

BEFORE THE CORPORATION COMMISSION  
OF THE STATE OF OKLAHOMA

APPLICANT: BRG PETROLEUM LLC )  
)  
RELIEF REQUESTED: VACATE ORDER NO. 600376 )  
)  
LEGAL DESCRIPTION: SECTION 29, TOWNSHIP 20 )  
NORTH, RANGE 5 WEST, )  
GARFIELD COUNTY, )  
OKLAHOMA )

CAUSE CD NO.  
201205042

**FILED**  
MAY 06 2013

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CORPORATION COMMISSION  
OF OKLAHOMA

REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Michael Norris**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 19<sup>th</sup> day of September, 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: **Stephen R. McNamara**, attorney, appeared on behalf of applicant, BRG Petroleum, LLC ("BRG"); **Charles L. Helm**, attorney, appeared on behalf of Longfellow Energy, L.P. ("Longfellow"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") filed his Report of the Administrative Law Judge on the 23<sup>rd</sup> day of January, 2013, 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 8<sup>th</sup> day of March, 2013. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

## **STATEMENT OF THE CASE**

**BRG TAKES EXCEPTION** to the ALJ's recommendation that the application of BRG be denied. Longfellow filed three applications pertinent to a horizontal well they are seeking to drill in Section 29. The first application was a horizontal spacing application (CD 201105948) and Order No. 600376 was issued as a result of the hearing of this cause. A location exception application (CD 201105949) was also filed which led to the issuance of Order No. 600770. Longfellow also filed an application for exception to OCC-OAC 165:5-7-6(h) in CD 201201847.

On March 30, 2012 BRG entered a written entry of appearance in CD 201201847 and on April 27, 2012 BRG entered a notice of protest in said cause. Subsequent thereto, BRG verbally protested CD 201105949 and CD 201105948. BRG's protest in all three cases was acknowledged on a written scheduling form filed on May 7, 2012. All three cases were set on the court's protest document for June 20, 2012. BRG's office was informed on June 19, 2012 that CD 201201847 was going to be dismissed. BRG believed the two related causes would also be dismissed or continued. BRG's attorney did not attend the hearing on June 20, 2012 due to his involvement in a trial based upon his belief that all three cases would be dismissed or continued. On July 30, 2012 the Oklahoma Corporation Commission entered Order No. 600376 in Cause CD 201105948. BRG filed the present application to vacate Order No. 600376 entered in CD 201105948 because BRG continues to protest the relief requested therein.

BRG operates a well in the SW/4 of Section 29 which is producing from the same common source of supply that Longfellow is targeting in their horizontal well in the same section.

### **BRG TAKES THE POSITION:**

1) BRG articulated to the Commission that its producing vertical well will be substantially harmed by the drilling, fracing and completing of the proposed horizontal well at issue. BRG also argued that the proposed vacation of existing vertical spacing units will violate BRG's correlative rights, cause waste, and result in an unconstitutional taking of BRG's vested property rights. BRG desires to make these arguments at a hearing before the Commission.

2) It was undisputed that BRG's counsel was serving as the Presiding Master in an ongoing trial panel of the Professional Responsibility Tribunal in a six (6) week hearing conducted pursuant to 50 O.S. 2001, Ch.1, App.1-A. During the course of that hearing, this matter came up for hearing. BRG's counsel was unable to continue or reschedule the Tribunal hearing and took steps to continue the hearing before the Commission. BRG's counsel verbally

advised opposing counsel of this conflict in advance of the scheduled hearing. The ALJ Report completely ignores this fact.

3) BRG's counsel's office contacted counsel for Longfellow a second time the week of the scheduled hearing and again notified him of the conflict. Prior to that communication, BRG's counsel had verbally advised opposing counsel of BRG's opposition of the proposed Longfellow horizontal well and the proposed spacing application. As a result of these communications, BRG's counsel was under the good faith belief and understanding that all matters relating to the proposed well, including the spacing and location exception applications, would be dismissed or continued to another date. Communication between the lawyers was very clear that BRG was protesting the spacing and location exception (see ALJ Report paragraph 6). Notwithstanding these events, the hearing proceeded with respect to the spacing and location exception applications without BRG, or its counsel, being present.

