

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

<u>APPLICANT:</u>	MEWBOURNE OIL COMPANY)	
)	
<u>RELIEF SOUGHT:</u>	POOLING)	CAUSE CD NO.
)	200604826
)	
<u>LAND COVERED:</u>	SECTION 1, TOWNSHIP 20)	
	NORTH, RANGE 24 WEST,)	
	ELLIS COUNTY, OKLAHOMA)	

REPORT OF THE ACTING OIL AND GAS APPELLATE REFEREE
ON
AN ORAL APPEAL OF A MOTION FOR EXTENSION OF TIME TO
COMMENCE OPERATIONS

This Motion came on for hearing before **Michael Decker**, Administrative Law Judge for the Oklahoma Corporation Commission, at 9:00 a.m. on the 31st day of January, 2007, 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 A. Grimes**, attorney, appeared for movant, Mewbourne Oil Company ("Mewbourne"); **John C. Moricoli, Jr.**, attorney, appeared for 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 granting the Motion to which an Oral Appeal was timely lodged and proper notice given of the setting of the Appeal.

The Oral Arguments on the Oral Appeal were referred to **Patricia D. MacGuigan**, Acting Oil and Gas Appellate Referee ("Referee"), on the 1st day of February 2007. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

OPTIMA APPEALS the ALJ's recommendation to grant Mewbourne's Motion for Extension of Time to Commence Operations.

This is the application of Mewbourne pooling all oil and gas interest in the Morrow, Tonkawa, Cottage Grove, Cleveland, Big Lime, Oswego, Cherokee Group, Atoka, Morrow Sand, Springer and Chester separate common sources of supply for the 640-acre drilling and spacing unit consisting of Section 1, Township 20 North, Range 24 West, Ellis County, Oklahoma. The Commission entered its Order No. 528230 in this cause on August 10, 2006, and provided one hundred eighty (180) days within which Mewbourne was to commence operations for the drilling of said well.

Mewbourne's commencement of operations for the drilling of said well has been delayed based upon an appeal of Order No. 528230 to the Oklahoma Supreme Court by Optima. Mewbourne therefore requested the Commission enter an order amending Order No. 528230 to provide Mewbourne as Operator an additional one (1) year from February 6, 2007 within which to commence operations for the drilling of the initial well covered thereby. The Petition In Error was filed by Optima with the Oklahoma Supreme Court on September 8, 2006. Briefing is now in progress and the case could take up to one year to decide. Mewbourne has not commenced the well because of the appeal as 85% of the working interest is owned by Optima. Mewbourne owns 15% and will claim the 85% under the pooling order. Therefore 85% of the interest is in limbo. Optima made an election under the pooling order of 1/4th royalty and no cash. Mewbourne wants to extend the pooling order one year so that both Optima and Mewbourne can fully explore and flesh out their rights. Mewbourne was prepared to drill the well and had the original rig scheduled for December 2006, but decided not to do so when the appeal was filed. If the Supreme Court reverses Pooling Order No. 528230 then it will be erased and before Mewbourne drills the well, they want the uncertainty of their rights resolved. Mewbourne is afraid to drill the well because pooling Order No. 528230 may be reversed and they will have spent the money but then would not possess the interest.

Therefore, it is reasonable to extend the order for one year as this is a complex case. Let the Supreme Court have the opportunity to resolve the uncertainty.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

