

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

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

|   |   |                              |
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| In the Matter of the Application of Redtail Investments, LLC, to drill the Redtail #1 well located in Section 2, Township 35 South, Range 1 West, Sumner County, Kansas, as a deviated well pursuant to K.A.R. 82-3-103a. | ) | Docket No: 18-CONS-3075-CHOR |
|   | ) | CONSERVATION DIVISION        |
|   | ) | License No: 35142            |
|   | ) |                              |

**ORDER ON APPLICANT'S MOTION TO DISMISS PROTEST**

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 and concludes as follows:

**Background**

1. On August 4, 2017, Redtail Investments, LLC (Operator) filed an Application requesting permission to drill and complete its proposed Redtail #1 horizontal well into the Hunton Formation in Sumner County, Kansas.<sup>1</sup>
2. On September 5, 2017, Operator filed an Amended Application,<sup>2</sup> and another Amended Application on November 16, 2017.<sup>3</sup>
3. On March 14, 2018, Commission Conservation Staff (Staff) filed a Motion for the Designation of a Prehearing Officer and the Scheduling of a Prehearing Conference.<sup>4</sup>

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<sup>1</sup> Application, p. 1 (Aug. 4, 2017).

<sup>2</sup> Amended Application (Sept. 5, 2017).

<sup>3</sup> Amended Application (Nov. 16, 2017).

<sup>4</sup> Motion for the Designation of a Prehearing Officer and the Scheduling of a Prehearing Conference (Mar. 14, 2018).

4. On April 3, 2018, the Commission issued its *Order Designating Prehearing Officer and Setting Prehearing Conference* (Order), which designated Samuel Feather as the Prehearing Officer in this proceeding.<sup>5</sup>

5. On April 26, 2018, Michael J. Duenes was designated as the new Prehearing Officer.<sup>6</sup>

6. On June 1, 2018, the Operator filed its Third Amended Application, asking the Commission to accept this Application in place of prior applications filed in this docket, and barring any protests, to grant the Operator's request to drill the Redtail #1 horizontal well, to be completed in the Hunton formation.<sup>7</sup>

7. On June 6, 2018, the Operator published notice of its Application in both the Wichita Eagle and The Wellington Daily News.<sup>8</sup>

8. On June 15, 2018, Dwain L. Yearout and Peggy Yearout filed their Protest and Opposition to Application of Redtail for Drilling Permit (Protest). The Yearouts asked the Commission to find that they have a valid interest in the Operator's Application and have full standing to participate in this proceeding.<sup>9</sup> The Yearouts also asked the Commission to set this matter for hearing, to deny the Operator's Application, and to find that these matters are properly before the Commission.<sup>10</sup>

9. On June 25, 2018, the Operator filed a Motion to Dismiss Protest. The Operator argued that the Protest is facially deficient because it lacks specific allegations.<sup>11</sup> The Operator

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<sup>5</sup> Order, Ordering Clause A (Apr. 3, 2018).

<sup>6</sup> *Order Designating New Prehearing Officer*, Ordering Clause A (Apr. 26, 2018).

<sup>7</sup> Third Amended Application, p. 4 (June 1, 2018).

<sup>8</sup> Affidavit of Publication – The Wichita Eagle (June 11, 2018); Affidavit of Publication – The Wellington Daily News (June 11, 2018).

<sup>9</sup> Protest, p. 3 (June 15, 2018).

<sup>10</sup> Protest, p. 3.

<sup>11</sup> Motion to Dismiss Protest, p. 4 (June 25, 2018).

also asked for dismissal based on its claim that “all of Protestants’ unsubstantiated contentions are inaccurate or entirely speculative.”<sup>12</sup>

### **Legal Standards**

10. 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 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.” These requirements are akin to the requirements for standing.<sup>13</sup> A protestant can only show a “direct and substantial interest” in the Application where the protestant demonstrates that, “[1] he or she suffered a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct.”<sup>14</sup> “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.”<sup>15</sup> “Mere allegations of possible future injury do not meet the requirements of standing and instead, any threatened injury must be certainly impending.”<sup>16</sup> Moreover, “an injury must be more than a generalized grievance common to all members of the public.”<sup>17</sup>

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<sup>12</sup> Motion to Dismiss Protest, p. 4.

<sup>13</sup> Docket No. 17-CONS-3689-CUIC, Written Findings and Recommendations, ¶ 28 (Mar. 29, 2018); *Final Precedential Order*, ¶ 1 (Apr. 5, 2018) (adopting and incorporating the Written Findings and Recommendations made by the Presiding Officer, Shari Feist Albrecht).

<sup>14</sup> See *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33, 49 (2015) (citations and internal quotations omitted). See also Docket No. 17-CONS-3689-CUIC, *Final Precedential Order*, ¶ 3 (Apr. 5, 2018).

<sup>15</sup> See *FV-I, Inc. for Morgan Stanley Mortg. Capital Holdings, LLC v. Kallevig*, 306 Kan. 204, 212, 392 P.3d 1248, 1255–56 (2017) (internal citations and quotations omitted). See also Docket No. 17-CONS-3689-CUIC, Written Findings and Recommendations, ¶ 29 (Mar. 29, 2018).