4) The ALJ erred in determining at Paragraph 4 of his "Recommendations and Conclusions" that "BRG admitted that a Notice of Protest was not filed in the Spacing or the Location Exception. It was also established that BRG did not appear at any of the Motions or hearings in these matters."

5) BRG filed a written Notice of Protest in the Application for Exception to Rule (CD 201201847) in order to negate the written consent it had previously given. BRG verbally protested both the Spacing and the Location Exception. This fact was not rebutted by any statement by Longfellow's counsel. The ALJ Report does not reference any rebuttal testimony. In fact, the Scheduling Form entered on May 7, 2012 in all three cases, clearly indicates that BRG was, on May 7, 2012, a Protestant in all three matters. The Scheduling Order was signed by counsel for Longfellow. Counsel for Longfellow further acknowledged that it sent BRG's counsel the exhibits and a witness list in all three matters prior to a previously scheduled hearing. The existence of the May 7, 2012 Scheduling Form and the exchange of exhibits by Longfellow negates any assertion that Longfellow was "unaware" of BRG's opposition to the relief requested in its spacing and location exception applications or that BRG failed to notify opposing counsel of the protest. Further, the existence of the May 7, 2012 Scheduling Form showing BRG as a Protestant, and Longfellow's exchange of exhibits, negates the AL's assertion in paragraph 4 of the ALJ Report that "if a party does not timely file pleadings or make an appearance to preserve their reasons for opposing a cause, they cannot validly object if it goes forward and is finalized".

6) The ALJ Report further ignores the fact that the underlying causes have a long and tortuous history of continuances. The matters had been continued no less than eight times. A protestant should not be required to spend an

inordinate amount of time determining when and if a matter was actually going to proceed to trial.

7) The ALJ further erred in ignoring the conflict that counsel for the Applicant had with the hearing dates. As the Presiding Master in a Professional Responsibility Tribunal for the Supreme Court, BRG's counsel was involved in an ongoing trial. Longfellow's counsel was aware of this conflict. Standard judicial practice would be for this case to yield to an ongoing proceeding in another matter.

8) BRG's counsel exercised reasonable caution to prevent this result. His office called Longfellow's counsel to determine the status and advise of the existence of the conflict. BRG's counsel's office was informed that the Longfellow matters would be "dismissed or continued off the docket". Longfellow's counsel admits that a telephone conversation occurred. It was altogether reasonable and understandable for BRG's counsel to rely on the information it was provided by his office. Counsel for Longfellow should not have gone forward with the hearing without resolving any ambiguity with respect to BRG's position.

9) The ALJ erred in holding that BRG's Notice of Protest filed in CD 201201847 (Application for Exception to Rule OCC-OAC 165:5-7-6(h)) was somehow separate from BRG's protest of the underlying spacing application (CD 201105948) which was an application to establish horizontal spacing and to vacate existing vertical spacing. The underlying application to establish horizontal spacing and to vacate existing vertical spacing was predicated on OCC-OAC 165:5-7-6(g)(h) and (i). Those rules provide that relief cannot be afforded unless the applicant receives affirmative approval of 50% of the owners of the vertical units. When BRG entered its Notice of Protest in the Exception to Rules, counsel for Longfellow was on notice of BRG's objection and opposition of the establishment of horizontal well spacing. The ALJ Report completely ignores the linkage between the two causes of action. Longfellow's counsel by strategically dismissing the Exception to Rules request, was nonetheless aware of BRG's protest.

