

STATEMENT OF THE CASE

KEENER APPEALS the ALJ's recommendation that the application of Mac should be recommended for the amended well location of 145 feet FNL and 125 feet FWL of the SW/4 SE/4 of Section 4, T20N, R2W, Noble County, Oklahoma. Mac's well location application originally sought a location of not closer than 100 feet FNL and not closer than 100 feet FWL of the SW/4 SE/4 of Section 4. The well location application by Mac requested the location exception for the Avant, Skinner, Mississippi Lime, Misener, First Wilcox, Marshall, Second Wilcox, Oswego and Viola common sources of supply for the 40 acre drilling and spacing unit Order No. 191406, consisting of the SW/4 SE/4 of Section 4.

KEENER TAKES THE POSITION:

1) The Administrative Law Judge ("ALJ") based his recommendation to allow a well 125 feet off of Keener's lease line based upon incompetent or mistaken evidence. Mac's witness, Mr. Joseph Conger, acknowledged that he had, historically, mapped the Marshall structure underlying the captioned land and the SW/4 of Section 4 where Keener's Laudon #1 well is located as a single structure. Although no new wells have been drilled since his opinion previously interpreting a one pod zone, he admitted that he is now trying to convince the Commission that two pods exist. The sole basis for Mr. Conger's dramatic change in his geologic interpretation of the Marshall structure underlying the SW/4 and W/2 SE/4 of Section 4 is based upon his belief that the Laudon #2 well had watered out too quickly. As noted by the ALJ in paragraph 12 of his findings, "His only reason for moving his oil-water contact lines was the watered out wells."

Such opinion by Mr. Conger is mistaken as to his basis and is incompetent under the *Daubert* test. Mr. Doug LaGarde, geologist in charge of drilling the Laudon #2 well for Keener, testified that the water encountered in that well was not coming from the Marshall, but was coming from the deeper, Second Wilcox. He testified that Keener had conclusive, empirical data in the form of a tracer survey proving that the water produced was from the Second Wilcox, probably as a result of a faulty cement job. Mr. Stromberg confirmed that any water produced from the Laudon #2 well did not come from the Marshall, but came from the Second Wilcox. He testified that the Marshall was too small of a reservoir to have an actual water drive and that any active water drive would be coming from the Second Wilcox. In adopting the credibility and veracity of Mr. Conger's mistaken opinion that the Laudon #2 well watered out in the Marshall formation, the ALJ failed to follow the procedure set forth in *Haymaker v. Oklahoma Corp. Com'n*, 731 P.2d 1008 (Okl. App. 1986), wherein the Court stated:

Proper appraisal of the expert testimony requires observance of the following benchmark principle approved in *Downs v. Longfellow Corp.*, 351 P.2d 999 (Okl. 1960):

The reasons given in support of the opinions [of an expert witness], rather than the abstract opinions, are of importance, and the opinion is of no greater value than the reasons given in its support. If no rational basis for the opinion appears, or if the facts from which the opinion was derived do not justify it, the opinion is of no probative force, and it does not constitute evidence sufficient to...sustain a finding or verdict.

Because Mr. Conger mistakenly based his alleged change of conditions on an incompetent or incorrect set of facts, his two pod theory should have been summarily discarded. The Laudon #2 did not water out in the Marshall but was in communication with the Second Wilcox through channeling or a bad cement job, as evidenced by the tracer survey. Otherwise, his opinion is no more than a change of interpretation which does not encompass a change of condition as defined by *Phillips Petroleum Co. v. Corporation Commission*, 482 P.2d 607, 1971 OK 13 (Okl. 1971), wherein the court stated:

The phrase 'change in knowledge of conditions' (as would warrant a change by order) does not encompass a mere change of interpretation on the part of the Commission. Rather, it encompasses an acquisition of additional or new data or the discovery of new scientific or technical knowledge since the date of the original order was entered which requires a re-evaluation of the geological opinion concerning the reservoir.

Since Mr. Conger's premise was faulty, his structure map, Exhibit 7, is also faulty in depicting two pods in the Marshall. Without a valid change of condition, Mr. Conger has merely reinterpreted the same well control he used in 2007 to depict a single pod.

