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5-6-14

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

FILED
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CORPORATION COMMISSION
OF OKLAHOMA

<u>APPLICANT:</u>	DEVON ENERGY PRODUCTION COMPANY, L.P.)	
)	
)	
<u>RELIEF SOUGHT:</u>	POOLING)	CAUSE CD NO.
)	201306241
)	
<u>LEGAL DESCRIPTION:</u>	SECTION 23, TOWNSHIP 19 NORTH, RANGE 1 WEST, PAYNE COUNTY, OKLAHOMA)	
)	
)	

**REPORT OF THE OIL AND GAS APPELLATE REFEREE ON AN
ORAL APPEAL OF A MOTION TO DISMISS**

This Cause came on for hearing before **David D. Leavitt**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 25th day of November, 2013, 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: **David E. Pepper**, attorney, appeared on behalf of applicant, Devon Energy Production Company, L.P. ("Devon"); **Gregory L. Mahaffey**, attorney, appeared on behalf of B&W Operating, L.L.C. and B&W Exploration, Inc. ("B&W"); and **Jim Hamilton**, Deputy General Counsel for Deliberations, filed notice of appearance.

The Administrative Law Judge ("ALJ") filed his Report of the Administrative Law Judge IN Response to Motion to Dismiss on the 10th day of January, 2014, 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 25th day of February, 2014. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

DEVON APPEALS the ALJ's recommendation in response to a motion to dismiss filed by B&W.

On July 5, 2013, the Commission issued Order No. 613484 establishing 640 acre horizontal drilling and spacing units for the Big Lime, Oswego, Mississippian, Woodford, Misener-Hunton, Sylvan and Viola common sources of supply underlying all of Section 23, T19N, R1W, in Payne County, Oklahoma.

On September 18, 2013, the Commission issued Order No. 616078 pooling the Big Lime, Oswego, Mississippian, Woodford and Misener-Hunton common sources of supply underlying all of Section 23, T19N, R1W, in Payne County, Oklahoma. B & W Operating, L.L.C. ("B&W") was designated the operator under the order.

Devon subsequently filed a Motion to Reopen and Stay Issuance of the Order. The Commission issued Order No. 618256 denying the Motion and the Stay on November 19, 2013. Devon then filed its Application to pool the Big Lime, Oswego, Mississippian, Woodford, Misener-Hunton, Sylvan and Viola common sources of supply underlying all of Section 23, T19N, R1W, Payne County, Oklahoma. The Application allegedly named more respondents to be pooled than were pooled under Order No. 616078.

On November 6, 2013, B&W filed its Motion to Dismiss Devon's Application, alleging it to be an impermissible collateral attack upon pooling Order No. 616078, and the Motion was heard by ALJ David D. Leavitt.

DEVON TAKES THE POSITION:

- 1) The ALJ Report is contrary to the law, contrary to the evidence and fails to effect the means of prevention of waste and protection of correlative rights.
- 2) The ALJ Report overlooks the clear evidence that a subsequent pooling is necessary as acknowledged by B&W as set forth in paragraph 3 of the ALJ Report. B&W acknowledged that Devon's application was appropriate as limited to Respondents 21 and 22.
- 3) The ALJ Report fails to acknowledge that the respondents that were unpooled in the prior pooling need to be pooled as to the Mississippian and Woodford. Failure to include the Mississippian and Woodford does not pool the

appropriate common sources of supply, and therefore would be of no force and effect.

4) Wherefore, Devon requests that the Report of the ALJ be overturned and that Devon be allowed to proceed with their pooling application.

THE ALJ FOUND:

1) Based upon the testimony and arguments presented during the hearing, the ALJ recommended the following:

a) that B&W file a "clean-up" pooling application to pool the Big Lime, Oswego Mississippian, Woodford, and Misener-Hunton common sources of supply underlying all of Section 23, T19N, R1West, in Payne County, Oklahoma with respect to the respondents not named in the original pooling, namely, the Estate of Agnes Gaffney and George Gaffney, the Estate of Kenneth E. Reynolds, and Sooner Trend Leasing, LLC; and

b) that Devon's pooling Application in this present cause be amended to pool only the Sylvan and Viola common sources of supply underlying all of Section 23, T19N, R1W, in Payne County, Oklahoma, and that B&W be named the operator under the order to be issued.

POSITIONS OF THE PARTIES

DEVON

1) **David E. Pepper**, attorney, appearing on behalf of Devon, stated this case is about a pooling application. Devon filed a Motion to Re-open and Stay the issuance of the B&W pooling application, due to a belief that entitled parties were left off of the B&W pooling as well as the need to include additional common sources of supply. That motion was denied. Devon has now filed its own pooling application on the same unit to insure the inclusion of those parties and sources. In addition, Devon has filed an application to vacate and/or change operators under B&W's original pooling Order No. 616078. The Devon pooling application is set to be heard on the protest docket and ALJ Leavitt's present ruling stems from the B&W Motion to Dismiss the Devon pooling application.

