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NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

DAVID POST and PAULA POST, husband and wife; SARAH JULIAN, as Trustee of the Sarah Julian Trust; STACY DIANE POST WINKLER and JACOB WINKLER, husband and wife; MAX THOMAS and SHEILA THOMAS, husband and wife; KURT THOMAS; and COURTNEY THOMAS,

Plaintiffs/Appellees,

vs.

DEVON ENERGY PRODUCTION COMPANY, LP and BP AMERICA PRODUCTION COMPANY,

Defendants,

NEWFIELD EXPLORATION MID-CONTINENT INC. t/k/a OVINTIV MID-CONTINENT INC. n/k/a OVINTIV USA INC.,

Appellant.

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COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

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APPEAL FROM THE DISTRICT COURT OF
KINGFISHER COUNTY, OKLAHOMA

HONORABLE LANCE SCHNEITER, ASSOCIATE DISTRICT JUDGE

AFFIRMED IN PART AND REVERSED IN PART

Kane Cassil
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and

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

Ovintiv USA Inc. appeals two decisions by the district court. The first is that an oil and gas lease given by the plaintiffs, the Posts, in the SE/4 of Section 22, Township 15N, Range 7W, Kingfisher County, expired in May 2013 because it failed to produce in paying quantities for a reasonable period. The second is that the Posts' rights in the section were not pooled by a 2015 commission order because the Posts had not received the elected bonus and royalty payments. We affirm the first decision and reverse the second.

BACKGROUND

The Posts own a 160-acre mineral estate in the SE/4 of Section 22. In 1979, they leased this interest for oil and gas exploration (1979 or base lease[1]). The appellants, Ovintiv, are current assignees of the base lease. A 2015 pooling order made Newfield Exploration Mid-Continent Inc. the operator for Section 22, and Ovintiv is also the successor to Newfield. The 1979 lease contained a habendum clause as follows:

[1] Sometimes referred to as "the Felix lease," as Felix Energy LLC owned the lease during portions of the relevant time period.

> It is agreed that this lease shall remain in force for a term of three years from the date (herein called primary term) and as long thereafter as oil and gas, or either of them is produced from said land by the lessee.

The lease also contained a savings clause that would allow the lease to be continued under certain circumstances by a rework or new well. The clause states:

> If the lessee shall commence to drill a well or commence reworking operations on an existing well within the terms of this lease or any extension thereof, or on acreage pooled therewith, the lessee shall have the right to drill such well to completion or complete reworking operations with reasonable diligence and dispatch, and if oil and gas or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the terms of years first mentioned.

In March 2014, Newfield filed a pooling application, Cause 201402237-T, for Section 22. In September of 2014, the Posts were approached by an attorney who opined that the base lease was no longer being held by production in paying quantities and offered to help the Posts obtain a decision that the lease had expired. The Posts received notice of the pooling.

The Posts' right to drill, to the extent the base lease had expired, was pooled with Newfield as the operator in March 2015 by OCC Order No. 367116. The Posts affirmatively elected a $900 per acre bonus and a one-fifth royalty. In April 2015, the Posts also made demand on Felix Energy, then holders of the base lease, to provide a release of the 1979 lease on the grounds of lack of production by the Post 22-1 well. No demand was made on Newfield or Ovintiv, although Newfield had been granted the right to drill by the pooling order. On December 8, 2016, the Posts filed the underlying case in district court, naming over 100 potential defendants, and seeking to quite title in their mineral interest.

Neither Newfield nor Ovintiv was named, but each moved to intervene as a real party in interest. Intervention was granted.

Alignment of the proper parties took considerable time, and the court did not make its first significant decision until April 2021, finding on summary judgment that the SE/4 of Section 22 subject to the 1979 lease had not been communitized with the remainder of Section 22 by a 1958 spacing order. Hence, other production in Section 22 could not be considered in determining if the 1979 lease was producing in paying quantities. After a 2022 bench trial including expert testimony, the court issued a journal entry finding that the lease had failed to produce in paying quantities between April 2011 and May 2013 and had expired in May 2013.

The Posts then filed a motion seeking summary judgment that their recovered rights had not been pooled by the 2015 pooling order because they had not received their elected bonus and royalty payments. The court held hearing on this question in August 2022 and granted summary judgment that the pooling order was not effective as a matter of law because an operator's rights do not vest unless an agreed pooling bonus is actually paid. The court thus quieted title in the Posts. Ovintiv now appeals these decisions.

STANDARD OF REVIEW

As noted by *Tres C, LLC v. Raker Res., LLC*, 2023 OK 13, ¶ 22, 532 P.3d 1, 14, this action is a matter of equitable cognizance. *See also Hall v. Galmor*, 2018 OK 59, ¶ 11, 427 P.3d 1052, 1061 (citing *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 8, 85 P.3d 830, 833; *Hininger v. Kaiser*, 1987 OK 26, ¶ 10, 738 P.2d 137,

141; *Cotner v. Warren*, 1958 OK 208, ¶ 5, 330 P.2d 217, 219). Accordingly, issues of fact are reviewable under the clearly-against-the-weight-of-the-evidence standard, and issues of law are reviewable *de novo*. *Hall*, 2018 OK 59 at ¶¶ 12-13.

ANALYSIS

The court made two final decisions. The first is that the 1979 lease expired in May of 2013. The second is that, although the Posts elected a statutory royalty and bonus in the 2014-15 pooling procedure, the right to drill their 160-acre mineral estate was *never pooled* because the elected bonus has not been paid. The result is that Newfield/Ovintiv have been acting, for more than seven years, as operator of a 640-acre section, 160 acres of which were neither pooled nor leased.

