

BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

FILED

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CORPORATION COMMISSION
OF OKLAHOMA

APPLICANT: BOONE OPERATING, INC.)
)
RELIEF SOUGHT: VACATION OF POOLING) CAUSE CD NO.
ORDER NO. 610129) 201400632
)
)
LEGAL DESCRIPTION: NW/4 SW/4 OF SECTION 29,)
TOWNSHIP 7 NORTH, RANGE)
4 EAST, POTTAWATOMIE)
COUNTY, OKLAHOMA)

REPORT OF THE OIL AND GAS APPELLATE REFEREE

This Cause came on for hearing before **Michael Norris**, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, on the 19th day of June, 2014, 21st and 29th day of August, 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 A. Grimes**, attorney, appeared on behalf of applicant, Boone Operating, Inc. ("Boone"); **David E. Pepper**, attorney, appeared on behalf of protestants, Basis Resource Group, LLC ("Basis"); **Richard Gore**, attorney, appeared on behalf of respondents, Britt Oil Company ("Britt") and Ladd, LLC ("Ladd"); 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 29th day of December, 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 6th day of March, 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 ALJ's recommendation that the application of Boone be granted as to the interest of Fern Barnett and J.D. Barnett, with pooling Order No. 610129 being vacated as to any interest of these individuals and declared void ab initio as to Fern Barnett and J.D. Barnett.

Boone has requested Order No. 610129 be vacated as to one respondent because of improper notice and lack of documentation and resources utilized to locate the one respondent. Pooling Order No. 610129 pooled various 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 NW/4 SW/4 of Section 29, T7N, R4E, Pottawatomie County, Oklahoma. Basis opposes this application asserting that their business protocol includes all available resources to actively locate individuals. Boone presented evidence indicating the methods they used to locate the respondent. Boone elicited the sources, steps and time frames involved in locating the respondent in question. Boone states that the fact they were able to locate the respondent is proof that the efforts of Basis were inadequate. Basis argues that their efforts did not produce the same results as Boone. Basis argued the same or similar efforts during different timeframes can produce different results. Basis believes that their searches were thorough and adequate.

BASIS TAKES THE POSITION:

- 1) The Report of the ALJ ("ALJ") 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 concluding that a proper search and due diligence was not effectuated for Fern Barnett. The evidence indicated that there was no question that due diligence was utilized, and that many man hours were spent on attempting to locate a better address for Fern Barnett. The mere fact that the Basis did not succeed in finding an accurate address for Fern Barnett does not mean that a due diligence effort has not been made. The requirement that all efforts must succeed is not supported by the law.
- 3) The ALJ erred in concluding that because Boone had located a potentially accurate address for Fern Barnett is outcome determinative of whether a diligent effort was utilized. Boone's efforts were not driven by the fact that it was necessary to prosecute a forced pooling application in order to further the drilling of the well. Boone was allowed to wait until after the well had been drilled, production had been potentially established, and therefore

had the opportunity to go forward and attempt to find a different address unfettered by time restraints.

4) The mere fact that Fern Barnett was not listed as an unknown party does not automatically void a publication process. Fern Burnett's name is clearly listed in the publication of the Notice of Hearing.

5) After notice and hearing as required by law, Basis requests that the Report of the ALJ be reversed and that Boone's application be denied.

THE ALJ FOUND:

1) After taking into consideration all the facts, circumstances, evidence and testimony presented in this cause, it was the ALJ's recommendation that the application of Boone be granted.

2) The evidence established that a proper search and due diligence was not effectuated for Fern Barnett. It was demonstrated that a minimal effort of searching accepted resources would have resulted in locating Fern Barnett.

3) Basis offered their established protocols as proof of a diligent search for a proper address for Fern Barnett. However, they were unable to provide documentation of such activity. The individuals who conducted those efforts were not present during these proceedings and did not testify.

4) Boone submitted evidence and testimony corroborating their successful efforts to locate Fern Barnett. Their evidence was substantial and persuasive that a good faith effort was not made to conduct a thorough search to locate Fern Barnett. It was apparent that such an effort could have resulted in actual notice to Fern Barnett.

