

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

**COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA**

APPLICANT: CURTIS AND PAM TOEWS, TILLEY)
OIL & GAS, INC., EVA ROBISON)
AND LEONARD ROBISON)
) CAUSE CD NO.
RELIEF SOUGHT: DRILLING AND SPACING UNITS)
) 201306995
LEGAL DESCRIPTION: SECTION 28, TOWNSHIP 24)
NORTH, RANGE 4 WEST,)
GARFIELD COUNTY, OKLAHOMA)

APPLICANT: CURTIS AND PAM TOEWS, TILLEY)
OIL & GAS, INC., EVA ROBISON)
AND LEONARD ROBISON)
) CAUSE CD NO.
RELIEF SOUGHT: EXCEPTION TO OCC-OAC 165:5-)
7-6) 201400721
LEGAL DESCRIPTION: SECTION 28, TOWNSHIP 24)
NORTH, RANGE 4 WEST,)
GARFIELD COUNTY, OKLAHOMA)

REPORT OF THE OIL AND GAS APPELLATE REFEREE

These Causes came on for hearing before **Susan R. Osburn**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 13th day of March, 2014, 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: **Richard J. Gore**, and **Gregory L. Mahaffey**, attorneys, appeared on behalf of applicants, Curtis and Pam Toews, Tilley Oil & Gas, Inc., Eva Robinson and Leonard Robinson ("Toews"); **J. Fred Gist**, attorney, appeared on behalf of Plymouth Exploration, LLC ("Plymouth"); **James R. Cox**, attorney, appeared on behalf of Charlene Gae and Don O. Nelson, Trustees of the Charlene Gae Nelson Trust, dated May 31, 2001 ("Nelson"); **William H. Huffman**, attorney, appeared on behalf of Wicklund Petroleum Corporation

("Wicklund"); and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") filed her Report of the Administrative Law Judge on the 5th day of May, 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 27th day of June, 2014. After considering the arguments of counsel and the record contained within these Causes, the Referee finds as follows:

STATEMENT OF THE CASE

WICKLUND APPEALS the ALJ's recommendation to grant the applications in CD 201400721 and CD 201306995 of the Toews for horizontal 640-acre units for the Mississippi and Woodford and exception to OCC-OAC Rule 165:5-7-6. These are applications to respace the Mississippi and Woodford on a 640-acre horizontal basis for further development and for waiver of consent requirement. Applicant Toews has tried to lease his interest which is in the E/2 NE/4 of Section 28 and, because of agreements between Wicklund and Plymouth, Toews has been unable to do so. Toews believes it would be in the best interest of all parties if this is spaced on a 640-acre horizontal basis so development could commence and it would avoid waste by being able to drill in the center of the section if necessary to develop the reserves. Toews also seeks a waiver of the consent requirement from parties in the existing Robinson #1-28 well. Toews is unable to obtain that consent because parties in that well are also protestants to the 640-acre horizontal spacing requested here. Wicklund believes that the same type of development can occur on a 320-acre basis and would have a lesser impact on diluting their interest than the 640-acre requested spacing. Since Wicklund owns in the SE/4, their interest would be diluted only by one-half if the section is spaced 320-acre horizontal standup, but would be diluted to only one-fourth of the revenues produced if it is spaced on a 640-acre horizontal basis.

WICKLUND TAKES THE POSITION:

- 1) Wicklund alleges the Report of the ALJ is both contrary to the law and the evidence.
- 2) The ALJ's Report fails to protect the owners in the common sources of supply and fails to protect correlative rights of the owners in the common sources of supply and hydrocarbons therein.

3) The expert witnesses agreed that no Mississippi horizontal well will drain in excess of 160 acres. In addition, Toews and the experts agreed there would be no contribution of hydrocarbons from the Toews property to a well drilled in the W/2 of Section 28.

Curtis Toews testified that he believed there will be development in the W/2 of Section 28 and if he can get the section spaced on 640 acres, he can share in that production and potentially lease his acreage.