<sup>16</sup> See also *Labette Cty. Med. Ctr. v. Kansas Dep't of Health & Env't*, 2017 WL 3203383 at \*8 (unpublished), 399 P.3d 292 (Kan. Ct. App. 2017). See also Docket No. 17-CONS-3689-CUIC, Written Findings and Recommendations, ¶ 29.

<sup>17</sup> *Labette Cty. Med. Ctr.* 2017 WL 3203383 at \*10 (internal citations and quotations omitted).

## Findings and Conclusions

11. In its Motion to Dismiss, the Operator relied on the reasoning in the Commission's *Final Precedential Order* in the 17-CONS-3689-CUIC Docket (17-3689) to argue that the "Protestants have not done what is required to state a valid protest to the Application under Commission regulations and orders."<sup>18</sup> The Operator argued that the Yearouts' Protest is deficient on its face because it contains no "specific allegations describing how or why granting the application would actually cause waste, violate correlative rights or pollute the water resources of the State."<sup>19</sup>

12. The Operator argued that the difference of and distance between the two formations out of which the Operator and the Yearouts will be producing (i.e., the Hunton and the Simpson, respectively) ensures that there will be no production from a common source of supply.<sup>20</sup> Moreover, the Operator asserted that the completion interval for its well will be over twice the allowable setback distance from the Yearouts' lease line, and thus, the Operator's well poses no threat to the Yearouts' correlative rights.<sup>21</sup> In addition, the Operator argued that the Yearouts made the unsubstantiated charge that the Operator's well may cause water pollution.<sup>22</sup>

13. The Yearouts stated that they "have a direct and substantial interest in these proceedings."<sup>23</sup> They attempted to support this statement by asserting the following:

- Applicant's proposed well and activities will exploit a common source of supply, and if permitted, will result in an undue proportion of obtainable oil and/or gas to the benefit of applicant Redtail and to the detriment of protestors Yearout;<sup>24</sup>

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<sup>18</sup> See Motion to Dismiss, pp. 3-6.

<sup>19</sup> Motion to Dismiss, p. 4.

<sup>20</sup> Motion to Dismiss, pp. 4-5.

<sup>21</sup> Motion to Dismiss, p. 5.

<sup>22</sup> Motion to Dismiss, pp. 5-6.

<sup>23</sup> Protest, ¶ 12.

<sup>24</sup> Protest, ¶ 15.

- [I]f permitted, applicant's proposed development will cause undue drainage between developed leases and cause further harm to Dwain and Peggy Yearout;<sup>25</sup>
- If permitted, applicant's proposed development will injure the reservoir to the detriment of the Yearouts and others;<sup>26</sup>
- [P]rotestors have grave concerns about ground water and surface water issues not properly addressed in the Redtail application;<sup>27</sup>
- Upon information and belief, Dwain L. and Peggy Yearout understand that the State of Kansas has previously designated certain parts and portions of [the Section at issue] as a "established sensitive ground water area," and as such is afforded additional protections under Kansas law.<sup>28</sup>

14. The Commission finds that the Yearouts' alleged supporting statements in the previous paragraph are bare assertions that, as the Operator correctly noted, "merely parrot[] phrases from the Commission's regulation book."<sup>29</sup> The Yearouts' assertions contain no specific allegations as to *the manner in which* the grant of the Application will cause waste, violate correlative rights, or pollute Kansas' water resources, as K.A.R. 82-3-135b(a) requires. The Yearouts' Protest did not provide evidence that they have personally suffered a cognizable injury.<sup>30</sup> Further, the Yearouts' assertions are speculative and do not provide a basis for even alleging the possibility of a future injury, must less an impending injury.<sup>31</sup> The Commission finds the Yearouts' Protest does not meet the regulatory standard for protests, and thus, the Yearouts have not filed a valid protest pursuant to K.A.R. 82-3-135b(a).

15. Based on the above, the Commission finds the Yearouts' Protest shall be dismissed. There are no other protests of record in this matter. Therefore, Staff is directed to process the Operator's Third Amended Application accordingly and advise the Commission if, in Staff's

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<sup>25</sup> Protest, ¶ 16.

<sup>26</sup> Protest, ¶ 17.

<sup>27</sup> Protest, ¶ 19.

<sup>28</sup> Protest, ¶ 21.

<sup>29</sup> See Motion to Dismiss, p. 6.

<sup>30</sup> See ¶ 10 of this Order, *supra*.

<sup>31</sup> *Id.*

opinion, a hearing is necessary. Otherwise, the docket shall be closed, and there shall be no further proceedings.

**THEREFORE, THE COMMISSION ORDERS:**

A. Redtail Investments, LLC's Motion to Dismiss Protest is granted. Staff shall process the Application accordingly.

B. 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).<sup>32</sup>

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering additional orders as it deems necessary.

**BY THE COMMISSION IT IS SO ORDERED.**

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 07/12/2018



Lynn M. Retz  
Secretary to the Commission

Mailed Date: \_\_\_\_\_

MJD

<sup>32</sup> 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**

18-CONS-3075-CHOR

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 07/12/2018.

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