10) The ALJ's failure to reopen the record, under these circumstances, has had the effect of adjudicating BRG's correlative rights and vested property interests without affording BRG its right to put on testimony and evidence in opposition. The ALJ has, de facto, granted a default judgment. The consequences to operators in this state of upholding the ALJ Report would be profound. Oklahoma Courts view default judgments with disfavor and have an affirmative policy of affording "every party to an action a fair opportunity to present his side of a cause." *Burroughs v. Bob Martin Corp.*, 536 P.2d 339, 342, (Okl. 1975). The Oklahoma Supreme Court has always emphasized the

discretion vested in the trial judge to vacate default judgments where justice would better be served by permitting a litigant to have his "day in court." *Id.*

11) The ALJ Report shows that the ALJ did not weigh or attempt to weigh the potential harm to Longfellow if the record were to be reopened against the potential impact on BRG's property rights. As the proposed well has not been drilled, the ALJ abused his discretion in not weighing the potential inconvenience of Longfellow against BRG's claims of damages.

12) Constitutional due process is an obligation of this Commission. With all due respect to the ALJ, Protestant's rights will be violated if the ALJ Report is upheld. The Commission must provide a procedural vehicle whereby parties have notice and an opportunity to be heard. BRG, in this matter, is being denied its opportunity to be heard.

13) Regardless of any concern about administrative inconvenience or delay in reopening the record to allow BRG to put on testimony and evidence, both of which would be minimal, it may not be allowed to override the constitutional mandates of due process and the right to be heard. This situation is analogous to *Latson v. Eason*, 311 P.2d 231 (Okla. 1957), where the Oklahoma Supreme Court stated:

"In cases like the present one, where the motion to vacate is seasonably filed after the default judgment, and, as far as the record shows, no rights of strangers to the action have intervened, and the motion to vacate could well be granted without substantial delay or injustice, and denial of the motion may work a serious injustice, such denial constitutes an abuse of discretion and should, under the previous decisions of this court, be reversed on appeal."

14) The Oklahoma Supreme Court has always emphasized the discretion vested in the trial judge to vacate default judgments where justice would better be served by permitting a litigant to have his "day in court." *Burroughs v. Bob Martin Corporation*, *supra* at 342. See also *Midkiff v. Luckey*, 412 P.2d 175 (Okla. 1966) and *Chesnut v. Billings*, 452 P.2d 138 (Okla. 1969).

15) BRG respectfully requests that the Court overrule and reverse the Report of the ALJ.

**THE ALJ FOUND:**

1) In the oral presentations BRG stated that they operate a well in the SW/4 of Section 29 that is producing from the same common sources of supply

that Longfellow is targeting in their horizontal well in the same section. BRG was contacted by Longfellow to sign a consent as a result of their horizontal spacing case which they did. Therefore, BRG did not file a protest initially.

2) Subsequent to signing the consent BRG had conversations with the protestant, David Morgan. BRG then had concerns about the horizontal well possibly coming into the SW/4 where its vertical well was producing. That is when BRG filed a protest and entered an appearance late. At that time a prehearing conference agreement had been signed between Longfellow and the protesting party, Mr. Morgan. Hearing dates had been set and BRG determined that its best option would be to abide by the dates that were set for hearing. BRG agreed that they would live and die with the evidence that the protestant would put on but that BRG would participate in cross-examination.

3) On the hearing date, counsel for BRG was involved in a six week hearing at the professional responsibility tribunal as the presiding mentor. This ongoing matter prohibited his participation in the rule exception cause. He advised counsel for Longfellow of his conflict. The day before the hearing Mr. McNamara instructed his secretary to call Mr. Helm's office and inquire as to the status of the case. It was his understanding that the case would be either dismissed or continued off the docket on the hearing date. He took this to mean the spacing, the location exception and the exception to the rule cases were all to be included. He stated he was mistaken in that assumption. The exception to the rule case was dismissed. The spacing and the location exception were heard on that date as unprotested cases because the parties had reached a settlement. BRG was not aware that the spacing and location exception had gone forward until they received a copy of the spacing order in the mail. Upon receiving the order BRG immediately filed this application to vacate the spacing order and also filed a motion to reopen in the location exception.