5) The standard of due diligence was not followed in the instance of Fern Barnett. The sufficiency of this particular search was lacking. A meaningful search of all reasonably available resources was not completed. Further, Fern Barnett was not listed as an unknown party in the pooling but shown with an address that Basis knew to be invalid. Basis had received returned mail from that address. Publication would not have been proper in this cause.

POSITIONS OF THE PARTIES

BASIS

- 1) **David E. Pepper**, attorney, appearing on behalf of Basis, notes from the record that Boone, who was a participant in the well, received certain well information from the drilling of the well which was used to locate Fern Barnett through various sources. The Applicant then took a lease from Fern Barnett with the admitted intent of increasing the Applicant's interest in the well.
- 2) Fern Barnett was listed in a pooling order with an incorrect address. The ALJ found that the application should be vacated as to the interest of Fern Barnett, as stated in the Report of the ALJ. Basis takes exception. If the ALJ is asserting that a failure to list Fern Barnett as 'address unknown' would invalidate the publication, then this case will be short-lived. Basis is unaware of any law that says a party must be listed as 'address unknown' to receive proper publication notice in the newspaper. All of the respondents are listed in the newspaper, whether their address is unknown or not.
- 3) Basis notes that the ALJ found that Basis did not exercise the proper standard of due diligence for Fern Barnett, and that the sufficiency of the particular search was lacking. Basis takes exception. The ALJ details the arguments of the witness for Basis, Mr. Hines, and the research he conducted, including the Internet resources used. Mr. Hines used a number of resources and spent a fair amount of time researching and stated that they found multiple addresses and names for Fern Barnett. Mr. Hines did not find the last address that Boone found, but did find the next to last address. To suggest that Mr. Hines did not do anything is incorrect. Basis notes that Mr. Hines was not sure whether or not the broker used the Pottawatomie County Clerk computer system to find Fern Barnett.
- 4) Basis asks if the Commission is setting the standard: if someone else could find the address, then you did an insufficient job. Boone may have found the correct address, but that does not mean the broker for Basis did not follow the standard practices to find the addresses. They simply did not go far enough. Basis asks the court to determine what the standard should be (that you attempt to locate a party but were unsuccessful and should have used other resources OR that someone else found it so you failed).
- 5) Basis also notes that Basis was preparing a pooling to be prosecuted and to get a well drilled. Basis was therefore partly constrained by time.
- 6) In summation, Basis asks the court to reverse the report of the ALJ and to set a standard for the type of notice and service needed.

BOONE

1) **Richard A. Grimes**, attorney, appearing on behalf of Boone, notes it relies on *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okl. 1986), which establishes an insulating factor whereby, "...A collateral attack may not be launched on a Commission order that is facially invulnerable." *Carlile*, supra at 441. To overcome this finality of judgments and orders, the attorney must show that the insulation does not exist. *Carlile* continues, "...power to inquire into the validity of Commission orders is legally limited to ascertaining, from inspection of the face of the proceedings, if the Commission had jurisdiction to issue the order. *Carlile*, supra at 441. *Carlile*, supra, in footnote 8 defines "face of the proceeding" to mean the application, the process by which the parties were notified, and the order itself. Each of these was reviewed by the ALJ. The order is facially void if one of three jurisdictional elements is missing. The three jurisdiction elements are jurisdiction over the parties, subject matter jurisdiction, and jurisdictional power to issue the specific order.

2) In *Carlile*, the court found that to attack a spacing order, the statute focuses on actions of the Commission and its officials if the party is going to seek publication notice. Under 52 O.S. Section 87.1(e), to attack a pooling order, the statute places the onus on the applicant to provide notice. *Carlile*, supra, in footnote 2, also notes the duty to prove notice in a pooling falls directly upon the applicant. Boone notes the foundation for *Carlile*, supra, at 444 is that in any adjudicative order where significant property interests are affected, the court states that a party has the constitutional right to be notified and be prepared to defend what otherwise could be an order under which a relinquishment of interest accrues. Before *Carlile*, publication notice alone was sufficient. *Carlile* addresses why actual notice is required. Under Commission rules, pooling notices are sent by certified mail to assure that the Commission can be informed if an applicants fulfilled their notice obligation. Boone therefore, according to the ALJ, had the right to collaterally attack the order because Basis failed in this capacity.

