BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT:	**CIMAREX ENERGY CO.**	)	
RELIEF SOUGHT:	**CLARIFICATION, CONSTRUCTION, AND/OR INTERPRETATION OF SPACING ORDER NO. 94846**	)	**CAUSE CD NO. 201103741**
LEGAL DESCRIPTION:	**SECTION 16, TOWNSHIP 14 NORTH, RANGE 15 WEST, CUSTER COUNTY, OKLAHOMA**	)	

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CORPORATION COMMISSION
OF OKLAHOMA

APPLICANT:	**UNIT PETROLEUM COMPANY**	)	
RELIEF SOUGHT:	**CLARIFICATION, CONSTRUCTION, AND/OR INTERPRETATION OF SPACING ORDER NO. 220834**	)	**CAUSE CD NO. 201103821**
LEGAL DESCRIPTION:	**SECTION 9, TOWNSHIP 5 NORTH, RANGE 20 EAST, LATIMER COUNTY, OKLAHOMA**	)	

APPLICANT:	**NEW DOMINION, LLC**	)	
RELIEF SOUGHT:	**CONSTRUCTION AND/OR CLARIFICATION OF SPACING ORDER NO. 531669**	)	**CAUSE CD NO. 201104167-T**
LEGAL DESCRIPTION:	**N/2 SW/4 OF SECTION 28, TOWNSHIP 25 NORTH, RANGE 1 WEST, KAY COUNTY, OKLAHOMA**	)	

APPLICANT:	**RANGE PRODUCTION COMPANY**	)	
RELIEF SOUGHT:	**CLARIFY, CONSTRUE, AND/OR INTERPRET SPACING ORDER NO. 575650**	)	**CAUSE CD NO. 201105057**
LEGAL DESCRIPTION:	**SECTION 29, TOWNSHIP 5 SOUTH, RANGE 6 EAST, MARSHALL COUNTY, OKLAHOMA**	)	

APPLICANT:	**RANGE PRODUCTION COMPANY**	)	
RELIEF SOUGHT:	**CLARIFY, CONSTRUE, AND/OR INTERPRET SPACING ORDER NO. 565635**	)	**CAUSE CD NO. 201105112**
LEGAL DESCRIPTION:	**S/2 NE/4 OF SECTION 29, TOWNSHIP 25 NORTH, RANGE 1 WEST, KAY COUNTY, OKLAHOMA**	)	

APPLICANT:	**RANGE PRODUCTION COMPANY**	)	
RELIEF SOUGHT:	**CLARIFY, CONSTRUE, AND/OR INTERPRET SPACING ORDER NO. 579126**	)	**CAUSE CD NO. 201105113**
LEGAL DESCRIPTION:	**N/2 SW/4 OF SECTION 28, TOWNSHIP 25 NORTH, RANGE 1 WEST, KAY COUNTY, OKLAHOMA**	)	

REPORT OF THE OIL AND GAS APPELLATE REFEREE ON MOTIONS TO DISMISS

These Causes came on for hearing before **David Leavitt**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 24th day of April, 2012, 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: **Richard K. Books**, attorney, appeared on behalf of applicants, Range Production Company ("Range") and for the Oklahoma Independent Petroleum Association ("OIPA")(collectively "Range"); **Dale E. Cottingham** and **Russell James Walker**, attorneys, appeared on behalf of applicant, Cimarex Energy Company ("Cimarex"); **Dale E. Cottingham**, **Paula Williams** and **Mark E. Schell**, attorneys, appeared on behalf of applicant Unit Petroleum Company ("Unit"); **Ron M. Barnes** and **Kevin Hayes**, attorneys, appeared on behalf of applicant, New Dominion, LLC ("New Dominion")(collectively "applicants"); **John A. Mackechnie**, **Robert G. Gum**, **Bradley D. Brickell** and **Timothy J. Prentice**, attorneys, appeared on behalf of Movants, Roy J. Reynolds, Evelyn Fay Reynolds Tuesdell, Clark Vandergriff, Ginger Williams, Lisa Nisbett, Tommy Carl Hager, Jr., Myrtle Horton Smith, Tony D. Hager, Tess Smith, Michael McFeely, James Bingham, Sherry Smith, Michael Wayne Reynolds, Dorothy Sue Jarvis, Stanley and Julie Kennedy Family Trust, Norvell Royalty Co., Inc.; Hadley Alton Reynolds, Jr., Mary N. Bowser, Trustee of the Mary Nell Bowser Trust, Sherman Payne, Jr., Janeen Heller and Jane Bowser Woods, Trustees of the Donald P. Bowser Irrevocable Trust, Helen Farnham Hutchison, Larry Allen Davies, Barbara J. Hager, Trustee of the Barbara J. Hager Revocable Living Trust, Mary Sue Brawner, Danny Reynolds, Kay L. Branum, Trustee of the Helen K. Little Trust, Burco, Inc., Geraldine & David Bruce Byars & Richard & Phillip Byars, joint tenants, Charles William Nuckolls, Robbie Reed Smith, Marjorie C. Kennedy, Catherine Lou Endicott, Marvin B. Dinsmore, Jr., Janis Kay Yaste, Christopher W. Edwards, Tammy J. Satterwhite, Lana Stewart, Cheryl Jean Booth Palmer; Jane Kallis, as Trustee of William Ross Cabeen and Wendy Cabeen Trust, Danny Vandergriff, James W. Jones, and First United Methodist Church of Decatur, Alabama ("Reynolds"); **Gregory L. Mahaffey**, **Terry J. Barker** and **Douglas G. Dry**, attorneys, appeared on behalf of Movants Juanita Golightly, Panola Independent School District No. 4, Michael Kilpatrick, Gwen Grego, Carla Lessel, Thelma Christine Pate, Melody Culberson and Charlotte Abernathy ("Golightly"); **Rex Sharp**, **Joseph Woltz** and **Gregory L. Mahaffey**, attorneys, appeared on behalf of Movants David D. Duncan, The Duncan Group, LLC, Nancy Beth Archer and Vicki Lynn Stone ("Duncan"); **Robert N. Barnes**, **Patranell Britten Lewis**, **Kerry W. Caywood** and **Bradley E.**