4) BRG requests to reopen the record to put on testimony in opposition to the relief requested. They believe that their producing vertical well will be substantially harmed by the drilling, fracing and completing of the horizontal well. They also argue that it will violate their correlative rights. They also believe that the pattern of development will cause waste. BRG intended to make these arguments at the hearing and believed that the matter should have been continued off the docket until counsel was available.

5) After taking into consideration all the facts, circumstances, testimony and evidence presented in this cause, it was the ALJ's recommendation that the application of BRG filed in Cause CD No. 201205042 be denied.

6) BRG agreed to sign the Consent to the Formation of a 640 Acre Horizontal Drilling and Spacing Unit in the horizontal spacing cause CD No.

201105948. They voluntarily consented to the creation of the requested 640 acre horizontal well spacing unit. Subsequent to executing the consent they filed a protest in the waiver of consent cause, CD 201201847. The notice of protest filed by BRG did not indicate any opposition or repudiation of their previously executed consent. BRG admitted that no action has been taken to demonstrate any reason to invalidate said consent. Therefore, at the time of the spacing hearing and order Longfellow was justified in filing the BRG consent. Lack of knowledge or misunderstanding of the statute or rules is not a valid reason.

7) The applicant further admitted that the misunderstanding involving whether the cases would be dismissed or continued off the docket was entirely their mistake. At the scheduled date of the hearings a settlement was negotiated resolving the protest and Longfellow legitimately proceeded to hear the uncontested causes. The orders in these causes were properly obtained and validly entered.

8) BRG admitted that a notice of protest was not filed in the spacing or location exception. It was also established that BRG did not appear at any of the motions or hearings in these matters. If a party does not timely file pleadings or make an appearance to preserve their reasons for opposing a cause, they cannot validly object if it goes forward and is finalized. BRG did not present evidence of any procedural error or violation that would allow the relief they requested.

## **POSITIONS OF THE PARTIES**

### **BRG**

1) **Stephen R. McNamara**, attorney, appeared on behalf of BRG, requested that Order No. 600376 be vacated.

2) Longfellow filed three applications essentially simultaneously to obtain permission from the commission to drill a horizontal well. The three applications were for a 640 acre horizontal spacing, a location exception, and an application for exception to OCC-OAC 165:5-7-6(h).

3) OCC-OAC 165:5-7-6(h) requires at least 50% of the working interest owners in the existing wells and spacing units to consent. BRG signed a written consent, but later realized its rights were going to be affected by the vacation of the vertical spacing unit in favor of the horizontal spacing unit.

BRG verbally revoked its consent and notified Mr. Helm that BRG was protesting all three causes.

4) The issue is whether BRG notified Longfellow of its protest. BRG requests that the Court look at the objective facts present in the record that show BRG was protesting all three applications by Longfellow.

5) There are two objective facts that BRG believes show their protest of Longfellow's applications: 1) The written scheduling order of May 7<sup>th</sup>, signed by Longfellow's counsel Mr. Helm; 2) Longfellow sent BRG a set of exhibits and a list of witnesses that were required by the Prehearing Conference Agreement. BRG argues that these two facts show there was no doubt BRG was protesting all three causes.

6) Mr. McNamara had a conflict with the June 20<sup>th</sup> hearing and could not attend because he was the presiding master at a contentious Professional Responsibility Tribunal of the Oklahoma Bar Association. He advised Mr. Helm that he had the conflict and could not attend the hearing. Mr. McNamara also had his office call Mr. Helm's office the day before the hearing. They were told that the three matters would either be dismissed or continued off the docket for June 20<sup>th</sup>.

