

DA
5-20-14

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

APPLICANT: CHESAPEAKE OPERATING, INC. AND)
 CHESAPEAKE EXPLORATION, L.L.C.)
)
 RELIEF SOUGHT: INTERPRETATION, CLARIFICATION)
 AND SUPPLEMENTATION)
 OF POOLING ORDER NO. 437716,)
 INCLUDING DETERMINATION OF)
 CONTINUING EFFECTIVENESS OF)
 SUCH ORDER AS TO CERTAIN)
 INTERESTS COVERED THEREBY)
)
 LEGAL)
 DESCRIPTION: SECTION 1, TOWNSHIP 2)
 NORTH, RANGE 19 EAST OF)
 THE IM , PUSHMATAHA)
 COUNTY, OKLAHOMA)

CAUSE CD NO.
201305130

FILED
MAY 13 2014

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

REPORT OF THE OIL AND GAS APPELATE REFEREE

On May 5, 2014, Oil and Gas Appellate Referee Ben Jackson heard exceptions to the Report of Administrative Law Judge Paul E. Porter on motions for summary adjudication. The following attorneys entered appearances: John C. Moricoli, Jr., Philip A. Schovanec, Douglas D. Wilguess, Heather A. Garrett and Robert S. Settles for David Joseph O'Connor ("O'Connor"); John R. Reeves, Timothy J. Bomhoff, Robert H. Gilliland, Jr., and Paul D. Trimble for Chesapeake Operating, Inc., and Chesapeake Exploration, L.L.C ("Chesapeake").

Being fully advised of the premises, the Referee recommends that the Commission issue an order rejecting Judge Porter's recommendation and granting summary relief to O'Connor.

Statement of the Case

1. Before Judge Porter, each party presented its motion for summary adjudication of the application, which has yet to undergo a full evidentiary hearing. At the motion hearing, Judge Porter did not take testimony or receive exhibits into evidence. The parties based their motions on Commission records, pleadings and briefs, along with depositions and exhibits from voluntary discovery.
2. This matter arose from a request from the District Court of Pushmataha County. The District Court asked if a pooling order described as Order No. 437716 (January 4, 2000) applied to O'Connor's leasehold interest in the above-captioned Governmental Survey Section ("Section").

3. The GHK Company (“GHK”) was the applicant in the pooling application (Cause No. CD 990003987) and original unit operator. Chesapeake is a lessee-working owner, which acquired interests from Gothic Production Corporation and GHK. Chesapeake merged with Gothic Production Company in 2001, and during 2009, Chesapeake acquired the GHK interests in the Section. Although Chesapeake acquired the interests of the unit operator GHK, Chesapeake is not the unit operator. LRE Operating, L.L.C. currently operates the three unit wells drilled under the pooling order between 2000 and 2006.

4. Under Case No. CJ-2000-175, certain mineral interests covered by O’Connor leases are the subject of a quiet title action in the District Court of Pushmataha County. In 2006, the Oklahoma Supreme Court confirmed the District Court’s holding on the title issue. The lawsuit now focuses on money damages and the scope of an alleged letter agreement between O’Connor and GHK.

5. O’Connor is an independent petroleum land manager, who worked as a petroleum land manager with Union Oil Company of California for twenty-one years, including eleven years in Southeast Oklahoma. O’Connor acquired leases in the Section before filing of the pooling application on November 9, 1999. Copies of the leases appear in Exhibit “A” attached to O’Connor’s Motion for Summary Adjudication. O’Connor’s leases state that they cover eighty acres, but only five of the 80-acres were undisputed, when O’Connor acquired the leases. O’Connor contends that before issuance of the pooling order, he farmed out five-acres to GHK by letter agreement, whereby he received a one-sixteenth of eight-eighths overriding royalty on the five-acres. In 2006, the Oklahoma Supreme Court confirmed a judgment of the District Court quieting title to thirty-five mineral acres in favor of O’Connor’s lessors. As a result, the O’Connor leases now cover forty acres. O’Connor now wants to participate in the three unit wells with the thirty-five acre interest.

6. Chesapeake opposes O’Connor’s participation in the three unit wells. Chesapeake contends that O’Connor is bound by the pooling order to take royalty and overriding royalty and cannot elect to participate.

7. At the Commission, the dispute centers on whether O’Connor made a valid election under the pooling order even though O’Connor was not named as a respondent in the application, notice and pooling order. GHK failed to include O’Connor in the application, even though O’Connor was a lessee of record. GHK never sent O’Connor copies of the pooling application and notice of hearing. GHK never mailed O’Connor a copy of the pooling order.

8. O’Connor did not appear at the pooling hearing on November 30, 1999. Neither GHK nor O’Connor ever contacted the Administrative Law Judge Charles L. Willing about the omission of O’Connor from the application. No one protested the full evidentiary hearing on November 30, 1999. At the end of the uncontested pooling hearing, Judge Willing recommended that the Commission grant the application.