Beckworth, attorneys, on behalf of Movants Little Land Company, LP, James A. Drummond, Chris Parrish and as appointed Interim Class Counsel for a state-wide putative class of Range royalty owners in Case No. CJ-2010-510 District Court of Grady County ("Little Land")(collectively "Movants"); **Terry L. Stowers** and **Douglas E. Burns**, attorneys, on behalf of the Coalition of Oklahoma Surface and Mineral owners ("COSMO")' 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 in Response to the Motions to Dismiss on the 23rd day of August, 2012, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 28th day of September, 2012. After considering the arguments of counsel and the record contained within these Causes, the Referee finds as follows:

STATEMENT OF THE CASE

APPLICANTS TAKE EXCEPTION to the ALJ's recommendation that the Motions to Dismiss be granted.

These causes spring forth from a dispute between four operators, Cimarex, Unit, New Dominion and Range, and their respective royalty owners and lessors, over the distribution of royalties derived from production in wells that were drilled by the operators. The issues before the Commission are the intent and meaning of the spacing orders that established the drilling and spacing units under which the operators drilled the wells and whether the Commission has jurisdiction to clarify and interpret the spacing orders with respect to fiduciary duties and royalty obligations.

Cimarex currently operates a well in Custer County, Oklahoma that it drilled under a spacing order issued by the Commission in 1972. The dispute arose between Cimarex and certain royalty owners over the distribution of proceeds from the well and the clarification, construction and interpretation of the spacing order. The dispute evolved into lawsuits filed in state and federal court where the intent and meaning of the spacing order became an issue. Cimarex subsequently filed an application asking the Commission to clarify, construe and interpret the spacing order to determine whether the intent and meaning of the order was to impose royalty obligations upon operators, working interest owners and any other designated payors of royalties.

Unit operates wells in Latimer County, Oklahoma that it drilled under a spacing order issued by the Commission in 1982. The dispute arose between Unit and certain royalty owners over the distribution of proceeds from the wells and the clarification, construction and interpretation of the spacing order. This dispute led to a lawsuit filed in state court where the intent of the spacing order became an issue. Unit subsequently filed an application asking the Commission to clarify, construe and interpret the spacing order to determine whether the intent and meaning of the order was to impose royalty obligations upon operators, working interest owners and any other designated payors of royalties.

New Dominion operates a well in Seminole County, Oklahoma that it drilled under a spacing order issued by the Commission. The dispute arose between New Dominion and certain mineral interest owners or lessors over the distribution of proceeds from the well and the clarification, construction and interpretation of the order. The dispute led to a class action lawsuit filed in state court where the intent and meaning of the spacing order became an issue. New Dominion subsequently filed an application asking the Commission to clarify, construe and interpret the spacing order to determine whether the intent and meaning of the order was to create, modify, or amend the legal rights of the royalty owners with respect to marketing or royalty obligations on the part of the operator.

Range operates wells in Marshall and Kay Counties, Oklahoma that it drilled under three separate spacing orders issued by the Commission. The dispute arose between Range and certain mineral interest owners over the distribution of proceeds from the well and the clarification, construction and interpretation of the spacing orders. The dispute led to a class action lawsuit filed in state court where the intent and meaning of the spacing orders became an issue. New Dominion subsequently filed an Application asking the Commission to clarify, construe and interpret the spacing orders to determine whether the intent and meaning of the orders were to impose duties with respect to royalty obligations, or a covenant or duty to market or to place gas in a marketable condition without costs to royalty owners, upon the operators or working interest owners.

The Movants protested the applications, contending that the Commission lacks jurisdiction to determine the legal effect of the spacing orders, arguing that such issues involving royalty obligations comprise private rights between private parties that are under the exclusive jurisdiction of the district courts. The six applications were consolidated by the Commission and the Movants filed Motions to Dismiss. Subsequently, responses were filed by the applicants and reply briefs were filed by some of the Movants and a hearing on the Motions to Dismiss was heard. The ALJ took the cause under advisement after receiving the transcript on May 18, 2012 and issued his report.

THE ALJ FOUND:

1) The Commission is a tribunal of limited jurisdiction charged with overseeing the conservation of oil and gas and its jurisdiction is limited to the resolution of public rights. See *New Dominion, LLC v. Parks Family Company, LLC,* 216 P.3d 292 (Okl.Civ.App. 2008). The Commission's jurisdiction and authority is limited to what is expressly or by necessary implication conferred upon it by the Constitution and statutes. See *Merritt v. Corporation Commission,* 438 P.2d 495 (Okl. 1968). Matters involving the private rights of the parties are reserved to the district court. See *Tenneco Oil Co. v. El Paso Natural Gas Co.,* 687 P.2d 1049 (Okl. 1984). As held by the Oklahoma Supreme Court:

> That the Commission is a tribunal of limited jurisdiction is well established in Oklahoma jurisprudence. It possesses only such authority as is expressly or by necessary implication conferred upon it by the Constitution and statutes of Oklahoma. If no Commission jurisdiction stands expressly conferred or necessarily implied, either by the constitution or by statue, its order would be void. The function of the Commission is to protect the rights of the body politic; private rights and obligations of private parties lie within the purview of the District court...The Commission is without authority to hear and determine disputes between two or more private persons or entities in which the public interest is not involved.

Rogers v. Quiktrip Corp., 230 P.3d 853 (Okl. 2010).