2) The ALJ erred in failing to admit Exhibit 10, Mr. Conger's inconsistent 2007 map. During cross-examination of Mr. Conger, he admitted that prior to

this proceeding he had prepared a structure map showing that the subject unit, the SW/4 SE/4 of Section 4, is in the same Marshall reservoir and the same pod as the Keener Laudon #1 well. Upon cross examination, Mr. Conger was presented with a copy of his Northeast Solution Development Prospect Marshall Zone structure map which showed that a well drilled at a legal location in the SW/4 SE/4 would be in the same pod as the Laudon #1, would be above the current oil-water contact, and would be, structurally, the highest well in the field at approximately sub-sea -4,120 feet. The Laudon #1 is sub-sea -4,126. He admitted that his structural picks were the same today as they were for the 2007 map, Exhibit 10. For example, Mr. Conger shows the sub-sea depth of the top of the Marshall to be the same on both maps for the key wells: Laudon #1 at -4,126 and Laudon #2 at -4,127, and Capitol #1 Hopkins located in the SW/4 NW/4 SE/4 of Section 4 at -4,130. He also depicted the top of the porosity and the oil-water contact the same sub-sea depth for all three wells.

After cross-examining Mr. Conger and establishing that his current opinion was inconsistent with the opinion previously rendered based upon the same data, Mac offered into evidence the inconsistent, 2007 map, Exhibit 10. The ALJ refused to allow admission of Exhibit 10. Mac cannot credibly argue that it would be prejudiced by admission of Exhibit 10 since this is a map prepared by the Mac's geologist, Mr. Conger, a map that he confirmed as being his map and a map that has very probative evidence as far as the credibility of his current two pod theory. The ALJ should have admitted Exhibit 10.

3) The ALJ erred in failing to impose a penalty upon Mac's proposed Gloria #1 well, a location exception well located only 125 feet off of the Laudon unit boundary. The ALJ's recommendation fails to comply with the statutory mandate of 52 O.S. Section 87.1(c) where the Commission is given guidelines on what to do when a location exception is granted:

Whenever such an exception is granted, the Commission **shall** adjust the allowable production for the said spacing unit and take such other actions as may be necessary to protect the rights of interested parties. (emphasis added)

The statute contains a mandate, and such mandate has been interpreted by the Oklahoma Supreme Court in *The Application of Continental Oil Co.*, 178 P.2d 880 (Okl. 1947), wherein the Court stated:

We construe this statute and the other provisions of the Well Spacing Act to mean that **all property owners and lessees**

whose property is in the same source of supply, as determined by order of the Commission, shall be treated alike and that one group shall not be given an advantage over another. (emphasis added)

As set forth above, Keener feels strongly that Mr. Conger's two pod theory is not based upon competent or credible evidence, since it is based solely upon his mistaken belief that the Laudon #2 well watered out in the Marshall. As noted by Mr. LaGarde, he is concerned that a well 125 feet off the Laudon #1 lease line might obtain just a foot of sand near the water contact and would have a detrimental effect upon the owners in the SW/4 of Section 4. Even if you believe Mr. Conger's theory, there are only, approximately, four acres out of a 14.9-acre pod situated in the subject unit. This is only 27% of the total reservoir. The proposed Gloria well is 62% closer to the unit boundary than could be drilled without a location exception; thus, the Gloria well is obtaining a tremendous advantage over the two offsetting units that it will be draining and is recovering approximately 74% of its oil from the two offsetting units. As admitted by Mr. Dick on cross-examination, 25,000 BO, out of the total recoverable oil in the alleged second pod of 34,147 BO, will be produced outside of the Gloria tract.

Although the law of capture and the concept of correlative rights allow each owner of a common source of supply to produce his "fair share" of the recoverable oil, no owner is entitled to take an undue portion of the reserves. Thus, the Commission has designed allowable and penalties to keep uncompensated drainage at a minimum and to allow each owner to produce his equitable share of recoverable reserves in the "proportion or ratio" which such reserves bear to the total recoverable reserves in the common source of supply. The testimony of Mr. Stromberg showed that a location exception with a lid of 10 barrels per day would only be a restriction of about 40% based upon the current production of the Keener Laudon well of 18 BOPD. Such allowable would allow the well to recover all of the oil underlying the Gloria unit in 2.5 to 3 years and would allow an economical well with a payout of 2.5 to 3 years. The ALJ erred in not imposing some restriction or penalty upon the well.

4) The ALJ erred in failing to deny the location exception and in failing to recommend a plan of development that would prevent waste and the drilling of unnecessary wells in the event that Mac's two pod theory is correct. Mr. Conger admitted that it would be economic waste to drill two wells in his eastern pod, but admitted that the only way that the owners in the Laudon unit would get their share of the Gloria pod would be to drill a separate well. Mr. J. P. Dick admitted that one well properly situated could completely drain the Gloria pod, and he admitted that an irregular unit of approximately 20

acres would avoid economic waste of drilling a second or third well. The Commission has broad discretion in framing the relief that will prevent all types of waste, both waste of hydrocarbons and economic waste. If the Commission believes Mr. Conger's two pod theory, then the best solution is for an irregular unit to be formed comprising all or a portion of the four 10-acre tracts where such pod is situated, and drilling one well to drain all the hydrocarbons. Mac's evidence was that it would not oppose a mirror location in the Laudon unit; however, drilling of a mirror well 125 feet from the common boundary line and 250 feet from the proposed Gloria well is the ultimate of economic waste and is the very situation that the spacing statutes aimed to prevent. This Commission should deny the location exception and recommend creation of an irregular 20-acre unit should it believe there is a separate Gloria pod as opined by Mr. Conger.