7) Mr. McNamara explains that Mr. Helm said later that the exception to the rule, the 50% waiver, would be dismissed or continued off the docket, but not the spacing and location exception applications. Thus, BRG was not allowed to make an appearance to voice objection to the spacing and location exceptions because they went forward as unopposed cases on June 20<sup>th</sup>.

8) BRG did not know the spacing and location exception applications had gone forward on June 20<sup>th</sup> until they received a copy of the order. The ALJ's order did not address the scheduling order from May 7<sup>th</sup> that showed BRG was protesting the three applications.

9) BRG argues that there should be a continuance in a situation where an attorney is involved in a higher priority matter in another court or jurisdiction.

10) The Order No. 600376 establishing the 640-acre spacing unit is predicated on BRG's consent being a valid consent and waiver of the 50% rule. While BRG did sign giving consent to the unit, they later revoked that consent prior to the hearing.

11) BRG would like to reopen the record to make their case that their correlative rights would be seriously impacted by the establishment of this 640 acre spacing unit. Reopening the record would be equitable because no well has been drilled at this date.

**LONGFELLOW**

- 1) **Charles L. Helm**, attorney, appeared on behalf of Longfellow, requesting that the Referee deny BRG's requested relief.
- 2) This case began in November of 2011 and ended in July of 2012 with the final Order No. 600376. Longfellow asserts that during this time BRG never appeared in any hearing nor filed an appearance or interest in the case. BRG also never filed a written or verbal protest in the case. Sometime after the final order was issued, BRG decided to protest the spacing application.
- 3) OCC-OAC 165:5-17-2 describes the actions needed to be taken to vacate a previous order. BRG filed an application to vacate the previous order, but at the hearing before the ALJ they did not present evidence showing that notice was sent to the appropriate parties; that BRG owned the right to drill; that there was publication of notice; and that there has been some change of conditions since the issuance of the spacing order that would allow the Commission to vacate the order. In the hearing before the ALJ, BRG presented no evidence, no witnesses, and no presentation of the required items necessary to perfect this case.
- 4) Longfellow argues that the law is clear that this is simply a collateral attack on a prior Commission order. 52 OS 1971 Section 111 states that no collateral attack shall be allowed upon an order of the Commission where they are trying to determine the validity, justness, reasonableness or correctness of a prior order except by appeal to the Supreme Court.
- 5) Because BRG filed its application but presented no evidence that any of the procedural requirements had been met, this is a prohibited collateral attack and therefore the Commission lacks any jurisdiction to issue an order granting BRG's requested relief.
- 6) The ALJ noted in his Report that BRG admitted that they've never filed any notice of protest in either the spacing or the location exception. The ALJ also noted that BRG failed to present any evidence of any procedural error or violation that would justify their requested relief.
- 7) The sole and exclusive reason that BRG appears on the scheduling form is because they filed an entry of appearance and a protest on the Waiver of Consent application in CD 201201847 when they revoked their previous consent, not the spacing and location exceptions.
- 8) Mr. Helm indicates that Mr. McNamara called in June to inform of his participation in the bar hearing, but said he would call if the bar hearing would impact the June 20<sup>th</sup> hearing. Mr. McNamara never called back until August.

His assistant did leave a message the day before the hearing. Mr. Helm called Mr. McNamara's assistant and told her that the consent application hearing was being dismissed or continued, and it would not be heard.

9) It's unreasonable, unjust, and unfair to require that Longfellow start over in this case just so BRG can now have an opportunity to present evidence that they could not otherwise have presented even if they had shown up at the hearing on June 20<sup>th</sup>.

### **RESPONSE OF BRG**

1) In the hearing in front of the ALJ, BRG did not put on any live witnesses, but BRG argued essentially a Motion to Dismiss and they made a record. The record in the file has a certificate of mailing to all of the respondents listed on Exhibit "A". The file should contain affidavits of publication so that notice was properly given of BRG's Application to Vacate Order No. 600376.

