

RULE 37 CASE NO. 0261049
District 06

**APPLICATION OF CHINN EXPLORATION COMPANY FOR A RULE 37 EXCEPTION
FOR THE FOGLE LEASE, WELL NO. 1, HARDWOOD (COTTON VALLEY) FIELD,
HARRISON COUNTY, TEXAS**

APPEARANCES:

FOR APPLICANT:

George C. Neale
Kit Maddox
Greg Cloud
Sam Fogle

APPLICANT:

Chinn Exploration Company

FOR PROTESTANT:

David Gross
Dale Miller
David Oakes
Larae Sanders
Rhonda Kaschmitter

PROTESTANT:

Comstock Oil & Gas Company

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

DATE APPLICATION FILED:	February 17, 2009
DATE OF NOTICE OF HEARING:	May 7, 2009
DATE OF HEARING:	July 30, 2009
HEARD BY:	James M. Doherty, Hearings Examiner Andres J. Trevino, Technical Examiner
DATE TRANSCRIPT RECEIVED:	August 11, 2009
DATE CLOSING ARGUMENT FILED:	August 17, 2009
DATE PFD CIRCULATED:	October 6, 2009

STATEMENT OF THE CASE

Chinn Exploration Company (“Chinn”) seeks an exception to Statewide Rule 37 to drill Well No. 1 on its 10.034 acre Fogle Lease, Hardwood (Cotton Valley) Field, Harrison County, Texas. The well is proposed to be drilled to a depth of 11,250'. Field rules for the Hardwood (Cotton Valley) Field provide for 467' lease line spacing and 600' between well spacing. The standard proration unit is 40 acres, with optional 20 acre units. Chinn requires a lease line spacing exception to drill the Fogle Lease, Well No. 1 because the proposed location is 381' from the east line and 123' from the south line of the lease. In lieu of requesting a Rule 38 density exception, Chinn has filed Form W-1A (Substandard Acreage Certification) showing a discovery date for the Hardwood (Cotton Valley) Field of February 8, 1985, and stating that the Fogle Lease was established as a separate tract in its present size and shape on March 16, 1982.¹ A plat showing the proposed well location and the 10.034 acre Fogle Lease is attached to this proposal for decision as Appendix 1.

The application is opposed by Comstock Oil & Gas Company (“Comstock”) which is the operator of the Layton Unit offsetting the Fogle Lease to the south. A hearing was held on July 30, 2009, at which both Chinn and Comstock presented evidence. Written closing argument was filed by both parties on August 17, 2009.

POSITIONS OF THE PARTIES

Chinn takes the position that the 10.034 acre Fogle Lease is a legal subdivision because it took its present size and shape prior to discovery of the Hardwood (Cotton Valley) Field. Chinn believes that it is entitled to a Rule 37 exception for a first well on the 10.034 acre tract to prevent confiscation because Chinn and the royalty owner in the tract are not receiving their fair share of hydrocarbons from other wells on nearby tracts, and the proposed well location is reasonable. Chinn does not contend that a Rule 37 exception is necessary to prevent waste of hydrocarbons.

Comstock argues that the 10.034 acre Fogle Lease is a voluntary subdivision because: (1) the tract took its present size and shape after substantial oil and gas development in the area had occurred and after the voluntary subdivision rule of Statewide Rule 37(g) had attached; and (2) the parent tract from which the 10.034 acre tract was subdivided had been subject to an oil and gas lease and included in a producing gas unit for 22 years prior to the purported March 16, 1982, subdivision date. Because a voluntary subdivision is not entitled to a Rule 37 exception to prevent confiscation under Statewide Rule 37(g)(2), and Chinn does not contend that a Rule 37 exception is required to prevent waste, Comstock asserts that the Chinn application should be denied.

Chinn disputes Comstock’s position that the voluntary subdivision rule had attached prior to the subdivision date for the 10.034 acre tract, and argues that the subdivision was not in

¹ Statewide Rule 38(d)(1) provides that an exception to the minimum density provision is not required for the first well on a lease which is a legal subdivision under Statewide Rule 37(g).

contemplation of oil and gas development. Chinn believes it immaterial that the parent tract was covered by an oil and gas lease and included in a producing gas unit prior to the subdivision date, because the gas unit was for a well producing from a Pettit reservoir, not the Cotton Valley.