9. After that hearing but before issuance of the pooling order, Kim Swyden, GHK's Land Manager contacted O'Connor with a proposal about the unit well proposed by the GHK pooling application. Swyden negotiated an agreement with O'Connor to accept terms per the pooling order. O'Connor sent a letter to GHK dated December 14, 1999 ("Letter of December 14, 1999"). A copy of the letter appears as Exhibit No. 3 in the Appendix to Chesapeake's Response to O'Connor's Motion for Summary Adjudication and Cross-motion for Summary Adjudication. The Letter of December 14, 1999 advises GHK that O'Connor wants to make a "voluntary election" and receive overriding royalty per the terms of the pooling order. O'Connor and Chesapeake disagree over what is covered by the private agreement. O'Connor denies that he was ever pooled and contends that the letter is an election under the letter agreement for only five-acres. Chesapeake contends that the Letter of December 14, 1999 is a valid election under the pooling order for O'Connor's entire interest of forty-acres. Chesapeake contends that O'Connor submitted to the pooling order by mailing a copy of the letter to the Commission's Court Clerk, who has no record of receiving the document. Chesapeake lacks proof of delivery to the Court Clerk, but contends that the Commission must accept extrinsic evidence of the document. The Letter of December 14, 1999 appears in Commission files as a replacement copy filed by Chesapeake on August 20, 2013.

10. On January 4, 2000, the Commission issued the pooling order with a fifteen day election period. After issuance of the pooling order, no one filed any post-order motion or application to include O'Connor in the pooling order. No one appealed the order to the Oklahoma Supreme Court. The order became final and unappealable, unchanged since its issuance on January 4, 2000.

11. On March 21, 2000, GHK filed with the County Clerk of Pushmataha County an affidavit of elections under the pooling order. A copy of the affidavit appears as Exhibit No. 4 attached to Chesapeake's Response to O'Connor's Motion for Summary Adjudication and Cross-motion for Summary Adjudication. The GHK affidavit of March 21, 2000 lists O'Connor's interests under "interests acquired outside this order," i.e., interests acquired outside of the pooling order. On May 14, 2004, GHK filed a corrected affidavit of elections, showing the O'Connor interest as subject to a letter agreement. The corrected affidavit of March 14, 2004 appears as Exhibit No. 5 attached to Chesapeake's Response to O'Connor's Motion for Summary Adjudication and Cross-motion for Summary Adjudication. .

12. Between 2000 and 2006, GHK drilled three productive, vertically completed gas wells. The well completion reports (OCC Form 1002A) appear in Exhibit No. 6 attached to Chesapeake's Response to O'Connor's Motion for Summary Adjudication and Cross-Motion for Summary Adjudication. Although completion intervals differ between wells, all production comes from common sources of supply subject to the pooling order, basically the Stanley formation and Jackfork Series.

13. GHK did not seek a “cleanup pooling, ”i.e., a separate and subsequent pooling proceeding to address any interest omitted by the prior pooling order.

14. Before Judge Porter, Chesapeake presented four theories on how the pooling order covered O’Connor’s entire forty-acre interest. First, the Letter of December 14, 1999 covered the entire interest of forty acres. Second, O’Connor made the original five-acre election under the Letter of December 14, 1999, and a thirty-five-acre default election by failing to make a new election on the thirty-five acres in 2006. Third, O’Connor’s had the original five-acre election and a thirty-five-acre default election passed to him by his lessors. Fourth, O’Connor ratified the pooling order or confessed to its validity by receiving distributions of production proceeds on a forty-acre basis.

15. On April 3, 2014, Judge Porter issued his report recommending that the Commission side with Chesapeake. Judge Porter concluded that O’Connor’s letter of December 14, 1999 made O’Connor a party of record subject to the pooling order and that by and through that letter, O’Connor elected to receive an overriding royalty interest over and above the royalty burden on his leasehold. Along that line, Judge Porter found that O’Connor’s election under the pooling order covers the full forty acres based on the terms of the election letter and also because of O’Connor’s receipt of proceeds of production on a forty-acre basis.

16. O’Connor filed exceptions to Judge Porter’s report.

Referee’s Findings

1. When GHK filed its pooling application on November 9, 1999, an objective of the application was to pool the interests of what turned out to be O’Connor’s lessors. Discovery of O’Connor’s leasehold interests after the pooling hearing presented GHK with three choices: GHK could move to reopen the evidentiary hearing; GHK could enter into a private agreement with O’Connor outside of Commission jurisdiction; or GHK could seek a “cleanup pooling” after issuance of pooling order. GHK chose not to postpone acquiring a commitment on the O’Connor interests. The Corrected Affidavit of Elections points to a letter agreement, for which we do not have the details. Nevertheless, the ongoing District Court suit shows that a controversy exists over the scope of the letter agreement. In that controversy, Chesapeake is asking the Commission to adopt its position that the O’Connor interests are subject to the pooling order.

