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

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CORPORATION COMMISSION
OF OKLAHOMA

<u>APPLICANT:</u>	KELLY WARD)	
)	
<u>RELIEF SOUGHT:</u>	DETERMINATION OF ELECTION UNDER POOLING ORDER NO. 558381)	CAUSE CD NO. 201106897
)	
<u>LEGAL DESCRIPTION:</u>	SECTION 9, TOWNSHIP 6 NORTH, RANGE 15 EAST, PITTSBURG COUNTY, OKLAHOMA)	
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REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Paul Porter**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 7th day of March, 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: **John E. Lee, III**, attorney, appeared on behalf of applicant, Kelly Ward ("Ward"); **John Reeves**, attorney, appeared on behalf of Antero Resources Corporation ("Antero"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance for the Oklahoma Corporation Commission.

The Administrative Law Judge ("ALJ") filed his Report of the Administrative Law Judge on the 6th day of April, 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 18th day of May, 2012. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

ANTERO TAKES EXCEPTION to the ALJ's recommendation that the proposal letter from Antero was an offer to Ward which was accepted by Ward creating a private contract. The ALJ found that the present pooling proceeding naming Ward as a respondent was filed before Ward had a reasonable time to either pay or arrange for the payment of his share of well costs. The ALJ found that because the Commission lacks jurisdiction to force pool a party subject to a private agreement, the application in this cause for determination of election under pooling Order No. 558381 by Ward should therefore be dismissed for lack of jurisdictional authority.

Ward was named in an Antero pooling application the same day Antero received the proposal letter in which Ward had selected his chosen option. Ward did not return a signed AFE or his portion of well costs.

Upon the application of Antero in Cause CD 200804355, the Commission issued Order No. 558381, dated August 21, 2008, pooling and adjudicating the rights and equities of the owners named in Exhibit "A" attached to said Order, in the Upper Atoka, Middle Atoka, Basil Atoka, Wapanucka, Cromwell, Caney, Mayes, Woodford, Hunton, Limestone and Viola sources of supply underlying the 640 acre drilling and spacing unit consisting of Section 9, T6N, R15E, Pittsburg County, Oklahoma. Ward was named as a respondent to the application filed in Cause CD 200804355. Ward alleges in the present application in Cause CD 201106897 that Ward properly elected to participate in the well contemplated by Order No. 558381, however, Antero refuses to acknowledge Ward's election to participate. Therefore Ward requests that the Commission in the present case determine that Ward validly elected to participate in the well contemplated by Order No, 558381.

ANTERO TAKES THE POSITION:

1) The ALJ Report erred in finding that the proposal letter from Antero was an offer to Ward which was accepted by Ward creating a private contract; that the pooling proceeding naming Ward as a respondent was filed before Ward had a reasonable time to either pay or arrange for the payment of his share of well costs; and that because the Commission lacks jurisdiction to force pool a party subject to a private agreement, the application in this cause should be dismissed for lack of jurisdictional authority. Such findings and recommendations by the ALJ are contrary to law and to the evidence presented. Such findings and recommendations are arbitrary, unreasonable and discriminatory and if adopted, would not prevent or assist in preventing the various types of waste and would not protect or assist in protecting correlative rights.

2) The ALJ specifically erred in finding that the "proposal letter offer followed by a proposal letter acceptance appears to be a private agreement." The proposal letter referenced by the ALJ is the proposal letter, dated June 10, 2008, and marked as Exhibit 4. Such proposal letter provides that if Ward desired to participate, he was required to comply with the following:

4. Participate with your interest by paying your proportionate share of actual well costs. If you elect to participate in the drilling of this well, please execute and return the attached AFE, **along with your share of the completed well costs.** (Emphasis added)

3) Ward admitted that while he signed the proposal letter, dated June 10, 2008 and returned an executed AFE to Antero, he did not include his share of the completed well costs as required by such proposal letter. The well costs were set forth in the proposal letter and in the AFE attached thereto. The ALJ specifically found that Ward "did not send his share of the completed well costs" to Antero after executing the proposal letter and AFE. Furthermore, Ward stated that he did not send his share of the completed well costs for the well referenced in the proposal letter because he was not sure of how much money to send to Antero. The ALJ found that is was "difficult to sustain the argument of not knowing how much to pay when you have had a small oil and gas company since 1974, have operated wells, and have calculated the minimum mineral interest to five decimal places as had Ward." The ALJ found that the excuse given by Ward for not sending in his share of the completed well costs along with the executed proposal letter and AFE was not credible.

4) Even with Ward's failure to comply with the requirements of the proposal letter, the ALJ erroneously found that Ward's response to such proposal letter "appears" to have created a private agreement between Antero and Ward. Such a conclusion is contrary to the obvious provisions of the proposal letter and Ward's admission concerning his failure to comply therewith. The evidence presented by the witness for Antero was that Antero did not treat Ward as complying with the provisions of the proposal letter and therefore, did not treat Ward as effectively participating under the proposal letter. Antero does not treat Ward's actions in regard to the proposal letter as creating any type of private agreement. It is fundamental that if the proposal letter is treated as an offer, Ward's response to such proposal letter was not an acceptance because such response did not comply with the provisions of such letter. Ward's actions did not create a private agreement in that he never paid any well costs as required by the proposal letter.

5) The ALJ is inconsistent in his analysis in that while he stated the actions of Ward in connection with the proposal letter "appear" to create a private agreement and therefore, the Commission lacks jurisdiction in this cause, he further stated that "[w]hether there is a private agreement is for District Court determination." The ALJ further found that the "Commission lacks jurisdiction to interpret a private agreement or to determine possible breach of same." While these statements by the ALJ are inconsistent and somewhat confusing, he is correct that the Commission lacks jurisdiction to make the determination that he did concerning a private agreement, specifically when one of the parties to such alleged private agreement denies its existence.