5) The ALJ erred in not requiring Mac to run a bottomhole directional survey. Mr. LaGarde and Mr. Stromberg both testified that a well with a surface location 125 feet off the west line would likely deviate toward or possibly cross the Laudon #1 lease line because the structure is up dip towards the Laudon #1 well. Both recommended that Mac be required to run a bottomhole directional survey and furnish a copy of the survey, plus the necessary data to interpret same, to the Commission and Keener prior to the well having an allowable. This recommendation was supported by competent geological and engineering evidence, was not refuted by any evidence of Mac, and such recommendation should have been granted. The ALJ erred in not addressing Keener's request that a bottomhole directional survey be run on the proposed Gloria well before it is given an allowable.

6) The ALJ erred in its factual findings about common ownership. The ALJ found that "Ownership is the same in this unit as in the north and east offsets." Such is an incorrect factual finding. While the mineral ownership and much of the leasehold ownership is the same in the SE/4 SE/4 and the NW/4 SE/4, it was the undisputed evidence that Atchley Resources owned only half as much in the subject unit (12.5%) as the north offsetting unit (25%). Keener owns no interest in the proposed location exception well. To the extent that the ALJ finds that paragraph 6, "Keener voluntarily chose to only take half of its working interest in the Gloria," and based any part of this opinion on such erroneous finding, he is in error. To the extent the ALJ based his opinion on erroneous data that the ownership in the north offset which will be drained by the Gloria well in the south offset are the same, it should be reversed.

7) The ALJ erred in not requiring any order granting the location exception to mandate that Mac would not oppose a mirror location. As summarized in paragraph 6 of the ALJ's report, "MacKellar had no objection to a mirror well." Should the Commission enter an order granting the requested location exception over the objection of Keener, then such order should contain a

provision finding that Mac would be precluded from opposing a mirror location by Keener or its designee.

(8) Keener respectfully requests that the Report of the ALJ be reversed and that the location exception be denied. Should the Commission grant the location exception of 125 feet off of Keener's lease line, then a meaningful penalty should be imposed upon the well, the order should find that Mac will not oppose a mirror location, and Mac shall be required to run a bottomhole directional survey and furnish same to the Commission with sufficient log data to interpret same to show that its bottomhole location in the Marshall is not closer than 125 feet off of the west line.

THE ALJ FOUND:

1) Mac showed by competent testimony, electric log review, and well production that there is a barrier creating separate pods for development. Keener showed the Mac requested location should be a dry hole. Therefore, since either Mac will drill a dry hole or be in a separate pod of development, Keener suffers no injury. Therefore, the Mac application should be recommended.

2) At some past point in time the proposed Gloria well and the Laudon well were in a single Marshall reservoir. Since that time there has been Marshall production from several area wells. It is reasonable to believe recoverable Marshall reserves were reduced by this production. A structure map, prepared using electric logs, provides visual representation of the above reduced oil-water contact line. The Laudon production depleted more quickly than expected and this is explained by production from a smaller area than expected. The smaller production area displays zone depletion that would lower the oil-water contact line.

3) Mac interprets the above as showing there is an anticline, effectively separating the Marshall into two separate pods for development. The hydrocarbons in the Gloria pod will not be produced unless a well is drilled. Leaving oil unproduced is waste.

4) Keener has not shown, by competent evidence, that there is recoverable Marshall oil at the proposed Gloria location should there be only a single Marshall development pod. Keener does show, by competent evidence, that if a well were drilled at the proposed Gloria location it would be a dry hole. Keener alleges no producible Marshall oil from the Gloria if there is a single pod. There can be no drainage if there are two pods. Keener has not shown sufficient detriment or injury to deny the Mac application.

- 5) Mac showed that quick watering out of the Laudon, electric logs and the existence of an anticline explain the existence of two pods.
- 6) Offsetting sections contain most of the oil that will probably be produced by the Gloria. There is no Marshall production in those offsets and, therefore, no correlative rights have accrued. Mac has the right to search for hydrocarbons and gain possession and ownership of those hydrocarbons. This prevents waste. In addition, although not necessary, there is identical ownership. The Mac application should be granted without penalty (separate Marshall common sources of supply).