2) The ALJ issued a recommendation, from the B&W Motion to Dismiss the Devon pooling, that B&W file an amended pooling application in order to "clean up" the parties in question and that Devon file a pooling application

limited to the Sylvan and Viola common sources of supply with operator being B&W.

3) Devon owns a large percentage of this unit and this ruling will essentially remove any standing that Devon may have regarding its protest operator issue. The crux of the protest is which company should be named as operator, and this ruling names B&W operator. Since this ruling will dispose of the issues outlined, and prevent Devon from presenting evidence about why it should be named operator of this unit, Devon asks that this ruling be overturned and Devon be allowed to proceed with its pooling application.

4) This unit contains several common sources of supply, some of which B&W does not have plans to drill. B&W wishes to drill into the Mississippi, which is a shallower formation than Devon would like to drill. Devon has plans to drill not only the Mississippi, but the deeper formations of the Woodford, the Sylvan and the Viola. That is why Devon has filed its own pooling application on this unit. The deeper formations require additional parties to be included in the pooling, and those parties were not included within the B&W pooling application.

5) Devon requests that the ALJ ruling be reversed and the Devon pooling application be allowed to be heard on the protest docket as scheduled.

B&W

1) **Gregory L. Mahaffey**, attorney, appearing on behalf of B&W, stated the Devon pooling is an impermissible collateral attack on a final and unappealed order. Devon attempted to re-open the B&W pooling cause unsuccessfully, and failed to appear or make a protest on that cause when the matter was initially heard before the Commission.

2) B&W has a title opinion that it relied upon to complete the pooling application. That opinion contained three parties which Devon believes were not included properly in the B&W pooling order. Those parties are respondents #21, #22, and #23 to the B&W pooling application. Respondent #21 leased its interests and that lease was assigned to Devon and Devon has elected to participate in the well. The B&W title opinion shows that respondents #22 and #23 have no ownership interest in the unit and were therefore removed from the pooling.

3) The ALJ recommended that B&W amend its pooling application to include respondents #22 and #23 as curative in order to "clean up" the pooling.

B&W has agreed to do this. The ALJ believed that this would avoid any collateral attack on the pooling order.

4) In *Harding & Shelton, Inc. v. Sundown Energy, Inc.*, 130 P.3d 776 (Okl.Civ.App. 2006) as well as *Amoco Production Company v. Corporation Com'n of State of Okl.*, 751 P.2d 203 (Ok.Civ.App. 1986), the Court held that poolings are to be done on a unit basis and there can be only one pooling. A second pooling constitutes an impermissible collateral attack unless there has been a change in conditions or knowledge of condition sufficient to render a modification to the order.

5) Devon is claiming that they now have a greater ownership interest in this unit; however, there is case law that says a mere change in ownership is not a change of condition sufficient to modify the pooling order or change the operator of a unit.

6) Devon also wishes to drill a well into the Woodford formation. This again is not a sufficient change in condition. The existing order allows for subsequent wells to be drilled and any participant in the well may propose additional wells. Since Devon has elected to participate in this well, Devon is allowed to propose subsequent wells.

7) This cause has been heard by the Commission. Devon failed to appear, or make any protest, to the B&W pooling application until after the order had been issued. Devon failed at its attempt to re-open that cause and the Devon pooling application on this same unit is an impermissible collateral attack on the B&W pooling order. For these reasons the ALJ ruling should be affirmed.

RESPONSE OF DEVON

1) There can be more than one pooling if the original pooling did not name all of the parties in the unit being pooled.

2) Devon believes those respondents #21, #22, and #23 need to be named specifically in this pooling. The title opinions relied upon by B&W and Devon differ as to the ownership interests of these respondents.

3) Devon wishes to cure the defects in the existing pooling which failed to properly include respondents #21, #22 and #23.

4) The ALJ ruling should be reversed and allow Devon's present pooling application to be set on the protest docket.

CONCLUSIONS

The Referee finds that the Report of the Administrative Law Judge in Response to Motion to Dismiss should be affirmed.

- 1) The Referee finds that the ALJ's recommendation is supported by applicable law and free of reversible error.
- 2) In *Harding & Shelton, Inc. v. Sundown Energy, Inc.* 130 P.3d 776 (Ok.Civ.App. 2006) the Court held:

When considering whether to grant or deny an application to pool common sources of supply, the Corporation Commission possesses "incidental" authority to determine whether a prior pooling order was still effective as to the applicant's interest. *Buttram Energies Inc. v. Corporation Commission of State of Okl.*, 1981 OK 59 ¶7, 629 P.2d 1252, 1254.