6) The ALJ's determination that there was a private agreement between Antero and Ward constitutes a prohibited collateral attack on pooling Order No. 558381, being Exhibit 7. Ward is named as a respondent in Exhibit "A" attached to pooling Order No. 558381 and the Commission in paragraph 14 of such order specifically found that Antero "has made a bona fide effort to reach an agreement with each respondent in this cause, who could be located, as to how units involved in this cause would be developed" and that Antero "has been unable to reach an agreement with the owners named and described as respondents in this cause." Ward was not dismissed as a respondent from the pooling proceeding in which pooling Order No. 558381 was entered because Antero had been unable to reach an agreement with Ward concerning the development of the units covered by such pooling order. The ALJ's findings in this cause are directly contrary to the Commission's prior findings in pooling Order No. 558381, being a final, unappealed order. Such a collateral attack is prohibited. Furthermore, the ALJ stated that the "Commission lacked jurisdiction to force pool parties who have entered into a private agreement." Such a finding if applied to Ward constitutes a further prohibited collateral attack on pooling Order No. 558381. In such pooling order, the Commission specifically found that the "Commission has jurisdiction of the subject matter herein and of the persons interested therein and has jurisdiction to enter this order as hereinafter set forth." Ward was properly named in and properly notified of the pendency of the pooling proceeding in which Order No. 558381 was entered, and Ward never asserted in such proceeding that he was subject to any private agreement that would render such pooling ineffective as to his interest in the lands involved herein. The findings of the ALJ in the Report in regard to the private agreement and the Commission's jurisdiction are, not only inconsistent with and contrary to the facts of this case, but constitute a prohibited collateral attack on Order No. 558381.

7) The ALJ further found in the Report that the "definitive finding is that Antero failed to force pool Ward before he had a reasonable time to pay, or arrange for paying, his share of well costs after he had apparently elected to participate, per a private agreement." The ALJ's statement of his "definitive finding" highlights the inconsistency in his analysis in that in such finding, the

ALJ determined that there was a private agreement which the ALJ subsequently found the Commission did not have the jurisdiction to determine and the ALJ interpreted such alleged agreement concerning the time Ward had to pay his share of well costs under such alleged agreement which the ALJ subsequently found the Commission did not have the jurisdiction to do. The "definitive finding" is contrary to the facts of this case, beyond the Commission's jurisdiction and constitutes a prohibited collateral attack on pooling Order No. 558381. Furthermore, such "definitive finding" is in error in that Ward did have a reasonable time to pay his share of the well costs for the subject well because pursuant to the proposal letter, Ward's share of well costs was to be included with the executed proposal letter and AFE returned to Antero. Ward had sufficient time to execute the proposal letter and AFE and return them to Antero; however, Ward failed to include with the returned documents his share of the well costs. As the ALJ found, Ward could have easily determined the amount of well costs to be included with the documents returned to Antero.

8) The erroneous determination that there was a private agreement between Antero and Ward resulted in the ALJ's erroneous finding that the "second pooling did not apply to Ward because it appears he already had an agreement with Antero." Given the fact that there was and is no private agreement between Antero and Ward concerning the well referenced in the proposal letter, Ward's interest is subject to the provisions of pooling Order No. 558381. As stated in paragraph 6), above, this determination by the ALJ is contrary to and constitutes a prohibited collateral attack on the findings in pooling Order No. 558381. Ward admitted that he timely received pooling Order No. 558381, that he reviewed such order, that he was familiar with the provisions of such order and that he failed to make any written election pursuant to provisions of such order or to pay to Antero any well costs in connection with the initial well covered by such pooling order. Paragraph 6.3 of the pooling order provides that Ward was to make a written election within 15 days from date of such order. Ward failed to make any written election under such order within such time frame. Paragraph 7 of the pooling order provides that if an owner fails timely and properly to elect in writing under paragraph 6.3 of the order, such owner shall be deemed to have elected not to participate as a working interest owner under such order. If the response of Ward to the proposal letter is treated as Ward's written election to participate under pooling Order No. 558381, Ward was still obligated under subparagraph (i) of paragraph 6.2 of the pooling order to pay Antero Ward's proportionate part of the \$4,560,112 estimated costs of the initial well covered by such pooling order or in lieu of such payment, to furnish to Antero security satisfactory to Antero for the payment of such costs all within 20 days from the date of the pooling order in order to perfect such an election to so participate. Paragraph 8.2 of the pooling order provides that if an owner elects to participate under subparagraph (i) of paragraph 6.2 of such order, but thereafter fails or refuses to pay or secure

the payment of such owner's proportionate part of the costs of the initial well covered by such order as provided in subparagraph (i) of said paragraph 6.2, such owner shall be deemed to have withdrawn such owner's election to so participate and such shall be deemed to have failed to have affirmatively elected any other option afforded in paragraph 6.2 of such order and will be treated being subject to the provisions of paragraph 7 of such order. Ward failed to comply with any of the above-described provisions of pooling Order No. 558381 and Ward is deemed to have elected not to participate as a working interest owner under such order. The ALJ found that "[h]ad the pooling applied to Mr. Ward he would have been subject to the deeming provisions in the pooling order for failure to pay his proportionate share of costs." Ward is subject to the pooling order and Ward is subject to the deeming provisions in the pooling order for failure to make any election under such order and/or to pay his proportionate share of well costs.

9) The determination by the ALJ that there is a private agreement between Antero and Ward is contrary to the position of Antero which denies such private agreement. Furthermore, the finding of a private agreement between Antero and Ward which renders Ward not subject to pooling Order No. 558381 is actually contrary to the admissions made by Ward by filing the application in this cause requesting the Commission to determine whether Ward made an election to participate under pooling Order No. 558381. By filing the application in this cause, Ward admits that he is subject to the provisions of pooling Order No. 558381, otherwise there would be no need for the Commission to make a determination of whether Ward made any election under such pooling order.

10) The recommendation of the ALJ to dismiss the application in this cause for lack of jurisdictional authority is contrary to the facts of the case and to the applicable law, and the Commission should reject such recommendation. The Commission does have jurisdiction in this cause and should determine that Ward failed to make any written election under pooling Order No. 558381 and is thus deemed to have elected not to participate under such order, or if the Commission finds that Ward's response to the proposal letter (Exhibit 4) constitutes a written election under the pooling order, the Commission should determine that Ward failed to perfect such election to participate pursuant to the provisions of such pooling order and is thus deemed to have elected not to participate under such order. The initial well covered by pooling Order No. 558381 was completed on March 14, 2008 and as of the hearing in this cause on March 7, 2012 (four years later), Ward has never paid or even tendered any well costs for such well and has never assumed any risk in connection with such well.

