

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

2016-04-08 16:29:27
Kansas Corporation Commission
/s/ Amy L. Green

Before Commissioners: Jay Scott Emler, Chairman
 Shari Feist Albrecht
 Pat Apple

In the matter of a Compliance Agreement)	Docket No.: 16-CONS-3876-CMSC
between Steven A. Leis and Commission Staff)	
regarding bringing the twenty-eight wells in)	CONSERVATION DIVISION
Woodson County into compliance with K.A.R.)	
82-3-111.)	License No.: 33900

STAFF’S RESPONSE TO LANDOWNER’S PETITION FOR INTERVENTION

Commission Staff (“Staff”) opposes LD and Cheryl McCormick’s (“Landowners”) petition to intervene in this compliance matter. The issues at hand pertain to Steven A Leis’s (“Operator’s”) regulatory obligations, which have been addressed by the Compliance Agreement approved by the Commission. The Landowners have no particularized statutory right to insert themselves into a determination of what Operator’s obligations are to the Commission. To the extent Landowners have contractual or statutory rights regarding Operator’s activities, Landowners’ appropriate venue for Operator’s failure to abide by its duties to Landowners is a civil court of competent jurisdiction, not the Commission. Landowners’ petition for intervention should be denied.

I. STATEMENT OF FACTS

1. On March 10, 2016, Staff filed a motion for the Commission to adopt a Compliance Agreement (“Agreement”). As described in the Agreement, Operator is responsible for 28 wells on the Hartzler Lease. The wells are currently out of compliance with K.A.R. 82-3-111, which is the Commission’s regulation regarding temporary abandonment. The Agreement states that Operator shall bring the wells into compliance at a rate of two wells every three calendar months – by plugging the wells, or returning them to service, or obtaining temporary

abandonment status for them – until such time as all wells are in compliance with K.A.R. 82-3-111. The Agreement was signed by Operator and Staff, and provides penalties if Operator fails to meet the described deadlines. On March 15, 2016, the Commission approved the Agreement at its open meeting, via summary proceedings as part of its consent agenda.

2. On March 29, 2016, Landowners petitioned for intervention, stating they qualify to intervene under K.S.A. 77-521 and should be allowed to do so. Staff respectfully disagrees.

II. ARGUMENT

3. Landowners here do not and should not qualify to intervene under K.S.A. 77-521. Summary proceedings were appropriately conducted under K.S.A. 77-537, and if summary proceedings were appropriate, then Landowners' intervention under K.S.A. 77-521 is not. K.S.A. 77-537 allows summary proceedings where protection of the public interest does not require the state agency to give notice and an opportunity to participate to persons other than the parties. In matters such as these, Staff represents the general public in defense of the public interest, and it is therefore unnecessary for other parties to participate to protect that public interest.

4. In this case, the Agreement delineates Operator's obligations to the Commission. It has nothing to do with any obligations Operator may have regarding Landowners, and the Commission itself has no obligations to Landowners not generally owed to all Kansas citizens. Landowners here make no claim to protect the public interest, only their own interest. Even if the Commission determines that summary proceedings under K.S.A. 77-537 were inappropriate, which would result in the need to change long-standing Commission processes regarding compliance agreements, intervention should not be granted under K.S.A. 77-521 because Landowners may seek any necessary legal recourse elsewhere, and it is certain Landowners'

intervention would impair the orderly and prompt conduct of proceedings. Accordingly, Landowners' petition for intervention should be denied.

A. The Commission Appropriately Conducted Summary Proceedings.

5. Summary proceedings under K.S.A. 77-537 allow Kansas administrative agencies, including the Commission, to issue orders without the need to first hold an evidentiary hearing. The Commission may do so, subject to a party's request for a hearing, if the following provisions are true:

- (1) The use of those proceedings in the circumstances does not violate any provision of law;
- (2) The protection of the public interest does not require the state agency to give notice and an opportunity to participate to persons other than the parties;
- (3) Based upon an investigation of the facts by the state agency, beyond receipt of the allegations, the state agency believes in good faith that the allegations will be supported to the applicable standard of proof, provided however that an alleged failure to meet the standards set forth in this subsection shall not be subject to immediate judicial review and shall not invalidate any later agency action that has been supported to the applicable standard of proof; and
- (4) The order does not take effect until after the time for requesting a hearing has expired.