3) In the August 21st transcript. P. 107, line 14-19, Basis admitted it did not have actual service of notice of the hearing for Fern Barnett or Mr. J.D. Barnett, and has never disputed this. Boone notes that J.D. Barnett should not have been listed at all since Fern Barnett owns the entire interest, she is divorced, and J.D. Barnett has since passed away. Boone points out that Boone took a lease from Fern Barnett individually. Boone argues that the proceedings (CD 201301453, the pooling case from which pooling Order No. 610129 was issued), did not insulate the order from a collateral attack. *Carlile*, supra, at 444, states, "we hold today that the face of an administrative proceeding must affirmatively show a diligent but unsuccessful effort to reach

an affected party" by better process than publication notice only. *Carlile*, supra, in footnote 30 states, that at a minimum, the proceedings must show that the Applicant: a) filed an affidavit for service by publication by naming the parties to be served only by publication, and b) that the proceedings show there was elicited testimony for view by the ALJ and the Commission concerning the search made to find the party. Here, there was no affidavit filed for publication service naming any party, and none naming Fern Barnett. In a pooling, the applicant must establish what has been done to notify parties and must inform the court what has been done to find unknowns. In Exhibit #3, transcript of March 28, 2013, page 5, Basis asks their expert witness if he tried to find the unknown parties, who responded, "Yes we have." The attorney then asks, "Did you utilize the court house records, tax records, Secretary of State and then have people under your direction get on the Internet and try to find them?" Basis' witness responds, "Yes we have." The attorney asks, "Using such sources as Lexis Nexis, or Accurint," and once again the witness responds in the affirmative. The attorney asks if they satisfied a good faith effort to find these parties, and he responds, "Yes we have." This is the only part of the hearing that talks about notice. There were no questions made about certified mailings, or returns for mailings that were made. Boone notes that the ALJ was never told that the green card was never received back signed. Furthermore, in Exhibit #2, pooling Order No. 610129, the respondents 36-49 were listed as 'address unknown' and the only ones considered as 'unknown parties.' Fern Barnett and J.D. Barnett were not included and therefore the judge did not know that they were unknown parties. *Carlile*, supra, in footnote 30, notes that to qualify for publication notice, it is the obligation of the applicant to illicit testimony to inform the judge to get approval for publication notice. In this case the judge was never told.

4) Boone notes that to qualify for publication notice, every order issued since *Carlile* should include a finding to insulate the order from a collateral attack. That paragraph is not in this pooling order. Pooling Order No. 610129 contains one finding in paragraph 3, stating that the Commission has jurisdiction over the subject matter herein, that notice has been given in all respects as required by law and by the rules of the commission. This was the language used pre-*Carlile*. The obligation falls on the applicant, not the ALJ, to find any missing facts or if a witness is misrepresenting something. Basis admits they did not have good service on Fern Barnett, but never told the court. Mr. Hines, the Basis witness for both cases, could not tell us why the judge was not given that information. According to *Carlile*, supra, at 443 in footnote 30, if you have any of the three elements missing, 1) the affidavit for service of publication, 2) an adjudicative inquiry into the sufficiency of the search and 3) the actual examination of the record and elicitation of testimony, then they fail. Basis has all three missing. Therefore, the party cannot qualify for publication notice.