2) BRG argues that it is axiomatic that since they filed a protest in the Waiver of Consent Application (CD 201201847) that they put Longfellow on notice that BRG was also objecting to the establishment of the underlying 640-acre horizontal spacing unit.

3) BRG anticipated that the hearing would occur on June 20<sup>th</sup>, and they were wanting to participate in it. Their argument was going to be that BRG's 80 acre vertical unit didn't have 50% of the working interest owners consent for Longfellow's request for 640 acre horizontal spacing.

4) Mr. McNamara had a good faith belief that all three matters were going to be continued off the docket or dismissed.

5) There is not language in the order that says they satisfied the 50% rule, and the underlying reality and the injustice if this goes forward is that BRG did not give its consent and, therefore, with respect to BRG's unit Longfellow didn't get the 50% and the exception to the rules was dismissed. So how can spacing Order No. 600376 be a valid order?

### **CONCLUSIONS**

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

1) The Referee finds that the ALJ's recommendation to deny the application of BRG to vacate Order No. 600376 is supported by the weight of the evidence and by law.

2) Order No. 600376 is a 640 horizontal drilling and spacing unit order in Section 29, T20N, R5W, Garfield County, Oklahoma. It was issued July 30, 2012 and is a final, unappealed order of the Commission. In the present record, there is no showing of a change of condition or change in knowledge of conditions that would allow modification of said order. The evidence established that Longfellow met all due process concerns by giving the proper notice required by the Commission rules and by law concerning the horizontal drilling and spacing unit request by Longfellow in Cause CD 201105948. Longfellow sought to create 640 acre horizontal spacing for the Cleveland, Oswego, Mississippian and Woodford common sources of supply underlying Section 29. The initial application was filed on November 7, 2011. BRG was a respondent. The initial hearing date was set for December 5, 2011. BRG received actual notice of the initial hearing, the amended hearing, the notice on the motion to set the case on the protest docket and a copy of the final order. There were numerous hearing dates set and during that process BRG never appeared at any of the hearing dates set. BRG nor their counsel ever filed an appearance or an interest in the CD 201201847 horizontal well drilling and spacing case. BRG never filed a written protest in the case.

3) An application was filed by Longfellow for Waiver of Consent Regarding Proposed Spacing for Horizontal Well Unit pursuant to OCC-OAC 165:5-7-6(h) and (i) on March 21, 2012 in Cause CD 201201847. Counsel for BRG filed his entry of appearance in Cause CD 201201847 on March 30, 2012 requesting "copies of all exhibits entered into evidence at this time." A Notice of Protest was entered by counsel for BRG on April 24, 2012 in the Cause CD 201201847 Waiver of Consent case.

4) In the horizontal well drilling and spacing unit case, CD 201105948 and the well location case, CD 201105949, filed by Longfellow the Prehearing Conference Agreement, dated 2-13-2012, only listed Longfellow and the protestant/respondent David E. Morgan, Inc. On March 21, 2012 Longfellow filed the application for Waiver of Consent in Cause CD 201201847.

5) After the protest of BRG in the Waiver of Consent case Cause CD 201201847, a scheduling form was prepared by Longfellow, and filed May 7, 2012 scheduling the protested hearings on June 20-22, 2012 of Cause CD 201105948, the horizontal drilling and spacing unit application; CD 201105949, the well location exception application; and CD 201201847, the Waiver of Consent application. The scheduling form lists the parties of record as Longfellow, David E. Morgan, Inc. and BRG. On the scheduled hearing date of June 20, 2012, the counsel for BRG was involved in a six week hearing at the Professional Responsibility Tribunal as the Presiding Master. BRG's

counsel was unable to continue or reschedule the Professional Responsibility Tribunal hearing and informed Longfellow's counsel of his conflict. The day before the hearing BRG's counsel instructed his secretary to call counsel for Longfellow's office and inquire as to the status of the case. The secretary was informed that the Waiver of Consent application, CD 201201847, was going to be dismissed. BRG's application in the present case states in paragraph 2(a):

Applicant's office was informed on June 19, 2012 that CD 201201847 was going to be dismissed. Applicant believed the two related causes would also be dismissed or continued.

