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BEFORE THE CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA

APPLICANT:	**MEWBOURNE OIL COMPANY**	)
		)
RELIEF SOUGHT:	**POOLING**	) **CAUSE CD NO.**
		) **200604826**
		)
LEGAL DESCRIPTION:	**SECTION 1, TOWNSHIP 20**	)
	NORTH, RANGE 24 WEST,	)
	ELLIS COUNTY, OKLAHOMA	)

REPORT OF THE OIL AND GAS APPELLATE REFEREE ON AN ORAL APPEAL OF MOTION TO STAY ISSUANCE OF ORDER AND TO REOPEN AND MOTION TO VACATE ORDER NO. 528230

These Motions came on for hearing before **Michael Decker**, Administrative Law Judge for the Oklahoma Corporation Commission, at 9 a.m. on the 14th and 15th days of August, 2006, 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: **Richard Grimes**, on appeal, and **James W. George**, on the merits of the motions, attorneys, appeared for applicant, Mewbourne Oil Company ("Mewbourne"); **John C. Moricoli, Jr.**, attorney, appeared for Movant Optima Oil & Gas Company ("Optima"); and **Sally Shipley**, Deputy General Counsel for the Conservation Division, filed notice of her appearance for the Oklahoma Corporation Commission.

The Administrative Law Judge ("ALJ") issued his Oral Ruling recommending the Motions to which an Oral Appeal was timely lodged and proper notice given of the setting of the Oral Appeal.

The Oral Arguments on the Oral Appeal were referred to **Randolph S. Specht**, Oil and Gas Appellate Referee ("Referee"), on the 21st day of August, 2006. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

MEWBOURNE APPEALS the ALJ's recommendation to grant the Optima Motions to Reopen and to Vacate Order No. 528230 obtained by Mewbourne covering Section 1, Ellis County, Oklahoma, and to remand the case to the original ALJ on the Merits as a protested cause. Optima is an 85% owner and the sole respondent under the Mewbourne application.

On August 9, 2006, Optima filed its Motion to Stay Issuance of Order and to Reopen this cause for a trial on the merits. At the time this Motion was filed, no Order had issued in this matter. On August 10, 2006, the Commission entered pooling Order No. 528230 mooting the Motion to Stay Issuance of Order.

Optima, the owner of 85% of the working interest, is the only respondent. The **Mewbourne application was filed on June 1, 2006. The uncontested application was heard on June 27, 2006, without an appearance by Optima** either personally or through counsel; and recommended for approval.

Optima, by and through its president, William Jack, was at all relevant times, up to and including August 8, 2006, unaware of the filing of this case, and that it had been previously set and heard on June 27, 2006, on an uncontested basis. Had Optima been aware of the Mewbourne application, it would have appeared on June 27, 2006, through counsel and **Optima would have protested the requested relief.**

The evidence established that Mewbourne mailed its copy of the application and notice of the hearing for the force pooling of Section 1 to Optima at the office of Mr. William Jack, the service agent, operations manager/president of Optima at 211 N. Robinson, Suite 1600 South, Oklahoma City, OK 73102. The Mewbourne application and notice was delivered on the second day of June, 2006, and is shown to have been received and signed for by Rachel Hill, a secretary that is used within the building. See Exhibit C. Apparently, Rachel Hill was an upset employee who, rather than deliver the application and notice to Mr. William Jack in his office, chose to place it within her desk where it remained undelivered and unfound until August 8, 2006, subsequent to the hearing on the merits.

The evidence also established that Mewbourne and Optima have been developing a prospect in and around the nine-section area as shown by Exhibit E. Apparently, during a Mewbourne/Optima dispute concerning a well in Section 6; Mr. Jack informed Mr. Falkenstein, the landman for the subject area, or a representative of Mewbourne, a lease broker; that Optima would protest any pooling application filed within the area that they had a mutual

interest. This was prior to the pooling application being filed in Section 1. Optima also sent Mewbourne a letter dated August 1, 2006 in which it informed Mewbourne of a change of address to a mailing address in Denver, Colorado, for any future correspondence including JIBs/revenues, well notices, AFEs, etc. See Exhibit A.