2) Within the scope of its jurisdiction to regulate the conservation of oil and gas, the Commission is directed to prevent waste and protect correlative rights, and to issue spacing orders to provide for the orderly development of hydrocarbons within a governmental unit. As part of this regulatory process, 52 O.S. Section 112 authorizes the Commission to repeal, amend, modify or supplement its orders and thus confers upon the Commission power to construe, interpret and clarify the terms, intent and meaning of its spacing orders. See *McDaniel v. Moyer,* 662 P.2d 309 (Okl. 1983) and *Nilsen v. Ports of Call Oil Co.,* 711 P.2d 98 (Okl. 1985).

3) The power of an administrative agency such as the Commission to interpret and clarify its orders benefits the public because the agency is presumed to capably understand and have expertise over the areas it is

entrusted to regulate, and the Oklahoma Supreme Court supports this position, holding that an agency has the authority to interpret statutory language and act constructively concerning activities delegated to them by the Legislature. See *Cox v. State ex rel. Okla. Dep't of Human Servs.*, 87 P.3d 607 (Okl. 2004). Applying the logic of the Court, an agency that has the authority to interpret statutory language related to its delegated activities is also empowered to interpret and clarify its own orders issued to carry out the purposes of the statutes.

4) In general, the interpretation or construction of an ambiguous or uncertain statute by the agency charged with its administration is entitled to the highest respect from the courts. See *Leake Estate v. Oklahoma Tax Commission,* 891 P.2d 1299 (Okl.Civ.App. 1994); *Oral Roberts University v. Tax Commission*, 714 P.2d 1013 (Okl. 1985). In such cases the administrative construction will not be disturbed except for very cogent reasons, provided that the construction so given was reasonable. *Tulsa Tribune Co. v. State ex rel. Oklahoma Tax Commission, 768 P.2d 891 (Okl. 1989)*; *Udall v. Tallman*, 380 US 1, (1965), 85 S.Ct. 792; and *Hoover & Bracken Energies, Inc. v. U.S. Department of Interior*, 723 F.2d 1488, (10th Cir. 1983). As held by the United States Supreme Court in *Udall v. Tallman*, supra at 380 U.S. 1, 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm's of Territory of Alaska v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136. See also e.g., *Gray v. Powell*, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301; *Universal Battery Co. v. United States*, 281 U.S. 580, 583, 50 S.Ct. 422, 74 L.Ed. 1051. 'Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Power Reactor Development Co., v. International Union of Electricians*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924. **When the construction of an administrative regulation rather than a**

statute is in issue, deference is even more clearly in order (emphasis added)."

5) Because an administrative order is more akin to a rule or a regulation than to a statute, the Court shows great deference to an agency's interpretation of its orders. By showing great deference to an agency's interpretation of its own rules and orders, the Court respects the opinions and reasoning of the agency with regard to matters delegated to it by the Legislature. Because the United States Supreme Court shows great deference to an agency's interpretation of its own orders, rules and statutes, the lower courts should follow suit and in this case, rely upon the Commission's clarification and interpretation of the meaning and intent of its administrative orders.

6) Clearly, the Commission has the expertise and authority to clarify its own spacing orders, and its opinions and interpretations concerning its orders should be respected by other Oklahoma courts. The primary question before the Commission is thus not whether the Commission has subject matter jurisdiction to interpret and clarify its spacing orders, which it does, but whether the applicants' six spacing orders warrant clarification and interpretation with respect to the issues identified by the applicants.

7) The applicants asked the Commission to determine if the entry of the spacing orders created any fiduciary duties with respect to royalty obligations or marketing duties on the part of the operator, but both parties acknowledged that the language found in the spacing orders is clear and unambiguous, containing no express terms about marketing duties, fiduciary duties or royalty obligations. The applicants noted from their review of case law that clarifying a spacing order supplements the prior order by refining its language to eliminate obscurity or ambiguity, but here there is no language in the orders that is patently obscure or ambiguous or in need of refining, and in fact the spacing orders have no terms or provisions related to royalties other than a restatement of the statute that the creation of each drilling and spacing unit communities the royalty interest. See 52 O.S. Section 87.1 which states "Whenever the production from any common source of supply of oil or natural gas in this state can be obtained only under conditions constituting waste or drainage not compensated by counterdrainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this section provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

8) The ALJ thus agrees with the Movants that there is no express language in the orders for the Commission to clarify, construe or interpret regarding royalty interests or the royalty-related duties of the working interest owners. As part of their inquiry, the applicants asked the Commission to determine what language within the orders addressed any such resulting royalty obligations, and the ALJ states that no such language is to be found in the orders.

9) The intent of any spacing order is to protect correlative rights and prevent waste by regulating the number of wells that can be drilled in a governmental unit. A spacing order thus provides for the number of wells in the spaced area, establishes where a well is located in the unit, communities the royalty and provides the foundation for the entry of a pooling order. Communitizing the royalty interest means that a mineral owner entitled to royalties from production in the unit has the right to take a share of the total royalty in proportion to the percent interest owned in the unit. Communitizing the royalty interest is a public interest matter between an individual mineral owner and the government, and the Commission has jurisdiction over this public right.

10) Spacing orders are directly related to public rights and are an exercise of the police power of the state within the realm of the protection of correlative rights or the prevention of waste, and thus do not contain express language pertaining to private rights and private interests. Spacing orders don't contain language pertaining to the royalty obligations between private parties, post-production costs or gas marketing duties because such matters are typically private interests between private parties. The ALJ notes that the applicants contended that an order of the Commission may not impose a duty without containing explicit language for that purpose, and that the extent of the duty owed must be contained in the order, citing the Oklahoma Court of Civil Appeals holding in the *deCordova v. Corporation Commission* case, No. 93,373 (Okl.Ct.App. March 24, 2000, an unpublished opinion of the Oklahoma Court of Civil Appeals. Following the lead of this court, the Commission cannot impute the existence or the non-existence of a duty or obligation into an interpretation of a spacing order that isn't expressly found in the language of the order.

