BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT:	**BOONE OPERATING INC.**	)
RELIEF SOUGHT:	**VACATION OF POOLING ORDER NO. 610906**	) **CAUSE CD NO. 201401865**
LEGAL DESCRIPTION:	**NE/4 SW/4 SECTION 29, TOWNSHIP 7 NORTH, RANGE 4 EAST, POTTAWATOMIE COUNTY, OKLAHOMA**	)

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CORPORATION COMMISSION
OF OKLAHOMA

REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Keith T. Thomas**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 19th day of February, 2015, 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 A. Grimes**, attorney, appeared on behalf of applicant, Boone Operating, Inc. ("Boone"); **David E. Pepper**, attorney, appeared on behalf of protestant, Basis Resources Group, LLC ("Basis"); and **James L. Myles**, Deputy General Counsel for Deliberations, filed notice of appearance.

The Administrative Law Judge ("ALJ") filed his Report of the Administrative Law Judge on the 13th day of May, 2015, 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 24th day of July, 2015. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

BASIS TAKES EXCEPTION to the recommendation of the ALJ that the application of Boone to vacate pooling Order No. 610906 as to the respondents listed in its application be granted.

Boone is seeking to have pooling Order No. 610906 vacated as to numerous respondents due to the lack of due diligence in giving said respondents notice of the pooling application and notice of the Commission hearing on the matter before an ALJ. Basis opposes Boone's application. Basis asserts that it did in fact exercise due diligence in its attempt to give notice to all respondents. Further, Basis states that it obtained notice by publication on the respondents, for which it had no address, as allowed under the rules of the Commission.

The Corporation Commission previously issued Order No. 610906, in Cause CD 201301454, pooling oil and gas interests in the Earlsboro, Bois D'Arc, Chimney Hill, Viola, Simpson Dolomite and Wilcox common sources of supply in the 40 acre drilling and spacing unit consisting of the NE/4 SW/4 of Section 29, T7N, R4E, Pottawatomie County, Oklahoma.

Boone asserted that it was able to locate numerous respondents that Basis showed in its application in Cause CD 201301454 and in Order No. 610906 as not having a known address and as such were notified via a mailing in care of another party. Boone further stated that Basis had received written notice of the names and addresses of a number of the respondents who were served notice in care of another party, and that said written notice was given prior to the hearing in CD 201301454. Additionally, Boone states that Order No. 610906 does not contain the explicit provision required by the Oklahoma Supreme Court in *Harry R. Carlile Trust vs. Cotton Petroleum Corporation*, 732 P.2d 438 (Okl. 1986) concerning the inquiry required to permit the Commission to approve service by publication on those owners who could not be found for actual service. Finally, Boone alleges that Basis cannot claim that service was properly obtained by either actual notice or by publication notice on all of the enumerated respondents.

Basis states that it made a good faith effort to locate all respondents and complied with the Commission rules by publishing notice of the hearing on the matter. Therefore, Basis believes that it exercised due diligence, thus meeting the standards of the Commission. As such, Basis does not believe that Order No. 610906 should be vacated as to the parties listed in Boone's application.

BASIS 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 the protection of correlative rights.

2) The ALJ erred in determining that Basis did not present any evidence showing that they had conducted a diligent search for the respondents. The ALJ should consider the testimony of Mr. J. Carter Hines in that the parties that Boone seeks to have dismissed from the pooling have never and do not now own title or are in the chain of title to the referenced properties. Any Heirs of Joseph B. Willsie, have never perfected any of their title and do not appear of record in the referenced 40 acre tract. In order for Basis to provide actual addresses for these respondents, it would require Basis to, in essence, perfect the title of all of the Heirs of Joseph B. Willsie, deceased. Basis can find no legal authority that requires Boone in the pooling case to perfect the title of any named respondents.

3) Further, Boone exhausted the appropriate sources to see if any of the Heirs of Joseph B. Willsie could be identified. Basis believes that a good faith effort and an effort which meets the standard of the Commission was performed to the named respondents set forth in the last paragraph found under the ALJ's Recommendations and Conclusions.

4) Basis requests that the Report of the ALJ be reversed and that the application be denied.

THE ALJ FOUND:

1) After taking into consideration all of the testimony, facts, circumstances, and evidence presented in this cause, it is the recommendation of the ALJ that the application of Boone be granted. It is recommended that the respondents named in the instant application be vacated from pooling Order No. 610906.

