18) Redbud contends that the Commission is without authority to void *ab initio* conflicting orders, and that Concorde may only seek to vacate, alter, amend, or change a prior spacing order.
- 19) Redbud asserts that the ALJ was correct in finding a 640 acre spacing was more appropriate for the prevention of waste and protection of correlative rights.

RESPONSE OF CONCORDE

- 1) Concorde restates that the Order is void, and when an Order is void it is a nullity.
- 2) Concorde reasserts laches is not a defense to a void order, citing *B&C Investments v. F&M Bank*, supra.
- 3) Concorde states they were put in a quandary when they acquired the 7.5 acre interest from a party that received notice of the spacing order and was subject to the spacing order and the 7.5 acre interest is subject to the interest that was subject to the Spacing Order. Concorde reasserts this does not remove the problem with the Order because it was still invalid as to the 160 acre interest that was owned by Concorde at the particular time the Order was entered.
- 4) Concorde states that in *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, supra, the action to challenge the Spacing Order was not until eight years later. Concorde restates that the Court in *Carlile* basically said without actual notice an order is invalid.
- 5) Concorde states the Commission's jurisdiction to protect correlative rights and prevent waste is only one component of the jurisdictional prerequisites. Concorde states that the jurisdiction to protect correlative rights does not permit the Commission to do so without giving the requisite Constitutionally required personal notice.
- 6) Concorde claims that in its current lawsuit, *Concorde Resources Corp v. Kepco Energy Inc.*, supra, it appears that the Court of Appeals found that Concorde has an interest in at least one of the four leases. Concorde claims this interest entitled them to notice.
- 7) Concorde reasserts that neither judicial estoppel or laches can be applied, because a void Order is a "dead limb on the judicial tree that we can at any time lop off."

CONCLUSIONS

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

I.**NOTICE**

1) On July 24, 1981 the Pyle #1 well in the SW/4 of Section 12 was drilled and completed in the Booch formation. On April 5, 1990, the Pyle #1 well (renamed the Conners #1 well) was transferred and acquired by Concorde with the transfer being effective April 5, 1990. Form 1073 was filed with the Oklahoma Corporation Commission on October 4, 1994. The Conners #1 well which was completed in the Booch common source of supply in 1981 had not produced any hydrocarbons through 2007, approximately 26 years. The Conners #1 well began producing in July of 2008. The Conners #1 well never produced from the Hartshorne formation.

2) In June of 1990 Concorde filed an application with the Oklahoma Corporation Commission to vacate Order No. 101228, which established 320-acre Upper Booch, Lower Booch and Hartshorne common sources of supply in the W/2 of Section 12 and to establish 160-acre drilling and spacing units underlying the W/2 of Section 12 for the Hartshorne, Lower Booch and Upper Booch common sources of supply. Drilling and Spacing Order No. 349015 was issued by the OCC on July 31, 1990.

3) On May 9, 2007 Redbud filed an application in Cause CD No. 200703170-T to delete Order No. 101228 for the 320-acre Bartlesville, Cromwell, Hartshorne, Atoka, Wapanucka and Hunton common sources of supply and to establish the common sources of supply on 640 acre drilling and spacing units underlying Section 12. No notice of the application to establish the drilling and spacing units was given to Concorde. Redbud took the position that the oil and gas leases had expired under their own terms as to the lease of Concorde.

4) Redbud asserts that the Spacing Order No. 540665 is valid as to the individuals and entities that did receive proper notice citing the Supreme Court cases of *Union Texas Petroleum, a Division of Allied Chemical Corporation v. Corporation Commission of State of Oklahoma*, 651 P.2d 652 (Okla. 1981) and *Anson Corporation v. Hill*, 841 P.2d 583 (Okla. 1992). One of the issues on appeal in the *Union Texas Petroleum* case was the validity of notice given to Union Oil of California and Tenneco Oil Company. *Supra* at 657. The Court found that the two entities "propose the judgment must be vacated here on appeal because, as the transcript of the hearing on the motion to dismiss reveals, neither of these parties received notice of this proceeding." *Supra* at 617. The Court states:

Appellant Union Oil Company of California states it was never served by mail. The affidavits of mailing confirm that allegation. Appellant Tenneco Oil Company states service upon it was improper in that "the notice sent to Tenneco was improperly addressed." There is no allegation in the briefs, or lengthy record of this appeal, which indicates there was any prejudice resulting from the improper address on Tenneco's notice. The record indicates service by mailing was made. If the incorrect address resulted in failure to give notice that fact should have been raised. The Appellant, Tenneco, has not alleged in the proceedings before the Commission that the improper address resulted in failure to impart notice. A mere defect in form of style or nomenclature will not invalidate service of process unless it actually resulted in failure to give notice, as can be discerned from the excerpts from *Mullane* which demonstrate the inquiry is centered on what steps are necessary to impart actual notice, and not formalistic ritual of service of process.

Even though the Court does find that notice was improper as to Union Oil of California it finds that the order is still valid as to each party who did receive notice. The Court concludes that "the order of the Corporation Commission is determinate to be supportive by substantial competent evidence and is therefore affirmed; provided that no part thereof is valid insofar as it affects the rights and interests of Union Oil of California, and is reversed insofar as it attempts to adjudicate the rights of Union Oil Company." *Supra* at 664.

5) In *Anson Corporation v. Hill*, Hill and other respondents sought to vacate an order due to lack of notice, *supra* at 583. Although the *Anson* Court did find that the respondents failed to receive notice, it utilized the holding in the *Union Texas Petroleum* case and concluded that "the Commission's attempt to exercise jurisdiction over the respondents was ineffective and a nullity insofar as it affected the respondent's interest. *Supra* at 587. Thus, under the Supreme Court cases of *Union Texas Petroleum, a div. Of Allied Chemical Corporation v. Corporation Com'n of State of Okl.*, and *Anson Corporation v. Hill*, *supra*, the Spacing Order No. 540665 cannot be vacated as to any parties who were properly served and who have legitimate rights under that order.

II.

JUDICIAL ESTOPPEL

1) The Referee agrees with the ALJ that even if Concorde did not receive notice, it is still bound by Spacing Order No. 540665 under the doctrine of judicial estoppel.

2) Concorde knowingly assumed the position that Spacing Order No. 540665 was a valid order when it filed its pooling application in CD 200704890-O/T covering Section 12 which resulted in Pooling Order No. 548316. Concorde's application pooled the 640-acre Hartshorne common source of supply in Section 12 and in its application and notice of hearing Concorde stated:

Section 12, T9N, R15E, McIntosh County, Oklahoma, a 640 acre drilling and spacing unit for the Red Fork, Bartlesville, Savannah and Hartshorne common sources of supply created by Order No. 540665."

Now Concorde is attempting to take an adverse position to Spacing Order No. 540665 which it previously used in its pooling application resulting in Concorde's Pooling Order No. 548316 before the Oklahoma Corporation Commission. Concorde's conflicting positions arises in the courses of subsequent proceedings involving identical parties and questions.

3) The Supreme Court in *Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695 (Okl. 2001), stated:

Judicial estoppel is an equitable doctrine designed to bar a party who has knowingly and deliberately assumed a particular position from assuming an inconsistent position to the prejudice of the adverse party. *Messler v. Simmons Guns, Specialties, Inc.*, 1984 OK. 35, 687 P.2d 121, 128. The rule applies to inconsistent positions assumed in the course of the same judicial proceeding or in a subsequent proceeding involving identical parties and questions. *Id.* It applies to prevent advancement of inconsistent positions only vis-a-vis matters of fact. *Parker v. Elam*, 1992 OK 32, 829 P.2d 677, 680. It does not prevent a

party from asserting a legal theory contrary to one advanced earlier in litigation. Id.

- 4) The Supreme Court in *Capshaw v. Gulf Insurance Company*, 107 P.3d 595 (Okl. 2005) states in footnote 28:

Oklahoma recognizes the legal doctrine of judicial estoppel. 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 a subsequent proceedings where the parties and questions are identical. *Panama Processes, S.A. v. City Service Company*, 1990 OK 66, ¶¶ 21-22, 796 P.2d 276, 287-88; *Messler v. Simmons Gun Specialties, Inc.* 1984 OK 35, ¶ 18, 687 P.2d 121, 128.