ALJ Michael Decker reported: **(1)** that after Mewbourne obtained Pooling Order No. 528230, Optima filed a Motion to Reopen and Vacate said Order and to remand the case to the original ALJ on the merits as a protested cause; **(2)** that the uncontested Application was heard as an uncontested matter on June 27, 2006 without an appearance by Optima and was recommended for approval; **(3)** that the Oil and Gas Appellate Referee upheld the ALJ's recommendation to grant the Motion to Reopen and Remand to the original ALJ to take additional evidence as a protested case; **(4)** that the issue with regard to the Motion for Extension of Time to Commence Operations is whether the Commission has the authority or jurisdiction to issue an order to extend the term of Order No. 528230 to provide Mewbourne an additional one year from February 6, 2007 within which to commence operations for the drilling of the initial well covered by the Pooling Order, because the matter is now being appealed to the Supreme Court of Oklahoma; **(5)** that it is expected it will take approximately a year before a decision is rendered by the Supreme Court; **(6)** that the question is whether pursuant to *Turpen v. Oklahoma Corporation Commission*, 769 P.2d 1309 (Okla.1988) the Commission is divested of jurisdiction to affect or amend the Pooling Order No. 528230 to provide Mewbourne with an additional one year to commence operations for the drilling of the initial well; **(7)** that in the Supreme Court case of *Chaparral Energy L.L.C. v. Corporation Commission of the State of Oklahoma*, No. 102,881, the Court issued an Order on February 6, 2006, and found that the issues pending in related appeals from pooling orders, which set forth the pre-drilling estimated well costs, are distinct from the issues raised in Motions for Redetermination of Well Costs within the meaning of 52 O.S. 2001 §87.1 (e). Therefore, the Court found the Corporation Commission had not lost jurisdiction over said Motions for Redetermination after the appeals were commenced. Thus, the Supreme Court stated that issues in the pooling appeals that were pending were not "legally similar" so as to deprive the Corporation Commission of its jurisdiction to rule on discovery motions and motions for redetermination of well costs during the pendency of the appeals. See *Anson Corporation v. Hill*, 841 P.2d 583, 587 (Okla.1992); *Amarex Inc. v. Baker*, 655 P.2d 1040, 1043 (Okla.1982); **(8)** that Oklahoma Corporation Commission Rule 165:5-7-7 (f) and (g) provide that a pooling order may be extended in time upon proper notice by motion and a Hearing for a Redetermination of Well Costs shall be conducted upon proper notice by motion. The Supreme Court's order in the Chaparral Energy case, No. 102,881, concerned the determination of actual well costs under Oklahoma Corporation Commission Rule 165:5-7-7(g) and 52 O.S. §87.1 (e), and this Mewbourne Motion concerns the extension of time of the pooling order pursuant to Oklahoma Corporation Commission Rule 165:5-7-7 (f); **(9)** that the

Supreme Court of Oklahoma therefore would decide that the issues in the pending appeals are not so legally similar as to deprive the Corporation Commission of its jurisdiction to rule on Mewbourne's Motion for Extension of Time to Commence Operations, which was similar to the allowance by the Supreme Court for the Commission to determine the proper actual costs under an appealed pooling order; **(10)** that the ALJ therefore recommended the granting of the Motion for Extension of Time to Commence Operations under Pooling Order No. 528230 for one year because it would take that long for the Supreme Court to reach its decision.

POSITIONS OF THE PARTIES

OPTIMA

OPTIMA TAKES THE POSITION: **(1)** that the legal principles that need to be applied here are straight forward and the cases are clear that when an appeal of a Commission Order is perfected the Commission is divested of jurisdiction to affect or amend the order, and therefore such order would be null and void if entered; **(2)** that under Oklahoma Supreme Court Rule 1.15 only provides the Corporation Commission with jurisdiction to consider an application to stay the appealed order and not a motion to amend the order to extend the time within which the unit well is to be commenced; **(3)** that stay of enforcement of the decisions of the Corporation Commission is governed by the applicable statutory law or rules applying to the Corporation Commission; **(4)** that the only thing the Commission can do when an order has been appealed is enter a stay and set a supersedeas bond if, in its discretion, the facts warrant it. This is what should have been done in this particular case; **(5)** that the only reason Mewbourne wants this Extension of Time is that if they drilled the well and the Supreme Court reversed, Mewbourne could end up being divested of the 85% interest in the unit owned by Optima; **(6)** that this particular and only reason presented by Mewbourne can not rise to substantial evidence or good cause for granting this Motion for Extension of the Pooling Order to Commence Operations, even if the Commission has jurisdiction to enter it; **(7)** that Mewbourne should have filed a Motion for Stay within the authorized 10-day time period after entry of the pooling order, or they could have filed a motion, with proper notice given, seeking to modify the order outside of the ten-day time period pursuant to Oklahoma Corporation Commission Rule 165:5-17-2; **(8)** that Optima until this Pooling Order No. 528230 was entered owned 85% of the working interest; **(9)** that the Chaparral Supreme Court case, No. 102,881, cited by the ALJ had to do with ascertaining final well costs and it is well settled that the Commission retains continuing jurisdiction under a pooling

order to adjudicate the reasonable final well costs. The Supreme Court stated that these issues were not similar to the issues that were raised in Chaparral's appeal to the Oklahoma Supreme Court; **(10)** that the present case is totally different because one of the grounds appealed by Optima is that the Commission lacked jurisdiction over the person of Optima Oil and Gas Company and over the subject matter of this case, which brings the whole order into issue before the Oklahoma Supreme Court, including the six-month time period within which to commence operations; **(11)** that Optima will be materially affected by the issuance of an extension of time to commence drilling operations under Order No. 528230 as some of its leases will expire. One of its leases has already expired in December of 2006; **(12)** that well costs determination is something that the Commission has continuing jurisdiction over whereas the time period within which to commence the initial well is a material element of the pooling order. This motion to modify materially affects the rights of the parties which is on appeal to the Supreme Court of Oklahoma based upon the jurisdictional attack that Optima has raised; **(13)** that the ALJ's recommendation in granting Mewbourne's Motion to Extend the Commencement of Operations of the initial well for one year should be reversed.