4) Dan Rieneke, a petroleum engineer, testified that he agreed with the Applicants expert that any hydrocarbons from the Toews property that migrated to the west would be produced by the Garber well in the W/2 NE/4 of Section 28. There would be no contribution of hydrocarbons from the Toews property to a horizontal well in the W/2 of Section 28. He believes the Toews minerals have been fully developed by the Garber well,

Undisputed testimony was presented that the E/2 of Section 28 has been developed and drained, thus limiting the number of wells in the E/2. In addition, he has consulted on many Mississippi horizontal wells and the frac design is to go out 600 feet and cover an area of 145 acres. To place a well any closer than 1,320 feet apart, would create interference. When asked about a placement of wells commencing 330 feet from the unit boundary and 660 feet apart, he stated that under that scenario, you would not have a well running down the center of the section. This type of well placement fits a 320-acre unit and minimizes the impact on correlative rights.

5) The 640-acre unit will allow owners in the W/2 to share in reserves taken from the Robinson unit without the risk and expense incurred by the Robinson owners to prove up the reservoir. Those reserves have vested in the Robinson owners and the proposed spacing divests those owners of their rights. The proposed spacing violates the correlative rights of the Robinson owners.

6) The ALJ makes no finding that the refusal to consent is without foundation or is good cause indicated for the exception. There is no finding that the recommendations serve to protect correlative rights or in anyway serve to prevent waste.

7) Legal Authority: OCC-OAC rule 165:5-13-5 et. seq.

8) Wicklund requests that the Oklahoma Corporation Commission reverse the recommendations of the ALJ, deny the exception to the rule and establish 320-acre drilling and spacing units for the Mississippian common source of supply.

THE ALJ FOUND:

1) It is the recommendation of the ALJ that the application in CD 201306995 requesting that the Commission enter an order: (A) amending the provisions of Order No. 149617, which order established 80-acre drilling and spacing units for the production of oil from the Mississippi Lime common source of supply, to delete said common source of supply underlying the SW/4 of said Section 28; (B) amending the provisions of Order No. 560794, which order established 160-acre drilling and spacing units for the production of gas from the Woodford common source of supply, to delete said common source of supply underlying the SE/4 of said Section 28; (C) extending the provisions of Order No. 598041, which order established 640-acre horizontal drilling and spacing units for the production of oil from the Mississippi and Woodford common sources of supply to cover and include said Section 28, T24N, R4W, Garfield County, Oklahoma, be granted. It is the recommendation of the ALJ that the application in CD 201400721 requesting the Commission enter an order granting Toews an exception to the horizontal well spacing requirement in OCC-OAC Rule 165:5-7-6(h) for the Mississippi common source of supply be granted.

2) Toews seeks to space the Mississippi and Woodford on a 640-acre horizontal basis to encourage further development, thereby avoiding waste for this section. Based on the experience of Mr. Toews, he believes further development will not occur if such respacing does not occur. Based on the existence of an agreement between Wicklund, an operator of the existing Mississippi vertical well in the SE/4 of Section 28, and Plymouth, an interested party in this case, Mr. Toews has been unable to get Plymouth nor any of the other operators he has approached to develop the Mississippi and Woodford reserves in Section 28. Upon filing of the application, Wicklund protested and apparently in recognition of the need for horizontal development has recommended in the alternative 320-acre horizontal spacing for the Mississippi and Woodford. Experts for both Toews and Wicklund agree that until they have production from horizontal wells in Section 28, no one knows exactly how many wells will be necessary to develop those reserves available in Section 28, nor will they know where best to locate such wells. Both sides agree that horizontal Mississippi wells that they are familiar with in Garfield County and in adjacent sections drain less than 640 acres and that a number of horizontal wells will probably be necessary regardless of unit size. The question then becomes which spacing size will result in the most efficient development. Toews points out that 640-acre horizontal development will afford the longest lateral and most flexibility in locating the wells necessary to develop this section. Wicklund notes 640-acre horizontal development will dilute their interest in sharing revenue more than their recommended 320-acre horizontal spacing.