See also *Parker v. Elam*, 829 P.2d 677 (Okl. 1992).

II.

LACHES

- 1) The Referee also agrees that the doctrine of laches is applicable in the present cause. The Supreme Court in *Sullivan v. Buckhorn Ranch Partnership*, 119 P.3d 192 (Okl. 2005) stated:

Laches is an equitable defense to stale claims. There is no arbitrary rule for when a claim becomes stale or what delay is excusable. Application of the doctrine is discretionary depending on the facts and circumstances of each case as justice requires. As an affirmative defense, the party claiming the doctrine's benefit has the burden of proof...The party invoking the laches defense must show unreasonable delay coupled with knowledge of the relevant facts resulting in prejudice.

2) Redbud argues that the present Concorde cause is a stale claim. It was unreasonable delay when Concorde did not file the present action until four years after it was aware of the 640 acre Hartshorne drilling and spacing unit Order No. 540665 before it filed its pooling in 2007 in CD No. 200704890-O/T. Concorde was also aware that a horizontal Hartshorne well was drilled, the Conner #2-12H well by Redbud in the S/2 of Section 12. Concorde therefore knew about and relied upon the Spacing Order No. 540665 in 2007 yet waited until 2011 to file the present action at the Commission. Redbud has certainly been prejudiced by the four year delay as it has relied on the Hartshorne 640-acre drilling and spacing unit Order No. 540665 to pool, drill, produce and pay revenue on the Conner #2-12H well.

III.

CONFLICT IN SPACING

1) OCC-OAC 165:5-7-6(f) provides:

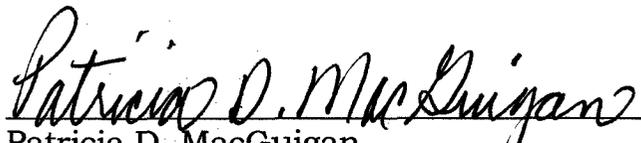
(f) Where two or more orders have issued spacing a common source of supply and such spacing orders have resulted in there being a conflict either as to the size of the unit or as to a common source of supply or conflict as to the nomenclature of the common source of supply, then the applicant seeking to vacate, alter, amend or change one of the prior spacing orders shall either file an application to construe and modify the conflicting orders or may amend a relative application to accomplish the same result. Notice of hearing shall be served and published as required upon by the commencement of a proceeding.

2) Spacing Order No. 349015 and Spacing Order No. 540665 are presently both valid orders of the Oklahoma Corporation Commission. However, Order No. 349015 provides for 160 acre spacing for the Hartshorne in the W/2 of Section 12, and Order No. 540665 provides for 640 acre spacing for the Hartshorne in Section 12. Therefore, the two orders create a conflict in spacing which must be corrected by the Oklahoma Corporation Commission.

3) Redbud filed on October 7, 2011 its Request For Affirmative Relief By Confirming Order No. 540665.

4) Redbud's geologist testified that the Hartshorne common source of supply underlies all of Section 12 and Exhibits 17 and 18 were presented by Redbud demonstrating there were no faults separating the SW/4 from the remaining portions of Section 12. Redbud's engineer presented Exhibit 19 which demonstrated the Conner #2-12H well would affect the S/2 and the NW/4 of Section 12. There was also testimony by Redbud's engineer that the Conner #2-12H well would ultimately affect most of the entire Section 12. No geological or engineering testimony was presented by Concorde regarding the proper size of spacing for the Hartshorne common source of supply. Thus, the geological and engineering studies determined the proper size unit for the Hartshorne common source of supply is 640 acre unit. Therefore, the Referee believes that substantial evidence has been presented concerning the appropriate size of a unit for the Hartshorne common source of supply should be 640 acres. Thus, the recommendation of the ALJ that Spacing Order No. 540665 should be confirmed and the Hartshorne common source of supply should be vacated from Order No. 349015 should be affirmed. See *Cameron v. Corporation Commission*, 414 P.2d 266 (Okl. 1966).

RESPECTFULLY SUBMITTED THIS 5th day of June, 2012.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Anthony
Commissioner Douglas
Jim Hamilton
ALJ Curtis M. Johnson
William H. Huffman
Michael D. Stack
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