11) Antero requests that the Commission not adopt the Report of the ALJ in this cause on April 6, 2012 in regard to the finding that the Commission lacks

jurisdiction in this matter. The Commission does have jurisdiction and should determine that Ward is subject to pooling Order No. 558381, that Ward failed to comply with the provisions of such order, and that Ward is deemed to have elected not to participate as a working interest owner under such order.

THE ALJ FOUND:

- 1) Ward notified Antero, by letter dated December 26, 2007; he "...would be interested in participating some of my interest..." Interest in participating with some interest is not a declaration to participate in a well. It may have attracted interest from Antero that Ward was interested in participation.
- 2) Ward notified Antero, by letter dated April 4, 2008, he "[A]t this time it is my intention to participate at least part of my mineral interest and possibly all of it..." Intention to participate a portion of a mineral interest is not a declaration to participate in a well. Again, it may have attracted interest from Antero that Ward intended to participate.
- 3) The well was spud on February 8, 2008 and completed March 14, 2008. Ward was interested in participating before the well was spud and intended to participate after the well was completed and had first production (March 17, 2008). Antero sent Ward a proposal letter, with AFE, on June 10, 2008.
- 4) The proposal letter stated at Option #4: "If you elect to participate in the drilling of this well, please execute and return the attached AFE, along with your share of completed well costs." The following paragraph states, "Please indicate your choice of option as indicated below, and return an executed copy of this letter to the attention of the undersigned". After almost three months of production Antero offered Ward the option to participate in the producing well.
- 5) Ward responded to the proposal by executing the letter and returning it. He selected Option #4 (participation) on June 12, 2008 and returned the letter to Antero. He complied with Antero's request to choose an option. He did not send his share of completed well costs. Antero received Ward's returned and completed proposal letter and it recited the Antero language, "I/We hereby select Option No. 4" (participation option). The election was signed and dated. Antero filed for pooling on June 17, 2008, naming Ward.
- 6) Commission pooling Order No. 554809 for the subject property issued June 2, 2008, 10 days before Ward elected and 8 days before the proposal letter was dated. This pooling order required a written election with costs or satisfactory security made within 20 days of the order date. The pooling did not name Ward as a respondent. A title opinion error reflected his interest had been assigned to respondent #24 (Penn Virginia). It had not been assigned and was owned by Ward. This pooling did not affect Ward.

(7) A 'clean-up' pooling application was filed and Commission Order No. 558381 was issued August 21, 2008 (the Application was filed June 17, 2008). The well had now produced for over five months. Antero had corrected its title opinion and Ward was properly named as respondent #2. Again a written election was required and one of the options was participation. Respondents had 15 days to elect and 20 days to pay the respondent's proportionate share or present satisfactory security, both timed from the date the order issued.

8) Payment or security was necessary to perfect the election to participate, pursuant to either pooling order. This requirement was not mentioned in the Antero proposal. Had Ward thought he had not yet properly elected to participate he simply had to elect under the pooling. He did not elect under the pooling because he believed he had already elected pursuant to Antero's proposal letter. Ward alleged he had attempted to contact Antero to arrange payment of sums he owed for the project. Antero alleged they would not have accepted security from Ward because they did not know him. Antero later accepted Ward's creditworthiness because they sent Ward JIBs in the next three wells in which he elected to participate. Antero explained this because they became familiar with Ward.

9) Ward said his primary reason for not sending payment with his election was because he did not know how much to send. However, in his December 22, 2008 letter Ward stated, "Please revise this division order to reflect working interest ownership and forward to me along with this billing for drilling and completion and if correct I will execute and return to you." Ward did not explain how he could determine the correct amount and allege he could not determine the correct amount.

10) Also, Ward alleged, in his December 26, 2007 letter, that he owned about nine acres and in his April 4, 2012 letter he owned at least 8.38828 acres. It is difficult to sustain the argument of not knowing how much to pay when you have had a small oil and gas company since 1974, have operated wells, and have calculated the minimum mineral interest to five decimal places, as had Ward.

11) Ward was not named in the first pooling and that needs no additional consideration. Antero knew Ward owned an interest when they sent him a proposal letter dated June 10, 2008. Assuming the mail took a couple of days to travel from Denver, Colorado to McAlester, Oklahoma, the proposal arrived on June 12, 2008 and Ward made his election on the same day. There was no provision in the proposal letter requiring costs paid by a certain date, although it did request costs paid when Ward returned a signed AFE. The pooling naming Ward as a respondent was filed five days later, on June 17, 2008.

Although Ward had already returned the completed proposal letter he was not dismissed at the hearing.

12) The second pooling did not apply to Ward because it appears he already had an agreement with Antero. Had the pooling applied to Ward he would have been subject to the deeming provisions in the pooling order for failure to pay his proportionate share of costs. Ward admitted he had not paid because he did not know costs he owed even though he had an AFE and he said, in a letter, he could determine the correct amount of money he owed (December 22, 2008 letter).

13) I believe Ward submitted his election by returning the completed proposal letter to Antero on June 12, 2008. I also believe the AFE is best interpreted as requiring payment included with an executed copy of the AFE in a timely but unspecified timeframe or contacting Antero for discussion and questions on the matter (Antero has a business practice of JIBs or other arrangements). Ward appears to have elected to participate in the well but did not pay for that participation. He seemingly attempted to arrange payment.

14) Although, in later Antero wells, Ward timely paid his JIBs and minimal reason was given for not doing this same JIB procedure in this well (Antero did not know him), Ward is still obligated to pay monies owed at some future time. Antero did send royalty checks to Ward, which he has not cashed, to support their belief he was a deemed party. Ward never tendered any money to Antero. It should be common knowledge that a person must, at least, try to tender payment for something they have agreed to purchase.

15) It is not a matter of how much he paid; Ward sent no money to Antero. There is evidence he tried to determine how much to pay, but his lack of knowledge of the amount of debt is suspect for a sophisticated businessman like Ward. He had his self determined ownership, the AFE and his over 35 years of oil and gas experience. Ward did not even tender money for his minimum known interest. Although no time requirement or sanction is noted on the Antero proposal it is obviously unreasonable for Ward to receive a benefit for which he has not paid.