The Validity of the Pooling Order

The most fundamental of these questions is whether the district court could effectively "undo" a part of the 2015 pooling order making Newfield/Ovintiv the operator for Section 22. As such, we will address it first. At the time of the pooling order, the base lease was assigned to Ovintiv. Seven years after the pooling, the court held that the lease terminated on May 31, 2013, over a year before the pooling order was final. The Posts were, however, included in the pooling before they filed suit to declare the lease had expired, and elected a $900 per acre bonus and a one-fifth royalty in lieu of participation. The base lease, by comparison, paid a three-sixteenths royalty.

After expiration of the 1979 lease was established, the court did not, however, rule that Ovintiv was required to pay the agreed bonus and additional royalty to the Posts. Instead, it held that the pooling order did not "vest" as to the Posts' interest because Newfield/Ovintiv did not timely pay the bonus, and "quieted title" in the Posts.[2] As such, it inherently ruled, as matter of law, that a failure to pay a bonus by a particular (though unspecified) time invalidates any pooling of that interest. We find no support in Oklahoma law for this rule.

The Posts purport to base their theory that the rights given an operator under a pooling order are invalidated if an elected bonus is not paid within a certain time in the language of three Oklahoma Supreme Court cases: *SKZ, Inc. v. Petty*, 1989 OK 150, 782 P.2d 939, *Inexco Oil Co. v. Oklahoma Corp. Comm'n*, 1988 OK 78, 767 P.2d 404, and *Ranola Oil Co. v. Corp. Comm'n of Oklahoma,* 1988 OK 28, 752 P.2d 1116. We will briefly discuss each.

SKZ, Inc. stated that, in a forced pooling, the rights of the operator vested "once the election period passed." *SKZ Inc.*, 1989 OK 150, ¶ 10. It also states in the same paragraph, however, that "[b]y accepting the bonus, appellees assigned their exploratory rights to SKZ," and "once appellees received payment of the bonus, SKZ's property rights vested." *Id.* The Posts interpret *SKZ Inc.* as holding that the rights of the operator become effective only upon the date of payment of

[2] Newfield/Ovintiv states in its reply brief that it did not pay this bonus and royalty because Felix was the record holder of the lease on the Posts' minerals and remained so until the court's order of August 2022.

the elected bonus, and hence Ovintiv has never had any drilling or operating rights in the SE/4 of Section 22 as to the Posts' interest.

The actual question in *SKZ,* however, was not one of when the rights created by a pooling order "vest," let alone one of whether a failure to vest invalidates the pooling order. The issue on appeal was "whether [the] Corporation Commission has authority to force pool by the wellbore instead of force pooling by the drilling and spacing unit." *Id.* at ¶ 0. The Court found no authority allowing pooling by the wellbore. *Id.*[3] The question of when rights "vest" under a pooling order was not at issue in *SKZ.* Hence, any statement to that effect is *dicta.*[4]

The question in *Inexco Oil Co.*, was also one of "wellbore pooling." The Supreme Court held that a hearing officer's determination that a pooling order pooled a wellbore, not a unit, was clearly erroneous, and that the Commission exceeded its authority in ordering repooling absent changed conditions or an infirmity in the original pooling order. *Inexco Oil Co.*, 1988 OK 78, ¶ 7. *Inexco* follows essentially the same pattern as *SKZ.* It states that "[o]nce the election

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[3] "The appellees in *Amoco*, as here, argued that 52 O.S. 1981, § 87.1 does authorize pooling by the wellbore. To the contrary, the statute clearly requires pooling the 'spacing unit as a unit.' The rule announced in *Amoco* clearly shows the Commission exceeded its authority by holding Order Nos. 224432 and 231312 pooled only the wellbore and not the entire drilling and spacing unit." *SKZ Inc.*, 1989 OK 150, ¶ 8 (footnotes omitted).

[4] In *SKZ Inc.*, Commission orders allowed owners to participate in increased density wells in a formation despite the owners having elected not to participate in the original test well and receiving a cash bonus and/or overriding royalty. The Commission held that prior orders pooled "only the wellbore" and hence it could later make a new order pooling the entire unit. *Id.* ¶ 4. The Supreme Court found that the applicable statues do not allow "pooling by the wellbore" and the entire unit was already pooled. Hence, having elected a bonus, Petty could not later elect to participate.

period passed, the property interests of the affected parties vested." *Id.* at ¶ 5. "Once vested, the property rights of the parties were beyond the reach of the Commission's power to modify." *Id.* Only after this statement does *Inexco* note that "[b]y accepting the bonus, Ward assigned its exploratory rights to Inexco." *Id.*

Ranola Oil Co. is the root of both *Inexco* and *SKZ* and involves the same "wellbore pooling" issue and the same "vesting" language. The Corporation Commission denied Ranola the right to participate in three new wells after electing not to participate in the first. *Ranola Oil Co.,* 1988 OK 28, ¶ 6. The Commission found that the prior order pooled the unit and not just the borehole. In common with *SKZ* and *Inexco, Ranola* states that:

> Once the period for election designated by the pooling order passes, the property interests of the affected parties are vested and once vested, cannot be vulnerable to extinguishment.

Id. at ¶ 13. However, it also states:

> We find that acceptance of the bonus acted as an assignment of Wilver's exploratory rights in the Mississippi Lime formation to the operator. The operator's exploratory rights vested when the bonus was paid.

Id. at ¶ 14.