5) Boone states that Basis did not perform due diligence to find Fern Barnett, as the ALJ found correctly. The ALJ Report on page 21, paragraph 2, states that, "a proper search and due diligence was not effectuated for Fern Barnett. It was demonstrated that a minimal effort of searching accepted resources would have resulted in locating Fern Barnett." The ALJ continues in paragraph 3, "Basis offered their established protocols as proof of a diligent search for a proper address for Fern Barnett. However, they were unable to provide documentation of such activity. The individuals who conducted those efforts were not present during these proceedings and did not testify." This eludes to the fact that Carter Hines, a landman for Basis who hired a broker and his own son to assist in this matter, stated that, "I assume they would have followed a protocol that I had established for them." But Mr. Hines was not able to confirm what had been done. Boone cites *Carlile*, supra, at 443 in footnote 4 and *Bomford v. Socony Mobile Oil Co.*, 440 P.2d 713 (Okl. 1968), which states that when dealing with parties rights, you must show due diligence resulted from a search of local tax rolls, deed records, judicial and other official records, telephone directories, city directories, and the like. No testimony was offered in this case to find Fern Barnett. Basis had the opportunity during this proceeding to bring in the broker, or his son to be questioned, but did not. The ALJ Report on page 21, paragraph 4, states, "Boone submitted evidence and testimony corroborating their successful efforts to locate Fern Barnett. Their evidence was substantial and persuasive that a good faith effort was not made to conduct a thorough search to locate Fern Barnett. It was apparent that such an effort could have resulted in actual notice to Fern Barnett." On the other hand, Boone points out it submitted testimony and evidence of the steps they took to find Fern Barnett, namely the Pottawatomie County Clerk office computer system. This system was installed in 1992 and has a default 'name search' option that allows anyone to search for grantor/grantee. Exhibit 4 is the result of searching for Fern Barnett. It shows four hits for her name, including the divorce decree for Fern Barnett and J.D. Barnett, evidence that Fern Barnett was the sole owner of the property, oil and gas leases signed by Fern Barnett from 2007 and 2011 with addresses in Texas, and that J.D. Barnett had passed away. Boone notes it takes little effort and time to do this search and if minimal efforts were made, Basis would have found information. Boone notes that the efforts made were so minimal Basis likely only considered the original deed vesting in Fern Barnett and J.D. Barnett in the property. Mr. Gwin, working for Boone, went to the accepted Internet sources and conducted a search for Fern Barnett as shown in Exhibit 10. Mr. Gwin testified that it took him between 15 and 30 minutes to conclude that he could find her. The Basis witness testified that, "We wanted to acquire interest, that is what we pooled for." Pooling is now constantly being used as an offensive weapon for acquisition, and Basis, testified to it – to acquire interest. Boone notes that if Basis had wanted to find Fern Barnett, it did not require any herculean effort. Boone states that the real significant fact between getting ready to drill a well, having drilled it, and filing a pooling is

that a party is forcing people out potentially in a pooling. And if *Carlile*, supra, rings true for anything it is that you cannot, at the Commission, take lightly the circumstances under which you can use publication notice to acquire party's rights.

6) In summation, the Applicant notes that Basis does not even qualify to use publication notice because they failed to follow the *Carlile* case, supra. There was no diligent effort made to find Fern Barnett. Basis did not put any testimony on about their efforts. The only evidence Basis put forward was about the protocol that should have been followed, and they chose not to bring the people to testify who did the actual research. The ALJ is right in every respect in this case.

RESPONSE OF BASIS

1) Basis responds that he and Mr. Gore both filed briefs in regard to the *Carlile* case, supra, that were not responded to. The ALJ did not reference *Carlile* to reach his conclusion. He reached his findings based on failure of good faith efforts to find the parties.

2) In the transcript from August 21st, page 110, lines 5 and 6, the witness for Basis, Mr. Hines, stated, "I wanted to obtain an oil and gas lease." Basis points out that Mr. Hines is supposed to reach an oil and gas lease agreement with the parties/respondents.

3) Basis notes that Boone argued about the inclusion of J.D. Barnett on the respondent list. In the August 21st, transcript, Page 105, Basis' witness told the ALJ why J.D. Barnett was on the list based on a title opinion. The title examiner was concerned about the ambiguity in the probate. In addition, Basis' witness did go through a reasonably detailed effort with the multiple Fern Barnetts and addresses they found.

CONCLUSIONS

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

1) In *Cate v. Archon Oil Co., Inc.*, 695 P.2d 1352 (Okl. 1985) the 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.

2) A plaintiff may obtain service by publication if "with due diligence service cannot be made upon the defendant by any other method." 12 O.S. §2004 (C)(3)(a). Publication notice is effective as to a named defendant's unknown successors if the plaintiff or plaintiff's attorney cannot ascertain with due diligence "whether a person named as defendant is living or dead, and, if dead, the names or whereabouts of the person's successors, if any." 12 O.S. §2004 (C)(3)(b)(1). Before the court may exercise jurisdiction based on publication notice, it must determine the plaintiff exercised due diligence in attempting to locate the defendant. *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okl. 1968).