2. At the Commission, the pooling related dispute centers on three jurisdictional issues: (1) did O’Connor’s conduct submit his interests to the pooling order; (2) should the Commission consider the default election of O’Connor’s lessors; and (3) did O’Connor become bound by the pooling order by accepting production proceeds?

3. Granting summary adjudication is appropriate only if there is no genuine issue of material fact and the movant is entitled to an order as a matter of law. *Tucker v. Special Energy Corp.*, 2008 OK 57, ¶7, 187 P.3d 730, 733.

4. Under 52 O.S. Section 112, the Commission has jurisdiction to interpret, clarify, amend and supplement its own orders. *New Dominion, L.L.C. v. Parks Family Co.*, 2008 OK CIV APP 112 ¶4 fn4, 216 P.3d 292, 295.

5. Order No. 437716 is a final order, which became final and unappealable by operation of law. Ok. Const. Art. IX, §20, 52 O.S. 2011 §113 and 12 O.S. 2011 §990.2 set a thirty day limit for an appeal to the Oklahoma Supreme Court. No one launched a direct attack by appeal. Neither the Oklahoma Constitution nor Statutes provide for a delayed attack on a Commission order, and Ok.. Const. Art. IX, § 20 and 52 O.S. 2011 § 111 prohibit a collateral attack. A collateral attack is an attempt to avoid, defeat, evade, or deny force and effect of a final order in an incidental proceeding other than by appeal, writ of error, certiorari, or motion for new trial. *Harding & Shelton, Inc. v. PITCO*, 2005 OK CIV APP 88 ¶20 , 123 P.3d 56, 65; *Kaneb Prod. Co. v. GHK Expl. Co.*, 1989 OK 11, 769 P.2d 1388, 1391.

6. However, the prohibition against collateral attack does not prevent inquiry into the Commission's jurisdiction where the questioned ruling is relied upon in a subsequent proceeding. *Id.*, pp. 1391 and 1392. In a collateral proceeding, review of the prior order is confined to the face of the judgment roll or record. *Id.*, p. 1392

7. O'Connor and Chesapeake disagree over what constitutes the record in the GHK pooling application. Chesapeake wants to include the Letter of December 14, 1999, even though the letter did not appear in Commission records until August 20, 2013.

8. Exhibit B to the O'Connor's Motion for Summary Adjudication is a certified copy of the record in Cause CD No. 990003987. The documents in Exhibit B fail to mention O'Connor anywhere. The failure to mention O'Connor shows a defect in personal jurisdiction that appears on the face of record. Cf. *Anson Corp. v. Hill*, 1992 OK 138 ¶11, 841 P.2d 583, 587. In *Anson*, the jurisdictional defect was lack of notice. The Oklahoma Supreme Court found that the jurisdictional defect was apparent from the face of the record, because the record failed to establish that the respondents received the required notice. The same reasoning should apply here. The record clearly fails to show that O'Connor was ever a party to the GHK pooling application before the pooling order became final and unappealable.

9. Chesapeake contends that the Letter of December 14, 1999 had four effects: The Letter of December 14, 1999 is part of the judgment roll. It made O'Connor a party of record in the GHK pooling application. It submitted him to Commission jurisdiction and waived any notice requirement. And, it showed that O'Connor made an election under the pooling order for his entire interest.

10. Contrary to Chesapeake's contention, the Commission cannot presume that the Court Clerk either lost or misfiled the Letter of December 14, 1999. The Court Clerk has no record of the document. Chesapeake lacks proof of delivery or receipt. No one has a file stamped copy showing that the document was filed any time before August 20, 2013. The record does not show that either Judge Willing or the Commissioners relied on the Letter of December 14, 1999. Neither the exhibits nor the Judge Willing's report refer to the Letter of December 14, 1999. The facts fail to show that the pooling order fails to correctly show the Commission's decision. Based on the undisputed facts, the Commission must conclude that the Letter of December 14, 1999 was not a part of the record in Cause CD No. 990003987.

11. In effect, Chesapeake is trying to add a party to the pooling by adding the Letter of December 14, 1999, after the evidentiary record closed. Adding another party after the fact would alter the interests covered by the pooling order. At the end of the fifteen day election period under the pooling order, the interests under the pooling order vested and were beyond the Commission's power to change. *Harding & Shelton, Inc. v. PITCO*, 2005 OK CIV APP 88 ¶18, 123 P.3d 56, 62. *SKZ, Inc. v. Petty*, 1989 OK 150, 782 P.2d 939, 943. Chesapeake's attempt to add the O'Connor interests after expiration of the election period is an impermissible collateral attack.