Thus, based on: (1) the fact that Optima had informed Mewbourne that it wished to protest any future pooling application in the area; (2) the fact that Optima never had actual notice of the pooling application covering Section 1 that was heard on June 27, 2006 until August 8, 2006; (3) given the fact that Optima knew of other transactions in the area of which both parties had notice but were not brought out at the hearing; (4) the fact that that Optima would have sought operations as a 85% owner; (5) the fact that that Optima would have challenged the well costs established for the proposed Section 1 unit well; and (6) as the ALJ found: given the totality of circumstances, the cause should be reopened and the order vacated for the taking of additional evidence in a protested setting.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

ALJ Michael Decker reported that: **(1)** under *Gose v. Corporation Commission*, 460 P.2d 118 (Okl. 1969); **the Commission has the authority in a pooling matter to do what is necessary to make sure that correlative rights are protected, including but not limited to, a reopening, even after the issuance of an order, for the purpose of protecting a respondent's role in development of the unit**; **(2)** that the evidence raises a question of **whether the real party in interest was properly notified and named in the application** (Optima or the principals located at the Denver address); **(3)** that the ALJ believes the original ALJ should hear this new testimony in light of the fact **that Mewbourne was aware some months ago that all of its pooling applications would be protested by Optima**; **(4)** that **the cause should be reopened to allow the Commission to make sure the issues have been adequately adjudicated where no actual knowledge was had by Optima, an 85% owner, until August 8, 2006, when the Mewbourne application and notice were found still sealed in the desk of the upset employee that had left employment at Optima's office**; **(5)** that under *Vance v. Federal National Mortgage Ass'n*, 988 P.2d 1275 (Okl. 1999); **the notice contemplated by the due process clauses of the Constitution require more than compliance with procedural formalities, including a guarantee that the procedure be fair**; **(6)** that **the due process mandated by these basic-law provisions require notice reasonably calculated under all the circumstances to inform the interested parties of the action's pendency and to afford them an opportunity to present their objections**; **(5)** that **in *Vance*, the Court**

acknowledged the case of *Shamblin v. Beasley*, 967 P.2d 1200 (Okla. 1998); which adopted a *totality-of-circumstances* to determine the probability that the service actually imparted the degree of notice which is constitutionally prescribed (6) that **the test requires that under *all the circumstances present in a case* there be a *reasonable probability* the service of process employed apprises its recipient of the plaintiff's present demands and the result attempted to be reached;** and **(7)** that when the present circumstances are viewed in such a light, they show that due process has not served and that the order should be vacated in its entirety and the cause reopened as a protested case before the original ALJ.

MEWBOURNE TAKES THE POSITION: (1) that **the ALJ erred in granting the Optima motion to reopen and vacate the pooling order covering Section 1 as Mewbourne filed all the proper procedure steps concerning notice as service**; **(2)** that **Optima's reasons for reopening the cause are in contravention to OCC-OAC 165:5-13-3(t)(b) that provides that the Commission prior to a final order in a cause may order the record to be reopened for the purpose of taking testimony and receiving evidence *which was not or could not have been available at the time of the hearing on the merits* or the purposes of examining its jurisdiction**; **(3)** that here **the evidence concerning most of the matters that Optima wishes to address were in existence at the time of the hearing on the merits** as admitted by their own witnesses; **(4)** that Optima mistakenly tries to use the doctrine of intrinsic fraud but there must be misrepresentation present which is not present within this record; **(5)** that **Mewbourne has no duty to protect Optima and hold its hand but just give the proper notice which it did**; **(6)** that **as to the hint by the ALJ that the notice should have been sent to Colorado, Mr. William Jack is listed as a servant agent and the operations manager/president of Optima which address was employed by Mewbourne and was correct and where the application and notice was shown to have been received by Optima**; **(7)** that **even though there may have been some problems with Optima's procedure and receipt of the application and notice, that does not negate the proper service by Mewbourne**; **(8)** that **while the ALJ relies on the *Vance* and *Shamblin* cases, those cases relate to mortgage foreclosures or resell tax deed which are not the equivalent to the pooling process at the Commission**; **(9)** that one must remember that Mewbourne had no role in the deficiency of the notice given, **Mewbourne followed the rules with the lack of notice based on the internal process of Optima**; **(10)** that **if the Commission is going to reopen the cause to take in evidence concerning other transactions, the reopening should be limited to those transactions**; thus, there is no merit to the motions where the only deficiency in the process was Optima's actions and not Mewbourne's.

