

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the Application of Brian L.) Docket No. 19-CONS-3106-CUIC
Birk dba Birk Petroleum to Authorize)
Injection of Saltwater into the Kansas City) CONSERVATION DIVISION
Formation at the Merritt #10, located in)
Section 7, Township 23 South, Range 15) License No. 31280
East, Coffey County, Kansas.)

ORDER ON APPLICANT'S MOTION TO DISMISS THE PROTEST FILED HEREIN

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds the following:

Background

1. On August 31, 2018, Brian L. Birk dba Birk Petroleum (Operator) filed an Application to authorize the injection of saltwater into the Kansas City formation at its Merritt #10 well in Coffey County, Kansas.¹ Notice of the Application was published in The Coffey County Republican newspaper on August 23, 2018, with the Affidavit of Publication being filed in the docket on September 13, 2018.²

2. On August 28, 2018, Susan Royd-Sykes filed a letter of protest (Protest Letter), and on September 13, 2018, Ms. Royd-Sykes filed a letter requesting a hearing.

3. On October 30, 2018, the Commission issued an *Order Setting Procedural Schedule*, setting an evidentiary hearing for January 24, 2019, at the Commission's Wichita office.³

¹ Application, p. 1 (Aug. 31, 2018).

² See Affidavit of Publication – The Coffey County Republican (Sept. 13, 2018).

³ *Order Setting Procedural Schedule*, ¶ 4 and Ordering Clause A (Oct. 30, 2018).

4. On November 6, 2018, Protestant Ms. Royd-Sykes moved the Commission to change the hearing location from Wichita to Topeka.⁴ Ms. Royd-Sykes stated that health factors limit her driving ability, and she requested that, should this matter proceed to hearing, the Commission take her driving constraints into consideration and move the location of the January 24, 2019 hearing from Wichita to the Commission's Topeka office.⁵

5. On November 15, 2018, the Commission denied Ms. Royd-Sykes' Motion to Change Hearing Location, and ordered the hearing to be held in Wichita, as scheduled.⁶

6. On November 19, 2018, Ms. Royd-Sykes filed Protestant's Motion to Deny the Permits to Authorize the Disposal of Saltwater in Dockets No. 19-CONS-3106-CUIC (Merritt #10) and No. 19-CONS-3107-CUIC (Merritt #5) Located in Coffey County, Kansas, and Close the Docket in Both Matters (Motion to Deny Permits).

7. On November 26, 2018, the Operator filed a Motion to Dismiss the Protest Filed Herein (Motion to Dismiss).

8. On November 27, 2018, the Operator responded to Ms. Royd-Sykes' Motion to Deny Permits (Response to Motion to Deny Permits).

9. On December 4, 2018, Ms. Royd-Sykes filed a Renewed Motion to Change Hearing Locations from Wichita to Topeka or Reschedule the Evidentiary Hearings (Renewed Motion).

10. On December 6, 2018, Ms. Royd-Sykes filed a Response to Applicant's Motion to Dismiss the Protest Filed Herein (Response to Motion to Dismiss).

Legal Standards

11. K.A.R. 82-3-135a(e) requires a protestant to file a "valid protest." According to K.A.R. 82-3-135b(a), a valid protest is one that "include[s] a clear and concise statement of the

⁴ Protestant's Motion to Change Hearing Location from Wichita to Topeka (Nov. 6, 2018) (Motion).

⁵ Motion, p. 2.