6) The spacing and the location exception cases were heard on June 20<sup>th</sup> as unopposed cases because David E. Morgan, Inc. and Longfellow had reached a settlement. BRG was not aware that the spacing and the location exception had gone forward until they received a copy of the spacing Order No. 600376 in the mail. Upon receiving the Order No. 600376, BRG filed the present application to vacate the spacing Order No. 600376. BRG also filed a motion to reopen in the location exception case.

7) BRG asserts in its present application also in paragraph 2(a) that:

Subsequent thereto, Applicant verbally protested CD 201105949 and CD 201105948. Applicant's protest in all three cases was acknowledged on a written Scheduling Form filed herein on May 7, 2012.

8) Longfellow asserts this is incorrect as the scheduling form included counsel for BRG only because he had filed an entry of appearance in CD 201201847, the Waiver of Consent case, and subsequently filed a protest in said case and that was "the only reason why Longfellow placed BRG on the scheduling form." Longfellow asserts that BRG did not appear on the scheduling form as a result of BRG protesting cases CD 201105948 or CD 201105949 which were the spacing and location exception cases. Longfellow asserts that BRG never verbally protested the spacing and location exception cases and to the contrary signed a Consent To The Formation Of A 640 Acre Horizontal Drilling And Spacing Unit in Cause CD 201105948 acknowledging the OCC-OAC 165:5-7-6(h) requirement of "a total of at least 50% of the ownership having a right to drill in such well and in said developed and producing nonhorizontal 160 acre drilling and spacing unit have consented to the creation of the requested 640 acre horizontal well spacing unit." See Exhibit 7. The consent further states that:

The undersigned is the owner of a portion of the right to drill and the working interest in said existing producing well in the NE/4 SW/4 of said Section 29, and hereby consents to the formation of the 640 acre horizontal drilling and spacing unit comprised of lands described in the caption hereof, for the Cleveland, Oswego, Mississippian and Woodford common sources of supply.

This consent is signed by Stephen R. McNamara on January 5, 2011 on behalf of BRG.

9) In addition, at the September 19, 2012 protested hearing, the lawyer for BRG stated:

The only issue is whether that because I was involved in a proceeding at the Oklahoma Corporation – at the Oklahoma Bar Association and I couldn't be present I advised Mr. Helm that I wasn't going to be present. I was under the mistaken belief that all three of these matters were either going to be dismissed or continued off the docket. That's the long and short of it.

I apologize to the court. My secretary was doing this. In 20-20 hindsight I should have called Mr. Helm and spoken to him over the telephone so these types of misunderstandings would not happen but I was involved in a trial.

So my understanding at – on June 20<sup>th</sup> was that the matters all three matters were going to be continued or dismissed. It turns out they weren't. We're having – we're requesting the opportunity to reopen the record, particularly in the spacing put on record our opposition to the establishment of 640-acre drilling and spacing units in the Mississippian formation when we already have an existing 80-acre drilling and spacing unit in the Mississippian from which we are producing. Thank you, Your Honor. Transcript September 19, 2012, p. 29, line 11-25, p. 30, line 1-7.

10) The only way to avoid a collateral attack on Commission orders (other than showing a jurisdictional defect) is to demonstrate "a substantial change of conditions or substantial change in knowledge of conditions existing in the area since the prior order was entered." *Phillips Petroleum Company v. Corporation Commission*, 482 P.2d 607 (Okl. 1971); *Wood Oil Co. v. Corporation Commission*, 239 P.2d 1021 (Okl. 1950).

11) In *Phillips Petroleum Company v. Corporation Commission*, supra, at 609, 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 reevaluation of the geological opinion concerning the reservoir...

