

DECISION SHEET OF THE OIL & GAS APPELLATE REFEREE

APPLICANT: CARL E. GUNGOLL)
EXPLORATION, L.L.C.)
RELIEF SOUGHT: MODIFICATION OF POOLING) CAUSE CD NO.
ORDER NO. 616690) 201406049
LEGAL DESCRIPTION: SECTION 6, TOWNSHIP 18)
NORHT, RANGE 1 WEST,)
PAYNE COUNTY, OKLAHOMA)

FILED

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**ORAL APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S
RULING ON A MOTION TO PRODUCE**

Michael L. Decker, Administrative Law Judge, for Corporation Commission of the State of Oklahoma, heard the above motion on the 14th day of October, 2014, at 9 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 purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Gregory L. Mahaffey**, attorney, appeared on behalf of applicant, Carl E. Gungoll Exploration, L.L.C. ("Gungoll"); **Michael D. Stack**, attorney, appeared on behalf of Devon Energy Production Co., L.P. ("Devon"); and **John R. Reeves**, attorney, appeared on behalf of TipTop Energy Production US, L.L.C. ("TipTop").

The Oral arguments on the Oral Appeal/Exceptions were referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 24th day of October, 2014. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

On October 14, 2014, the Movants presented their request for an order of the Commission requiring the production of "[a]ll agreements between (Devon and

TipTop) regarding payment of costs to drill, complete and operate wells in the subject section."

The arguments of the parties indicated the potential existence of a joint operating agreement (JOA) for Section 6-18N-1W, Payne County, Oklahoma, as well as various non-specified agreements between Devon and TipTop covering the development of mineral rights involving the entities in Oklahoma and several states. At one point, some of the general agreements were characterized as "area of mutual interest" agreements, about which the Movants' disclaimed any interest.

The Protestants opposed the motion for several reasons, but primarily on the bases: (1) The claimed confidential nature of the business relationship between Devon and TipTop; (2) The alleged failure of the application for order modification to meet the jurisdictional requirement of showing a change of condition or a change of knowledge of condition subsequent to the issuance of Order No. 616690.

The Motion was taken under advisement with the purpose to review previously admitted exhibits in the application and to review cases referred to by the parties.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

- 1) **ALJ Michael Decker** recommended that that the Motion for Production of Documents filed by the Movants, Gungoll, be GRANTED IN PART, and DENIED IN PART.
- 2) Based upon the arguments of the parties on October 14, 2014, the ALJ recommends the motion be granted so that the Movants be provided a copy of the JOA Devon and TipTop covering Section 6-18N-1W, Payne County, Oklahoma. The motion should be denied with respect to request for copies of any other "area of mutual interest" agreements or other agreements described by the TipTop attorney covering its general participation with Devon in Oklahoma and other states. The Movants should be provided the copy of the JOA within five days of the Commission's order for production.
- 3) The JOA for Section 6-18N-1W, Payne County, Oklahoma should be considered a discoverable business record pursuant to OCC-OAC 165:5-11-1(b)(3). JOAs are not typically considered confidential business records in Commission proceedings.

4) Such status as a discoverable business record is underscored by the decision of the Oklahoma Court of Civil Appeals in *NBI Services, Inc. v. Corporation Comm.*, 2010 OK CIV APP 86, 241 P.3d 685, ¶11 18-22, where the court reversed the Commission's order and remanded a pooling application with instructions for the Commission to determine if the terms of the JOA resulted in jurisdiction over certain parties named as respondents in the proceeding.

5) Based upon the October 14, 2014 statements by the counsels for the Movants and TipTop, the status of TipTop as a party subject to the instant application is an unresolved question of fact. The Commission has jurisdiction pursuant to *NBI Services*, to consider the terms of the JOA and decide if TipTop's interest is or is not subject to the pooling order modification application.