11) The Movants also alleged that there is no need for the Commission to act upon the applications because the inquiries within them have been answered by the courts in Oklahoma. They alleged that the courts have held that unit orders entered by the Commission have the legal effect of creating a fiduciary relationship between the operator and the other owners in a unit. As pointed out by the applicants in their analysis of relevant case law, however, a genuine controversy still exists with respect to the fiduciary duties created by the entry of spacing orders. Because the Commission can't impute fiduciary duties and

royalty obligations into a spacing order that aren't found in the language of the order, its clarification and interpretation of applicants' spacing orders would not shed light on the controversy or serve as a useful guide to the other courts in Oklahoma. For all of the above reasons, the ALJ recommends that the Motions to Dismiss be granted.

POSITIONS OF THE PARTIES

CIMAREX

1) **Dale E. Cottingham,** attorney, appearing on behalf of Cimarex, is requesting the Commission to supplement or clarify specific spacing orders and language in those orders. Cimarex contend these issues involved are matters of public right.

2) Cimarex states these applications request the Commission to either supplement or clarify in regard to duties that the agency either intended or did not intend to impose regarding the matter in which royalties are paid under private lease agreements. Cimarex assert this action is not seeking money damages, title to property, or the legal effect of these orders.

3) Cimarex argues the case law is clear that the Commission can clarify or supplement its orders, so long as it does not attempt to adjudicate private rights.

4) Cimarex contends the Movants in this case do not want the Commission to take evidence or hold a trial. Cimarex alleges the Movants Motion to Dismiss has its basis under five different theories. Cimarex contends these five reasons are: 1) There's no language in the order to construe; 2) The applications request a determination of the legal effect of the order; 3) The district courts have exclusive jurisdiction over the issues involved in this case; 4) The applications are an attempt by the Applicants to avoid settled law; and 5) The questions at issue have already been decided by the Oklahoma courts.

5) Cimarex argues the ALJ's recommendation in regard to this Motion to Dismiss did not agree that this is a matter seeking a determination of legal effect. Cimarex further argues the ALJ did not agree that the district courts have exclusive jurisdiction over this matter, and the ALJ did not agree that Cimarex was seeking to avoid settled law.

6) Cimarex states the ALJ agreed with their proposition that communitizing royalty interests between government and individual interest owners is a public matter.

7) Cimarex asserts the ALJ "fundamentally" agreed with their position that "the manner of the payment of royalties addressed by the private contract, that is the oil and gas lease, is a private matter and is not implicated by the spacing order..." Cimarex contends despite "fundamentally" agreeing with their position, the ALJ made a critical mistake in his recommendation to dismiss the action. Cimarex states the ALJ's recommendation states there is no language in the spacing orders that warrant clarification.

8) Cimarex states the spacing Order No. 94846 in the Cimarex case contains language that states: "All royalty interests within the spacing unit shall be communitized. Each royalty owner within the unit shall participate in the royalty from the well drilled thereon." Cimarex is requesting the Commission to supplement or clarify that particular phrase.

9) Cimarex argues the ALJ incorrectly constructed their position. Cimarex cites page 19, paragraph 63 of the ALJ's recommendation as stating, "but both parties acknowledge that the language found in the spacing orders is clear and unambiguous." Cimarex states this is an incorrect statement of their position.

10) Cimarex contends the ALJ was incorrect in stating their position is that the spacing orders are clear and unambiguous, rather Cimarex asserts all the orders need clarification.

11) Cimarex argues the current circumstances, including a decision by the Federal Court, Western District from the summer of 2011, warrant the necessity for the Commission to address the issue of fiduciary duties.

12) Cimarex states the issue needing to be addressed is whether the Commission's spacing orders created an obligation that post production charges should not be deducted from royalty payments.

13) Cimarex argues even if the ALJ is correct that there is no language to construe, alternatively Cimarex requests the Commission supplement these orders pursuant to 52 O.S. Section 112. Cimarex states the Commission should not decline this responsibility.

14) Cimarex asserts the Commission has addressed the issue of supplementation of orders several times in the past. Cimarex cites *Centurion Oil v. Stephens,* 857 P.2d 821 (Ok. Civ. App. 1993) as involving a case in which a non-operating party sought copies of well logs. Cimarex states in *Centurion* case, the Commission supplemented its order even though there was no language in the original order specifically requiring the operator to provide the logs. Cimarex argues the Commission "filled in the blank. So the Commission can do this, even if there is no language."

15) Cimarex cites *deCordova* and *White Star v. Corporation Commission and Enron, a court of appeals, not for publication case, Case No. 93,373* as being on point. Cimarex states in the *deCordova* case, the Commission entered a pooling order naming Enron as the operator of a unit. Enron later constructed a gas gathering system to gather gas from the land covered by the order as well as adjacent lands. DeCordova took the position that Enron had a fiduciary duty under the pooling order to allow them the opportunity to participate in the gas gathering systems. Enron did not agree and subsequently an application was filed with the Commission seeking to clarify the pooling order. Cimarex cites that the Appellate Referee in that case found the order showed no intent or contemplation that deCordova was entitled to a share in a gas gathering system constructed subsequent to the issuance of the pooling order and the drilling of the unit wells; but the case was not dismissed and the Appellate Referee continued to answer the questions. Cimarex cites page 7 of the Commission order in *deCordova* as reading, "The Commission has jurisdiction over post-production activities in unit development, but its authority with respect to such activities is limited to those powers either expressly granted or implied. The pooling orders which are the subject of these applications cannot be construed in the manner suggested by *deCordova* because the Commission does not have jurisdiction to require an operator or its affiliate to allow working interest owners to participate in a gas gathering system, or require an operator or its affiliate to disclose proprietary or confidential information about the construction, maintenance, operation, and profits of a gas gathering system." Cimarex argues in this case the Commission "goes further and not only responds to the questions, but finds there's no fiduciary duty created by the pooling order in that instance. Again, the Commission did not duck its responsibility, in terms of responding to this question, even though there was no language in this pooling order about a gas gathering system."