16) Ward's returned proposal letter is marked received by Antero on June 17, 2008. Antero filed a pooling application naming Ward as a respondent on June 17, 2008. Antero had a selected option from Ward and yet did not dismiss him in a pooling proceeding. Antero did note, in the proposal letter that Ward should send his share of completed well costs (unspecified time) with the AFE but Antero also noted that Ward should contact them with any questions or to discuss the matter. Ward had contacted Antero even before the proposal letter arrived to discuss his payment of costs. Whether I believe Ward could have

determined well costs he owed is not a necessary determination for resolution of this cause.

17) Because Ward apparently elected and was attempting to discuss the matter further, had questions and states he wanted to arrange payment, it appears as a private agreement. That election was received by Antero the same day they filed to force pool Ward. The private agreement was apparently in place before the pooling. The Commission lacks jurisdiction to force pool parties who have entered into a private agreement. Whether the private agreement stands or was later breached by non payment of costs for over four years is a matter for District Court determination. The definitive finding is that Antero filed to force pool Ward before he had a reasonable time to pay, or arrange for paying, his share of well costs after he had apparently elected to participate, per a private agreement.

18) At the time the pooling was filed Ward appeared to have a private agreement with Antero and that deprives the Commission of jurisdiction to force pool him. Ward is force pooled by Commission order only if no private agreement is found. Ward did not elect pursuant to pooling Order No. 558381 because he appeared to have a private agreement. Whether there is a private agreement is for district court determination. The Commission lacks jurisdiction to interpret a private agreement or determine possible breach of same. In light of the above, Antero's Motion for Summary Judgment is recommended denied and this application dismissed for lack of jurisdiction.

POSITIONS OF THE PARTIES

ANTERO

1) **John R. Reeves**, attorney, appearing on behalf of Antero, stated the ALJ erred in his position that because of a private agreement, the Commission did not have jurisdiction in the pooling and therefore no jurisdiction in this cause. Antero further states they "disagree totally with that analysis."

2) Antero, referencing *Samson Resources Company v. Commission*, 702 P.2d 19 (Okl. 1985); *MM Resources Inc. v. Huston*, 710 P.2d 763 (Okl. 1985); and *Samson Resources Company v. Commission*, 742 P.2d 1114 (Okl. 1987); states the Commission cannot resolve a dispute as to a private agreement because it is a private rights dispute. Antero contends the ALJ initially mentioned in his Report the Commission does not have jurisdiction to determine whether or not there is a private agreement. Antero asserts the ALJ then decided that there was a private agreement and was therefore outside the

scope of the Commission's jurisdiction. Antero contends the ALJ was "inconsistent in that analysis."

3) Antero asserts that even putting the jurisdictional issue aside, they disagree with the ALJ's conception of a contract because it is contrary to the statute and basic contract law.

4) Antero asserts that by filing this determination of election under pooling Order No. 558381, Ward is admitting there is not a private agreement and that Ward is subject to pooling Order No. 558381.

5) Antero refers to Exhibit 4 as the proposal letter which the ALJ found there was an offer and acceptance forming a private agreement. Antero states there were three elements mentioned in this proposal letter which Ward must have done if Ward wanted to participate in the well. Antero states for Ward to participate Ward must have elected to participate; executed the attached AFE and returned it; and sent in the well costs. Antero states while the first two elements were satisfied, Ward failed to send in the well costs.

6) Antero states the ALJ erred in his Report stating that Ward did not send in the AFE. Antero asserts Ward clearly admitted in the transcript that he did return the signed AFE. Antero contends the ALJ's Report "makes a bunch of assumptions with that, and they are just wrong."

7) Antero cites 15 O.S. Section 71 as stating, "the acceptance must be absolute and unqualified." Antero contends Ward did not accept the proposal letter because only two of the three requirements of the proposal letter were satisfied.

8) Antero further cites *Price v. Oklahoma College of Osteopathic medicine and Surgery*, 733 P.2d 1357 (Okla.Civ.App. 1986) for the proposition that each element of a contract must be accepted to constitute an acceptance. Antero contends because Ward did not accept the third element, he did not accept the proposal. Antero reasserts the ALJ erred in finding a private agreement because Ward failed to send in the well costs required in the proposal letter.

9) Antero argues in the alternative if there is a private contract it would constitute a prohibited collateral attack upon the pooling order at issue, Order No. 558381.

10) Antero states pooling Order No. 558381 lists Ward as a respondent. Antero states Ward admitted receiving the pooling order, reviewing it, and through cross examination, was shown to be familiar with the provisions of the order. Antero, citing paragraph 14 of pooling Order No. 558381, states, "Furthermore, Applicant has made a bona fide effort to reach an agreement with each respondent in this cause, who could be located, as to how the units

involved in this cause would be developed." Antero, further citing paragraph 14 of the pooling order states the applicant "has been unable to reach an agreement with the owners named and described as respondents in this cause..."

11) Antero argues the Commission made a final unappealed order and that there was no agreement with Ward or any other named respondents.

12) Antero quotes paragraph 3 of pooling Order No. 558381 as stating, "Commission has jurisdiction of the subject matter herein and of the persons interested therein and has jurisdiction to enter this order as hereinafter set forth." Antero states "the persons interested therein" included Ward.

13) Antero argues Ward never objected to the findings, never sought to change the findings, and never appealed pooling Order No. 558381. Antero contends the ALJ's finding there was a private agreement is directly contrary to the findings in pooling Order No. 558381, and as such is a prohibited collateral attack.

14) Antero cites *State v. ex rel. Comm'n of Land Office v. Corporation Commission*, 590 P.2d 674 (Okl. 1979) for the proposition that once the Commission meets the three jurisdictional elements as it did in paragraph 3 of pooling Order No. 558381, "then can you have these quasi-jurisdictional facts."

15) Antero argues that even if the Commission is completely wrong on their quasi-jurisdictional facts, they cannot go back and change it. Antero cites *Leede Oil and Gas, Inc. v. Commission*, 747 P.2d 294 (Okl. 1987) for support of this proposition.