6. The Commission appropriately used summary proceedings in the present case to approve the Agreement. Operator and Staff, the only parties in this matter, entered into an Agreement describing Operator's regulatory obligations to the Commission. Under its terms, the Agreement was not binding unless formally approved by the Commission. No law prohibits Staff from seeking formal Commission approval of agreements, fulfilling provision (1) above.

7. In regard to provision (2), Staff and the Commission are tasked with protecting the public interest regarding operator compliance with Commission regulations, and in fact regarding all practices involved in the exploration and gathering of oil and gas.¹ Therefore, it is not necessary for other persons to be provided an opportunity to participate to protect that public

¹ See K.S.A. 74-623.

interest – that is the very purpose of Commission Staff. Further, Landowners’ petition makes no claim to protect the public interest, but only their own private interests. Regarding provisions (3) and (4), Operator and Staff stipulated to the pertinent facts, and as part of the Agreement, Operator waived its right to request a hearing regarding any Commission order approving the Agreement. Therefore, those provisions have also been fulfilled.

8. The Commission appropriately used summary proceedings to dispose of this matter, and under K.S.A. 77-537, no notice or opportunity to be heard was required to be given to any person but Operator. Staff and the Commission have protected the public interest, and the Landowners only claim a desire to protect their own private interests. Such desire has nothing to do with Staff’s Agreement with Operator, which merely delineates Operator’s obligations to the Commission, and through the Commission to the general public. Being the case, summary proceedings were acceptable, and Landowners’ petition to intervene should be denied.

B. Since the Commission Appropriately Conducted Summary Proceedings, Intervention under K.S.A. 77-521 is not Appropriate.

9. K.S.A. 77-521 does not envision intervention in circumstances such as this, where the Agreement between Staff and Operator was approved via summary proceedings without a full evidentiary hearing. Three portions of K.S.A. 77-521 demonstrate that fact. First, K.S.A. 77-521(a) states that upon meeting certain requirements, including the petition to intervene being submitted at least three business days before the hearing, intervention shall be granted. Here, Landowners did not submit a petition to intervene at least three business days before the hearing, and so intervention is not appropriate under K.S.A. 77-521(a). Either the hearing was simply the vote by the Commission to approve the Agreement, or in the alternative, no hearing is held for summary proceedings. It is not surprising Landowners did not submit a timely petition, because due to the summary nature of the proceedings, to which Landowners were not a party, and of

which Landowners were not noticed because it was unnecessary, only five days elapsed between Staff's motion and the Commission's order. In other words, if summary proceedings are appropriate under K.S.A. 77-537, then petitions for intervention under K.S.A. 77-521 are both inappropriate and either unlikely or impossible.

10. Second, K.S.A. 77-521(c) states that conditions may be imposed upon the intervenor's participation in the proceedings, including limiting participation to issues, limiting use of discovery, and limiting cross-examination. In this matter, there was no discovery and no evidentiary hearing, as Staff was simply seeking ratification of an agreement, signed by Operator, which outlined Operator's obligations to the Commission. K.S.A. 77-521(c) only envisions limitations regarding matters concerning evidentiary hearings, because it only envisions intervenors in matters that *require* evidentiary hearings. Such hearings do not occur with uncontested summary proceedings.

11. Third, K.S.A. 77-521(d) states the presiding officer shall issue an order on a petition for intervention at least one business day prior to the hearing. No petition for intervention was received prior to the hearing, which was either a vote by the Commission to approve the Agreement, or in the alternative does not occur during summary proceedings. So, no order granting intervention could be approved in the manner required by K.S.A. 77-521. The statute, as demonstrated by the language of K.S.A. 77-521(a), K.S.A. 77-521(c), and K.S.A. 77-521(d), is not an appropriate tool for Landowner to intervene in a regulatory compliance matter between Operator and Staff, resolved via summary proceedings, where Staff is the appropriate, designated party to protect the public interest.

12. Landowners state that they have legal interests that may be substantially affected by this proceeding.² Whether Landowners have legal interests that may be substantially affected under K.S.A. 77-521(a)(2) makes no difference unless a petition for intervention was timely submitted at least three business days prior to the hearing pursuant to K.S.A. 77-521(a)(1) – which was not done in this case. Even if Landowners’ petition had been timely filed, and even if they have legal interests that may be substantially affected, K.S.A. 77-521(a), and independently, K.S.A. 77-521(b), requires that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. Granting Landowners’ petition, however, is not in the interests of justice and would significantly impair the orderly and prompt conduct of these proceedings, which have already been resolved via summary proceedings.