3) Experts for Toews and Wicklund disagree as to the location of the most productive Mississippi, with Toews believing the Mississippi would be productive throughout, especially given the modern fracing techniques available. Wicklund's expert testimony was that the best productive Mississippi is in the upper 70 feet. Experts do not always agree about interpretation of the reservoir, but here at least both sides seem to agree some type of horizontal development would be most appropriate to obtain the reserves available.

4) There has been vertical Mississippi production in both the E/2 and W/2 of Section 28, and based on the drainage calculated by Toews' engineer, there are remaining reserves available for horizontal development. Both engineers believe drainage will come mainly from naturally occurring fractures in these formations. Both of the engineers have said they cannot know the number of wells nor the locations those wells should be drilled until there is some horizontal production data available from this section. Wicklund's engineer first said he believed the E/2 of Section 28 was better than the W/2 since it has two wells still currently producing there, however he later said the E/2 would be less attractive than the W/2 because the wells in the E/2 have poorer quality rock. It is hard to tell which half of the section he would characterize as better than the other. Toews' engineer believed that the entire Mississippi underlying Section 28 would be ripe for development through fracture treatments and the ALJ agrees. The history of development of both the Mississippi and Woodford indicate better recovery will occur through horizontal development. It is the opinion of the ALJ that 640-acre horizontal spacing will lead to the drilling of longer laterals and more efficient development of the Mississippi and the Woodford. There have been both 640 horizontal and 320 horizontal spacings of the Woodford and Mississippi in offsets. It is the recommendation of the ALJ that the applications be granted, authorizing spacing of the Mississippi and Woodford on a 640-acre horizontal basis with location set-back for each zone as recommended by Toews. It is the further recommendation that the 640-acre horizontal spacing supersede the existing spacing of the Mississippi where no production from that zone in those spaced units exists and the spacing exists concurrently with the Mississippi spacing in those units where Mississippi is productive. As to the request for an Exception to OCC-OAC rule 165:5-7-6, it is the recommendation of the ALJ that such Exception be granted. Toews has about 30% of the necessary consent but the owner of the remaining requisite percentage of agreement to the 640-acre horizontal spacing is the protestant and the likelihood of them voluntarily relinquishing such consent is remote. Therefore, in order to promote the development of the reserves in this section, it is the recommendation of ALJ that the request for Exception to OCC-OAC rule 165:5-7-6 in Cause CD 201400721 be granted.

POSITIONS OF THE PARTIES

WICKLUND

- 1) **William H. Huffman**, attorney, appearing on behalf of Wicklund, states that Wicklund is opposed to this application for 640-acre drilling and spacing units for the Mississippian and Woodford common sources of supply. Wicklund is particularly interested in the Mississippian. Initially, Plymouth applied for a standup 320-acre drilling and spacing unit for the Mississippian common source of supply, which Toews protested. Wicklund supports Plymouth's application, opposes Toews' 640-acre application, and requests affirmative relief for the establishment of standup 320-acre units.
- 2) Wicklund notes they filed an application for a location exception to drill a well in conjunction with Plymouth's application. The spacing plat shows a 320-acre spacing to the east, to the southeast, and to the south, as established by either Wicklund or Plymouth.
- 3) Wicklund argues, based on the testimony of petroleum engineer Dan Rieneke that the two wells located in the E/2 of Section 28 have sufficiently drained E/2 of the E/2. Toews owns the E/2 of the NE/4 of Section 28, where there is a well that was produced to completion and then plugged. To the west, the Garber well, located in the NE/4, is near depletion.
- 4) Wicklund notes that Mr. Tilley's property, leasehold covering the Garber well in the W/2 NE/4, is near depletion, as their own experts testified. Mr. Tilley would like to share in a well in the W/2.
- 5) Wicklund notes Plymouth approached Toews to lease his interest; in turn Toews contacted Wicklund to solicit a bid from them. Wicklund was not interested because they were developing the Robinson well. Plymouth then lost interest in leasing.
- 6) Wicklund notes Toews testified that he tried to lease his interest and was unable to do so, which Toews attributed to an agreement between Wicklund and Plymouth. Toews admits he knows nothing about the agreement and he has no knowledge of what the terms or conditions are with regard to that particular agreement.
- 7) Wicklund notes that Toews would share in production if the E/2 of Section 28 develops further, or that he could lease to another party, or could drill and produce the land himself.