⁶ *Order on Motion to Change Hearing Location*, Ordering Clause A (Nov. 15, 2018).

direct and substantial interest of the protester in the proceeding, including specific allegations as to the manner in which the grant of the application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas.” In Docket No. 17-CONS-3689-CUIC (17-3689 Docket or *Cross Bar*), the Commission found that to meet the “direct and substantial interest requirement, each protestant must demonstrate that he or she has “standing” under Kansas’ traditional two-part test for standing.⁷

12. Under the two-part standing test, each protestant must demonstrate that [1] he or she suffered a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct.⁸ A cognizable injury is established by showing . . . that [an individual] personally suffers some actual or threatened injury as a result of the challenged conduct . . . [and] . . . [t]he injury must be particularized, *i.e.*, it must affect the plaintiff in a personal and individual way.⁹ Mere allegations of possible future injury do not meet the requirements of standing.¹⁰ Any threatened injury must be certainly impending.¹¹ Moreover, an individual must assert his or her own legal rights and interests, and . . . an injury must be more than a generalized grievance common to all members of the public.¹²

13. The Commission also found that at the pre-evidentiary stage of a proceeding, a party need only demonstrate a *prima facie* case for standing, meaning the Commission must determine if the facts alleged in the protest, and inferences to be made therefrom, demonstrate standing.¹³ However, once an evidentiary hearing has taken place, the burden increases to a preponderance of the evidence.¹⁴

⁷ Docket No. 17-CONS-3689-CUIC, *Final Precedential Order*, ¶ 3 (Apr. 5, 2018).

⁸ *Id.*

⁹ Docket No. 17-CONS-3689-CUIC, *Written Findings and Recommendations*, ¶ 29 (Mar. 29, 2018), incorporated by reference into the *Final Precedential Order*, ¶ 1.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at ¶ 30.

¹⁴ *Id.*

Findings and Conclusions

14. In her Protest Letter, Ms. Royd-Sykes alleged that the subject well is located about 8 miles from her home.¹⁵ She then alleged that, based on the ostensible elevation of the well, she has “serious concerns that such injection of saltwater would lead to pollution of the immediate vicinity through leakage or spillage, and subsequently, violate water rights in the area to include local range and farmlands, and clean drinking water sources on which myself and the local Kansas citizens depend.”¹⁶ Ms. Royd-Sykes further stated her concerns about earthquakes allegedly stemming from injection activity in Kansas and Oklahoma.¹⁷ She claimed she has “inherent rights to the guarantee of clean drinking water,” and that her “status as a citizen and the proposed location of these wells just 8 miles from [her] home give [her] proximity and standing to file this protest.”¹⁸

15. In her Response to Motion to Dismiss, Ms. Royd-Sykes reiterated her initial protest and proclaimed that “all water, earth, air and, accordingly, all life, including humanity, on this planet are more than generally, but fully and inseparably connected.”¹⁹ Further, Ms. Royd-Sykes argued that a spill or leak from the subject well “not only pollutes . . . resources surrounding the immediate well site and its field or meadow, but those of Birk Petroleums’ families’ own personal space, the Protestant’s personal space, Birk Petroleum’s legal representatives personal space, the personal space of the Commission, ad infinitum.”²⁰ Ms. Royd-Sykes described her recollection of Staff’s role in previous Commission UIC dockets,²¹ her reportage of alleged roadside oil spills, her claim that she is not required to provide all of her intended evidence in her initial protest letter,

¹⁵ Protest Letter, p. 1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Response to Motion to Dismiss, p. 1.

²⁰ *Id.*

²¹ *See id.* at p. 2.

and assertion that a case on judicial review in Shawnee County District Court could affect the Commission's *Final Precedential Order* in the 17-3689 Docket.²²

16. The Commission finds that pursuant to K.A.R. 82-3-135b and the findings of the 17-3689 Docket, Ms. Royd-Sykes has not made a valid protest. Ms. Royd-Sykes is neither a landowner on whose land the subject well is located, nor does she live within a one-half mile radius of the subject well, which is the radius required for compulsory written notice of an application.²³ Ms. Royd-Sykes' claim that "leakage or spillage" from the subject well could possibly "violate . . . clean drinking water sources on which myself and the local Kansas citizens depend"²⁴ is a mere allegation of possible future injury which shows no evidence of being impending.²⁵ Moreover, Ms. Royd-Sykes has not alleged that she is close enough to any water source such that leakage or spillage from the subject well, if any, would have a causal connection to an injury she might ostensibly suffer.²⁶ Therefore, the fact that she lives within 8 miles of the subject well does not make a *prima facie* case for a direct and substantial interest in this proceeding, particularly when Ms. Royd-Sykes has made no *specific* allegation as to the manner in which the grant of the Application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas.²⁷