2) There were two issues repeated throughout the proceeding: First, whether Basis complied with the requirements for notice by publication as established by *Harry R. Carlile Trust vs. Cotton Petroleum Corporation*, 732 P.2d 438, (Okl. 1986); and second, whether due diligence was exercised by Basis in its attempt to locate the respondents to its pooling application in Cause CD 201301454. These are the issues, which once addressed, allowed for a decision to be made in this cause.

3) First, this Court considered whether Basis complied with the requirements for notice by publication as established by *Carlile*. Service of notice by publication in a pooling is appropriate only after an operator has proven it has exercised due diligence in its attempt to locate the parties to a

pooling as prescribed under 12 O.S. Section 2004(C)(3) et seq. Therefore, it must first be determined whether Basis did in fact exercise due diligence in its attempt to locate the parties named as respondents, thus being approved to serve notice on the unlocated parties by publication.

4) The second issue being addressed is whether Basis exercised due diligence in its attempt to locate the respondents to its pooling application in Cause CD 201301454. As stated above, a finding that notice by publication is appropriate is dependent upon a determination that due diligence was exercised in the attempt to locate the respondents.

5) Basis defended the methods it used to locate the respondents in its pooling application in CD 201301454. Basis did not present any evidence showing it conducted a diligent search other than the testimony of its witness, who was not the one who actually conducted the search of records in Pottawatomie County. The contracted party that conducted the record search did not testify in this cause. Additionally, Basis was aided by Ms. Gaeddert, but chose not to utilize the information supplied by her to assist in the location of the respondents it named in its pooling application. Based upon the testimony of its witness it would appear there was a sense of urgency to get the well drilled. Even with new information regarding unlocated respondents, Basis decided not to continue the hearing on its pooling application to a future date. A delay in obtaining a pooling order would have allowed Basis to use the information supplied by Ms. Gaeddert to conduct further research. It is clear that the information received from Ms. Gaeddert put Basis on notice that it needed to conduct further inquiry. In failing to conduct further inquiry as to the location and status of these parties, Basis acted in an imprudent manner.

6) Boone presented a step-by-step process by which each of the respondents in its application was located. Further, Boone offered extensive proof of how said respondents could be located. The evidence presented by Boone was credible, persuasive and showed that Basis had in fact not exercised due diligence in its search for the parties named in Boone's application. The testimony of Boone's witness made it apparent that with the appropriate effort, Basis could have located those respondents listed in Boone's application.

7) Whether Boone had an ulterior motive in its search for those parties shown as respondents in Basis' pooling application and pooling Order No. 610906 is irrelevant in this matter. Did Basis conduct its search for Respondents with appropriate due diligence? This is the question the Court believes is of paramount importance. This Court believes that in the pooling application in CD 201301454, that Basis did not exercise due diligence in its attempt to locate the respondents listed by Boone in the instant cause.

8) As to Boone's challenge of the sufficiency of proof offered by Basis in its request for notice by publication in Cause CD 201301454, this Court finds there is no need to rule on this matter since Basis failed to exercise the requisite due diligence that would allow for the granting of notice by publication. Therefore, a determination of whether Basis met the requirements delineated in *Carlile* is not necessary.

9) It is, therefore, the recommendation of this Court that as to pooling Order No. 610906, the interests of the respondents named in the instant application and who are described as: Ailcie Mary Hardesty, Willie Lowell Lynn, Vernon L. Fisher, Troy D. Fisher, Sr., Betty Lou Olden, Clyde B. Lynn, Billy Joe Lynn, Virginia A. Blakley, Vida Aloway, Clement Davis, Dec'd, Orvin (Orrin) L. Beckner, III, J. A. Beckner, Jr., Larry Schoemann (Deceased), John Sidney Butts, John A. Butts, Emma Lee Boyt, Mollie Carlton, Laura Lightfoot, Irene W. Davis Sykes, Billy V. Lynn (Life Estate) Remainderman: Diane R. Becker, Midokla Royalty Company, and Joseph B. Willsie, Dec'd; shall be vacated as to said order.

POSITIONS OF THE PARTIES

BASIS

1) **David E. Pepper**, attorney, appearing on behalf of Basis, contends that it did exercise due diligence in its attempt to give notice to all respondents. Further, Basis stated that it obtained notice by publication on the respondents for which it had no address, as allowed under the rules of the Commission.