8) Wicklund notes that Toews, knowing Plymouth wishes to produce the area, wants a 640-acre drilling and spacing unit so that Plymouth would be forced to lease Toews and give him the opportunity to share in production in the W/2.

9) Wicklund notes the Toews expert's drainage calculations from the various wells used an average reservoir thickness of 300 feet; however, the ALJ found that experts agree that only about 70 feet of the Mississippian interval is productive reservoir rock. Also, the Toews' expert only looked at one of the five wells drilled in the immediate area.

10) Wicklund directs the court's attention to the testimony of petroleum engineer, Dan Rieneke, who stated that if hydrocarbons begin to move, the Garber well would intercept them before they reached the W/2. Also, a fracking program extends 600 feet and should not overlap with other completed fracks for fear of watering out; no one would put a horizontal well within about 1200 feet from another horizontal well, making it unlikely a well would be put in the E/2, but would rather be located further away from drained areas.

11) Wicklund notes that Mr. Rieneke testified that only one well would be drilled in the E/2 of Section 28; the spacing and the frack programs would allow room for approximately two wells in the W/2 of Section 28.

12) Wicklund notes according to 52 O.S. Section 87.1 the Commission, in determining the proper spacing and drilling units, should determine them with due and relative allowance for the correlative rights and obligations of the producers and royalty owners interested therein.

13) Wicklund examines correlative rights by relying on *Layton v. Pan American Petroleum*, 383 P.2d 624 (Okl. 1963) which states a statute authorizing the Commission to regulate production of oil and gas so as to prevent waste and secure equitable apportionment among the owners of the leasehold interest of oil and gas underlying their lands and to fairly distribute among them the cost of production and of apportionment as a proper exercise of the police power and does not violate the provisions of the State and Federal constitutions. The Commission has to secure equitable apportionment of the production of the oil and gas among the various owners, but in this case Toews will not contribute hydrocarbons to any wells that are drilled in the W/2.

14) Wicklund argues there are correlative rights issues raised: it is the Commission's duty to allocate the production among the contributing parties, and overwhelming evidence shows Toews would not contribute any hydrocarbons to a well drilled and produced in the W/2 of Section 28.

15) Wicklund examines fair and equitable share of production by relying on *Application of Peppers Refining Co.*, 272 P.2d 416 (Okl. 1954) which states that it is more important to secure to each lessor, lessee and owner of the

mineral rights in a field his ratable share of the production therefrom and to prevent underground waste than it is to secure to some the maximum profits from drilling and producing operations. The goal is to secure an owner's fair and equitable share of production, but Toews wants to dilute Wicklund's share of production and to claim a share of production to which they are not going to contribute.

16) Wicklund notes the main reason the ALJ agreed that the section needs 640-acre spacing is Towes' claim that the parties do not know where wells should be placed, and they need flexibility in placements of wells, potentially having a well located in the middle of Section 28. However, Towes agrees there is 70 to 120 acres of drainage per well. Three wells in the W/2 would drain around 345 acres. Two wells in the E/2 would negate the need of having wells located in the center of Section 28.

17) Wicklund argues that giving operators flexibility in the placement of their well is not a criterion for creating a drilling and spacing unit. A drilling and spacing unit is created to allow people to equitably share in production – those people that contribute are those people that get to share. The evidence was unanimous here that Toews would not share in any well production in the W/2 because he would not contribute any production to the W/2.

18) Wicklund notes that the recommendation of the ALJ should be reversed and 320-acre drilling and spacing units should be established. This unit size matches the pattern that is used with actual drilling in this area for this common source of supply, and it is a pattern that most equitably distributes the production and the revenue for the various owners.

TOEWS

1) **Richard J. Gore**, attorney, appearing on behalf of Towes, notes that the ALJ made the decision in accordance with the evidence that was presented to her at the hearing. Wicklund elected to put on no fact witness, and offered no evidence to disprove that there is a general agreement between Plymouth and Wicklund not to lease Toews. The Report of the ALJ should be affirmed.