3) In addressing appellate's jurisdictional challenges of the notice to Fern Barnett, 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) *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla. 1986) provides:

Footnote 30. At a minimum, well spacing procedures should include (a) the filing by Commission officials of an affidavit for publication service which reflects the identity of the parties whose whereabouts are unknown for service of process and cannot be ascertained with due diligence, (b) an adjudicative inquiry by the Commission into the sufficiency of the search to ascertain the whereabouts of parties served solely by publication and (c) a recitation in the Commission well spacing order that [1] upon an examination of the record and proof of publication, the Commission found the process to be proper and [2] upon an adjudicative inquiry into the factual issue of due diligence, the Commission found that its officials conducted a meaningful search of all reasonably available sources at hand to ascertain the whereabouts of those entitled to notice but who were served solely by publication

* * *

A like procedure should be followed in a pooling application. In those proceedings the burden of notice-giving falls on the applicant rather than on the Commission.

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

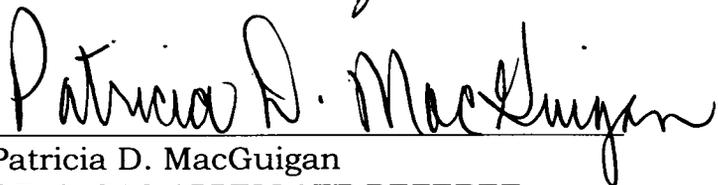
(a) Each pooling application shall include a statement by the applicant that the applicant exercised due diligence to locate each respondent and that a bona fide effort was made to reach an agreement with each such respondent as to how the unit would be developed. The applicant shall present evidence to this effect at the time of hearing.

6) In the present case there was no request to approve service by publication for any party including Fern Barnett. Fern Barnett and J.D. Barnett were included in the pooling respondent list by Basis. However, Fern Barnett was not served with any notice of the hearing in the cause nor did she sign for or receive the certified mailing purportedly made to her in the cause.

7) Boone's witness, Mr. Gwin, testified that the parties described as unknown did not include Fern Barnett. The witness stated that the transcript of the proceedings CD 201301452 and CD 201301453 dated March 28, 2013, did not indicate that the ALJ was ever told at any point in the hearing that Basis did not have good service about Fern Barnett, nor was the ALJ told what efforts were made to find the current address for Fern Barnett, nor was there any record in the transcript that the ALJ knew that Basis didn't have a green card from Fern Barnett. There was no statement in the record also that due diligence had been employed to find a current address for Fern Barnett. After searching by computer the Pottawatomie County records, People's Search website and the Google Search, Boone's witness found Fern Barnett listed with an address in Duncanville, Texas. His searches found a divorce decree for Fern Barnett and J.D. Barnett, who were divorced in 1980, long before the 2013 pooling Cause CD No. 201301453, and also he found a final decree in the estate of J.D. Barnett deceased. Boone's witness lastly stated that in his opinion Fern Barnett could have been easily found and it was obvious that from the county records that she was not at the address shown under the pooling and therefore a good faith diligent effort was not made by Basis to find Fern Barnett.

8) For the above stated reasons and legal support the Referee would find that there is sufficient evidence to support the Commission's entering an order vacating Order No. 610129 based upon the failure of Basis to properly serve notice of the hearing in Cause CD No. 201301453 upon Fern Barnett. The Referee would therefore affirm the Report of the ALJ as the standard of due diligence was not followed in the case of Fern Barnett and a meaningful search of all reasonably available resources was not conducted or completed by Basis. Service was not properly obtained upon Fern Barnett, either by actual notice or by publication notice. Further, the evidence reflects that Fern Barnett was not listed as an unknown party, but was shown with an address that Basis knew to be incorrect as they had received returned mail from that address. Thus, the application of Boone should be granted as to the interest of Fern Barnett and J.D. Barnett with said pooling Order No. 610129 being vacated as to any interest of these individuals and should be declared void ab initio as to Fern Barnett and J.D. Barnett.

RESPECTFULLY SUBMITTED THIS 10th **day of** April, 2015.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Anthony
Commissioner Murphy
Commissioner Hiett
James L. Myles
Richard A. Grimes
David E. Pepper
Richard Gore
Office of General Counsel
Michael L. Decker, OAP Director
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