POSITIONS OF THE PARTIES

KEENER

- 1) **Gregory L. Mahaffey**, attorney, appearing on behalf of Keener, takes exception to the January 11, 2012 Report of the ALJ recommending allowing a well 125 feet off of Keener's lease line without penalty. Keener states they want the location exception denied, or in the alternative if the location exception is allowed, a meaningful penalty be imposed on the location exception that will protect Keener from drainage.
- 2) Keener states that the Keener-Laudon #1 well is the only existing Marshall producer in the area. The Laudon #2 has been converted to a saltwater disposable well. Keener states the Laudon #2 is located on the 40 acre tract west of the Laudon #1.
- 3) Keener contends Mac wants to locate a well 125 feet off of Keener's lease line without being assessed a penalty.
- 4) Keener argues that the ALJ issued his recommendation on either mistaken or incompetent evidence. Keener states the ALJ's Conclusions of Law found in paragraph (3) and (4) that the quick watering out of the Laudon #2 explained the existence of two pods which would preclude drainage, were based on either mistaken or incompetent evidence.
- 5) Keener cites *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and states Mac's geologist, Mr. Conger, had "bad" scientific data to support his theory.
- 6) Keener contends that Mac's geologist, Mr. Joseph Conger, is now showing the area in question as having a separate pod of production. Keener

contends this theory of two pods did not exist prior to at least 2007-2008, and that previously Mr. Conger always mapped this area as one pod.

7) Keener references the ALJ's report on Page 4, Paragraph (10), summarizing Mac's geologist testimony as stating the structure moves to the southeast and that no new wells have been drilled since he changed his theory of a one-pod zone to a two-pod zone. Keener further references the ALJ's report at Paragraph 12 which states, "His only reason for moving his oil-water contact lines was the watered out wells."

8) Keener states that the porosity in the Laudon #2 is one foot higher than the Laudon #1. Keener contends that generally the lower wells water out first, not the higher well.

9) Keener states their geologist, Mr. Douglas LaGarde, found that the Laudon #2 was communicating with the Second Wilcox. Keener states that they ran a tracer survey which found that the well did not water out because it was making water in the Marshall formation, but rather it watered out because it was communicating with the Second Wilcox.

10) Keener states their geologist, Mr. LaGarde, disagrees with Mr. Conger's position that the Laudon #2 prematurely watered out with Marshall water. Keener argues that while they are unsure of why the Laudon #2 watered out, they are sure that the water was coming from the Second Wilcox and not the Marshall formation.

11) Keener cites from *Downs v. Longfellow*, 351 P.2d 999 (Okl. 1960), "...if the facts from which the opinion was derived do not justify it, the opinion is of no probative force, and it does not constitute evidence sufficient to...sustain a finding or verdict." Keener contends that Mac's geologist, Mr. Conger, mistakenly based his alleged change of condition on incompetent or incorrect data.

12) Keener argues that because there have been no new wells drilled, Mac's geologist's opinion is only a change of interpretation. Keener cites *Phillips Petroleum Company v. Corporation Commission*, 482 P.2d 607 (Okl. 1971), for the proposition that a reinterpretation of the same data does not warrant a change in knowledge of conditions as would warrant a change by order.

13) Keener argues that because Mac's geologist, Mr. Conger, had a faulty premise that Laudon #2 watered out in the Marshall formation, in turn Exhibit 7 is incompetent.

14) Keener contends that the ALJ erred in not admitting Exhibit 10. Keener states that Exhibit 10 is a 2007 map prepared by Mac's geologist, Mr.

Conger. Keener contends the map had probative value in confirming Mr. Conger's testimony that prior to this proceeding, he had prepared a structure map that the subject unit, the SW/4 SE/4 of Section 4, is in the same Marshall reservoir and the same pod as the Keener Laudon #1 well.

15) Keener contends that if the Commission is going to allow the drilling of Mac's proposed well, the Commission should impose a penalty on them as provided by 52 O.S. Section 87.1(c). Keener also contends if the location exception is to be granted, Mac should be required to run a bottomhole survey.

16) Keener states that Mac, through their consulting engineer J.P. Dick, admits that under the two-pod theory only 27% of the oil coming from the well is from their unit. The remaining 73% of the oil will come from outside the unit.

17) Keener argues that it would be economic waste for the owners in the Laudon unit to drill another well to compete for 30,000 BO.

18) Keener contends a restriction, such as one suggested where Mac would be afforded a 10-barrel-a-day restriction, would still allow Mac to recover all of or more than the oil that underlies their unit.