6) The ALJ recommends that the JOA for Section 6-18N-1W, Payne County, Oklahoma, be considered evidence "relevant to the subject matter, or may reasonably lead to such evidence" pursuant to OCC-OAC 165:5-11-1(b)(3). In the case of *Lear Petroleum Corp. v. Seneca Oil Co.*, 1979 OK 15, 590 P.2d 670, ¶¶16-20, the court recognized that participating working interest owners under a pooling order can be permitted to reach agreements with an operator regarding modified terms of payment for well costs. Also, the court in *Tenneco Oil Co. v. El Paso Natural Gas Co.*, 1984 OK 52, 687 P.2d 1049, ¶¶26-28, held that participating working interest owners under a pooling order for a spacing unit can alter or further define the relationship with the unit operator through execution of JOAs.

7) The terms of the JOA for Section 6-18N-1W, Payne County, Oklahoma, perhaps will have relevance to demonstrate how the Movants should be treated as participating working interest owners under the subsequent well provision of Order No. 616690. On its face, CD No. 201406049 is a valid statutory remedy to Order No. 616690 pursuant to 52 O.S. Section 112. Whether or not the Movants can obtain recourse through the requested modification of Order No. 616690, based upon a showing of a change of condition or a change of knowledge of condition since the date of the order, is a question of fact yet to be determined.

8) At the discovery stage of the application, the ALJ recommends that the JOA for Section 6-18N-1W, Payne County, Oklahoma, between Devon and TipTop be considered a discoverable, non-privileged business record relevant to the subject matter, or reasonably leading to such evidence. The other general agreements described by the counsels for the Movants and the Protestants should be considered irrelevant to the Section 6- 18N-1W application. The

request to discover the general "area of mutual interest" or multistate agreements is overly broad and should be denied.

9) If the parties deem it necessary and appropriate, because of the nature of the instant facts, to require a Protective Order limiting the copying, access, and review of the JOA for Section 6-18N-1W, Payne County, Oklahoma, to the Movants, Devon, and TipTop in the context of CD No. 201406049, the ALJ recommends a Protective Order be issued. The Protective Order would be consistent with the Movants' offer for a Protective Order pursuant to OCC-OAC 165:5-11-1(d). The parties should strive to agree upon the terms of a Protective Order, which will ensure the security of the JOA, if such order is deemed necessary.

DECISION OF THE OIL & GAS APPELLATE REFEREE

The Referee finds the Oral Report of the ALJ in response to Motion for Production of Documents should be affirmed.

1) The Referee finds that the ALJ's recommendation to grant Gungoll's Motion for Production of Documents with respect to the JOA between Devon and TipTop covering Section 6-18N-1W, Payne County, Oklahoma and the ALJ's recommendation to deny Gungoll's Motion for Production of Documents with respect to its request for copies of any other "area of mutual interest" agreements or other agreements described by TipTop covering its general participation with Devon in Oklahoma and other states is in accordance with the weight of the evidence, prior interpretations of the Commission's discovery rules and free of reversible error. The Referee would also affirm the recommendation of the ALJ that Gungoll should be provided a copy of the JOA within five days of the Commission's order for production.

2) OCC-OAC 165:5-11-1(b) provides in part:

(3) An order pursuant to this subsection may require production of any document not privileged which constitutes or contains evidence relevant to the subject matter of the cause, or may reasonably lead to such evidence. Business records shall not be deemed privileged as such; but confidential business records and information will be protected from disclosure except where directly relevant to the issues in the cause.

3) The Supreme Court in *Boswell v. Schultz*, 175 P.3d 390 (Okl. 2007) stated:

The purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aid in their concealment.

4) The Oklahoma Court of Civil Appeals determined in *State ex rel Protected Health Services v. Billings Fairfield Center, Inc.*, 158 P.3d 484 (Okla.Civ.App. 2007):

Civil trials no longer are to be conducted in the dark. Discovery, consistent with recognized privileges, provides to the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1346 (5th Cir. 1978). "The aim of these liberal discovery rules is to "make a trial less a game of third man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

5) The JOA in the present case should be considered a discoverable business record pursuant to the above listed cases and OCC-OAC 165:5-11-1(b)(3). JOAs are not typically considered confidential business records in Commission proceedings and under the rules concerning discovery the JOA is a document which constitutes or contains evidence relevant to the subject matter of the cause, or may reasonably lead to such evidence. See *NBI Services, Inc. v. Corporation Commission of State of Oklahoma*, 241 P.3d 685 (Ok.Civ.App. 2010).