In each of these cases the question of whether rights "vested upon payment" or vested upon expiration of the election period was not the question before the Court. The issue in each was the ability of the Commission to pool "by the wellbore" and the effect of subsequent attempts to re-pool by section or non-participating owners' attempts to elect participation in new wells within a unit. As such, any statement that a pooling order is not effective until a bonus is

received is *dicta* in these cases, and we find no statutory or binding common-law authority for the Posts' position that the pooling order is invalidated by the current failure to pay the elected bonus.

The Posts then cite *Centurion Oil, Inc. v. Stephens Prod. Co.*, 1993 OK CIV APP 119, 857 P.2d 821, as persuasive authority for their position. What relevance *Centurion* has to the issue before us is not entirely clear. The only discussion of "vesting" occurs in a footnote to the Court's analysis of an argument that the Commission's finding that Stephens was a participant in the well constituted an impermissible "collateral attack" on the original pooling order. *Id.* at n.1. The court found that, although the Commission may not collaterally attack a prior Commission order,

> [t]he clarification of an order does not effect a change in a prior order or in the rights which accrued under the order. The power to effect a change in a previous order requires a showing before the Commission of a change in conditions or knowledge of conditions necessitating the repeal, amendment or modification. The dismissal order simply contained a finding that Stephens had made a proper election under the pooling order. The dismissal order does not change the pooling order or change any rights which had vested under the order.

Id. at ¶ 12 (citations omitted). It is at this point that *Centurion* cites *Ranola Oil* in a footnote for the language we have previously discussed. We find that *Centurion* does not require any change in our analysis of *Ranola, Inexco,* or *SKZ.*

The Posts' "vesting" theory also raises a practical problem. If rights under a pooling order cannot vest until bonus or royalty payments are made, it appears impossible to effectively pool any interest where there is an ownership dispute without paying *both* potential owners, and then seeking repayment when the

true owner is determined.[5] We strongly doubt the Supreme Court intended such a result from its statements in *Ranola, Inexco,* or *SKZ,* and such a rule, at least as to royalty payments, would seem to run contrary to the Production Revenue Standards Act, 52 O.S. § 570.1 *et. seq. See* § 570.10(D)(2)(a) (allowing an operator to retain proceeds of production as to unmarketable title if the proper interest is also retained).

Further, all of these cases indicate that any challenge to the final Commission order pooling the Posts' interest must be first made before the Commission. The only allowable collateral attack to a final order of the Commission in district court is one which attacks the order as being void for a lack of jurisdiction, and which is limited to an examination of the record in the prior case. *SKZ Inc.*, 1989 OK 150, ¶ 11. When free from such vitiating infirmity, a pooling order is *res judicata*. The same principle is noted in *Gulfstream Petroleum Corp. v. Layden*, 1981 OK 56, ¶ 6, 632 P.2d 376, 378. Further, "[t]he power to effect a change in a previous order requires a showing before the Commission of a change in conditions or knowledge of conditions necessitating the repeal, amendment or modification." *Kaneb Prod. Co. v. GHK Expl. Co.*, 1989 OK 11, ¶ 11, 769 P.2d 1388, 1391. We find no indication that the bonus issue here is "jurisdictional."

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[5] "'Owner' means a person who has the right to drill into and to produce from any common source of supply and to appropriate the production, either for that person or for that person and others." 52 O.S. § 86.1.

With regard to jurisdiction, the Posts also argue that they are not, in fact, directly challenging the Commission's pooling order, but that that are merely seeking a declaration of "title," a matter that is within the jurisdiction of the district court, not the Commission. The Posts' mineral title, granted by deed, was never in question in this case. All that was in question was the accompanying leased right to search for and reduce to possession any oil and gas as may be found.[6] The pooling order establishes that this right belongs to Ovintiv. The "title" question before the district court was not whether the right to drill was pooled, but whether that pooled right was owned by the Posts or by the holders of the base lease at the time of pooling. The ownership of the right to drill and extract obtained by pooling is properly a matter of "rights" not of "title."

> An oil and gas lease does not convey ownership of the oil and gas *in situ* but merely conveys a right to search for and reduce to possession any oil and gas as may be found. Rather than a true lease, it is really a grant *in praesenti* of oil and gas to be captured from underneath the land described during the term of the lease and for so long thereafter as these substances may be found.

Ranola Oil Co., 1988 OK 28 at ¶ 9.

Challenges to the validity of a pooling order are, assuming the Commission initially had jurisdiction, a matter for the Commission and may not be made under the guise of determining which of two parties held the right to drill at the

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[6] This appears no different in terms of possession and title to other *in praesenti* or *profit a pendre* rights to enter upon land and take trees or produce, hunt animals, or remove soil. *See Oil Valley Petroleum, LLC v. Moore*, 2023 OK 90, 536 P.3d 556, 563, citing *Hinds v. Phillips Petroleum Co.*, 1979 OK 22, 591 P.2d 697, 698 and *Mohoma Oil Co. v. Ambassador Oil Corp.*, 1970 OK 161, 474 P.2d 950, 960, for the rule that "[a]n oil and gas lease is a chattel real, an incorporal hereditament, and a *profit a pendre*, which grants only the exclusive right, subject to legislative control, to explore by drilling operations, to reduce to possession, and thus acquire title to the oil and gas which is personalty."

time of pooling, provided both were given notice of the pooling procedure. The pooling is effective whether or not the 1979 lease had expired at the time because the Posts were given notice and made an election.

The Posts next argue that any rule that makes pooling effective without the payment of the elected bonus authorizes an unconstitutional taking without compensation. In this, the Posts protest too much. There appears to be no dispute that, if the Posts were the owners of the right to drill at the time of the pooling, they are they are entitled to their elected bonus and royalty. The Posts are currently being "deprived of compensation" for pooling by their own stance that their interest was not legally pooled. If we finally conclude that the Posts were owners at the time of pooling they will be entitled to the elected compensation.