16) Antero argues in *Leede Oil and Gas Inc. v. Commission*, supra, the Commission issued an order designating Leede as the operator of a well in which the Commission found they owned a working interest. Later parties came back to argue that Leede did not own a working interest and therefore should not be operator. Antero argues the Commission responded, "...You could have litigated that at the time; and, therefore, you are out of luck, and we are not going to change it, because it's a quasi-jurisdictional fact."

17) Antero argues the private agreement the ALJ has construed is similar to the facts of *Leede* case. Antero contends that even if there is a finding of a private agreement, it is still a prohibited collateral attack because the jurisdictional elements of the Commission have been satisfied and were not appealed.

18) Antero states the ALJ, throughout his Report, references the private agreement as the "apparent" private agreement. Antero argues this language offers a "very, very soft-type determination." Antero argues the ALJ would have

to find more than an "apparent" agreement to take away jurisdiction from the Commission. Antero argues the ALJ was wrong in his analysis.

19) Antero states it is "very clear" Ward is subject to the pooling order. Antero contends Ward was named a respondent and also was served with the pooling application. Antero further asserts Ward did not appear at the hearing, did not assert any kind of position that the two parties were in agreement or wanted to be dismissed from the pooling application, and did not have an attorney come and assert that position at the hearing.

20) Antero asserts Ward has been in the oil and gas industry since 1974. Antero argues Ward is not unsophisticated in the workings of the oil and gas industry.

21) Antero contends Ward was named in Exhibit "A" of pooling Order No. 558381. Antero states paragraph 6.3 of the pooling order provides that within 15 days from the date of an order an election must be made to participate if the party wishes to do so. Antero states paragraph 10 of the pooling order provides where to send the election along with the payment for well costs. Antero states paragraph 7 of the pooling order states if a party fails timely and properly to make a written election pursuant to paragraph 6.3, then that party is deemed to have elected one of the three non-participating options.

22) Antero argues because Ward failed to elect under paragraph 6.3 of the pooling order, Ward is deemed to have elected not to participate. Antero contends this is a "pretty simple type of analysis."

23) Antero asserts even if the Referee were to ignore that Ward did not send in well costs and assume that Ward's response to the proposal letter was an election, subparagraph (i) of paragraph 6.2 of the pooling order states if a party elects to participate they are agreeing to either pay the proportionate share of the actual well costs or provide security to the operator's satisfaction within 20 days of the order. Antero argues Ward admitted to not attempting to pay or attempting to provide any security under the pooling order within that 20 day period or even after the 20 day period lapsed. Antero reasserts Ward admitted it "didn't comply with the order in any way, whatsoever."

24) Antero argues the obligation to clarify the intent to participate under the proposal letter and the order fall on Ward. Antero reasserts that Ward has been in the oil and gas business for 38 years and as such should have known what Ward had to do in order to participate.

25) Antero, referring to paragraph 12 on page 8 of the ALJ's Report, said the ALJ found "Had the pooling applied to Mr. Ward, he would have been subject to the deeming provisions in the pooling order for failure to pay his proportionate share of the costs." Antero argues because the ALJ found a

private agreement, he erroneously found that the pooling order did not apply to Ward.

26) Antero argues Ward claims to own 8.38828 mineral acres. Antero states a portion of Ward's acreage was acquired from his deceased mother, which included an additional 1.67766 net acres.

27) Antero states when asked why Ward did not send in any money with the proposal letter or pooling order, Ward responded by stating Ward did not know whether Antero would recognize the 1.67766 acres because it was going to probate. Antero argues they never have not recognized Ward owned the full 8.38828 acres.

28) Antero asserts the only issue was if Ward's acreage was subject to an oil and gas lease to Penn Virginia. Antero states this goes back to an earlier pooling Order No. 554809 in which Antero named Penn Virginia instead of Ward as a respondent because the title opinion Antero obtained listed Penn Virginia as owner of the working interest.

29) Antero states Ward subsequently sent a letter to Antero stating the 8.38828 acres was not leased. Antero states Antero then went back and checked the records and subsequently the title attorney changed his opinion. Antero contends Antero then filed the second pooling, resulting in pooling Order No. 558381. Antero argues at no time did Antero state Ward did not own the mineral acreage, but rather only questioned whether it was leased or not.

30) Antero contends Ward could have easily calculated the money to be sent to Antero. Antero argues "it's just third grade arithmetic." Antero states Ward received the total cost the well, which was slightly over \$4.5 million. Antero states Ward received this dollar amount in the proposal letter, AFE, and in the pooling order. Antero argues Ward could have done the arithmetic, which comes out to be \$59,767.96.

31) Antero argues Ward admitted Ward could have made the calculation, but Ward never attempted to do it or send in the money because Ward was not sure if Antero would recognize the 1.67766 acres in probate. Antero argues Ward never tried to send in money for the part of the acreage Ward thought would be recognized.

32) Antero reasserts Ward did nothing when Ward receive the pleadings or the pooling order.

33) Antero states the ALJ, to an extent, critiqued Ward's excuse for not sending in the money. Antero, referencing paragraphs 9 and 10 on page 7 of the ALJ Report states the ALJ found "Mr. Ward said his primary reason for not

sending payment with his election was because he did not know how much to send. However, in his December 22, 2008, letter Mr. Ward stated 'Please revise this division order to reflect working interest ownership and forward to me along with this billing for drilling and completion; and if correct, I will execute and return to you.'" Antero argues Ward did not complain or explain that he could not determine the correct amount of money to send in.

34) Antero states the ALJ Report also found "It is difficult to sustain the argument of not knowing how much to pay when you have had a small oil and gas company since 1974, have operated wells, and have calculated the minimum mineral interest to five decimal places, as had Mr. Ward."

35) Antero also states the ALJ Report found in paragraph 14 on page 8, "Mr. Ward never tendered any money to Antero. It should be common knowledge that a person must, at least, try to tender payment for something they have agreed to purchase."

36) Antero contends the ALJ's analysis shows Ward's reasons for failing to pay well costs were lacking in basis.

37) Antero states when asked at hearing why Ward did not pay the money, Ward responded Ward did not want to "send a blank check." Antero states Antero responded, "A blank check? The check would have been payable to Antero Resources Corporation in the 59,000, you know, plus dollars. It wouldn't be a blank check."