16) Cimarex states the *deCordova* case went on appeal to the Court of Appeals who rendered an unpublished decision.

17) Cimarex cites page 7 and 8 of the unpublished Court of Appeals case in *deCordova* as agreeing with the Commission that the pooling order did not create a fiduciary duty.

18) Cimarex contends in the case at bar, even if the Commission finds there is no language specifically stating whether post production charges should be deducted, there is language in the orders involving royalties; and the Commission "needs to weigh in on that."

19) Cimarex argues the ALJ's recommendation essentially reads, "Well, the Commission doesn't have jurisdiction over this, and therefore, the Commission doesn't have jurisdiction to answer the question."

20) Cimarex states the Commission has jurisdiction to determine its jurisdiction. Cimarex cites *Samson v. Corporation Commission*, 742 P.2d 1114 (Okl. 1987) for this proposition.

21) Cimarex cites *NBI Services v. Corporation Commission*, 241 P.3d 685 (Okl. Civ. App. 2010) as reasoning, "Hence, although the OCC does not have the authority to adjudicate private rights disputes, it does have the authority of a court of record to make fact findings to determine whether the dispute is one involving private rights or public rights. That is, the OCC has the power to receive evidence and make findings to determine whether it has the jurisdiction to enter an order."

22) Cimarex concludes that it is difficult to reconcile the *deCordova* case and the recommendation from the ALJ. Cimarex requests the Motion to Dismiss be overruled.

RANGE

1) **Richard K. Books**, attorney, appearing on behalf of Range, contend this issue should be decided by the Commission who issued the orders in the first place. Range states, "It is important for people in the industry to know, one way or another, from this tribunal that issued these orders what the situation is." Range further asserts this issue involves "vital importance to this industry".

2) Range argues issuing a spacing order is a public right's issue and therefore clarifying or supplementing that spacing order is clearly also a public right's issue. Range argues to declare otherwise would be "disingenuous."

NEW DOMINION

1) **Ron Barnes**, attorney, appeared on behalf of New Dominion, argues if this Motion to Dismiss is upheld, a duty will be imposed on operators without first being informed they had a duty in the first place. New Dominion simply is asking the Commission to clarify whether they intended to create a fiduciary duty or not.

REYNOLDS

1) **John A. MacKechnie**, attorney, appearing on behalf of Reynolds, states the six spacing orders in this case are "ordinary" spacing orders that were entered between the 1970's and the 2000's. Reynolds contends these spacing orders were not complained by anyone until these recent applications for clarification were filed.

2) Reynolds states two of the six spacing orders include the phrase about royalty being communitized by the effect of the spacing order while the other four do not. Reynolds argues the absence of that language has not been a source of confusion in the past. Reynolds contends that Cimarex is incorrect in arguing the royalty communitization clause is ambiguous.

3) Reynolds contends the subject of current district court litigation involves disputes between royalty interest owners and the operators with regards to the payment of royalties. Reynolds asserts that one of the arguments being put forth by the Plaintiffs in the current district court cases is that the existence and legal effect of the spacing orders created marketing and royalty related duties upon the operators. Reynolds argues, "No one has alleged that this – that such royalty marketing duties are from the terms of the spacing orders that the Commission entered, or should have entered, did enter, confusedly entered, ambiguously entered, royalty marketing duties. Rather, the plaintiffs allegedly argued that based upon case law cited in all of the briefs and so forth, from the *Young v. West Edmond Hunton Lime Unit* case, through several others, to most recently, the *Hebble v. Shell* case, are to the effect that the existence and legal effect of these spacing orders is to create royalty marketing duties that favor the royalty interest owners."

4) Reynolds argues, "To my knowledge, no one has ever alleged or suggested that the Commission intentionally created any such royalty marketing duties. Rather, the Appellate Courts and the district courts allegedly have argued – or held that the existence and effect of the spacing order caused this duty to be imposed upon the operators."

5) Reynolds alleges that Cimarex, who are defendants in the district court cases, do not like the above argument and the case law that has evolved from it. Cimarex allege all six of the applications are "almost verbatim" and that is why they have been consolidated.

6) Reynolds contends prior to this case there had been no indication by anyone that there is anything unclear, incomplete, or ambiguous about the spacing orders. Reynolds argues, "For that reason we contend that this is simply an argument over the existence of a royalty marketing duty created by

the Supreme Court and the Court of Appeals, and by arguments by Plaintiffs in the district court. It has nothing to do with Commission jurisdiction."

7) Reynolds argues the Commission does not have jurisdiction to create any royalty marketing duties. Reynolds, agreeing with ALJ's Leavitt's position, argues "Because everyone understands that the Commission doesn't have the power to create such duties, nor does the Commission have the power to overrule the Supreme Court or the Court of Appeals, or involve itself in the district court litigation in which someone argues or holds that the result of the existence of a drilling and spacing unit may be to impose various royalty marketing duties upon the operator. Therefore, we're dealing with completely unambiguous – completely unambiguous documents."

8) Reynolds argues, contrary to Cimarex's position that this case was brought pursuant to the Commission's authority for construction, interpretation, and clarification, that in fact that Cimarex is asking the Commission to involve itself in a nonconservation subject. Reynolds further argues, "It's undisputed that the amount owed or not owed by the oil and gas operator to the royalty interest owner is a matter of private rights. It is not a matter of conservation jurisdiction."

9) Reynolds contends whether the existence of a spacing order creates legal effects over the private rights matter of royalty duties, is an issue outside the Commission's jurisdiction.

10) Reynolds quotes ALJ Leavitt's Report on page 19 paragraph 64 as stating, "The ALJ thus agrees with the movants that there's no expressed language in the orders for the Commission to clarify, construe or interpret regarding royalty interests or the royalty related duties of the working interest owners. As part of their inquiry the Applicants asked the Commission to determine what language within the orders addressed any such resulting royalty obligations, and the ALJ states that no such language is to be found in the orders."