To summarize, we find no indication whatsoever that the Supreme Court has held that a pooling order becomes *invalid* if a bonus is not paid by a certain deadline. We find it clear the 160 acres in question was pooled, and the Posts are entitled to whatever rights they elected under the pooling order. However, this does not answer the question as to whether the interest so pooled remained under a valid lease or not. Thus, we must determine if the 1979 lease expired.

The Production in Paying Quantities Analysis

Newfield/Ovintiv allege several errors in the decision that the 1979 lease expired by lack of production in May 2013. We must first address whether the court's finding that the proper unit to consider in that analysis was the 160-acres on which the Post 22-1 was drilled, or if the court was required to consider

other wells producing within the 640-acre section. We agree with the trial court that the appropriate unit was the 160 acres on which the Post 22-1 was drilled. We then address whether that well expired for want of sufficient production.

a. The Effect of the 1958 Spacing Order

The spacing question was decided on summary judgment in April 2021, when the court held, without further comment, that no applicable spacing order was in force, and it was thereby appropriate to consider the Post 22-1 as if it had been spaced on 160 acres. The summary judgment motions on the question ran for more than three hundred pages. We will attempt to summarize them more briefly.

In 1958, the Commission issued Order No. 37910 in Cause 11156, which states, in pertinent part that "640-acre drilling and spacing units be and the same are hereby established for the production of natural gas and natural gas condensate from the ***Mississippi Chester Lime***" underlying various sections, including Section 22. R. 196-97 (emphasis supplied). Ovintiv correctly notes that this order "communitized" production from the Mississippi Chester Lime in Section 22, with each royalty owner sharing proportionally in production. Hence, a pro-rata share of production from wells anywhere in the section should count as production from the Post 22-1 for the purposes of a paying qualities analysis, *if the Post 22-1 was producing from that formation.*[7]

[7] *See e.g., Kuykendall v. Helmerich & Payne, Inc.*, 1987 OK 51, ¶ 5, 741 P.2d 869, 870 (holding that an order which "established all of Section 7 as a drilling and spacing unit" allowed a new well within the spacing unit to be considered as continuing a lease).

In return, the Posts note that no well was actually drilled to any formation in Section 22 until the 1980s; that the 1002A forms from the first seven wells drilled in Section 22 stated that the section was unspaced, and that the completion reports for the wells all identified formations *other than* the "Mississippi Chester Lime" as the producing formations. The Posts also noted that seven wells could not be drilled into a formation in Section 22 without an increased density order if a 640-acre spacing was actually in effect, but no such order was made. They further noted that none of the individual well owners or operators have ever proportionally pooled or participated in the royalties for other Section 22 wells. *See* R. 56-59. The Posts brought undisputed evidence—but for the statement made in the 2014 order discussed below—that neither the well owners nor the Commission had ever regarded the Post 22-1 as being subject to the 1958 spacing order.

Ovintiv argues, however, that these contrary facts are irrelevant because, in 2014, some thirty-four years after the first well was drilled, the Commission issued Order 634149 regarding a horizontal well and spacing application. That order states in part that certain wells in Section 22, including the Post 22-1, produce from the Mississippi Chester Lime. Ovintiv argues that the court erred in granting summary judgment to the Posts on the spacing issue because it is *res judicta* that the Post 22-1 produces from the Mississippi Chester Lime, and this finding of the Commission cannot be collaterally attacked in the district court.

The 2014 order in question, No. 634149, arose from an application by Felix for a horizonal spacing unit to facilitate a horizontal well known as the Ralph 1H-15X and an application from Newfield for a spacing order in another formation. In a section of Order 634149 entitled "previous orders vacated amended or reformed" the Commission made four statements, in the following form, that do not appear to actually vacate, amend or reform any existing order:

> Felix Energy, LLC, operates the Post 22-1 well, API #07303679, located in the NW/4 SE/4 Section 22, Township 15 North, Range 7 West, Kingfisher County, Oklahoma, *which is producing from the Mississippi Chester Lime (includes Manning) and Hunton common sources of supply.* Felix Energy, LLC owns a 77.4625% working interest in the Post 22-1 well and has consented in writing to the approval of this horizontal well unit.

R. 165 (emphasis supplied). It is this statement, that the Post 22-1 produces from the Mississippi Chester Lime formation, on which Ovintiv relies.[8]

Both parties argued this question largely in terms of jurisdiction. We find no jurisdictional question here, however. The Commission is inherently a tribunal of limited jurisdiction, and the Oil and Gas Conservation Act confers upon the Commission only the authority to determine and enforce correlative rights in the development and production of oil and gas. *Atl. Richfield Co. v. Tomlinson*, 1993 OK 106, ¶ 24, 859 P.2d 1088, 1095. The Commission therefore had sole jurisdiction to determine the correlative rights involved in the horizontal well application. However, this power to protect correlative rights does not

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[8] The 2014 order made functionally identical statements regarding three other wells in Section 22, Township 15 North, Range 7 West, Kingfisher County, Oklahoma, being the James 22-1, the Evelyn Lester 1, and the Evelyn Lester 2.

include the power to adjudicate private rights. *Nilsen v. Ports of Call Oil Co.*, 1985 OK 104, ¶ 14, 711 P.2d 98, 102; *Leck v. Cont'l Oil Co.*, 1989 OK 173, ¶ 7, 800 P.2d 224, 226. District courts are "the proper forum for questions dealing with the respective rights of private parties." *Samson Resources Co. v. Corp. Comm'n*, 1985 OK 31, ¶ 7, 702 P.2d 19, 21, and the district court had sole jurisdiction to consider the private rights involved in the lease question.