2) Toews argues that the contract between Plymouth and Wicklund is preventing development. Mr. Toews testified that due to an agreement with Wicklund, Plymouth could not lease him.

3) Toews argues that Wicklund does not want to develop the E/2 of Section 28 where the Robinson well drains 7.5 acres, which is uncontested by Wicklund and confirmed by Towes' expert.

- 4) Toews notes that Wicklund has had the Robinson well in the SE/4 since 2009 without having recompleted their well, despite the fact that it was not fracked with sand and only drains 7.5 acres. Wicklund wants to keep 320-acre drilling and spacing units because they are uninterested in leasing the other parties in the E/2 and are not interested in drilling another well.
- 5) Toews argues there is zero evidence in the record concerning depletion of the E/2. Wicklund made several comments about drainage, claiming that the Toews' property has been depleted, however the petroleum engineer, Mr. Rieneke, who testified to the depletion did no drainage study.
- 6) Toews notes that they represent the entire E/2 of Section 28, not only that portion owned by the Toews that Wicklund refers to. The Toews own the E/2 NE/4, Tilley owns the W/2 NE/4, and the Robinsons own the SE/4.
- 7) Toews directs the court's attention to the testimonies of both petroleum engineers, Dan Rieneke and Jon Stromberg, stating that neither party has any idea what a horizontal well is going to do in this section, or how many wells it will take, or what they are going to drain until at least one well is drilled.
- 8) Toews notes that 640- acre drilling and spacing units will prevent waste, which, according to case law, waste is predominant over correlative rights. It is also important to minimize the number of wells while getting all reserves and all the production.
- 9) Toews notes that 320- acre drilling and spacing units limit the ability of operators to place the wells. Two 320- acre drilling and spacing units create competition with each other and a buffer zone between them. Having an odd number of wells required to drain the section (70-120 acres of drainage per well, 9-5 wells to drain entire section), it is more likely you are going to need a well in the middle of Section 28.
- 10) Toews notes that Mr. Rieneke flip-flopped during testimony about which side of Section 28 would be better to produce, as noted by the ALJ. The W/2 had two wells that were completed, produced, and plugged. Mr. Rieneke initially stated that the E/2 is better because the wells there are still producing, but then stated the rock is not as good in the E/2, so maybe the W/2 is better.
- 11) Toews notes that, while not mentioned in the evidence, a 640- acre drilling and spacing unit can minimize expenses, allowing the parties to use a single saltwater disposal well for all the wells and one tank battery.
- 12) Toews notes the ALJ stated that the only real issue Wicklund has was that their interest would be diluted if a 640-acre drilling and spacing unit is used as opposed to a 320-acre drilling and spacing unit. Interest being diluted has nothing to do with correlative rights or waste.

13) Toews notes the ALJ noted that both sides agree horizontal development is appropriate and agree with the Toews' engineer, Mr. Stromberg, who stated that the whole section is ripe for development due to horizontal technology and fracture treatment.

14) Toews notes there is another application about waiving the consent requirement. Due diligence was exercised in finding all parties, a bona fide effort was made to obtain those percentages, but there is no alternative method of developing here because getting consent from Wicklund is remote. The ALJ recommended that the waiver be granted.

15) Toews takes issue with the statement that only 70 feet of the Mississippian would be productive. A party does not know which parts of the formation is going to be productive or good until a well is drilled.

16) Toews notes the closest thing he found to a case talking about small versus large spacing is *Ward v. Corporation Commission*, 470 P.2d 993 (Okla. 1970).

RESPONSE OF WICKLUND

1) Wicklund notes that Toews' statement that Section 28 will not be developed unless there is a 640-acre drilling and spacing unit ignores the fact that Plymouth proposed the drilling of the well in the W/2 of the section, and if not for Toews' protest there might be a well drilled today (There was no evidence in the record that Toews protested the cause, but that the causes were dismissed).

2) Wicklund argues that the Robinson well was fracked by injecting acid to dissolve limestone and open the channels, a technique used on a lot of wells around here. It is now believed that it is more effective to use sand. The geologist testified that there are behind pipe reserves, which Wicklund could produce in upper zones. It is inaccurate to use 7.5-acre drainage because the entire interval has not been fully developed.