11) Reynolds argues the *deCordova* case is a not-for-publication decision of the Oklahoma Court of Appeals, and as such has "no bearing whatsoever."

LITTLE

1) **Robert Barnes**, attorney, appearing on behalf of Little, cites *Grayhorse v. Crawley*, 245 P.3d 1249 (Okl. Civ. App. 2010) as a case which involved a dispute over who had the right to own casing in a well; one party argued the Commission had jurisdiction to make a determination because of a prior

pooling order under which the casing had been there. Little argues in *Grayhorse*, the court found the Commission had no jurisdiction. Little quotes the court in *Grayhorse* as stating, "The district courts do have power to adjudicate the legal effect of an OCC order, when necessary to resolve a dispute over property rights."

2) Little argues none of the plaintiffs in any of the class actions or individual actions regarding an operator's duty to make gas a marketable condition have claimed it is the spacing orders that mandate this duty. Rather, Little argues the claims are that the operators owe this duty under the implied covenants of their oil and gas leases.

3) Little refers to a book written by Maurice Merrill in the late 1920's titled "Implied Covenants in Oil and Gas Leases," as proposing that implied covenants arise out of the oil and gas lease and not spacing orders. Little states the Commission and spacing orders did not exist when these implied covenants began being recognized.

4) Little argues royalty is communitized in a spacing order pursuant to 52 O.S. Section 87.1(e), not because of the wording of the spacing order.

5) Little contends the fiduciary duty relation as created by drilling and spacing units is "not something that is addressed in the spacing order itself. Instead, the courts have said that it is a necessary implication of the spacing order." Little quotes the court in *Naylor Farms* No. CIV–08–668–R. (W.D. 2009), as stating, "This court determines as a matter of law that the defendant QEP as operator of wells in drilling and spacing units owes a fiduciary duty to the lessor royalty owner within each unit. It is the status of operator that gives rise to this fiduciary duty under *Leck*."

6) Little argued that the Oklahoma Supreme Court in *Young v. West Hunton Lime*, 275 P.2d 304 (Okl. 1954) began recognizing that an operator under a secondary recovery unit owed a fiduciary duty to everyone who was subject to the unit. Little argues the court in *Leck v. Continental Oil*, 800 P.2d 224 (Okl. 1989) expanded these fiduciary duties to include not only secondary recovery units, but also in drilling and spacing units under 52 O.S. Section 87.1.

7) Little quotes *Leck*, as stating, "When a dispute arises between a lessor and a lessee regarding the lessee's breach of an implied covenant the rights involved enter the realm of the private world, and are proper disputes for the district court to resolve because they involve issues concerning the construction of a private contract between the parties. Therefore, the appellant's action for damages for the lessees alleged breach of the implied covenant to protect against drainage is a private action arising from their contract, and does not involve the correlative rights of the public."

8) Little cites *Rogers v. Quiktrip Corp.*, 230 P.3d 853 (Okl. 2010), for the proposition that the Commission only determines public rights between the government and others and the liability of one individual to another is a matter of private rights. Little argues *Rogers* stands for, "Questions concerning the relationship of private parties, their duties, rights and obligations, and the existence of the liability for the breach of such duties to be matters particularly within the province of the district court, not the Corporation Commission."

9) Little argues the Commission does not have the authority to look into cases that involve damages. Little contends all the cases involved in this motion involve damages.

10) Little alleges, "No one has claimed that the spacing order, in and of itself, is any more than the framework behind duties that the courts have determined exist between private parties...A spacing order is the public right between the public and all of the parties involved in it. The courts have simply gone on to say that is a background fact that creates a fiduciary duty of the operator – not of other working interest owners, but of the operator, as the operator changes over time under a spacing order, and all parties. Not even just the royalty owners."

11) Little requests the ALJ's dismissal be affirmed.

DUNCAN

1) **Rex Sharp**, attorney, appearing on behalf of Duncan, asserts the Commission doesn't have jurisdiction merely because this is of vital interest to the oil and gas industry.

2) Duncan alleges Cimarex is only seeking a new tribunal to rule something different than the Oklahoma Supreme Court has already ruled. Duncan argues the Commission "should never touch it with a 10-foot pole."

3) Duncan argues that Cimarex originally was seeking the clarification, construction, and/or interpretation of these spacing orders; only at oral arguments in front of the Referee has Cimarex argued the spacing orders need supplementation. Duncan alleges this is because recent legislation has destroyed the fiduciary duty going forward and that Cimarex no longer need prospective relief.

4) Duncan contends none of the lawsuits involving royalty owners allege the spacing order creates a fiduciary duty.

5) Duncan quotes *Hebble*, as stating "The critical factor is the resort to the police powers of the state on the part of a lessee in unitization proceedings." Duncan argues it is not what is in the language of the spacing order, but rather the order issues with the power of the state that creates the fiduciary duty.

6) Duncan argues the Commission has jurisdiction to deal with drainage issues and "issues that occur underground." Duncan argues the Commission does not have the jurisdiction to rule on how oil and gas operators calculate their royalties or issues regarding payment to royalty owners because these are private issues.

7) Duncan contends it is "a little disingenuous" to argue the applications do not involve damages. Duncan alleges the real issue is that the applicants do not want to be held to a fiduciary duty standard, because they do not want to pay certain amounts of money to royalty owners.

8) Duncan argues putting on evidence as to what the intent of the Commission was with regards to a 1972 order would be particularly difficult. Duncan argues if the Commission gets involved with this case, the Commission "will have to modify, or supplement, or clarify every single unitization order throughout the entire state."

9) Duncan requests the Report of the ALJ be adopted and this matter be dismissed.

GOLIGHTLY AND DUNCAN

1) **Gregory L. Mahaffey**, attorney, appeared on behalf of Golightly and Duncan, argue the proper payment of royalties is a private right's issue and as such the Commission has no jurisdiction.