The Posts argued extensively, however, that the Commission had no "jurisdiction" to consider the factual issue of what formation a well is producing from. It is difficult to credit that the Commission may have jurisdiction to decide an application, but no jurisdiction to make factual findings necessary to that application. Nonetheless, the Posts cite *Vastar Res., Inc. v. Oklahoma Corp. Comm'n*, 1996 OK CIV APP 35, 917 P.2d 480, as holding that the Commission had no jurisdiction to determine that a well produces from a particular formation.

Vastar does not hold that the Commission had no jurisdiction to determine what formation a well is producing from. It held that the question of whether a well had been drilled into the wrong formation, injuring only the private rights of owners in that formation, did not involve correlative rights, and therefore lay beyond the Commission's statutory subject matter jurisdiction. *Id.* at ¶ 2. If a case involves a determination of correlative rights properly before the

Commission, as Order 634149 does, the Commission had "jurisdiction" to consider all necessary questions.[9]

The question here is not whether the Commission had "jurisdiction" to recite that the Post 22-1 is "producing from the Mississippi Chester Lime (includes Manning) and Hunton common sources of supply." The question is whether this recitation has a preclusive effect in this private rights case. It is the party asserting a preclusion defense that bears the burden of proof. *Anderson v. Falcon Drilling Co.*, 1985 OK 13, ¶ 16, 695 P.2d 521.

Not all administrative orders create either claim or issue preclusion. Whether issue preclusion is applicable initially turns on whether the Commission was exercising judicial or legislative power when it considered Felix's application. *See Matter of Application of Oklahoma Gas & Elec. Co.*, 2018 OK 31, ¶ 12, 417 P.3d 1196, 1201–02. An exercise of judicial power by an agency can have a preclusive effect. *Id.* A proceeding is "judicial" if it "investigates, declares, and enforces liabilities as they stand on present and past facts and under laws supposed already to exist." *Id.* ¶ 13. It appears that the commission proceeding here was judicial rather than legislative or executive in nature. But

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[9] Subject matter jurisdiction is the "power to deal with the general subject involved in the action" and includes the power of the court "to proceed in a case of the character presented, or power to grant the relief sought." *Matter of S.J.W.*, 2023 OK 49, ¶ 12, 535 P.3d 1235, 1241; *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 16, 353 P.3d 532, 539. If an agency has been granted jurisdiction over the subject matter involved, we find it inherent that this grant includes the power to inquire into each individual relevant question of fact, unless this function may somehow impinge on the exclusive jurisdiction of another court. *Vastar* does not hold that the district court had exclusive jurisdiction to determine if a well produces from a particular formation but held that the Commission could not do so unless it has subject matter jurisdiction over the underlying claim.

even so, not all agency findings made in a "judicial" proceeding are entitled to preclusive effect.

In *Dority v. Green Country Castings Corp.*, 1986 OK 67, ¶ 12, 727 P.2d 1355, 1360, a group of employees were awarded reinstatement and backpay as a result of "judicial" administrative proceedings before the NLRA. The employer later argued that certain findings of facts made by the NLRA were preclusive in a subsequent civil retaliatory discharge claim. In response, the Oklahoma Supreme Court cited the *Restatement (Second) of Judgments* for a rule that withholds preclusive effect from an agency's adjudicative decision if pursuit of a related claim in another tribunal would not disturb "the scheme of remedies" affordable by the administrative tribunal. *Id.* ¶ 13. The Restatement notes:

> (3) An adjudicative determination of a claim by an administrative tribunal does not preclude relitigation in another tribunal of the same or a related claim based on the same transaction if the scheme of remedies permits assertion of the second claim notwithstanding the adjudication of the first claim.

Restatement (Second) of Judgments § 83 (1982). We find no indication that "the scheme of remedies" afforded by the Commission determining correlative rights in a horizontal drilling application would be disrupted by litigation in state court of a lease expiration case, even if the producing formation of the Post 22-1 was peripheral to both cases.

The *Restatement* further notes that an essential question is whether, within the context of the larger purpose of an administrative proceeding, an issue is "formulated as it would be in a court and decided according to procedures similar to those of a court." *Id.*, note g. We find no indication that the question

here was "decided according to procedures similar to those of a court," or any judicial procedure at all. In fact, there is no record of any litigation of the issue or forensic inquiry at all by the Commission on this issue. The purported finding of fact appears to be merely a recitation of the statement made by Felix and Newfield in the applications that lead to Order 634149. *See* R. 207-223. How, or if, the Commission actually "adjudicated" that the Post 22-1 produces from the Mississippi Chester Lime remains entirely unknown. We find no indication of any adjudication or forensic court procedure leading to the recitation in Order 634149.

Claim preclusion further resolves claims between parties or their privies. "In order for the 'privity' rule to apply, the party in privity must actually have the same interest, character, or capacity as the party against whom the prior judgment was rendered." *Hildebrand v. Gray*, 1993 OK CIV APP 182, ¶ 16, 866 P.2d 447; *Mineral Acquisitions, LLC v. Hamm*, 2020 OK CIV APP 55, ¶ 64, 477 P.3d 1159, 1176. The Posts were not participants in the horizontal well proceeding, and the existence of privity required that Felix/Newfield be so identified in interest with the Posts that they represented the same legal right. *In the Matter of the Death of Hyde*, 2011 OK 31, ¶ 12, 255 P.3d 411, 415. Privity of interest here is doubtful.