DISCUSSION OF THE EVIDENCE

Chinn

A petroleum landman contracted by Chinn researched county records for relevant title and leasing information relating to the history of the 10.034 acre Fogle tract where Chinn proposes to drill. On May 26, 1947, the heirs of E. L. Harrison and wife Jennie Harrison partitioned a tract of land consisting of 126 acres more or less. Tract 2 resulting from this partition, consisting of 14.3 acres, was conveyed to Emma D. Hopkins, one of the heirs of E. L. Harrison. This 14.3 acre tract included the 10.034 acres now comprising the Fogle tract. On October 10, 1961, Emma D. Hopkins and husband W. M. Hopkins deeded one acre out of the 14.3 acre tract to their son Hershall A. Hopkins and his wife Hazel Hopkins. Emma D. Hopkins retained 13.3 acres more or less, including the 10.034 acres now in the Fogle tract.

On March 16, 1982, the heirs of Emma D. Hopkins and husband W. M. Hopkins partitioned the Emma D. Hopkins retained acreage, which was described as 12.543 acres.² This partition resulted in one tract of 2.509 acres and another of 10.034 acres, being the same 10.034 acres now in the Fogle tract. The 10.034 acre tract was conveyed by the March 16, 1982 partition deed to Hulon Hopkins, Jennie Bell Mayfield, Annie Ruth Earl, and Thelma St. Andre. Chinn believes this partition deed conveyance on March 16, 1982, created the 10.034 acre Fogle tract in its present size and shape.

On April 1, 1982, Hulon Hopkins, Jennie Bell Mayfield, Annie Ruth Earl, and Thelma St. Andre deeded to John Samuel Fogle the 10.034 acres partitioned to them by the March 16, 1982, partition deed. According to Chinn's contract landman, the 10.034 acre Fogle tract has not been owned in common with any neighboring tract since March 16, 1982.

Sam Fogle is the mineral owner of the 10.034 acre Fogle tract. It was his original intent to purchase the entire 12.543 acres inherited by the heirs of Emma D. Hopkins and W.M. Hopkins, but one of the heirs, Hazel Hopkins, did not wish to sell. This is what led to the March 16, 1982, partition of the 12.543 acres, creating the 10.034 acre tract. Fogle acquired the 10.034 acre tract from the other heirs on April 1, 1982. According to Fogle, he acquired the 10.034 acres with the plan in mind to build a home there for his retirement. However, on January 21, 1987, the surface estate of the 10.034 acres was conveyed by Fogle to the Veteran's Land Board, and then by the Veteran's Land Board to Fogle's cousin, Don Black. In this conveyance, Fogle reserved the mineral

² No certain explanation was provided for the discrepancy between the 13.3 acres which should have been retained by Emma D. Hopkins after the 1961 conveyance of one acre to Hershall and Hazel Hopkins and the total of 12.543 acres partitioned on March 16, 1982, but whatever the explanation, it does not appear to be material here.

estate of the 10.034 acres for himself.

Fogle did not recall any discussion of minerals under the 10.034 acres at the time he negotiated for purchase of the tract from the heirs of Emma D. Hopkins and W.M. Hopkins, and does not believe that he paid a premium to acquire the minerals. He claims that he had no thought of the minerals at the time of the purchase. After he acquired ownership, he received small royalty checks on account of the fact that the 10.034 acre tract was included in the H. E. Beatty Gas Unit No. 1 pooled unit.

According to Fogle, he also owns a 1/40th interest in 124 adjoining acres that are included in the Comstock Layton Unit, a unit believed by Fogle to contain a total of about 350 acres. Fogle receives royalties attributable to production on the Layton Unit. Fogle has not been successful in persuading either Comstock or Forest Oil Corporation to include Fogle's 10.034 acre tract in the Comstock Layton Unit to the south or the Forest Mayfield Unit to the north.

A petroleum engineer retained by Chinn for the purpose of this case testified that the discovery date for the Hardwood (Cotton Valley) Field was February 8, 1985. He presented a map showing a one mile radius around the proposed location of the Fogle Lease, Well No. 1. Color coded on the map are wells completed and producing in the Hardwood (Cotton Valley) and Darco, S.E. (Cotton Valley) Fields, and information is provided as to the sequence in which the wells were drilled. There are a total of 32 Cotton Valley wells within one mile of the proposed Fogle Lease, Well No. 1, and all were completed after March 2005. Based on the sequence in which the earliest wells on the map were drilled, Chinn's petroleum engineer believes that it is reasonable to permit the Fogle Lease, Well No. 1 in the Hardwood (Cotton Valley) Field, rather than the Darco, S.E. (Cotton Valley) Field.³ Forest Oil Corporation designated wells to the north, south, east, and west of the Fogle Lease as wells in the Hardwood (Cotton Valley). A 2.5 mile radius map shows that within 2.5 miles, Comstock is the only operator who has designated a well east of Hwy. 59 as a Darco, S.E. (Cotton Valley) well. The proposed Fogle Lease, Well No. 1 is within 2.5 miles of the discovery well for the Hardwood (Cotton Valley) Field, and further than 2.5 miles from the discovery well for the Darco, S.E. (Cotton Valley) Field.