19) Keener argues the ALJ's ruling violates the application of *In re Continental Oil Company*, 178 P.2d 880 (Okl. 1947), which states, "We construe this statute and the other provisions of the Well Spacing Act to mean that all property owners and lessees whose property is in the same common source of supply, as determined by the Commission, shall be treated alike and one group should not be given an advantage over another." Keener argues that the ALJ's ruling gives Mac an advantage by letting them move up to 125 feet from the Keener property line with no penalty, because two-thirds of the oil recovered by Mac will come from outside their unit.

20) Keener contends that the ALJ, if accepting the two-pod theory as the true geology, could have told Mac to apply for a spacing application for an irregular 20-acre spacing to avoid economic waste. Keener argues this would prevent the need to drill at a mirror location. Keener states the ALJ did not make such a recommendation.

21) Keener argues that 52 O.S. Section 87.1(c) further states the Commission, in addition to issuing a well-allowable, will take such other actions as necessary to protect correlative rights. Keener states they asked for a bottomhole survey, because a well being drilled to a depth of 6,000 feet and only 125 feet away from the property line could very well end up being on Keener's lease. Keener argues the ALJ should require Mac to run a bottomhole directional survey.

22) Keener argues the ALJ was incorrect in paragraph 6 of his Findings of Fact, in which the ALJ stated "The spaced forty acres where Laudon is located has the same mineral interest owners as the spaced forty acres where the Gloria will be located. Keener voluntarily chose to take only half of its available working interest in the Gloria." Keener states they have no interest in the proposed Mac well.

23) Keener contends that if the Commission grants a location exception this close to their lease line, the Order should contain a mandate that Mac not oppose a mirror location. Keener states that Mac has testified to not opposing a mirror location.

MAC

1) **Richard A. Grimes**, attorney, appearing on behalf of Mac, referenced the ALJ's report at Page 6 Paragraph 20, states that Keener's geologist, Mr. LaGarde, admitted the only evidence provided at the hearing supported either a two-pod theory or that the proposed #1 Gloria well would result in a dry hole.

2) Mac asserts there was nothing in the record for the Judge to find that any harm could accrue to Keener. Mac contends if they drill a dry hole, they cannot harm Keener; if the two parties are in separate pods, they cannot harm Keener.

3) Mac contends that at the time of the hearing, Laudon #1 had produced 69,786 BO. Mac states that between the Laudon #1 and the Province #2 well to the north, these wells had produced approximately 315,000 BO.

4) Mac reasserts that Keener believes the proposed location of Mac's well will resort in a dry hole. See Exhibits 17, 18, 19 and 20.

5) Mac argues that Oklahoma is a modified law of capture state where parties have the right to compete for their fair share. Mac does not argue that there should be an assessing of the effect of drainage, and although Mac can never catch up, they should now be allowed the right to compete.

6) Mac states their engineers believe a recovery of roughly 34,000 BO is the maximum recovery they can expect from this particular pod. Mac states there has already been 315,000 BO drained from the reservoir at issue, nearly 10 times more than what Mac would have a right to compete for at a maximum.

7) Mac states that because no *Daubert* objection was made at the hearing, the objection is waived. Mac argues a *Daubert* objection cannot be raised for the first time on appeal.

8) Mac argues that the references to *Haymaker v. Oklahoma Corporation Commission*, 731 P.2d 1008 (Okl.App. 1986) and *Downs v. Longfellow*, 351 P.2d 999 (Okl. 1960) are inapplicable because this is not a case of amending an Order. Mac argues that anyone who is qualified as an expert can give their opinion. Mac states if this opinion varies from a prior opinion but has no relationship to an attempt to modify an Order, it is only an issue for the ALJ in assessing the credibility of that opinion.

9) Mac states they do not believe that location exceptions are typically viewed as an amendment to a spacing order.

10) Mac argues in the alternative that if the location exception is viewed as an amendment of a spacing order, the applicable spacing order was issued in 1981. Mac states that because this Order was not predicated on their geologist's maps, which were prepared many years after this spacing order was issued, the change in knowledge argument is unfounded.

11) Mac argues that Keener's interpretation that the Commission must impose a penalty on every location exception is incorrect. Mac contends that hundreds of location exceptions are entered each year without penalty. Mac argues the proper reading of 52 O.S. Section 87.1(c) is that the Commission needs to consider whether in each particular case a penalty is warranted.

12) Mac, agreeing with the ALJ, states no penalty needs to be assessed because they have a right to compete. Further, Mac reasserts they will not oppose Keener if they decide to drill a well to compete with them.

13) Mac states, referencing the ALJ Report on Page 5, Paragraph 17, while Keener's geologist did not agree with Mac's two-pod map, he did agree that you could find the existence of multiple pods.