As discussed in detail below, the record shows that the Post 22-1 had been failing to produce in paying quantities since early 2012. Felix would have been aware of this. In 2014, it would be very much in lessee Felix's interest to represent that the 1959 spacing order covered the Post 22-1, and that other wells

should therefore be considered in the paying quantities analysis. This would also be contrary to the Posts' interest. We find no indication that the interests of Felix and the Posts were aligned on the spacing issue in the proceedings leading to Order 634149.[10]

In conclusion, we find that, although the Commission did not exceed its authority or jurisdiction in making the recitation in Order 634149 that the Post 22-1 produces from the Mississippi Chester Lime formation, that recitation does not have preclusive effect in this civil case involving private rights. We further find that the evidence presented by the Posts was sufficient to sustain the court's judgment on this issue.

b. The Period of the Analysis

The lease in question has two provisions that touch on a lack of production. The habendum clause states that, after the primary term, the lease would continue "as long thereafter as oil and gas, or either of them is produced from said land by the lessee." In Oklahoma, "[t]he term 'produced,' when used in a 'thereafter' provision of the habendum clause, denotes in law production in paying quantities." *Stewart v. Amerada Hess Corp.*, 1979 OK 145, ¶ 5, 604 P.2d 854, 857. *See also Pack v. Santa Fe Minerals*, 1994 OK 23, ¶ 8, 869 P.2d 323, 326 (a typical habendum clause which extends the lease past its primary term

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[10] Ovintiv would presumably argue that the Posts were given notice of the preceding, and hence waived any objection by failing to appear. However, the Posts' interposition of their private rights dispute into a Commission proceeding would have created a *Vastar* situation where the Posts would be forced to ask the Commission to go beyond its jurisdiction and determine, for private rights' purposes, which formation the Post 22-1 was actually producing from.

as long as oil or gas is produced is interpreted to mean "produced in paying quantities").

It also contains a cessation of production savings clause allowing the lease to be extended in circumstances where it would otherwise have expired if the lessee commences to drill a well or commences reworking operations on an existing well within the terms of this lease.

> If the lessee shall commence to drill a well or commence reworking operations on an existing well within the terms of this lease or any extension thereof, or on acreage pooled therewith, the lessee shall have the right to drill such well to completion or complete reworking operations with reasonable diligence and dispatch, and if oil and gas or either of them, be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the terms of years first mentioned

The lease also contains a shut-in clause, but neither party argued that it has any relevance here.

After this case was decided in the district court, the Oklahoma Supreme Court issued an opinion addressing habendum and cessation clauses and the question of production in paying quantities. *See Tres C, LLC v. Raker Res., LLC*, 2023 OK 13, 532 P.3d 1. The combined habendum and cessation clause in *Tres C* stated a strict timing requirement.

> If, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for drilling a well within sixty (60) days from such cessation.

Id. at ¶ 2. Although no such short period is present here, *Tres C* still provides the most recent guidance on several relevant issues.

Tres C confirms that "the reasonable amount of time needed for assessing a well's profitability and for determining whether a cessation has occurred is typically much longer than 3 months." *Id.* at ¶ 30. Unlike *Tres C*, the twenty-six-month period used to assess profitability in this case does not appear controversial, although the precise window selected by the court is a matter of significant controversy. Both experts, Raymond Roush for the Posts, and Royce Foster for Ovintiv, examined a similar time period of four years between April 2011 and December 2014. The court decided to use the twenty-six-month period of April 2011 through May 2013 as its baseline for production in paying quantities. Analyzing this period, the court found that the lease terminated on May 31, 2013.

The experts did appear to agree that in 2012, the Post 22-1 did not produce in paying quantities. Outside this, there was little agreement. The following table roughly summarizes the cashflow data found by the experts:[11]

	From April 2011	2012	2013	2014	Total
Post	$2,522	-$10,067	$8,314	-$3,144	$-2,375
Ovintiv	$2,522	-$10,060	$8,314	$3,144	$3,920

The court was not required, however, to use a four-year period to determine paying production. It chose the period of April 2011 through May 2013 as its baseline for production and found that the Post 22-1 did not produce in

[11] These numbers are derived from two sources: the opinion of Royce Porter, Ovintiv's Exhibit 2, pp. 4-7, and the opinion of Raymond Roush, Ovintiv's Exhibit 3, bates-stamped Roush 173-75. Analysis begins in April 2011 because it was after oil from previous production was sold. The difference in the 2014 figures is generally because Ovintiv's expert prorated a sale from 2015 into the 2014 figures.

paying quantities over this period. The first question is, therefore, whether the court properly chose this specific period to examine profitability.

In the case of *Barby v. Singer,* 1982 OK 49, 648 P.2d 14, the Supreme Court affirmed the trial court's use of a fourteen-month period to assess profitability. *Id.* at ¶ 6. In the case of *Smith v. Marshall Oil Corp.*, 2004 OK 10, 85 P.3d 830, it found that the three-year "period employed by the trial court in the instant case, to measure the Stacy and Paige wells' profitability, was sufficient under all the facts and circumstances for a fair and reasonable determination." *Id.* ¶¶ 11, 14, 85 P.3d at 834-35. In the case of *Henry v. Clay,* 1954 OK 170, 274 P.2d 545, the Supreme Court considered the subject well's production over a thirty-two-month period. The twenty-six-month period used by the court here is not, in itself, unreasonable.

Ovintiv argues, however, that using this particular period within the four years of data was inappropriate, *i.e.*, if the court had chosen to analyze a different two years within the four-year period, it would have found the Post 22-1 was producing in paying quantities. Ovintiv is generally correct in its assertion that other periods would give different results. If the court had chosen January 2013 to December 2014 as its baseline, the result would likely have been different. Further, the Posts filed suit in December 2016, a time when the lease evidently had been producing in paying quantities for almost two years, largely because of the addition of the Ralph 1H-15X well which was spud in December 2014 and became productive in March 2015.