Chinn's one mile and 2.5 mile radius maps also show wells completed in reservoirs other than the Cotton Valley. In July 1980, a well was completed in the Page Field about 1,800' southeast of the proposed Fogle No. 1 location.

Chinn's petroleum engineer believes that the proposed location of the Fogle Lease, Well No. 1 is reasonable. The well is near the center of the Fogle tract, 150' from the north line and 123' from

³ This became an issue because the discovery date for the Darco, S.E. (Cotton Valley) Field was April 29, 1979, a date before the subdivision date for the 10.034 acre Fogle tract. According to Chinn's petroleum engineer, within a one mile radius, wells in the Hardwood (Cotton Valley) and Darco, S.E. (Cotton Valley) are completed and producing from the same Cotton Valley interval.

the south line. Buildings exist on the surface of the Fogle tract several hundred feet to the west of the proposed location. Total acreage in the Fogle tract east of the proposed Fogle No. 1 is four acres, and total acreage to the west of the proposed location is six acres.

According to Chinn's petroleum engineer, the 10.034 acre Fogle tract took its present size and shape before discovery of the Hardwood (Cotton Valley) Field. He agreed that the statewide spacing rule had attached to the 10.034 acres before the tract's subdivision date.

Current recoverable Cotton Valley reserves beneath the Fogle Lease are about 350,000 MCF. A study of all Cotton Valley wells within one mile of Chinn's proposed well showed that these wells have an average estimated ultimate recovery of 500,000 MCF per well, 150,000 MCF more than the recoverable reserves under the Fogle tract.

Comstock

Comstock also retained a contract landman to research county property records relating to the history of the 10.034 acre Fogle tract. This research disclosed that on February 13, 1919, E. L. Harrison made an oil and gas lease to Frank Green of the 126 acres more or less then owned by Harrison, of which the subject 10.034 acres were then a part. Comstock's landman believed that this lease terminated after one year.

The research by Comstock's landman confirmed that on May 26, 1947, the 126 acres formerly owned by E. L. Harrison were partitioned by Harrison's heirs, creating, among other tracts not here relevant, a 14.3 acre tract that was conveyed to Emma D. Hopkins, including the 10.034 acres now contained in the Fogle tract.

Notwithstanding the partition and conveyances that had occurred on May 26, 1947, on April 10, 1952, the heirs of E. L. Harrison entered into a single oil and gas lease covering the entire amount of acreage that had been partitioned and conveyed. This oil and gas lease made by the heirs of E. L. Harrison named La Gloria Corporation as the lessee and purported to cover a total of 124.4 acres.⁴ The 10.034 acres now contained in the Fogle tract were included in the acreage covered by this oil and gas lease. The lease had a term of 10 years and as long thereafter as oil, gas, or other mineral were produced from the leased premises or land pooled therewith. On May 1, 1954, La Gloria Corporation assigned the lease to La Gloria Oil and Gas Company. On August 3, 1960, La Gloria Oil and Gas Company assigned the lease to J. C. Trahan Drilling Contractor, Inc.

On August 17, 1960, J. C. Trahan Drilling Contractor, Inc. designated the H. E. Beatty Gas Unit No. 1 containing a total of 703 acres, which contained the 124.4 acres (including the subject 10.034 acres) covered by the April 10, 1952, oil and gas lease made by the heirs of E. L. Harrison

⁴ Again, the discrepancy between the 126 acres formerly owned by E. L. Harrison and the 124.4 acres covered by the April 10, 1952, oil and gas lease to La Gloria is not explained, although the discrepancy appears to be immaterial here.

to La Gloria.

Comstock's contract landman confirmed that on October 10, 1961, Emma Hopkins and her husband deeded one acre out of the 14.3 acres partitioned to Emma Hopkins on May 26, 1947, to Hershall Hopkins and wife, and that on March 16, 1982, the heirs of Emma Hopkins partitioned 12.543 acres formerly retained by Emma Hopkins, creating the subject 10.034 acre tract.