38) Antero argues the possibility that Ward simply may not have had the money to send in or maybe Ward did not want to send in the money because this was an initial well and perhaps Ward was waiting on the results of the well before Ward sent in Ward's money to commit to the operation.

39) Antero states Antero employee, Tim Rady, raised the problem of accepting this proposal letter as an agreement without payment. Antero states Rady argued if Antero were forced to accept Ward's proposal letter as agreement without payment, all of the risk would fall on Antero.

40) Antero states that Antero employee, Tim Rady, also stated many people will respond to proposal letters by saying they wish to participate while not sending in the money. Antero states that in this cause Ward's own brother, James C. Ward, Jr., did exactly the same thing and that Antero had never treated him as participating.

41) Antero contends the ALJ's private agreement analysis is a "very dangerous thing, if accepted, because this is not a unique or different kind of proposal letter." Antero argues the Commission will lose jurisdiction on a lot of poolings if the ALJ's private agreement analysis is upheld.

42) Antero concludes by stating the ALJ's analysis is contrary to the concept of pooling and "with all due respect to the Judge: I think he made a terrible error in this "apparent private agreement analysis."

WARD

1) **John E. Lee, III**, attorney, appearing on behalf of Ward, states Ward agrees with Antero there is no private contract. Ward argues the ALJ should never have found a contract.

2) Ward contends because Ward filed the application for determination of election under the pooling order, Ward never thought there was a contract.

3) Ward argues Ward elected to participate under the second pooling. Order No. 558381.

4) Ward states Ward was not named in the first pooling order. Ward states Ward found out about the pooling after it was published in the McAlester newspaper. Ward argues Ward then informed Antero of Ward's interest and subsequently Antero filed a "cleanup pooling." The "cleanup pooling" created Order No. 558381.

5) Ward, referring to Exhibit 2, contends prior to the filing of the "cleanup pooling" there was communication between Ward and Antero stating Ward wanted to participate in the well.

6) Ward states Antero then sent the proposal letter with an AFE. Ward states Ward sent it back with the declaration Ward wanted to participate in the well. Ward argues Ward thought it had done everything to participate. Ward acknowledges at this point Ward was "under the deluded impression" that Ward elected to participate. Ward states Ward then received pooling Order No. 558381.

7) Ward contends after pooling Order No. 558381 issued, Ward began receiving royalty checks. Ward states Ward did not cash the checks and instead sent correspondence back to Antero stating, "I elected to participate. Send me a joint interest billing and I will pay." Ward argues this is the focus of what this cause is about.

8) Ward argues this cause is not about a quasi-contract or an apparent contract.

9) Ward contends before and after pooling Order No. 558381 Ward persisted in Ward's "idea, notion, and position" that Ward was participating in this well with Antero.

10) Ward states the default provision for failing to make an election under pooling Order No. 558381 was \$1,600 per acre bonus and a 3/16th royalty. Ward states Antero didn't follow pooling Order No. 558381 and instead tendered Ward royalty checks based on a 1/4th royalty, which was the second alternative in pooling Order No. 558381.

11) Ward contends Ward is participating with Antero in three other wells: the Snell well, the Utterback well and the City of McAlester well. Ward states Ward has not prepaid in any of those three wells and instead Antero has joint interest billed ("JIB") Ward.

12) Ward cites *Tenneco v. El Paso*, 687 P.2d 1049 (Okla. 1984) for the proposition that an election to participate can take many forms.

13) Ward argues that in CD Nos. 200903641 and 201000195 involving the parties Blue Baron and Marbet, there the Referee determined that Blue Baron elected to participate by a pre-pooling communication to Marbet and nothing more. Ward argues the Commission adopted the Referee's Report and found although Blue Baron did nothing after the initial correspondence, which predated the hearing and the final order, Ward was still deemed as having elected to participate.

14) Ward contends Ward is in a similar situation here as Blue Baron was in that cause. The only difference being is that Ward has elected to participate consistently throughout this pooling process.

15) Ward states throughout this pooling process Ward has basically been saying, "Send me a JIB. I will pay it. I'm not sending you a blank check. If I send you the wrong number, where – I'm not sophisticated enough to know what that puts me. Have I – what have I done? Just JIB me, like I'm used to in oil business, and I'll pay."

16) Ward reasserts Ward has subsequently participated with Antero in the above three referenced wells in which Antero sends Ward JIBs.

17) Ward states in these three referenced wells Ward was not named in the original pooling. Ward states Ward does not own minerals in these three referenced wells but instead owns oil and gas leases. Ward states Ward signed a pooling binding letter for these three referenced wells which basically states, "I agree to participate under the order," even though the pooling Order did not name Ward specifically.

18) Ward argues under each of these pooling binding letters Ward was required to prepay. Ward states Ward did not prepay, and that Antero did not require Ward to prepay. Ward states Antero JIB'd Ward on each of the three referenced wells and Ward is currently a recognized working interest owner in these three referenced wells.

19) Ward contends Antero is arguing the burden is now on Ward as a pooling respondent to assert Ward's right to participate in the well. Ward alleges every operator that comes before the Commission in a pooling is trying to acquire an interest in minerals under a taking. Ward argues shifting the burden to a pooling respondent because the Commission jurisdiction is invoked offends the notion of private property rights.

20) Ward states Ward attempted to make a decision as to Ward's minerals in this particular section. Ward states Ward's failure was to "send some amount of money."

21) Ward argues in CDs 200903641 and 201000195 there was no money sent and only one letter predating the pooling order was sent. Ward contends both the Referee and the Commission still found a valid election to participate under Order No. 578923.

22) Ward contends Antero can hardly make the argument that every provision of every pooling order be enforced, when in pooling Order No. 558381 Antero has been paying Ward a 1/4th royalty instead of the 3/16th as provided by pooling Order No. 558381.

23) Ward states Antero's witness testified Antero was uncertain about Ward's financial ability. Ward states Antero's witness further testified Antero was concerned if Antero accepted Ward's election to participate Antero would be "stuck holding the bag" should Antero drill a dry hole. Ward argues this is not true. Antero could have enforced the election under the pooling order in district court if it were necessary.