17. Ms. Royd-Sykes' universalized statements about the full and inseparable connectedness of all life and about pollution "ad infinitum" only reinforce the fact that her protest is not specific and particular, as a *prima facie* case for standing requires, but is a generalized grievance common to all members of the public.²⁸ Ms. Royd-Sykes' assertions regarding Staff's

²² See *id.* at pp. 2-3.

²³ See K.A.R. 82-3-135a; Protest Letter, p. 1.

²⁴ See Protest Letter, p. 1.

²⁵ See ¶ 12 of this Order, *supra*.

²⁶ See *id.*

²⁷ See K.A.R. 82-3-135b(a).

²⁸ See ¶ 12 of this Order, *supra*.

role in other Commission dockets and her alleged oil spill reportage are irrelevant to her standing claim in the instant docket.²⁹ In addition, while Ms. Royd-Sykes is correct in asserting that she need not “provide all of the evidence she intends to present in her initial protest letter,”³⁰ she must, however, allege sufficient facts to demonstrate a *prima facie* case for standing. She has not done so. Moreover, the 17-3689 Docket is not stayed by current legal action, and thus, how it might be affected in the future is irrelevant to the instant proceeding.³¹

18. Ms. Royd-Sykes’ protest and Response to Motion to Dismiss essentially amount to the generalized assertion that this well could perhaps leak or spill, and therefore, should not be approved. However, as noted above, such a generalized assertion is a mere allegation of possible injury, which does not meet the *prima facie* standing requirement.³² Ms. Royd-Sykes’ concerns about earthquakes in the broad area of Kansas and Oklahoma are generalized grievances common to all members of the public, and therefore, there is no allegation of an individual, personal, particularized or impending injury.³³ Thus, Ms. Royd-Sykes’ protest does not demonstrate that she has a direct and substantial interest in this proceeding. That is, she does not make a *prima facie* case for standing, and therefore, her protest is not valid.

19. Based on the above, the Commission finds the Applicant’s Motion to Dismiss the Protest Filed Herein should be granted. There are no other protests of record in this matter. Thus, Staff is directed to process Brian L. Birk, dba Birk Petroleum’s Application accordingly and advise the Commission if, in Staff’s opinion, a hearing is necessary. Otherwise, the docket shall be closed, and there shall be no further proceedings.

²⁹ See Response to Motion to Dismiss, p. 2.

³⁰ Response to Motion to Dismiss, p. 2.

³¹ See *id.* at p. 3.

³² See ¶ 12 of this Order, *supra*.

³³ *Id.*

20. In addition, dismissal of Ms. Royd-Sykes' protest renders moot both her Motion to Deny Permits and Renewed Motion to Change Hearing Locations.

THEREFORE, THE COMMISSION ORDERS:

A. Brian L. Birk, dba Birk Petroleum's Motion to Dismiss the Protest Filed Herein is granted. Staff shall process the Application accordingly.

B. The Protestant's November 19, 2018 Motion to Deny Permits and December 4, 2018 Renewed Motion to Change Hearing Locations are rendered moot.


C. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).³⁴

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 12/13/2018



Lynn M. Retz
Secretary to the Commission

Mailed Date: _____

MJD

³⁴ K.S.A. 55-162; K.S.A. 55-606; K.S.A. 55-707; K.S.A. 77-503(c); K.S.A. 77-531(b).

CERTIFICATE OF SERVICE

19-CONS-3106-CUIC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of electronic service on 12/13/2018.

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