This argument does not fit with the general structure of the lease and the common law surrounding it, however. Pursuant to the habendum clause, the lease fails if the well fails to produce in paying quantities for a reasonable time. The lease does not contain any provision to the effect that a simple return to production in paying quantities restores the lease *after it expires*. If the lease did not produce in paying quantities for twenty-six-months, the court could properly find that it expired, and any later production is irrelevant. Further, if the lease ceased to produce in paying quantities, it had a savings clause allowing the lessee to commence a new well or commence reworking operations on an existing well before the lease expired. No new well was drilled in the twenty-six-months during which the Post 22-1 failed to produce in paying quantities.

Hence, the matter of production in paying quantities turns on two questions related to work performed on the well in 2012. The first is whether 2012 swabbing and wellbore work constituted "reworking" that could have prolonged the lease under the cessation of production clause until it returned to profitability. The second is whether these expenses were properly considered lifting expenses for the production in paying quantities analysis.

c. The Cessation of Production and "Reworking" Clause

Oklahoma law has never attempted to define "reworking" in any precise, way, and the experts naturally disagreed on whether the work done in January through March 2012 constituted "reworking." As *Roemer Oil Co. v. Aztec Gas & Oil Corp.*, 886 P.2d 259, 264 (Wyo. 1994) noted when turning to a treatise for a definition, "[i]t is readily evident from the definition of 'reworking' in 8 Williams

and Meyers, supra at 1071–74 that it has no precise meaning; rather, its meaning is, most frequently, a function of the context in which it is used. We are persuaded that its meaning in the circumstances of this case is, at best, uncertain and should be presented to a fact finder for resolution."

A general rule in much of the nation is that physical on-site activities which are designed to revitalize a well or restore lost production constitute reworking.[12] Production from the Post 22-1 was evidently falling off, and the swabbing and packing appeared designed to improve production. Even accepting that this constituted reworking, however, we find the lease was not prolonged by the rework/saving clause. The clause clearly contemplates that a rework begun before the lease expires will delay expiration *provided the well returns to profitable production when the rework is complete.* The work ceased in March 2012. The testimony of Raymond Roush established that the Post 22-1 produced no oil until May of 2013. The "rework" here did not perpetuate the lease.

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[12] *See Serhienko v. Kiker,* 392 N.W.2d 808, 812–13 (N.D. 1986). *See also Cox v. Stowers*, 786 S.W.2d 102, 105 (Tex. App. 1990) (concluding that term "reworking operations" means "good faith effort[s] to cause a well or wells to produce oil or gas in paying quantities"); *Rogers v. Osborn*, 152 Tex. 540, 544, 261 S.W. 2d 311 (1953) ("re-working operations ... means actual work or operations which have theretofore been done, being done over, and being done in good faith endeavor to cause a well to produce oil and gas or oil or gas in paying quantities as an ordinarily competent operator would do in the same or similar circumstances"); 3 *Williams, Oil and Gas Law* § 618.1 (1988)("[R]eworking shall be defined as including, but not limited to, operations for and the reconditioning, deepening, plugging back, cleaning out, or repairing of any well or wells, or otherwise attempting in good faith to increase or restore production or discover new production."); *Serhienko,* 392 N.W.2d at 812-13 ("[t]he crucial test which must be met for an activity to constitute reworking is whether the operation is associated or connected with the physical site of the well or unit.").

d. Operating Expenses

Operating costs for the Post 22-1 generally ran around $300-500 per month. Exhibit 3, Roush 0173. Between February and April 2012, however, the Post 22-1 incurred over $11,000 in operating costs, $8-9000 of which relate directly to the "rework." Exhibit 2, Report of Royce Porter, p. 7. The Posts' expert found that the well lost $10,060 that year. If this $8-9000 is not an "operating expense," the Post 22-1 would likely have produced in paying quantities over the period examined by the court.

"Production in paying quantities" is a term defined by Oklahoma case law to mean "production of quantities of oil and gas sufficient to yield a profit to the lessee over operating expenses, even though the drilling costs or equipping costs are never recovered, and even if the undertaking as a whole may result in a loss to the lessee." *Hininger v. Kaiser,* 1987 OK 26, ¶ 6, 738 P.2d 137, 140. The phrase denotes a return in excess of "lifting expenses," costs associated with lifting the oil from the ground after the well has been drilled. *Stewart v. Amerada Hess Corp.*, 1979 OK 145, ¶ 6, 604 P.2d 854, 857. The matter therefore appears to hinge on whether this work in early 2012 constituted an operating expense, a "cost associated with lifting the oil from the ground after the well has been drilled."

There is a line where work such as that performed here crosses over from routine production expense into capital expenditure. No case law attempts to set it at any general amount, however, and it would be arbitrary to do so. As *Hininger v. Kaiser* notes, "the term [lifting costs] defies a more precise definition." *Id.*

Duerson v. Mills, 1982 OK CIV APP 14, ¶ 14, 648 P.2d 1276, 1279 notes that, in deciding if an item is a capital expenditure, "[i]n all cases, the court should be satisfied the expense in question is not a maintenance item but clearly a replacement of original lifting equipment occasioned by catastrophic failure or justified by improved production technology."