The April 10, 1952, oil and gas lease between the heirs of E. L. Harrison and La Gloria had a 60-day rework provision, and premised on an assumption that production was had on the H. E. Beatty Gas Unit No. 1 through August 2004, Comstock's contract landman expressed the opinion that the unit did not terminate until about October 2004. The April 10, 1952, oil and gas lease had no depth restriction. As of the March 16, 1982, subdivision date for the 10.034 acre Fogle tract, the 10.034 acres was subject to the April 10, 1952, oil and gas lease and leased in common with the remainder of the 124.4 acres covered by this lease. In addition, the entire 124.4 acres, including the subject 10.034 acres, were pooled into a 704 acre pooled unit and had been for 22 years as of the subdivision date. In the opinion of Comstock's landman, the subject 10.034 acres did not come out from under the April 10, 1952, oil and gas lease until about October 2004 when the H. E. Beatty Gas Unit No. 1 terminated.

An oil and gas consultant retained by Comstock presented an area map covering portions of Harrison and Panola Counties to show development in the area of the Fogle Lease that had occurred prior to the March 16, 1982, subdivision date for the 10.034 acre Fogle tract. As of that date, a total of 15 wells had been drilled in and produced from various reservoirs within 2.5 miles of the proposed location of the Fogle Lease, Well No. 1. These wells had been completed in and produced from Pettit, Travis Peak, Lower Pettit, Page, and Cotton Valley reservoirs. The closest well was a well completed in the L. C. G. (Page) Field, shown by Comstock's map to be about 1,875' away from the proposed Fogle No. 1 location. As of March 16, 1982, there was existing production from wells in all compass directions within 2.5 miles of the proposed Fogle No. 1.

Within the entire 350 square mile area of Comstock's map, there are discovery wells for 20 separate fields, 12 of which had discovery dates earlier than March 16, 1982. In this area, the Bethany (Pettit) Field had been developed for 22 years prior to March 16, 1982, as evidenced by inclusion of the 10.034 acres in the Fogle tract in the H. E. Beatty Gas Unit No. 1 in the Bethany (Pettit) Field for this period of time. The Beatty Gas Unit, Well No. 1 was completed on July 15, 1960. This well first produced in August 1960, and the last production was in August 2004. The well produced for 44 years, and was plugged on July 29, 2006. Cumulative production for the well was 3.5 BCF of gas and 69,000 BO.

The discovery well for the Darco S.E. (Cotton Valley) Field was the Tomlinson Interests, Inc. John W. Harris Et Al. No. 1, which was completed on April 25, 1979. However, this completion date was one day after the completion date for another well in the same field, the Tomlinson Interests, Inc., Susan Harris Gas Unit No. 2, Well No. 1, which was about 8,500' from

the proposed Fogle No. 1 location. Comstock believes that it would have been more appropriate for Chinn to seek a permit for the proposed Fogle No. 1 in the Darco, S.E. (Cotton Valley) Field. The field in which Chinn seeks to permit the well, the Hardwood (Cotton Valley) Field, is the only Cotton Valley field in the area that had a discovery date later than the March 16, 1982, subdivision date for the 10.034 acre Fogle tract.

The Cotton Valley was a well known reservoir in the area of the Fogle tract as of March 16, 1982. As of that date, there was Cotton Valley development in all compass directions from the Fogle tract, in the Blocker (Cotton Valley), Carthage, North (Cotton Valley), Bethany (Cotton Valley), Beckville (Cotton Valley), and Darco, S.E. (Cotton Valley) Fields. According to Comstock's consultant, none of these fields had a discovery date that would suggest that the 10.034 acre Fogle tract is a legal subdivision.