24) Ward argues Antero's witness testified to admitting Antero did not know anything about Ward's financial ability to pay in the three referenced wells where Ward is now a working interest owner with Antero.

25) Ward argues this cause should go "hand in glove" with the Referee Report findings in the Report of the Oil and Gas Appellate Referee filed 8-5-2010 in CDs Nos. 200903641 and 201000195 and the subsequent Order No. 578923.

26) Ward contends Ward has not engaged in a collateral attack on a Commission order. Ward argues the determination of elections is a clarification and construal of an order and as such is not a collateral attack.

27) Ward reasserts there was no private contract in this cause and asks the Commission to find Ward made a valid election to participate in the well in question.

RESPONSE OF ANTERO

1) Antero states Antero paid the higher royalty of 1/4th instead of 3/16th in an attempt to appease Ward, because Antero knew Ward was upset with not participating. Antero states Antero can impose any burden on Ward's interest Antero chooses because Antero acquired that right under pooling Order No. 558381.

2) Antero states the issues that happened in the case at bar took place in 2008. Antero contends the pooling binding agreements with the three referenced wells where Ward participated with Antero, took place in 2010. Antero states Ward outbid Antero for leases that were subject to pooling orders for the three referenced wells.

3) Antero states Rady, testified that after Ward outbid Antero for these three referenced leases, Antero knew "he had some substance" so Antero decided Antero would JIB Ward on those three referenced wells. Antero argues these events took place two years after the facts of the current cause.

4) Antero argues Commission orders have meaning and substance. Antero argues Commission orders "actually impose upon the respondent they have to do certain things." Antero contends once the respondent does not do these certain things, there is a conveyance of the interest by operation of law.

5) Antero argues that pooling Order No. 558381 told Ward what Ward had to do in order to participate and Ward failed to do so. Antero argues if substance is to be given to these Commission orders, the pooling orders must be upheld.

6) Antero alleges the case involving Blue Baron and Marbet (Order No. 578923) is not precedential. Antero argues the present case calls for the Commission to look at the facts of this cause and apply the law.

7) Antero reasserts Antero believes the Commission should reject the ALJ's finding of an apparent private agreement, and adopts the finding in paragraph 12 of the ALJ's Report that Ward is in fact subject to pooling Order No. 558381.

CONCLUSIONS

The Referee finds the Report of the ALJ should be reversed.

- 1) The Referee points out that the Commission has the authority to review the conduct of the parties subsequent to the issuance of a pooling order and determine whether or not that conduct was contemplated by the Commission under the terms of the pooling order and whether such conduct satisfied the terms of the pooling order. *Nilsen v. Ports Of Call Oil Co.*, 711 P.2d 98 (Okl. 1985); *Amarex, Inc. v. Baker*, 655 P.2d 1040 (Okl. 1982); *Cabot Carbon Company v. Phillips Petroleum Company*, 287 P.2d 675 (Okl. 1955).
- 2) It is clear that the Commission has exclusive jurisdiction to determine whether an owner has properly elected to participate under a Commission-issued forced pooling order. *Tenneco Oil Company v. Oklahoma Corporation Commission*, 775 P.2d 296 (Okl. 1989); *Samson Company v. Tenneco Oil Company*, 847 F.2d 650 (10th Cir. 1988); *Centurion Oil, Inc. v. Stephens Production Company*, 857 P.2d 821 (Okl.App. 1993); *Samson Resources Co. v. Oklahoma Corporation Commission*, 742 P.2d 1114 (Okl. 1987); and *Nilsen v. Ports Of Call Oil Co.*, supra at 99.
- 3) The Supreme Court in *Samson Resources v. Oklahoma Corporation Commission*, supra at 115 states:

In the case at bar, the Corporation Commission was called upon to clarify paragraph 4 of its order number 226092, dated October 13, 1982 which states:

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

The issue before the Commission was whether either the letter written by Pettit, the letter written by Samson, or both taken together satisfied the order set out above. As in *Nilsen*, the Commission was

attempting to clarify its order, and therefore we find that jurisdiction was properly before the Commission.

Tenneco Oil Company v. El Paso Natural Gas Company, 687 P.2d 1049 (Okla. 1984) provides:

It cannot be argued successfully or established by the evidence that the forced-pooling order issued herein requires a written notice of election, or any given method for that matter. An election can be written, oral, by estoppel, or according to statute, rule, or regulation, to name but a few methods.

* * *

...the question whether an option holder did timely and effectively exercise his right of election under a pooling order is to be gauged not by the familiar offer-and-acceptance test of the contract law but rather by the holder's compliance with the terms provided in the source by which the right was conferred.

* * *

An election right cannot be conferred by private contract. It must have its genesis in the Commission order. Although by contract the parties may vary a pooling order's election provision, they must do so on due notice to all other interested parties and upon a hearing before, and approval of, the Corporation Commission.

4) In the present case, just as in the *Samson Resources* case, the Commission's jurisdiction has been invoked to determine/clarify whether the actions of Ward since the issuance of the pooling order has satisfied the election provisions of pooling Order No. 558381. Said determination is a matter for the Commission to determine under the public issues concerning conservation of oil and gas.

5) There is a presumption that a Commission order is valid, reasonable and just. 52 O.S. Section 111; *Mustang Production Company v. Corporation Commission of Oklahoma*, 771 P.2d 201 (Okl. 1989).

6) The determination of legislative intent controls judicial statutory construction. Legislative intent is determined from the language of the statute in light of its general purpose and object. We presume that the Legislature intends what it expresses in a statute. *Oglesby v. Liberty Mutual Insurance Company*, 832 P.2d 834 (Okl. 1992)

7) The construction of the pooling Order No. 558381 in question is a question of law for the Commission, as applied to the facts. *Charles v. St. Louis M & S.E.R. Co.*, 101 S.W. 680 (Mo. 1907). The same rules of construction apply to administrative orders, rules and regulations as to statutes. *Mayfield v. H.B. Oil & Gas*, 745 P.2d 732, 735 (Okl. 1987).

8) Any controversy over the meaning and effect of an order must be resolved solely by resort to the face 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.