3) Wicklund notes that the ALJ said the Toews' expert testimony was that the best productive Mississippi is in the upper 70 feet; that was the only geologist that testified in the particular case.

4) Wicklund argues that the parties overlooked some issues regarding well placement: there is a rule that a well cannot be placed within 600 feet of another well. With two wells on the E/2 (Garber and Robinson wells), it is limited where you can place a horizontal well. Toews claims that they can place the well 300 feet from the Robinson well without creating a problem.

However, placing a well 300 feet away from a producing well and using a frack plan that extends out 660 feet could potentially frack all the way through, or damage the Robinson well. Wells have to be placed 1,320 feet away from each other to keep from interfering. This type of frack would allow for one well in the E/2 due to the location restrictions on well placement.

5) Wicklund notes that both operators have disposal wells in this area and that it is not an issue in this case.

6) Wicklund argues that by using inference, Toews did not use well data in the immediate area because they only used wells with the longest production, but avoided closer wells with data that did not help their case.

7) Wicklund argues that the Toews and the ALJ said that 30% of the parties in the Robinson well agreed to the horizontal 640. 70% did not agree because 70% understand the circumstance with regard to the creation of the 640-acre drilling and spacing unit.

8) Wicklund argues lessors have the right to demand additional development, but there is no evidence that additional development was ever demanded by lessors upon Wicklund or Plymouth. The parties must first pursue their rights under the oil-and-gas lease before they can come to the Commission and upset the equities and correlative rights of all the owners in the unit.

9) Wicklund notes the small versus large spacing case mentioned by Toews, *Ward v. Corporation Commission*, supra, was a dispute over what zone in the Hunton formation was being produced from the particular well, and that both parties agreed that 640-acre drilling and spacing unit was appropriate.

10) Wicklund examines the issue over size of units, 640-acre versus 320-acre, in *Hladik v. Lee*, 541 P.2d 196 (Okla. 1975), in which the Supreme Court said that 52 O.S. Section 87.1 indicated that the Commission may limit the size of a drilling and spacing unit on the grounds that one well will not effectively drain a larger tract and a larger drilling and spacing unit might not assure maximum ultimate recovery of minerals.

11) Wicklund cites *Shell Oil Company v. Davidor and Davidor*, 315 P.2d 259, (Okla. 1957), a case that determined a 320-acre drilling and spacing unit should be established because the Commission found that one well would not drain 640 acres, and would more accurately drain 320 acres. Shell argues that this decision was not economic, but the court stated that economics of the operator is not the consideration.

12) Wicklund notes that this case is about underground waste and leaving reserves in the ground, not economic waste of the operator. There may be an additional well and economic waste on the part of the operator, but the

evidence and the drainage calculations presented show that the appropriate size unit for Section 28 is 320-acre drilling and spacing units.

CONCLUSIONS

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

1) The Referee finds that the ALJ's recommendation that the application in CD 201306995 requesting that the Commission enter an order: (A) amending the provisions of Order No. 149617, which order established 80-acre drilling and spacing units for the production of oil from the Mississippi Lime common source of supply, to delete said common source of supply underlying the SW/4 of said Section 28; (B) amending the provisions of Order No. 560794, which order established 160-acre drilling and spacing units for the production of gas from the Woodford common source of supply, to delete said common source of supply underlying the SE/4 of said Section 28; (C) extending the provisions of Order No. 598041, which order established 640 acre horizontal drilling and spacing units for the production of oil from the Mississippi and Woodford common sources of supply to cover and include said Section 28, T24N, R4W, Garfield County, Oklahoma, be granted is supported by the weight of the evidence, by law and free of reversible error. The Referee also finds that the recommendation of the ALJ that the application in CD 201400721 requesting the Commission enter an order granting Toews an exception to the horizontal well spacing requirement in OCC-OAC 165:5-7-6(h) for the Mississippi common source of supply be granted is supported by the weight of the evidence, by law and free of reversible error. The ALJ found that prevention of waste is paramount in the Commission's duties and must override the protection of correlative rights when in conflict.