OPTIMA TAKES THE POSITION: (1) that these type of proceedings are rare as the parties usually have had negotiations and are aware of the actions of the

parties and the date set; **(2)** that he submits that the Commission's rule concerning reopening the record presupposes **(a)** actual participation in the hearing on the merits and/or **(b)** that the party had proper notice and a chance to be heard originally; which are not the facts in this case; **(3) that the evidence showed Mewbourne and Optima have an ongoing business relationship between them regarding this area of mutual interest**; **(4)** that Optima and Mewbourne had a problem with the well to be drilled in Section 6 and the fact that Mewbourne was aware of the transaction regarding that well but did not testify about that transaction; **(5) that in this case: (a) where it is apparent Mewbourne and Optima were having problems between them; (b) where Optima sent a letter to Mewbourne changing the address to which notice should be sent; (c) where there was a conversation had between the representatives of Optima and Mewbourne where Mewbourne was informed of the protest of Section 1 at any pooling proceeding;** and (d) **where Mewbourne had been placed on notice of a protest, when no one showed, Mewbourne should have shut down the hearing and contacted Optima**; **(6)** that as the ALJ established, a pooling case is not "gotcha situation"; **(7)** that Mewbourne can not claim a deficiency in the process of which it was partially in fault, and say "gotcha" to prevail in this matter; **(8)** that as to the argument that allowing this reopening and vacation of an order will allow the "floodgates to open," he submits that will not happen; **(9)** that **this is the 11th day in a 15-day election period and if the motions are not granted, Optima will have to participate with its 85% interest under terms which it would have objected**; and **(10) therefore, where Mewbourne knew Optima was protesting the case and where Optima is not given a fair opportunity to be heard due to a troubled employee quitting without passing on the application and notice, he submits that under the "totality of circumstances" the Commission should affirm the ALJ and vacate the order and allow all objections to be given in a protested type hearing rather than resulting in a "gotcha case".**

MEWBOURNE TOOK FURTHER POSITIONS: **(1)** that **there is no evidence that this is a "gotcha" case**; **(2)** that **Mewbourne has been above board as both an operator and participant at the Commission**; **(3)** that one cannot become subjective in the circumstances **as the Commission must be objective and see if proper procedures were followed as set forth within its rules and statutes**; and **(4)** that the size of an interest does not matter; and **(5) where Mewbourne followed the proper procedure the ALJ should be reversed and the motions denied**.

CONCLUSIONS

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

1) The Referee finds the ALJs recommendation to grant the reopening of the cause and remand to the original ALJ to take additional evidence as in a protested case, with Order No. 528230 vacated in its entirety, to be supported by the totality of the facts and circumstances presented, to be free of reversible error and to be free of abuse of discretion. The Supreme Court has determined in *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla. 1986); that when significant property interests are affected when a Commission order is sought, interest owners are constitutionally entitled to notice which is reasonably calculated to apprise them of proceedings to be conducted.

2) The Referee believes that on the face of the proceedings, Mewbourne did properly notify Optima of the pooling application and hearing. Moreover, as one looks at the *totality of the circumstances* involved; on receipt of service the placing of the application and notice in a disgruntled employee's drawer until after the hearing on the merits, the request of Optima that Mewbourne serve all process upon the Colorado office; and the fact that William Jack notified Mewbourne that it would protest all future pooling applications; one can find that due process was not properly served in this particular case.

3) Just because service may be facially valid, but latently ineffective, means that the judgment is not impervious to an attack for an infirmity that lies beneath the *record's* surface. The ALJ's reliance upon the *Vance* and *Shamblin* cases is not totally inappropriate as applied to these circumstances. As noted in *Shamblin*: "It is the totality of circumstances - not the particular norms of statutory requirements – that dictates the quality of service necessary to safeguard an individual's property interest at stake." (Emphasis of court and footnote omitted). One must also consider that the validity of service in any case rests on the particular facts and circumstances of *that* case.

4) Therefore, when one reviews the totality of the circumstances presented in this cause: including the fact that Optima and Mewbourne had an ongoing

business relationship the fact that Optima had noticed Mewbourne of its intent to protest the future pooling application of Mewbourne; the lack of actual receipt due to inefficiencies within Optima's office and other concerns support the granting of the motion to reopen and remand as well as vacate the pooling order.

RESPECTFULLY SUBMITTED THIS 22nd day of August, 2006.

RANDOLPH S. SPECHT
OIL & GAS APPELLATE REFEREE

RSS:ac

cc: Commissioner Cloud
Commissioner Bode
Commissioner Anthony
Ben Jackson
Sally Shipley
ALJ Michael Decker
Richard Grimes
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