MEWBOURNE TAKES THE POSITION: **(1)** that Optima has injected in its appeal and in this present contested motion facts that are not in the record; **(2)** that there was no testimony concerning whether or not Mewbourne had a rig available to drill the initial well and nothing in the record states that Optima always planned to appeal the Pooling Order No. 528230; **(3)** that further there is no testimony in the record about lease expirations. The lease that was presented as an exhibit was presented to reflect the name of the lessee, Optima. There is nothing in the record to reflect the status of that lease by way of extension or otherwise and no other lease was discussed; **(4)** that Mewbourne presented an uncontested pooling application in an uncontested hearing where there was one respondent, Optima, and there was a signed green card which reflected proper notice to Optima, but they failed to appear; **(5)** that at the time the order was being entered, Optima filed its Motion to Vacate and ultimately the Commission found that notice was proper and the Order was issued; **(6)** that this appeal has nothing to do with subject matter jurisdiction. There are three types of jurisdiction with which the Commission must deal with: (1) personal jurisdiction, i.e. proper notification to a party, (2) subject matter jurisdiction, i.e. does the statute which governs the jurisdiction of the Commission reflect the type of relief requested, and (3) has the Commission's power been activated by properly following the procedures of the Commission; **(7)** that the only thing that is on appeal in this case is the first and third of those elements, personal jurisdiction and whether the Commission has properly activated and followed its rules and procedures; **(8)** that there cannot be a question about subject matter jurisdiction in the present case as it

is clear that the Corporation Commission has subject matter jurisdiction over pooling, and what is at issue in this case is whether or not personal jurisdiction was invoked and thus was the activation of power properly followed; **(9)** that Optima is also arguing that Mewbourne did not testify to some fair market value transactions that were relevant and Optima argued that because of the incomplete fair market value transaction evidence there was not substantial evidence to support the order; **(10)** that none of these issues on appeal have anything to do with subject matter jurisdiction, and what we have then are two issues, i.e. adequate personal notification to Optima and is the evidence complete as to fair market value; **(11)** that the general rule is that pending an appeal the Lower Court “is without jurisdiction over any issue pending on review...” See *City of Lawton v. International Union of Police*, 41 P.3d 371, 375 (Okla.2002); *Stetler v. Boling*, 152 P.452, Okla.1915; **(12)** that there are always continuing aspects of a pooling order which controls development of the common source of supply and the rules specifically point out aspects that are continuing after the pooling order is issued. There is also a third change that can be made to a pooling order and that is operational changes, i.e. OCC Rule 165:5-7-11 (c); **(13)** that if the only issues on appeal are fair market value questions and personal jurisdiction, then this Motion for Extension of Time to Commence Operations has nothing to do with the issues appealed; **(14)** that it should be noted that Optima did not decide to do nothing concerning this Pooling Order No. 528230, but has elected under the pooling order the overriding royalty and no cash option provision. Despite their appeal they have made this election; **(15)** that they have exercised their right to appeal, but they also have exercised their choice to give Mewbourne Optima’s 85% interest by electing not to participate in the risk of drilling. What’s fair in that circumstance is Mewbourne has the right to complete the process of Optima’s appeal to protect Mewbourne’s rights; **(16)** that the case in the Supreme Court is moving along as fast as it can with no delays by anyone; and **(17)** that by Optima’s choice Mewbourne has been given 100% of the unit well. The risk of that is what Mewbourne would like to defer to give Optima the right to complete the choice that they have made.

OPTIMA’S FURTHER POSITION: **(1)** that because of the jurisdictional issue on appeal the whole order is on appeal and a material portion of it is the time period within which to commence operations; **(2)** that had there been a contested hearing, operations would have been an issue by Optima. Optima would have contested Mewbourne’s status as operator as Optima has 85% of the working interest in the unit; **(3)** that Optima’s election was done “under protest”; **(4)** that this is not an Altex/Chaparral situation concerning actual well costs determination generated post order in which it is clear the Commission has continuing jurisdiction; and **(5)** that what is asked for here goes to the essence of the order and its existence. Therefore, the Commission

does not have jurisdiction to grant this Motion for Extension of Time to Commence Operations.