2) Toews in Commission hearings seeking relief has two burdens: the burden of persuasion (that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose); and the burden of production (a party's obligation to come forth with evidence to support its claim). *Director, Office of Workers' Compensation Program, Department of Labor v. Maher Terminals, Inc.*, 512 U.S. 267, 272, 275 (U.S. 1994).

3) In order to modify spacing Order No. 149617 for 80-acre drilling and spacing units for the production of oil from the Mississippi Lime common source of supply and in order to modify Order No. 560794 for 160-acre drilling and spacing for the production of gas from the Woodford common source of supply and respace Section 28 on a 640-acre basis by extending the provisions of Order No. 598041 which order established 640-acre horizontal drilling and spacing units for the production of oil from the Mississippi and Woodford common sources of supply to cover and include Section 28, it was incumbent

upon Toews to establish a substantial change of conditions or change in knowledge of conditions since the issuance of the prior orders. *Corporation Commission v. Phillips Petroleum*, 536 P.2d 1284 (Okl. 1975); *Marlin Oil Corporation v. Corporation Commission*, 569 P.2d 961 (Okl. 1977).

4) If Toews were successful in establishing a substantial change of conditions or change in knowledge of conditions, then Toews was required to prove that its particular method of modifying the spacing orders would prevent waste and protect correlative rights. 52 O.S. Section 87.1(d); *Corporation Commission v. Union Company of California*, 591 P.2d 711 (Okl. 1979); *Kuykendall v. Corporation Commission*, 634 P.2d 711 (Okl. 1981); *Union Texas Petroleum, A Div. of Allied Chemical Corporation v. Corporation Commission of State of Oklahoma*, 651 P.2d 652 (Okl. 1981); and *Winter v. Corporation Commission*, 660 P.2d 145 (Okl.Civ.App. 1983). The Court in *Denver Producing & Refining Company v. State*, 184 P.2d 961 (Okl. 1947) held:

In most instants it is impossible to use a formula which will apply equally to all persons producing from a common source. In striking a balance between conservation of natural resources and protection of correlative rights, the latter is secondary and must yield to a reasonable exercise of the former.

5) Since applicants are seeking to vacate 160-acre Woodford spacing underlying the SE/4 of Section 28 and to vacate 80-acre Mississippi spacing underlying the SW/4 of Section 28 the evidence reflected that the change of conditions since those orders issued, in 2008 for the Woodford and 1979 for the Mississippi Lime, was the advent of horizontal drilling and a need for long laterals to produce reserves. Long laterals cannot be drilled on 80 or 160-acre units and thus a change of condition has occurred warranting the vacation of those earlier spacing orders and the respacing for horizontal units for the Mississippi and the Woodford. The question then becomes which spacing size, 640-acre horizontal development or 320-acre horizontal development, would result in the most efficient development and prevent waste.

6) The evidence reflected that the experts for both Toews and Wicklund agreed that until they have production from horizontal wells in Section 28, no one knows exactly how many wells will be necessary to develop those reserves available in Section 28, nor will they know where best to locate such wells. Based on the best horizontal Mississippi well in Garfield County, as shown on Exhibit 5, it could take five wells, but based on the worst wells in the county it could take anywhere from 7 to 13 wells. If the 320-acre horizontal standup units were established, it would be difficult to place the wells as it would prevent one from drilling a well down the middle of Section 28 and it would be difficult to drill an odd number of wells. The 640-acre horizontal spacing for the Mississippi and Woodford would give more flexibility to locating wells to

develop the reserves the evidence reflected. The Referee agrees with the testimony of Toews that the 320-acre standup horizontal units could cause overdevelopment if one 320-acre unit has three wells, then the owners in the offset 320-acre horizontal unit would probably want to match that and it would lead to overdrilling and waste. The 640-acre horizontal spacing would yield more flexibility for locating wells and thereby avoid overdrilling and waste.