6) Gungoll owns about 28% and spent approximately \$1 million for their share in the initial Hudson well which was completed in the Mississippian formation. The Woodford, Sylvan, Misener-Hunton common sources of supply were not penetrated by the initial well and Gungoll alleges that there has been a change in condition based on the fact that Devon didn't penetrate anything below the Mississippian. Gungoll alleges that Devon asserted that they might drill and frac out of the Mississippian but that did not happen. Devon recently proposed a subsequent Mississippian well on August 1, 2014 and the next day proposed a Woodford well. Gungoll does not want to participate in the Woodford well but wants to keep their Mississippian rights, and therefore to the extent that Order No. 616690 is still valid as to the Woodford, such order should be amended and modified to allow formation by formation elections on subsequent wells so that Gungoll will not forfeit its Mississippian rights if it does not participate in a Woodford well, and vice versa. If Gungoll is cut out of the Mississippian because they don't want to participate in the Woodford they would lose their share of 700,000 BO and 2.5 BCFG. Gungoll asserts that this

is not what the pooling statute contemplates which is protecting parties' rights to insure that everyone gets their fair share.

7) The ALJ in his Report states on Page 3 under paragraph 3 and paragraph 4:

Based upon the October 14, 2014 statements by the counsels for the Movants and TipTop, the status of TipTop as a party subject to the instant application is an unresolved question of fact. The Commission has jurisdiction pursuant to *NBI Services*, to consider the terms of the JOA and decide if TipTop's interest is or is not subject to the pooling order modification application.

4. The ALJ recommends that the JOA for Section 6-18N-1W, Payne County, Oklahoma, be considered evidence "relevant to the subject matter, or may reasonably lead to such evidence" pursuant to OAC 165:5-11-1(b)(3).

* * *

The terms of the JOA for Section 6-18N-1W, Payne County, Oklahoma, perhaps will have relevance to demonstrate how the Movants should be treated as participating working interest owners under the subsequent well provision of Order 616690. On its face, CD 201406049 is a valid statutory remedy to Order 616690 pursuant to Okla. Stat., tit. 52, section 112. Whether or not the Movants can obtain recourse through the requested modification of Order 616690, based upon a showing of a change of condition or a change of knowledge of condition since the date of the order, is a question of fact yet to be determined.

8) The Referee agrees with the ALJ in his determination that this is the discovery stage of the application and whether or not Gungoll can obtain the requested modification of Order No. 616690 based upon a showing of change of condition or change in knowledge of condition since the date of the order is a question of fact that will have to be presented by Gungoll and whether Gungoll can present those facts to show a change of condition or change in knowledge of condition has yet to be determined. The Referee agrees however with the ALJ that at this discovery stage of the application the JOA for Section 6-18N-1W, Payne County, Oklahoma between Devon and TipTop is a discoverable,

nonprivileged business record relevant to the subject matter or reasonably may lead to such evidence. The Referee further agrees that any "area of mutual interest" agreements or other agreements between TipTop and Devon covering their general participation in Oklahoma and other states is overly broad and should be denied.

9) Lastly, the Referee agrees with the ALJ concerning his recommendation in paragraph 6 of his Report that if the party deems it necessary and appropriate a protective order limiting the copying, access and review of the JOA can be issued consistent with OCC-OAC 165:5-11-1(d).

RESPECTFULLY SUBMITTED THIS 30th day of October, 2014.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Anthony
Commissioner Douglas
Commissioner Murphy
Gregory L. Mahaffey
Michael D. Stack
John R. Reeves
Michael L. Decker, ALJ/OAP Director
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