14) Mac reasserts there are only two propositions that can be established by the evidence in this case. Either there are two pods, which the ALJ agreed to, or Mac is going to drill a dry hole. Mac argues either proposition does not harm Keener.

RESPONSE OF KEENER

1) Keener states their geologist believes if there is any oil in Mac's 40-acre tract it would not be economical to recover. Keener states that a well drilled in

the NW/4 NW/4 corner of the Mac's 40-acre tract would be producing most of its oil from the Laudon lease.

2) Keener asserts their geologist, Mr. LaGarde, found it "very possible" that Mac would be getting more than their fair share by placing the proposed well on the edge of the reservoir which is located on the edge of their land.

3) Keener contends, referencing the testimony of their geologist Mr. LaGarde, there has never been any well drilled at a legal location in Mac's unit that shows they cannot compete for Marshall oil.

4) Keener reasserts their concern about the possibility that the well being drilled will deviate and possibly cross onto their lease. Keener, referencing the December 8th Transcript at Page 70, Line 13, argues that if this well had normal deviation of one and a half degrees all in a westerly direction up dip, the bottomhole would cross into Keener's lease line. Keener reasserts their need for protection by requiring Mac to run a bottomhole survey.

5) Keener argues that Oklahoma is a law of capture state, and that no one has prevented owners in the Mac tract from producing up until now. Keener argues that the Mac's take the reservoir as they find it today.

6) Keener reasserts that the *Haymaker* or *Downs* objection can be made on appeal, and as such the Commission must determine if there is a rational basis for the expert's opinion. Keener asserts that if there is no such rational basis then the expert's opinion cannot constitute evidence sufficient to support the Court's ruling.

7) Keener contends that Mac is asking for an amendment to this spacing pattern, because the spacing order states you need to be 330 feet away from the property line. Keener further asserts that Mac's own map shows they could drill at a legal location and get a well that's relatively in the same part of the structure as the Laudon #1 well.

8) Keener states that while there may be hundreds or thousands of location exceptions issued by the Commission each year without penalty, most of the Orders today are for horizontal wells in tight, low permeability reservoirs. Keener argues that this is a "different animal" than the high porosity, high permeability sandstone formations like the Marshall formation in the present case.

9) Keener reasserts this location exception should be denied, but if it is not denied, the Commission should place restrictions on the allowable and require a bottomhole survey.

CONCLUSIONS

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

I.

LOCATION EXCEPTION

1) The Referee finds that the ALJ's recommendation to grant the Mac application at a location of 145 feet FNL and 125 feet FWL of the SW/4 SE/4 of Section 4 is supported by the weight of the evidence, by law and free of reversible error. At the time of the hearing the Laudon #1 well had produced 69,786 BO. Between the Laudon #1 well and the Province #2 well there has been produced approximately 315,000 BO. The Mac engineer believes a recovery of roughly 34,000 BO is a maximum recovery that can be expected from this Marshall particular pod. There has already been 315,000 BO drained from the reservoir at issue which is nearly ten times more than what Mac would have a right to compete for. This equates to a fair opportunity to compete for the remaining reserves within the depleted reservoir.

2) The Commission is granted almost plenary power and discretion in how to apply the doctrine of modified law of capture or to safeguard the interests of the owners within a common source of supply and to prevent waste. Oklahoma as a modified law of capture state gives parties the right to compete for their fair share. While Mac can never catch up, they should now be allowed the right to compete for their fair share.

3) The Referee notes that in applying the principles derived from the conservation laws as applied to law of capture, it is clear that the Commission must recognize that "drainage patterns of oil and gas well do not conform to, nor coincide with, section lines"; that greater emphasis must be placed upon the term "natural flow" rather than "acreage drained" and that there is no crucial difference in meaning between the term "recoverable reserves" and the term "natural flow". *Sinclair Oil and Gas Company v. Corporation Commission*, 378 P.2d 847 (Okl. 1963).

4) The issue here concerns locating the proposed well at the proper location to offer the owners in the SW/4 SE/4 of Section 4 a fair opportunity to compete within the Marshall reservoir to produce their fair share of remaining reserves from the Marshall reservoir.

5) The Supreme Court in *Kingwood Oil Company v. Hall-Jones Oil Corporation*, 396 P.2d 510 (Okla. 1964) stated concerning correlative rights:

...The term "correlative rights" embraces the correlative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners (1) not to injure the common source of supply and (2) not to take an undue proportion of the oil and gas....