7) While the testimony of the experts on both sides disagreed as to the location of the most productive Mississippi, the evidence reflected that they agreed that some type of horizontal development would be the most appropriate to obtain the reserves available. The evidence reflected that there was some disagreement between Toews' engineer and Wicklund's engineer as to whether the E/2 of Section 28 was better than the W/2 of Section 28. Toews' engineer believed that the entire Mississippi underlying Section 28 would be ripe for development through fracture treatments and the ALJ agreed with that determination. The Referee agrees with the conclusion of the ALJ that the history of development of both the Mississippi and Woodford common sources of supply indicate that greater recovery will occur through horizontal development.

8) It was the opinion of the ALJ that 640-acre horizontal spacing would lead to the drilling of longer laterals, more efficient development of the Mississippi and the Woodford and prevent waste. The Referee agrees with the ALJ's determination.

9) The Supreme Court in *Sundown Energy, L.P. v. Harding & Shelton, Inc.*, 245 P.3d 1226, (Okl. 2010) stated:

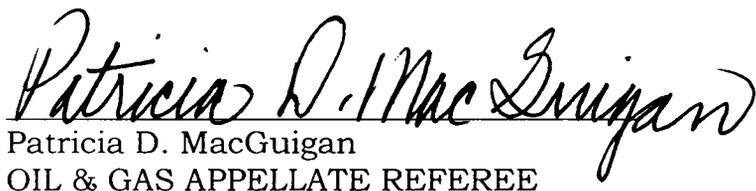
¶9 The Commission has a wide discretion in the performance of its statutory duties, and this Court may not substitute its judgment upon disputed factual determinations for that of the Commission but is restricted to a determination of substantial evidentiary support for the order issued under authority of the statutes. *Union Texas Petroleum v. Corporation Com'n.*, 1981 OK 86, ¶31, 651 P.2d 663; *In re: Application of Continental Oil Company*, 1962 OK 131, 376 P.2d 330. Searching a record for substantial evidence supporting the order appealed does not entail a comparison of the parties' evidence to determine that which is most convincing but only that the evidence supportive of the order be considered to determine whether it implies a quality of proof inducing a conviction that the evidence furnished a substantial basis of facts from which the issue could be reasonably resolved. *Union Texas Petroleum v. Corporation Com'n.*, 1981 OK 86, ¶31, 651

P.2d 663, *Chenoweth v. Pan American Petroleum Corp.*, 1963 OK 108, 382 P.2d 743. Substantial evidence has been additionally outlined as something more than a scintilla; possessing something of substance and of relevant consequence carrying with it a fitness to induce conviction, but remains such that reasonable persons may fairly differ on the point of establishing the case. A determination of substantial evidentiary support does not require weighing the evidence but only a measurement of the supportive points to determine whether the criterion of substantiality is present. *Union Texas Petroleum v. Corporation Com'n*, 1981 OK 86, ¶31, 651 P.2d 663 *Central Okla. Freight Lines v. Corporation Com'n*, 1971 OK 877, 484 P.2d 877, 879.

10) The Referee agrees with Toews that they presented substantial evidence that 640-acre horizontal spacing is more economical, better suited to full recovery of hydrocarbons and a better protection against waste. The Referee would therefore affirm the recommendation of the ALJ to grant Toews' proposed 640-acre horizontal spacing for the Mississippi and Woodford as provided by the ALJ in her Report. The Referee would also affirm the recommendation of the ALJ that the 640-acre horizontal spacing supersede the existing spacing of the Mississippi where no protection from that zone in those spaced units exist and the spacing exists concurrently with the Mississippi spacing in those units where Mississippi is productive. The Referee would also affirm the recommendation of the ALJ that the request for exception to rule in CD 201400721 be granted as the Toews have about 30% of the necessary consent, but the owner of the remaining requisite percentage of agreement to the 640-acre horizontal spacing is Wicklund and the likelihood of them relinquishing such consent is remote.

11) For the above stated reasons the Referee would recommend that the Report of the ALJ should be affirmed as the best choice considering the totality of the circumstances.

RESPECTFULLY SUBMITTED THIS 1st **day of** **August, 2014.**


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Anthony
Commissioner Douglas
Commissioner Murphy
Jim Hamilton
ALJ Susan R. Osburn
Richard J. Gore
Gregory L. Mahaffey
J. Fred Gist
James R. Cox
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