2) Golightly and Duncan cite *Nilsen v. Ports of Call*, 711 P.2d 98 (Okl. 1985), for the proposition that district courts have "jurisdiction to adjudicate the legal effect as distinguished from the continuing effectiveness of a Commission order."

3) Golightly and Duncan allege that the ALJ in finding nothing unambiguous about the spacing orders, is similar to contract law in that if the contract is unambiguous; outside evidence should not be considered.

4) Golightly and Duncan argue *deCordova* has no precedential authority pursuant to Supreme Court Rule 1.200(B) (8). To the extent *deCordova* has any authority, that case did not address the issue of the legal effect of a

Commission order on private rights, which is what the applicants seek determination here.

5) Golightly and Duncan state they are willing to rely upon the briefs that have previously been submitted in this case.

6) Golightly and Duncan agree with the ALJ. Even if this Commission does in fact have jurisdiction in this case, any proceeding should be stayed until the district court rules on the cases involving these parties.

RESPONSE OF CIMAREX

1) Cimarex contends none of the Movants' arguments suggested *deCordova* does not apply. Cimarex reasserts the issue in *deCordova* had to do with the construction of the pooling order, and in this case the issue is the construction of the spacing orders.

2) Cimarex argues despite the fact that Movants claim that no one has suggested entry of a spacing order creates a fiduciary duty, according to Movants' Motion to Dismiss. Movants in fact do argue their class of royalty owners were owed a fiduciary duty because of orders created by the Commission.

3) Cimarex quotes paragraph 9 of *Hebble v. Shell Western EXP Inc.*, 238 P.3d 939 (Okl. 2010), as stating "However, the Oklahoma Supreme Court has "recognized the existence of a fiduciary duty owed by a unit to the royalty owners and lessees who are parties to the unitization agreement and subject to the order creating the unit. This is not a duty created by the lease agreement, but rather by the unitization order and agreement." Cimarex argues this Commission under 52 O.S. Section 112 can be asked to answer what is the intent in the terms of the spacing order.

4) Cimarex contends the ALJ did not base his recommendation on *Leck v. Continental Oil Co.*, ("Leck") 800 P.2d 224 (Okl. 1989) because *Leck* was a drainage case. Cimarex argues drainage issues are clearly correlative rights issues and therefore a public right and as such the court in *Leck* found that that the operator owed a duty to protect these public rights.

5) Cimarex argues *Leck* does not create fiduciary duties for all circumstances, but rather *Leck* specifically articulates a duty in regard to protection against drainage. Cimarex argues *Leck* "cannot be extended beyond the scope of the conservation laws."

6) Cimarex alleges, "if this fiduciary duty that has been promulgated in the district courts by counsel here and elsewhere, if it is a creation of the conservation laws that this agency operates under, then do those laws give this agency the right to involve itself in private matters, including the manner in which royalties are paid under a private lease? I would suggest the answer to that is no."

7) Cimarex argues the fundamental question being asked by their applications is asking the Commission to determine its jurisdiction. Cimarex contends the Movants have not argued the agency does not have the jurisdiction to determine its jurisdiction.

8) Cimarex argues the Movants cite *Grayhorse Energy, LLC v. Crawley Petroleum Corp.*, 245 P.3d 1249 (Okl.Civ.App. 2010). Cimarex contends *Grayhorse* was a case involving parties suing one another and not a public rights issue, therefore the Commission "certainly" did not have jurisdiction.

9) Cimarex argues *Rogers v. Quiktrip Corp.*, 230 P.3d 853 (Okl. 2010) also involved parties suing one another and not a public rights issue. Cimarex contends the Movants' arguments referencing *Grayhorse* and *Rogers* were advanced in the lower proceedings and were rejected by the ALJ.

10) Cimarex argues New Dominion now states the commission cannot interpret the statute, despite stating "Well, maybe *Parks* does allow this commission to construe the statute, because the *Parks* cases specifically says that," in front of the ALJ during arguments prior to this appeal.

11) Cimarex contends the cases discussed by the Movants are too far of an extension of moving private rights into a public right area.

RESPONSE OF RANGE

1) Range reasserts this is a public right's issue. Range states the ALJ found in his report this is a public right's issue and that the Movants did not appeal this issue. Range contends, "It would make no sense whatsoever to say that the issuing of a spacing order is a public right's issue, but the clarification or supplementation of it is somehow a private right's issue."

2) Range argues they are not asking the Commission to determine the legal effect of their order. Range argues instead they are asking the Commission whether or not they intended to impose a duty with these spacing orders. Range contends any legal effect flowing from that duty will be determined in district court. Range alleges the Commission "does this all the time."

3) Range states there was a spacing dispute between two parties last year as to whether a particular horizon was included in the spaced common source of supply. Range states the Commission was called on to determine whether this horizon was included in the common source of supply. Range states once the Commission issued an order, the legal effect was to be determined in district court. Range argues this is the same kind of issue facing the Commission presently.

4) Range argues asking the Commission to determine the legal effect of these orders is no different than when the Commission determines whether or not somebody validly elected to participate in operations. Range argues the Commission determining election validity is something "do(ne) all the time and doesn't seem very much like a public right's issue to me. But certainly, the Commission has jurisdiction to do it. And once the Commission determines somebody has or has not elected, it goes to district court to determine the legal effect."

5) Range concludes stating, "This is about the Commission's intention, whether or not these orders should be clarified or supplemented. That's clearly within the jurisdiction of the Commission. Once that's determined, the district court determines legal effect, and the district court determines what amount, if any, of damages flow from that." Range requests the ALJ be reversed.

CONCLUSIONS

The Referee finds the Report of the Administrative Law Judge to grant the Motions to Dismiss should be affirmed.