12. Chesapeake seeks to introduce the Letter of December 14, 1999 through extrinsic evidence. Judge Porter and Chesapeake rely on a series of cases holding that under the Commission's statutory power to clarify an order (52 O.S. 2011 §112), the Commission may consider extrinsic evidence to decide a controversy over whether a person made a valid election under a pooling order. However, each of those cases assumes that a person making an election was already subject to a pooling order. Here, GHK took none of the steps to pool O'Connor's interests under 52 O.S. §87.1(e).

13. O'Connor was not an indispensable person for an application brought under 52 O.S. 2011 §87.1(e). GHK had the discretion to omit O'Connor from the pooling application, and GHK chose to do so. To become a party of record, O'Connor needed to obtain an order granting intervention. By omitting O'Connor, Order No. 437716 was not defective, because it addressed all issues before the Commission, when the order issued and became effective. O'Connor could only become subject to the pooling order through amending the pooling order. If GHK or O'Connor had proceeded timely, the Commission could have issued such an order upon motion or application after notice and hearing. OAC 165:5-9-4, 165:5-17-1 and 165:5-17-2. However, neither GHK nor O'Connor moved to either reopen the evidentiary hearing or amend the pooling order to include the O'Connor interests among what was pooled. As noted above, at the end of the fifteen day election period, the interests under pooling order vested and were beyond the Commission's power to change. When the thirty day appeal period ended, the Commission could only amend the pooling order only upon a showing a change in conditions or knowledge of conditions. *SKZ*, pg. 943.

14. If the Commission never pooled O'Connor's interest, then the increase in his leasehold interest in 2006 has no effect on the pooling. O'Connor was not required to make a second election as submitted by Chesapeake.

15. On pages 21-23 of Chesapeake's Response to O'Connor's Motion for Summary Adjudication and Cross-Motion for Summary Adjudication, Chesapeake contends that the default elections of O'Connor's lessors covered O'Connor's interests. In that regard, Chesapeake's argument assumes the Heirs of Gracie Renegar owned something that could be pooled. It is submitted that if the Renegar heirs owned something that could be forced pooled, then that interest passed under the pooling order not to O'Connor but to those who elected to participate under the pooling order. In any event, the Commission need not solve the problem of the alleged unknown and undetermined heirs and interests. The Commission lacks jurisdiction to determine the effect of its order on a legal title to property. *Tucker v. Special Energy*, 2008 OK 57 ¶10, 187 P.3d 730, 733.

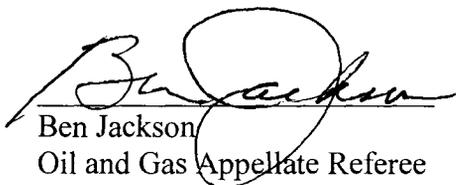
16. In its last argument, Chesapeake contends that O'Connor accepted production proceeds on a 40-acre basis per the pooling order and consequently accepted the benefits of the pooling order thereby waiving any right to appeal there from. Chesapeake relies on *Tara Oil Co. v. Kennedy & Mitchell, Inc.*, 1981 OK33, 622 P.2d 1076 (Okla. 1981). The principle of law stems from at least *City of Lawton v. Ayres*, 1914 OK 139, 139 P. 963 (Okla. 1914), where the Oklahoma Supreme Court said that any act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver to appeal there from, or to bring error to reverse it. In other words, voluntary compliance with a court's order bars subsequent review. The modern rule in Oklahoma is that unless the payment of a final judgment is shown to be made with the intent to compromise or settle the matter and thus, to abandon the right to appeal, the payment will not be deemed to either waive the right to appeal or moot the controversy. *Grand River Dam Authority v. Eaton*, 1990 OK 133, 803 P.3d 709, 710. The obvious problem here is that the pooling order never applied to O'Connor's interest. There was nothing to compromise or settle. GHK distributed production proceeds by private arrangement outside of Commission jurisdiction. Therefore, the doctrine does not apply.

Recommendation

Based on the foregoing findings, the Referee disagrees with Judge Porter and concludes:

- (1) The Commission must deny Chesapeake's motion for summary adjudication, because it is an impermissible collateral attack on a facially invulnerable order; and (2) the Commission should grant O'Connor's motion for summary adjudication, because the undisputed facts show that Order No. 437716 never applied to O'Connor's property interests.

Respectfully submitted,


Ben Jackson
Oil and Gas Appellate Referee

Date: 5/13/2014

BJ

Xc: Commissioner Anthony
Commissioner Douglas
Commissioner Murphy
Jim Hamilton
ALJ Paul E. Porter
John C. Moricoli, Jr.
Philip A. Schovanec
Douglas D. Wilguess
Heather A. Garrett
Robert S. Settles
John R. Reeves
Timothy J. Bomhoff
Robert H. Gilliland, Jr.
Paul D. Trimble
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