* * *

In the present case, Applicants, as successor lessees of 480 acres of the 640 acre unit previously pooled, sought to both re-pool the formations covered by the 1985 pooling order, and to pool previously unpooled formations underlying the same 640 acres. The prior pooling order constitutes a final determination of the rights and obligations of any present or future holders of a mineral interest in the affected common source(s) of supply, because to hold otherwise would cast the established rights and obligations of any holder of a mineral interest in a previously pooled common source(s) into chaos every time there was a change in ownership of mineral or leasehold rights in any pooled formation. Applicants must be held to have obtained their lease(s) subject to the terms of the prior pooling order.

See also *Sundown Energy L.P. v. Harding & Shelton, Inc.*, 245 P.3d 1226 (Ok. 2010); *Amoco Production Company v. Corporation Commission of State of Oklahoma*, 751 P.2d 203 (Ok.Civ.App. 1986), (approved for publication by the Oklahoma Supreme Court).

3) Devon argues that respondents #21, #22 and #23 listed in the present Devon pooling application were omitted and not pooled in the previous B&W pooling Order No. 616078. The title opinions which are relied upon by Devon and B&W differ as to the ownership interest of these respondents. B&W argues that respondent #21 leased his interest and that lease was assigned to Devon and Devon has elected to participate in the well. The B&W title opinion shows that respondents #22 and #23 have no ownership interest in the unit and therefore were removed from the previous B&W pooling in Cause CD 201305247 which resulted in pooling Order No. 616078. The resolution of quiet title disputes lies within the jurisdiction of the district court, not the Commission. Therefore, the ALJ recommended "that B&W file a "clean-up" pooling application to pool the Big Lime, Oswego, Mississippian, Woodford, and Misener-Hunton underlying all of Section 23, Township 19 North, Range 1 West, in Payne County, Oklahoma with respect to the Respondents not named in the original pooling," i.e. Respondent #21, the Estate of Agnes Gaffney and George Gaffney, Respondent #22, the Estate of Kenneth E. Reynolds, and Respondent #23, Sooner Trend Leasing, L.L.C.

4) The Referee agrees with the above listed recommendation by the ALJ. Only upon proper proof of a change of condition, or a change in knowledge of condition, can the Corporation Commission modify or vacate a prior pooling order. 52 O.S. Section 112; *Anson Corp. v. Hill*, 841 P.2d 583 (Okl. 1992); *Mustang Production Co. v. Corporation Com'n of the State of Oklahoma*, 771 P.2d 201 (Okl. 1989). As a proof of such a change of condition or knowledge of conditions, orders of the Corporation Commission effecting the development of common sources of supply constitute a final adjudication of the rights and obligations of the common source mineral interest holders, and once rights are fixed under such orders, those orders are not subject to a later collateral attack. 52 O.S. Section 111; *Eason Oil Co. v. Howard Engineering, Inc.*, 801 P.2d 710 (Okl. 1990). Thus, the Referee agrees with the ALJ that the preferred way to correct this particular situation would be for B&W to file a "clean-up" pooling application as suggested by the ALJ naming the three Respondents #21, #22 and #23.

5) It is also the Referee's opinion that this particular procedure to add the possible mineral interest owners would be the most efficient and economical judicial way to proceed. Any operations issues between B&W and Devon can be addressed in the Devon application to vacate and/or change operators under B&W original pooling Order No. 616078. See *Liberty Nat. Bank and Trust Co. of Oklahoma City v. Garcia*, 776 P.2d 1265 (Okl. 1989); *Gettler v. Cities Service Co.*, 739 P.2d 515 (Okl. 1987); *Christian v. Gray*, 65 P.3d 591 (Okl. 2003); *Patel v. OMH Medical Center, Inc.*, 987 P.2d 1185 (Okl. 1999).

6) Further, the Referee would affirm and agrees with the ALJ's recommendation that Devon's pooling application in the present cause be amended to pool only the Sylvan and Viola common sources of supply

underlying all of Section 23 with B&W being named operator. Again, the issue of judicial efficiency and economy warrant the ALJ's recommendation concerning this issue.

7) Therefore, based upon the proceeding rationale and law, the Referee recommends that the Report of the Administrative Law Judge in response to Motion to Dismiss be affirmed.

RESPECTFULLY SUBMITTED THIS 29th day of April, 2014.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Anthony
Commissioner Douglas
Commissioner Murphy
Jim Hamilton
ALJ David Leavitt
David E. Pepper
Gregory L. Mahaffey
Office of General Counsel
Michael L. Decker, OAP Director
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