1) The Referee finds that the ALJ's recommendation to grant Movants' Motion to Dismiss is supported by applicable law. These causes concern six spacing orders, six district court cases and six consolidated applications to clarify, construe and/or interpret the six spacing orders. The Commission created six drilling and spacing units and then the operators drilled and began producing unit wells. In recent years many of the oil and gas lessor/royalty interest owners filed cases in the district courts against the operators for the alleged breach of the working interest owners' duty to properly market the production and make proper royalty payments. These six applications filed by applicants Cimarex, Unit, New Dominion, and Range are asking the Commission to clarify, construe and interpret the spacing orders as to whether the Commission intended to impose duties with respect to royalty obligations, i.e. a covenant or duty to market or to place gas in a marketable condition without cost to royalty owners. The state and federal district court cases in Oklahoma are primarily concerned with the charging of post production cost to the royalty interests. The defendants in those cases are the applicants in these

consolidated applications and the plaintiffs in those state and federal district court cases are the protestants/Movants in the present applications.

2) In the state and federal district courts, the plaintiffs/Movants have argued that the Oklahoma Supreme Court has held in cases arising from district court litigation that the existence and function of drilling and spacing units and secondary recovery units creates and requires a legal result that the unit well operators have royalty marketing duties to the royalty interest owners, and that this legal result comes from the existence of the drilling and spacing units and secondary recovery units, not from any express terms of the Oklahoma Corporation Commission's orders creating the drilling and spacing units and secondary recovery units. See *Young v. West Edmond Hunton Lime Unit*, 275 P.2d 304 (Okl. 1954); *Olansen v. Texaco Inc.*, 587 P.2d 976 (Okl. 1978); *Leck v. Continental Oil Company*, 800 P.2d 224 (Okl. 1989); *Howell v. Texaco*, 112 P.3d 1154 (Okl. 2004); and *Hebble v. Shell Western E & P, Inc.*, 238 P.3d 939 (Okl.Civ.App. 2009).

3) A plain reading of these six spacing orders shows that they are usual and customary in all respects and that they have no terms or provisions related to royalty other than the two oldest orders include a recitation that the creation of each drilling and spacing unit communitizes the royalty interest. The rule that the creation of a drilling and spacing unit results in the communitization of the royalty interests is not a function of the Commission's discretionary intention, but is instead a statutory mandated effect of a spacing order as specified in 52 O.S. Section 87.1 and the Supreme Court case law interpreting the statute. The Referee believes that this is an example of a spacing order having a legal effect that is independent of the Commission's intent, and with respect to which the Commission is powerless to alter or explain by an exercise of its power to clarify, construe or interpret. No interpretation, clarification or construction is necessary for these orders to understand that the Commission did not provide for any other effect upon the royalty interest or the royalty related duties of the working interest owners. There is nothing in that regard to clarify, construe or interpret. Clearly, the Commission has the authority to clarify a prior Commission order when the order is ambiguous. The power to clarify a previous order is continuous in nature, and flows from the entry of the original order. *Forest Oil Corporation v. Corporation Commission of Oklahoma*, 807 P.2d 774 (Okl. 1990). Any disagreement over the terms and/or the application of an order of the Commission must be resolved by review of the judgment roll. *Dickason v. Dickason*, 607 P.2d 674 (Okl. 1980). The Supreme Court in *Dickason* stated: "Only if a judgment is ambiguous on the face of the record may the court "construe" it. In so doing the court stands confined to the inspection of the judgment roll. It cannot extend its inquiry beyond the instruments that comprise it." The determination of Commission intent controls construction of Commission orders. The Commission's intent is

determined from the language of the order in light of its general purpose and object .

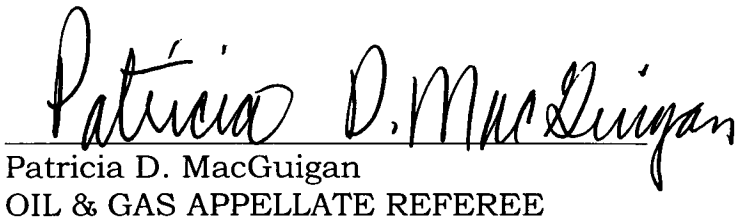
4) The six subject matter applications to clarify by applicants are not concerned with or related to the usual and proper purpose of a spacing order entered in the Oklahoma Corporation Commission's exercise of its subject matter jurisdiction, which is the conservation of oil and gas, prevention of waste and protection of correlative rights by the creation of drilling and spacing units, in which one well will be drilled to the unitized common source of supply. The Oklahoma Corporation Commission's conservation jurisdiction does not include royalty marketing duties. See *Tenneco Oil Company v. El Paso Natural Gas Corporation*, 687 P.2d 1049 (Okl. 1984); *Arrowhead Energy Inc. v. Barron Exploration Company*, 930 P.2d 181 (Okl. 1996); and *Samson Resources Company v. Corporation Commission*, 702 P.2d 19 (Okl. 1985).

5) The Commission does not have jurisdiction to interpret its previous orders where doing so is not within its power to hear and determine disputes between parties in which the public interest in the prevention of waste and the protection of correlative rights of interested parties in a common source of supply is involved. The Commission exceeds its jurisdiction in giving its opinion about the legal effect of its previous orders on the private rights of the parties. *Southern Union Production Company v. Corporation Commission*, 465 P.2d 454 (Okl. 1970).

6) The Referee agrees with the ALJ and the Movants that there is no express language in the spacing orders for the Commission to clarify, construe or interpret regarding royalty interests for the royalty related duties of the working interest owners. Spacing orders do not contain language pertaining to the royalty obligations between private parties, post production costs or gas marketing duties because such matters are typically private interests between private parties.

7) For the above stated reasons the Referee would affirm the Report of the ALJ as the applicants are asking the Commission to give what is in effect a declaration or opinion about the legal effect of the spacing orders on private rights.

RESPECTFULLY SUBMITTED THIS 4th day of December, 2012.



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