CONCLUSIONS

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

1) The Referee finds that the ALJ's recommendation to grant Mewbourne's Motion for Extension of Time to Commence Operations for the drilling of the initial well covered by Pooling Order No. 528230 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.

2) Optima appealed two issues in Optima's Brief-In-Chief filed on December 11, 2006 in the Supreme Court of the State of Oklahoma. Optima states that the Commission erred in entering Pooling Order No. 528230 and Order 529450 denying Optima's Motions to Reopen and Vacate Order No. 528230, because of Mewbourne's disregard of the notice requirements set forth in the Commission rules, and thus violated Optima's right to due process as protected by the Oklahoma Constitution and the Constitution of the United States of America. Thus, Optima is alleging that proper notice was not given by Mewbourne to Optima in the original pooling order. Optima is also asserting in its Brief-In-Chief that the Pooling Order No. 528230 is based on fraudulent concealment and misinterpretation of relevant and available evidence concerning fair market value testimony, and that Mewbourne misrepresented the market value of the interest covered by said order. Thus Optima states in its Brief-In-Chief that said Pooling Order No. 528230 is lacking the support of substantial evidence. Mewbourne also, it is alleged by Optima, withheld the fact that Optima had stated that it intended to protest the pooling application and Mewbourne's request to be appointed operator of the unit.

3) When the Supreme Court of the State of Oklahoma acquires jurisdiction over an issue, the trial court's jurisdiction is ousted as to any issue involved in the appeal, but not as to collateral matters not involved in the appeal or matters happening after the appeal. See *Stetler v. Boling*, 152 P.2d 452 (Okla.1915) where the Supreme Court held:

"While an appeal is pending in this Court the trial Court is without jurisdiction to make any order involving any question covered by the appeal; but matters independent of and

distinct from the questions involved in the appeal, and which are purely collateral or supplemental, lying outside of the issues framed in the case appealed, or arising subsequent to the delivery of the judgment from which the appeal is prosecuted, are not taken from the jurisdiction of the trial court by appeal." 152 P. at Page 454.

4) Pending an appeal or certiorari, the Lower Court "is without jurisdiction over any issue pending on review." See *City of Lawton*, supra, 41 P.3rd at 375.

5) The issues pending on appeal by Optima involve the question of proper notice given by Mewbourne to Optima in the original uncontested pooling proceeding, and whether concealment and misrepresentation of relevant and available evidence concerning fair market value testimony rendered the pooling order unsupported by substantial evidence. These two issues are distinct from the issues raised in Mewbourne's Motion for Extension of Time to Commence Operations for the drilling of the initial well under Pooling Order No. 528230.

6) Further, this Motion for Extension of Time to Commence Operations for the drilling of the initial well under Order No. 528230 is not "legally similar" to the issues in the pending appeal as to deprive the Corporation Commission of its jurisdiction to rule on said motion. See Order issued February 6, 2006 by the Supreme Court of the State of Oklahoma in *Chaparral Energy, L.L.C., Petitioner, v. The Corporation Commission of the State of Oklahoma, et al., Respondents*, Case No. 102881.

7) Further, the effect of the Pooling Order No. 528230 has not been stayed pending the appeal, as Optima did not attempt to supersede the order in the manner provided by 52 O.S. § 113. See *Anderson v. Ellison*, C.A. 10 (Okla.) 1960, 285 F.2d 484. Thus, Pooling Order No. 528230 continues in effect and can be "extended in time" by motion as provided for in OCC rule 165:5-7-7 (f).

8) The Referee concludes that the Motion by Mewbourne for Extension of Time to Commence Operations for the drilling of the initial well covered by Order No. 528230 is supplemental, dissimilar or collateral to the issues on appeal. Thus, the ALJ's recommendation that the Commission enter an Order amending Order No. 528230, to provide Mewbourne, as operator, an additional

one (1) year from February 6, 2007, within which to commence operations for the drilling of the initial well covered thereby should be affirmed.

RESPECTFULLY SUBMITTED THIS 5th DAY OF FEBRUARY, 2007.


PATRICIA D. MACGUIGAN
ACTING OIL & GAS APPELLATE REFEREE

PM:ac/sh

xc: Commissioner Cloud
Commissioner Bode
Commissioner Anthony
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