That concept is embodied in Professor Kuntz's Treatise, *Kuntz, Oil and Gas*, Section 47, page 102 (1962) as follows:

The right to a fair opportunity to extract oil or gas from a common source of supply has been clearly recognized as a correlative right which must be protected when conservation regulations are imposed which limit the operation of the Law of Capture. **When the right to produce oil and gas is denied or curtailed by conservation regulation, measures must be taken to assure owners equal opportunity to enjoy their fair share of production, and a denial of such equal opportunity would amount to confiscation.** (Emphasis added)

The Court, in *United Petroleum Exploration v. Premier Resources*, 511 F. Supp. 127 (1980); discusses Kuntz's concept and states:

However, the denial of the correlative right to extract oil or gas, which is referred to by Professor Kuntz, does not mean that the operator of an oil and gas well violates the correlative rights of other interest owners when it obtains a disproportionate share of the production. What Professor Kuntz has stated is that a governmental entity, such as a state, cannot restrict the right of a mineral interest owner from obtaining its **fair share** of the actual production from a pooled well when the amount of oil or gas permitted to be reduced to possession through that well is restricted for conservation purposes. (Emphasis added)

Certainly, the above concept must be examined in relation to Kuntz's finding in his Treatise, *Oil and Gas*, at Section 4.7:

At an early date, it was observed that proprietors have "coequal" or correlative rights to extract oil and gas from a common source of supply and that such right may be protected by legislation designed to secure a "just distribution" of the oil or gas and to prevent one proprietor from taking an "undue proportion". **Whatever was meant by such early observation, it is now clear that what is sometimes referred to as the correlative right to a fair share of oil or gas from a common source of supply does not mean that each owner is entitled to a proportionate share of the substances, but it means that owners have a right to a fair opportunity to extract oil or gas.** (Emphasis added)

6) The evidence established that the Laudon #1 well had produced 69786 BO. Between the Laudon #1 well and the Province #2 well to the north, these wells has produced approximately 315,000 BO. As noted above, the modified law of capture allows the extraction and possession of hydrocarbons coming from the lands of other. Thus, the granting of the Mac location exception equates to a fair opportunity to compete for the remaining reserves within the depleted reservoir. Hence, the Mac location exception should be granted.

7) It should also be pointed out that the only evidence presented at the hearing by Mac's geologist was that there were two separate pods for development (see Mac's Exhibits 4, 7, and 8) or by Keener's geologist was that the proposed Gloria #1 well would result in a dry hole (see Keener's Exhibits 15 and 17). Therefore, Mac asserts that there is nothing in the record for the ALJ to find that any harm could accrue to Keener, because if the proposed #1 Gloria well is a dry hole, it would not harm Keener and if there are two separate pods, Keener would not be harmed. Keener's geologist did not agree with Mac's two pod maps but he did agree that you could find the existence of multiple pods in the Marshall. If there are two pods then there would be no debilitating drainage concerning the Keener interests.

II.

ALLOWABLE

1) The Referee finds that the ALJ committed no reversible error in establishing a full allowable under the Gloria #1 well at the proposed location.

2) 52 O.S. Section 87.1(c) requires the Commission to adjust the allowable production on an off pattern well in a manner that will protect the rights of offsetting owners. The issue to be addressed in the adjustment of the allowable is whether there is substantial evidence that, by reason of the move, the proposed Gloria #1 well will obtain any geological advantage or cause any adverse drainage to the adjacent tracts. *Sohio Petroleum Company v. Parker*, 319 P.2d 305 (Okl. 1957); *Creslenn Oil Company v. Corporation Commission*, 244 P.2d 314 (Okl. 1952).

3) 52 O.S. Section 87.1(c) provides:

...Whenever such an exception is granted, the Commission shall adjust the allowable production for said spacing unit and take such other action as may be necessary to protect the rights of interested parties.

Hence, Keener contends that since the term "shall" is mandatory, the Commission must reduce the allowable at the proposed Mac 125 foot location.

4) However, the Referee points out that the Court in *Sohio Petroleum Company v. Parker*, supra, addressed that issue and stated:

The statute referred to does not require the commission to reduce the allowable production whenever an exception is granted, but requires the commission to adjust the allowable production for the spacing unit and to take such other action as may be necessary to protect the rights of interested parties...

* * *

...It should be here noticed that in arguing that the statute requires the commission to adjust the allowable whenever an exception is granted to the previously prescribed drilling locations, appellant treats the word "adjust" as if it were synonymous with the word "reduce", and in effect argues that the above cited statute requires the commission to reduce the allowable production whenever an exception is granted. Such of course is not the case. Had the legislature intended to require the Commission to reduce the allowable in any case in which an exception to the prescribed drilling pattern was made, it would have said so. The word "adjust" is defined in Webster's

New International Dictionary, second edition, as meaning "to settle or arrange; to free from differences or discrepancies." The order appealed from certainly settled or arranged the allowable for the well in question, and there is therefore no merit in appellant's contention that the order is void because it contained no provision adjusting the allowable.