9) Thus, to accomplish the task of construing or interpreting the prior pooling Order No. 558381, the Commission's inquiry must be confined to the four corners of the judgment roll, examined in light of the applicable statute and case law, as well as the actions of the parties subsequent to the issuance of the pooling order.

10) 25 O.S. Section 1, Chapter 1, Meaning of Terms and Construction of Statutes provides:

Words used in any statute [or Commission order] are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.

11) In the present case the Corporation Commission is called upon to clarify paragraph 6.2 of pooling Order No. 558381, dated August 21, 2008. Paragraph 6.2(i) provides in part as follows:

(i) Participation. To participate in the working interest in and the development of the separate common sources of supply in the drilling and spacing units involved in this cause in the land covered hereby under the plan of development established in this order by agreeing to pay such owner's proportionate part of the actual cost of any well covered hereby and by paying as set forth herein, to Operator, such owner's proportionate part of the \$4,560,112.00 estimated cost of the proposed initial unit well covered hereby, or in lieu of such payment, furnishing to Operator security satisfactory to Operator for the payment thereof within twenty (20) days of the date of this order so as to perfect such election to so participate; such owner's proportionate part of the cost of, and of the production from, any such well to be in the proportion that the number of net mineral acres in the units covered by the drilling rights or working interest owned by such owner bears to the entire number of mineral acres in such units;

12) The language of the pooling order is clear. It is apparent that under pooling Order No. 558381 Ward not only had to elect to participate within 15 days of the date of the order; but within 20 days of the date of the order, Ward had to either pay such owner's proportionate part of the actual cost of the well covered thereby or secure or furnish security for such payment satisfactory to Antero.

13) Thus, under the rules of construction, especially the plain meaning rule, the focus is whether or not Ward's signing of the proposal letter by Antero, dated June 10, 2008; returning an executed AFE to Antero, but not including his share of the completed well costs as required by such proposal letter, satisfied the terms of the pooling order.

14) Ward admits receiving the pooling Order No. 558381, reviewing it and being familiar with the provisions of the order. Paragraph 14 of pooling Order No. 558381 states, "Furthermore, Applicant has made a bona fide effort to reach an agreement with each respondent in this cause, who could be located, as to how the units involved in this cause would be developed..." Paragraph 14 of pooling Order No. 558381 states the Applicant "has been unable to reach an agreement with the owners named and described as respondents in this cause..." Thus the Commission made a final unappealed order and there was no agreement with Ward or any other named respondents. Paragraph 3 of pooling Order No. 558381 states, "Commission has jurisdiction of the subject matter herein and of the persons interested therein and has jurisdiction to

enter this order as hereinafter set forth." The persons interested therein included Ward. In addition, Ward never objected to the findings stated above, never sought to change the findings, and never appealed pooling Order No. 558381.

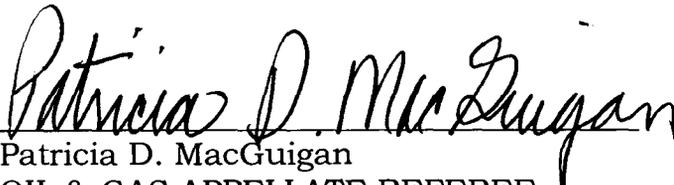
15) The Referee believes the ALJ's finding there was a private agreement is directly contrary to the findings in pooling Order No. 558381 and as such is a prohibited collateral attack. *State v. ex rel. Comm'n of Land Office v. Corporation Commission*, 590 P.2d 674 (Okl. 1979) stands for the proposition that once the Commission meets the three jurisdictional elements as it did in paragraph 3 of pooling Order No. 558381 then you have quasi-jurisdictional facts and even if the Commission was completely in error concerning those quasi-jurisdictional facts, they cannot go back and change it. *Leede Oil and Gas Inc. v. Commission*, 747 P.2d 294 (Okl. 1987). Thus even if there was a finding of a private agreement, it is still a prohibited collateral attack because the jurisdictional elements of the Commission have been satisfied and were not appealed.

16) Thus, the Referee believes it is clear that Ward is subject to the pooling Order No. 558381. Ward was named a respondent and also was served with the pooling application. Ward did not appear at the hearing, did not assert any kind of position that the two parties were in agreement or had a private agreement or wanted to be dismissed from the pooling application, and did not have an attorney come and assert that position at the hearing either. Ward has been in the oil and gas industry since 1974 and is not unsophisticated in the workings of the oil and gas industry. Paragraph 6.2(i) of pooling Order No. 558381 further states if a party elects to participate they must either pay their proportion of the well cost or provide security to the operator's satisfaction within 20 days of the order. Ward admitted to not attempting to pay or attempting to provide any security under pooling Order No. 558381 within that 20 day period of time.

17) The Referee further agrees with the ALJ that Ward could have easily calculated the money to be sent to Antero as Ward received the total cost of the well which was slightly over \$4.5 million in the proposal letter, AFE and easily could have done the arithmetic of Ward's share which would be \$59,767.96. Ward contends that it never attempted to make the calculation or send in the money because Ward was not sure if Antero would recognize the 1.67766 acres which were in probate of Ward's owned total net acres of 8.38828 mineral acres. However, the Referee points out that Ward never tried to send in money for the part of the acreage Ward thought would be recognized by Antero. Lastly, the Referee would point out that if Antero were forced to accept Ward's proposal letter as agreement without payment, all of the risk would fall on Antero.

18) Thus, the Referee disagrees with the Report of the ALJ with regard to the finding by the ALJ that there was a private agreement between Ward and Antero which deprived the Commission of jurisdiction to force pool Ward. In the present case the Referee finds that the Commission does have jurisdiction to determine whether Ward made an election to participate under pooling Order No. 558381. The Referee would find that Ward did not make an election to participate as a working interest owner in the development of the separate common sources of supply in the drilling and spacing units involved in the present cause. Ward is subject to pooling Order No. 558381 and Ward failed to comply with the 6.2(i) provisions of such order and thus Ward is deemed to have elected not to participate as a working interest owner under such order.

RESPECTFULLY SUBMITTED THIS 8th day of August, 2012.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Douglas
Commissioner Anthony
Commissioner Murphy
Jim Hamilton
ALJ Paul Porter
John E. Lee, III
John Reeves
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