In this case, the court determined that the expense in question was a maintenance item that properly fell under "lifting expenses." We find no Oklahoma case to the contrary. We therefore find that the court's decision to count the February-April 2012 expenses as operating expenses was within its discretion.

e. The Common Law Temporary Cessation Doctrine

Ovintiv next argues that, despite the well not producing in paying quantities for two years, the "temporary cessation" doctrine prolonged the lease. Ovintiv interprets *Tres C* as holding that, even though production in paying quantities had not occurred over a two-year period in this case, and the lease had contractually expired, the common law grants an operator an additional "reasonable time" to restore production *after* expiration. Ovintiv cites paragraph 28 of *Tres C* in its brief as follows: "[a]s the temporary cessation doctrine examines an operator's restoration of production it only 'come[s] into play *after* a cessation has occurred.'" *Brief-in-chief*, pg. 13. What *Tres C* actually stated,

however, was that "the cessation-of-production *clause* kicks in after a cessation has occurred." *Id.* at ¶ 28 (emphasis supplied).[13]

It is important to distinguish between contractual cessation of production clauses and the common law of temporary cessation. Cessation-of-production clauses serve to "modify the habendum clause[s] and to extend or preserve the lease[s] while the lessee resumes operations designed to restore production." *Hall v. Galmor,* 2018 OK 59, ¶ 35, 427 P.3d 1052, 1067. In the absence of such a clause, the temporary cessation doctrine provides a similar respite, and would ordinarily give a lessee a "reasonable" amount of time in which to restore production after a well begins to fail to produce in paying quantities. *Id.* However, a "cessation-of-production clause substitutes a bargained-for period of time that cannot be altered by any court's notion of reasonableness." *Id.* This rule was not changed by *Tres C,* which held only that, under the clause in that case, the bargained-for period to rework or redrill began to run only after the well had failed to produce in paying quantities for a reasonable time, rather than sixty days after a failure.

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[13] The trial court in *Tres C* found that, because production had ceased for ninety days, and no new well had been commenced, the lease had expired. It was in this context that the Supreme Court found that this sixty-day contractual "new well" period *had no connection to the length of time that must be examined to determine if the existing well was still producing in paying quantities.* The Court found that it was only after this reasonable period of failure to produce in paying quantities that the sixty-day window to commence a new well started running. *Id.* at ¶ 29. Hence, "the cessation-of-production clause [the sixty-day clause] is only implicated where production has already ceased." "It is not the purpose of the cessation of production clause to establish an accounting period for purposes of determining if production is in paying quantities." *Id.*

The cessation-of-production clause in this case allowed a lessee to begin operations to restore production to a failing well at any time *before* the lease expired ("within the terms of this lease or any extension thereof") and extended the lease until that work was complete, even if the lease would otherwise have expired while the work was being performed. It also required, however, that operations intended to restore production must actually return the well to production in paying quantities to extend the lease. As we previously noted, the "packing and swabbing" was complete by April 2012. If the work completed in April 2012 was intended to restore the well to production in paying quantities, we find no explanation why the well did not produce oil at all until May 2013, or any credible argument attributing the eventual production in May 2013 to the April 2012 "reworking." As such, the April 2012 "reworking" did not prolong the lease beyond the May 2013 termination date found by the court.

Further, even if we were to interpret *Tres C* as Ovintiv does—as rewriting the cessation-of-production clause in this case to allow reworking to begin not only within the lease term but also within a reasonable period after the lease expired—the lease expired in May 2013.[14] No rework was attempted after this, and the Ralph 1H-15X was not spud until December 2014 and became productive only in March 2015. We do not find this to be a reasonable period for resumption of production.

[14] To do so, however, would likely violate the rule of *Hall* that a bargained-for cessation of production provision "cannot be altered by any court's notion of reasonableness." *Tres C*, ¶ 31 (*citing Hall* at ¶ 35).

CONCLUSION

We find no error in the court's decision that the 1979 lease expired due to a lack of production in paying quantities in May 2013. We find the decision that, as a matter of law, a pooling order is invalidated by a failure to pay the agreed bonus within a certain time period is not consistent with the law of Oklahoma, and we reverse it. Lastly, we find the Posts' interest in Section 22 was pooled, and they are entitled to the pooling bonus and royalty they elected.

AFFIRMED IN PART AND REVERSED IN PART.

HUBER, J., concurs, and FISCHER, J. (sitting by designation), dissents.

FISCHER, J., dissenting:

In this case, during the second term of the lease, production from the Post 22-1 began to decline. By 2012, the Post 22-1 did not produce in paying quantities. From January through March of 2012, the operator engaged in operations to increase production from the well. The Post 22-1 began to produce oil again in May of 2013. In December of 2014, Ovintiv, the holder of the Post lease, began drilling operations for a new well in Section 22. The well was successfully completed in February of 2015. The new well, absent a prior termination of the Post lease, would satisfy the lease terms to extend the Post lease. Despite being aware of Ovintiv's intent to drill the new well in 2014, the Posts did not file this suit until December of 2016.

The parties and the Majority agree that whether the Post lease terminated for cessation of production depends on the period of time used to make that determination. There is nothing inherently wrong with the time period used by

Ovintiv. It is just longer than the time period advocated by the Posts and selected by the district court. "[W]hen an appellate court is reviewing whether 'the period employed by the trial court to determine profitability was sufficient,' 'the appropriate time period is not measured in days, weeks or months, but by a time appropriate under all of the facts and circumstances of each case.'" *Tres C, LLC v. Raker Res., LLC*, 2023 OK 13, ¶ 30, 532 P.3d 1, 17-18 (citation omitted).

In this matter of equitable cognizance, the equities favor Ovintiv. For the reasons stated in Proposition I of Ovintiv's Brief-in-Chief, it was error to find that the Post lease terminated for cessation of production during the April 2011 through May 2013 period selected by the district court. I would reverse the judgment of the district court and remand with instructions to enter judgment for Ovintiv, and, therefore, respectfully dissent.

August 22, 2024