5) The Referee points out that the evidence established that there's already been 315,000 BO drained from the Marshall reservoir. After years of production by the offset well, granting the proposed Gloria well, in the Referee's opinion, with a full allowable would not have an adverse affect on other wells in the same reservoir. The Gloria well will be restricted to the remaining reserves within the Marshall pod. See *GMC Oil and Gas Company v. Texas Oil and Gas Corporation*, 586 P.2d 731 (Okl. 1978).

III.

CONFLICTING EXPERT OPINION EVIDENCE

1) The ALJ had the opportunity to observe the demeanor of the various expert witnesses while they were testifying. Generally, deference is given to a judge's opportunity to view the witnesses firsthand. In *Williams v. Volkswagen Aktungesllschaft, et al.*, 226 Cal. Rpter. 306 (1986 California) the Court held:

Common sense dictates the rule. It is the trial judge who is at the best vantage point to surveil the grenades, the darts, the slings and arrows of outrageous forensic conduct, rather than the reviewer who, with the delayed deliberate detachment of a coroner examines the cold body of the record only after the warm life of trial has expired and its rattlings have ceased.

2) With regard to the weight to be given opinion evidence, the Supreme Court stated in *Palmer Oil Corporation v. Phillips Petroleum Company*, 231 P.2d 997 (Okl. 1951):

...At the hearing herein the testimony adduced was chiefly that of petroleum engineers and geologists who testified on the basis of both personal surveys made

and of an interpretation of the accumulated data in the hands of the Commission. The testimony of these experts was in direct conflict but that of each was positive upon the issue. Under the circumstances the objection is necessarily addressed to only the weight of the evidence. Under the holding of this Court and that of courts generally, *Chicago, R.I. and P. Ry. Co. v. Pruitt*, 67 Okl. 219, 170 P. 1143; 22 C.J. 728, sec. 823, 32 C.J.S., Evidence, § 567, p. 378, the weight to be given opinion evidence is, within the bounds of reason, entirely for the determination of the jury or of the court, when trying an issue of fact, it taking into consideration the intelligence and experience of the witness and the degree of attention he gave to the matter. The rule should have peculiar force herein where by the terms of the Act the Commission is recognized as having peculiar power in weighing the evidence. Since the evidence before the Commission was competent and sufficient if believed, to sustain the order we must, and do, hold that the order is sustained by the evidence and that the contention is without merit. *Ft. Smith & W. Ry Co. v. State*, 25 Okl. 866, 108 P. 407 ; *Bromide Crushed Rock Co. v. Dolese Brothers Co.* 121 Okl. 40, 247 P. 74.

3) The Referee finds that the ALJ based his recommendations on his assessment of the demeanor and credibility of the experts. The ALJ assigned the appropriate weight he believed should be applied to their opinions. As noted above, that is the ALJ's function and his placement of greater weight on the expert testimony of Mac's witnesses is not reversible error.

IV.

MIRROR LOCATION BY KEENER

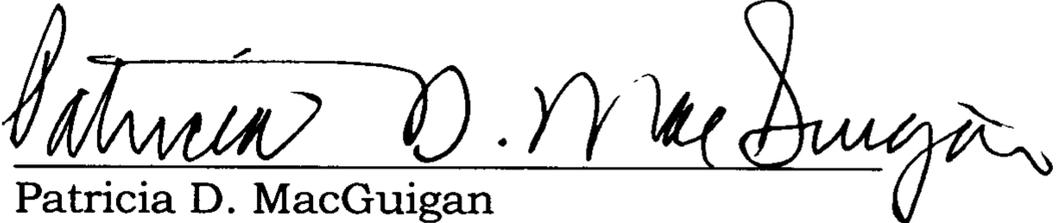
1) The ALJ stated in his Report in paragraph 6 that Mac "had no objection to a mirror well." Since Mac has agreed to not opposing a mirror location by Keener and since correlative rights would be protected for all parties and achieve the best balance of the interests herein, the Referee would recommend that the order granting the requested location exception should contain a provision finding that Mac would be precluded from opposing a mirror location by Keener.

V.

REFEREE'S DECISION

1) Based on the proceeding rationale, the Referee recommends that the Report of the ALJ be affirmed as Mac has met its burden of proof of showing the need for an additional well at the off pattern location with the additional requirement that Mac will not oppose a mirror location by Keener.

RESPECTFULLY SUBMITTED THIS 8th day of June, 2012.



Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Anthony
Commissioner Douglas
Jim Hamilton
ALJ Paul Porter
Richard A. Grimes
Gregory L. Mahaffey
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