The Supreme Court in *Marlin Oil Corp. v. Corporation Commission*, 569 P.2d 961 (Okl. 1977) further addressed the required showing and stated:

The general rule requiring a change of conditions, or a change in knowledge of conditions as a requisite to modification of an unappealed Commission order has been espoused by a long line of cases. This rule has recently been reiterated by a decision of this court in a case similar to the case at bar, *Corporation Commission v. Phillips Petroleum*, 536 P.2d 1284 (Okl. 1975). In that case Terra Resources applied to Commission to delete the Upper Morrow underlying several sections from the purview of a prior order. It alleged new knowledge of existing conditions, not available at time of prior order, determined the Morrow consisted of two common sources of supply. Commission refused to delete the Upper Morrow from its determination of one common source of supply. Terra appealed and this court affirmed. There was little conflict as to the geological facts, only a conflict as to their interpretation by experts. This court held the same geological facts, although established by

different evidence, were known and recognized at the time the entire Morrow was spaced as a single source of supply, despite the fact geologically separate unconnected accumulations of hydrocarbons existed in the area. Evidence presented by Terra merely confirmed the opinion of the Commission established in the earlier order and did not establish the requisite "change of conditions."

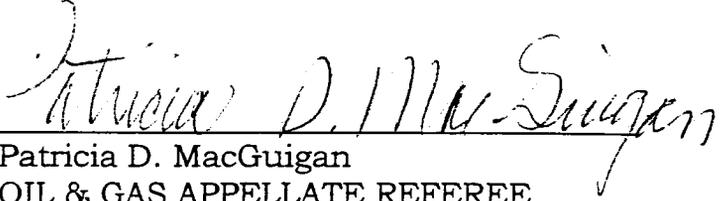
12) BRG further argues that Longfellow did not establish the 50% rule contained in OCC-OAC 165:5-7-6(h) and (i). There is no requirement that you have to have the consent for waiver filed and heard with the spacing. Spacing orders will not become effective until such time as the waiver or consent is obtained as required by OCC-OAC 165:5-7-6. As of January 2013 there have been put in place requirements that horizontal spacing orders should provide more definitive findings of fact and conclusions of law regarding the impact of this rule in a particular cause. Orders should definitely identify pre-existing nonhorizontal wells (if they occur) and the specific steps taken to secure waivers from impacted well owners/operators. If consent has not occurred the order should contain findings regarding the action by the applicant to file a separate cause pursuant to paragraph (i) requesting an order granting a waiver for good cause shown. Order No. 600376 in Cause CD 201105948 was issued on July 30, 2012 and contained the following language:

11. The horizontal spacing requested herein is subject to OCC rules of practice 165:5-7-6(g)(h) and (i).

13) BRG also argues that there is no prejudice against Longfellow if this case is granted as Longfellow has not proceeded to drill any wells concerning this spacing Order No. 600376. Longfellow denies this stating that Longfellow filed an intent to drill in November of 2012 to drill the proposed Peach #28-N4H horizontal well on the E/2 of Section 29. It is on the other side of this section from where BRG owns their interest. Longfellow filed an emergency application but it was protested by BRG and the rig that Longfellow had available was moved to another location. Longfellow also wanted to proceed with drilling after the ALJ denied BRG's present application, but counsel for Longfellow advised that an appeal was scheduled and Longfellow therefore could not drill in Section 29. Also, in May of 2013 a substantial part of Longfellow's lease interest will expire.

14) The Referee believes the facts and law as presented above support Longfellow's position. Therefore, for the above stated reasons, the ALJ's recommendations should be affirmed.

**RESPECTFULLY SUBMITTED THIS 6<sup>th</sup> day of May, 2013.**

  
Patricia D. MacGuigan  
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Douglas  
Commissioner Anthony  
Commissioner Murphy  
Jim Hamilton  
ALJ Michael Norris  
Stephen R. McNamara  
Charles L. Helm  
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