2) Based upon the title opinion that Basis' managing partner received, the respondents that Boone seeks to have dismissed from the pooling order are strangers to title. The title was and is under litigation as to ownership with respect to respondents #57, #58, #72, #73 and #79. Basis requested a reversal as to these respondents because they have no interest and therefore no standing and finally no notice is needed.

3) Basis argued for reversal as to the remaining respondents because the research that was performed including: the preparation of a title opinion, submitting leases, performing continued record checks, utilizing various tools including Accurint, and sending brokers to the courthouse, was diligently done and represents a good faith effort to find the respondents' addresses.

4) Finally, Boone has an interest in the well being drilled and only after finding out the well is producing did Boone start to research the respondents.

If the ongoing case in district court rules in favor of the respondents then Boone will not have title. The title opinion states that the respondents represented by Boone do not own title. Basis argued that this case should be stayed pending the outcome of the district court that will be outcome determinative in most parts of this case.

BOONE

1) **Richard A. Grimes**, attorney, appearing on behalf of Boone, states that pooling Order No. 610906 should be vacated as to numerous respondents due to lack of due diligence in giving said respondents notice of the pooling application.

2) Boone contends that the process to locate the respondents is easily done online with the touch of a button and Boone presented a step-by-step process by which Boone contends Basis knew about, but made no effort to do.

3) Boone also addressed a letter written by Pat Gaeddert that was given to Basis before the pooling hearing where she offers information on several respondents listed as deceased or address unknown. Basis ignored this information and did not notify these respondents or amend their pooling application.

4) Basis pooled all of the interests and the rights of the respondents based on research someone else did for them and this person was not brought forth to testify as to the research. Boone conducted their own research and offered extensive proof of how to locate respondents. Boone concluded that Basis could not have done the research they testified to doing and it can be said that Basis did not meet the standard for due diligence required by the Commission. Boone contended that unless the pooling order is vacated, the rights of the respondents are relinquished.

5) Basis requested a stay of this case pending an ongoing district court case that it believes to be outcome determinative on this case, but no motion to stay has ever been filed and nothing in the Report goes to the issue of staying the case. Therefore, Basis's request to stay is unsupported by the proper motion.

RESPONSE OF BASIS

1) Basis requests that the transcript of the February 19, 2015 hearing be reviewed concerning the testimony of the landman for Basis.

CONCLUSIONS

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

1) The Commission rules of practice provision on notice in a pooling application provides in OCC-OAC 165:5-7-7(a):

> (a) Each pooling application shall include a statement by the applicant that the applicant exercised due diligence to locate each respondent and that a bonafide effort was made to reach an agreement with each such respondent as to how the unit would be developed. The applicant shall present evidence to this effect at the time of hearing.
>
> As service of notice by publication is appropriate as stated in 12 O.S. Section 2004 (C)(3)(a):
>
> a. Service of summons upon a named defendant may be made by publication when it is stated in the petition, verified by the plaintiff or the plaintiff's attorney, or in a separate affidavit by the plaintiff or the plaintiff's attorney filed with the court, that with due diligence service cannot be made upon the defendant by any other method.

2) In *Cate v. Archon Oil Company, Inc.*, 695 P.2d 1352 (Okl. 1985) the Supreme Court discussed the importance of notice:

> Notice is a jurisdictional requirement as well as a fundamental element of due process. Due process requires adequate notice, a realistic opportunity to appear at a hearing or judicial sale, and the right to participate in a meaningful manner before one's rights are irretrievably altered. The right to be heard is of little value unless adequate notice is given. Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise interested parties of the pendency of an

> action and lack of notice constitutes a jurisdictional infirmity. (footnotes omitted)

3) In addressing Boone's jurisdictional challenges of the notice to the respondents named by Boone in its present application, an examination must be made as to whether the "Commission's notice requirement was complied with and whether the means employed to impart notice were reasonably adopted to accomplish it." *Miller v. Wenexco, Inc.*, 743 P.2d 152, 156 (Okl.Civ.App. 1987). The *Miller* court stated:

> When the names and addresses of the parties are known, or are easily ascertainable by the exercise of diligence, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process of Federal or Oklahoma Constitutions...Notice by publication is clearly insufficient with respect to one whose name and address are known or readily ascertainable from sources at hand. Primary sources at hand, such as local tax rules, deed records, judicial records and other official records, as well as available secondary sources, such as a telephone directory, a city directory or the like must be exhausted before the approval of publication process as a method of notification...Id. at 156 (citations omitted).