13. Regarding the interests of justice, the Landowners, or their predecessors in interest, had an opportunity to negotiate with Operator, or Operator’s predecessor in interest, as to their private legal obligations. The Agreement has nothing to do with Operator’s obligations to Landowners, and everything to do with Operator’s obligations to the Commission. If intervention is granted, then Landowners will either be negotiating about Operator’s obligations owed to the Commission, or negotiating new Operator obligations owed to Landowners. Neither outcome is appropriate. Landowners should not get to determine Operator’s obligations owed to the Commission, because it is instead the duty of Staff to protect the public interest. And Landowners should not get to negotiate via a Commission agreement regarding new Operator obligations owed to Landowners. Such obligations should have been privately negotiated, have nothing to do with protecting the general public interest, and are outside the purview of the Commission. Landowners may seek any justice owed to them by Operator in civil court.

² See Petition of Landowner for Intervention, ¶¶10-19.

14. The orderly and prompt conduct of this proceeding would also be harmed if Landowners were allowed to intervene. This matter, which simply determines Operator's duties with respect to the Commission, has already been resolved to the apparent satisfaction of both Operator and Commission Staff. Re-opening this matter to allow Landowners a say in how the Commission enforces its regulations, or to allow Landowners an opportunity to create private rights Landowners neglected to contractually obtain from Operator, would not promote the orderly and prompt conduct of this already-resolved proceeding.

15. There is an additional reason to deny Landowners' petition for intervention. Contrary to Landowners' assertion, Landowners have no legal right under Commission regulations or state statutes to have the wells on the Hartzler lease plugged.³ Operator's duties under Commission regulations and statutes are duties owed *to the Commission*; any duties Operator owes to Landowners are those that were privately, contractually negotiated.

16. Further, Operator does not owe a duty under the Agreement, or under Commission regulations, or under statutes, to *plug* the wells. Staff understands Operator will likely plug the wells as a means of obtaining compliance with the Agreement. However, both K.A.R. 82-3-111 and the Agreement also provide the option of temporarily abandoning the wells, or returning them to service.

17. The statute cited by Landowners, K.S.A. 55-177, also does not provide a timeframe for *plugging* wells, but rather a timeframe for removing structures and abutments from leases once wells are abandoned. The wells subject to the Agreement are seemingly not abandoned, because Operator has entered into the Agreement with Staff. Even if they are, and even if K.S.A. 55-177 describes Operator's obligations to Landowners to plug wells as

³ See Petition of Landowner for Intervention, ¶15-17.

Landowners suggest, the Commission's Agreement only describes Operator's obligations to the Commission, and would have no effect on Operator's separate obligation to Landowners.

18. Finally, allowing Landowners to intervene would set extremely damaging precedent. The Commission is tasked with protecting the public interest through regulation of the oil and gas industry, including the prevention of waste and the protection of correlative rights, as well as the protection of fresh and useable water. It is not tasked or equipped to negotiate legal rights and duties between operators and landowners. Staff routinely enters into compliance agreements with operators in order to protect the public interest. If landowners are granted a right to intervene in such matters, then Staff will no longer be able to effectively do so.

19. Instead, Staff would have to determine who owns the land upon which wells are located, something which is labor intensive and not pertinent to the Commission's core tasks, to allow landowners a say in an operator's obligations to the Commission, or to create extra-statutory obligations serving only the landowners. Basic compliance agreements regarding multiple leases could easily become massive affairs with multiple landowners arguing about which wells should be remedied first. Staff's ability to efficiently effectuate regulatory enforcement on behalf of the State, particularly the Commission's obligations to prevent waste, protect correlative rights, and protect fresh and useable water, would be severely damaged.

20. Staff recognizes Landowners' desire to resolve various issues on their property. Staff also understands that some disputes between Operator and Landowners, or their respective predecessors in interest, regarding duties Operator and Landowner owe each other, have been subject to some recently-concluded civil court proceedings, although Staff is not well-versed in such proceedings. Landowners' intervention in this matter, however, does not serve to further the

Commission's jurisdictional mandate, or to otherwise protect the public interest, and is simply not appropriate. Private claims between Landowners and Operator should be resolved elsewhere.

III. CONCLUSION

21. For the foregoing reasons, Landowners' petition to intervene should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

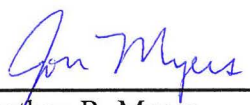
I certify that on 4/8/16, I caused a complete and accurate copy of this Response to be served via United States mail, with the postage prepaid and properly addressed to the following:

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