4) The ALJ in his Report on page 11 states:

> Basis defended the methods it used to locate the Respondents in its pooling application in CD 201301454. Basis did not present any evidence showing it conducted a diligent search other than the testimony of its witness, who was not the one who actually conducted the search of records in Pottawatomie County. The contracted party that conducted the record search did not testify in this cause. Additionally, Basis was aided by Ms. Gaeddert, but chose not to utilize the information supplied by her to assist in the location of the Respondents it named in its pooling application. Based upon the testimony of its witness, it would appear there was a sense of urgency to get the well drilled. Even with new information regarding unlocated Respondents, Basis decided not to continue the hearing on its pooling application to a future date. A delay in obtaining a pooling order would have

> allowed Basis to use the information supplied by Ms. Gaeddert to conduct further research. It is clear that the information received from Ms. Gaeddert put Basis on notice that it needed to conduct further inquiry. In failing to conduct further inquiry as to the location and status of these parties, Basis acted in an imprudent manner.
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> Boone presented a step by step process by which each of the Respondents in its application was located. Further, Boone offered extensive proof of how said Respondents could be located. The evidence presented by Boone was credible, persuasive and showed that Basis had in fact not exercised due diligence in its search for the parties named in Boone's application. The testimony of Boone's witness made it apparent that with the appropriate effort, Basis could have located those respondents listed in Boone's application.

5) In regard to the weight to be given opinion evidence, the Supreme Court stated in *Palmer Oil Corporation v. Phillips Petroleum Company*, 231 P.2d 997 (Okla. 1951):

> ...At the hearing herein the testimony adduced was chiefly that of petroleum engineers and geologists who testified on the basis of both personal surveys made and of an interpretation of the accumulated data in the hands of the Commission. The testimony of these experts was in direct conflict but that of each was positive upon the issue. Under the circumstances the objection is necessarily addressed to only the weight of the evidence. Under the holding of this Court and that of courts generally, *Chicago, R.I. & P. Ry. Co. v. Pruitt*, 67 Okl. 219, 170 P. 1143 ; 22 C.J. 728, sec. 823, 32 C.J.S., Evidence, § 567, p. 378, the weight to be given opinion evidence is, within the bounds of reason, entirely for the determination of the jury or of the court, when trying an issue of fact, it taking into consideration the intelligence and experience of the witness and the degree of attention he gave to the matter. The rule should have peculiar force herein where by the terms of the Act the Commission is recognized as having peculiar power in weighing the evidence. Since the evidence before the Commission was competent and sufficient if believed, to sustain the

> order we must, and do, hold that the order is sustained by the evidence and that the contention is without merit. *Ft. Smith & W.Ry Co. v. State*, 25 Okl. 866, 108 P. 407; *Bromide Crushed Rock Co. v. Dolese Brothers Co.*, 121 Okl. 40, 247 P. 74.

6) For the above stated reasons, the Referee believes there is substantial evidence to uphold the ALJ's decision regarding this matter and it is also consistent with Oklahoma law. The Referee would therefore find that the Commission should enter an order vacating Order No. 610906 as to the interests of the respondents named in Boone's application as: Ailcie Mary Hardesty, Willie Lowell Lynn, Vernon L. Fisher, Troy D. Fisher, Sr., Betty Lou Olden, Clyde B. Lynn, Billy Joe Lynn, Virginia A. Blakley, Vida Aloway, Clement Davis, Dec'd, Orvin (Orrin) L. Beckner, III, J.A. Beckner, Jr., Larry Schoemann (Deceased), John Sidney Butts, John A. Butts, Emma Lee Boyt, Mollie Carlton, Laura Lightfoot, Irene W. Davis Sykes, Billy V. Lynn (Life Estate) Remainderman: Diane R. Becker, Midokla Royalty Company, and Joseph B. Willsie, Dec'd. The Report of the ALJ should be affirmed as the standard of due diligence in giving notice to these respondents was not followed in the present case and a meaningful search of all reasonably available resources was not conducted or completed by Basis.

RESPECTFULLY SUBMITTED THIS 3rd day of September, 2015.

Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Anthony
Commissioner Murphy
Commissioner Hiett
James L. Myles
ALJ Keith T. Thomas
Richard A. Grimes
David E. Pepper
Michael L. Decker, OAP Director
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