The Beckville (Cotton Valley) Field was discovered in 1977, and the discovery well for this field was 7.67 miles southwest of the proposed Fogle No. 1 location. The nearest well in this field to the proposed Fogle No. 1 location as of March 16, 1982, was 2.33 miles to the southwest. As of March 16, 1982, this field had 640 acre proration units. The Bethany (Cotton Valley) Field was discovered in 1969. The discovery well for this field was 6.09 miles east southeast of the proposed Fogle No. 1 location. As of March 16, 1982, this field had 40 acre proration units, although on August 2, 1982, 640 acre, and optional 320 acre, proration units were adopted. The Blocker (Cotton Valley) Field was discovered in 1978. The discovery well for this field was 4.45 miles north northwest of the proposed Fogle No. 1 location. As of March 16, 1982, the closest well in this field to the proposed Fogle No. 1 location was 6,500' to the northwest. As of March 16, 1982, this field had 640 acre proration units. The Carthage, North (Cotton Valley) Field was discovered in 1981. The discovery well for this field was 5.09 miles north northeast of the proposed Fogle No. 1 location. As of March 16, 1982, this field had 40 acre proration units. The Darco, S.E. (Cotton Valley) Field was discovered in 1979. The discovery well for this field was 3.96 miles from the proposed Fogle No. 1 location, but the first well completed in the field was about 8,500' away. As of March 16, 1982, this field had 640 acre proration units.

Statewide rules calling for 40 acre units took effect October 1, 1962. Considering that 15 wells previously had been drilled in five different reservoirs within 2.5 miles, Comstock believes that the statewide spacing and voluntary subdivision rules had attached to the 10.034 acres in the Fogle tract prior to the March 16, 1982, subdivision date. Considering also that on the subdivision date, the 10.034 acre Fogle tract had been part of the H. E. Beatty Gas Unit No. 1 for 22 years, Comstock does not believe that the Fogle tract can be considered a legal subdivision.

EXAMINERS' OPINION

This case turns on the question of whether the Fogle tract is a legal or voluntary subdivision. The tract contains only 10.034 acres, whereas field rules for the Hardwood (Cotton Valley) Field provide for 40 acre, and optional 20 acre, drilling and proration units. Nonetheless, a first well on

the tract does not require a Rule 38 density exception if the tract is a legal subdivision. Furthermore, while the applicable field rules provide for 467' lease line spacing, and the location of the proposed Fogle Lease, Well No. 1 is only 381' from the east line and 123' from the south line of the lease, if the Fogle tract is a legal subdivision, Chinn is entitled to a Rule 37 exception for a first well to prevent confiscation if the mineral interest owners are not receiving their fair share of hydrocarbons from other wells on nearby tracts and the proposed location is deemed to be reasonable. On the other hand, if the Fogle tract is a voluntary subdivision, Chinn is not entitled to an exception to prevent confiscation under Rule 37(g)(2), and because Chinn has made no claim that an exception is necessary to prevent waste, the application should be denied.

The examiners conclude that the Fogle tract is a voluntary subdivision. It is not disputed that at the time the Fogle tract took its present size and shape on March 16, 1982, the 10.034 acres in the tract were, and for about 30 years had been, subject to an oil and gas lease dated April 10, 1952, made between the heirs of E. L. Harrison, lessors, and La Gloria Corporation, lessee. The only evidence of record on this point shows that this oil and gas lease did not terminate until 2004. In addition, as of the March 16, 1982, subdivision date, the 10.034 acres had for 22 years been included in a producing gas unit, the H. E. Beatty Gas Unit No. 1. Execution of an oil and gas lease on the parent tract for the 10.034 acres, as a matter of law, triggered attachment of the voluntary subdivision rule. *Railroad Commission v. Richards*, 336 S.W.2d 449, 450-52 (Tex.Civ.App.-Austin 1960, no writ). See also Smith & Weaver, *Texas Law of Oil and Gas*, Vol. 2, Chapter 9, §9.6(C) at page 9-68 (Matthew Bender 2007). (“Leases on large [parent] tracts automatically trigger the voluntary subdivision rule, and subsequent subdivisions by deed are voluntary subdivisions as a matter of law, even if the leased land is unproven and unexplored territory.”)

In its written closing argument, Chinn quotes a passage from the Smith & Weaver treatise wherein the authors state that “Notwithstanding the holding in *Richards*, it would seem that under the proper circumstances, land once under lease can be ‘detached’ from the voluntary subdivision rule, if the lease expires without drilling and the land reverts to being considered unproven territory again.” Disregarding for a moment that this is a statement by the authors of what they believe might be established as law in a future case “in the proper circumstances,” rather than the law as established in *Richards*, the principle is not helpful to Chinn for several reasons. First, although no well was drilled directly on the acreage in the Fogle tract or its parent tract, this acreage was pooled into the H. E. Beatty Gas Unit No. 1, and a producing gas well was drilled on the pooled unit. The 1952 oil and gas lease provided that drilling and production of a well anywhere on a pooled unit would be considered drilling and production on the leased premises. In addition, by reference to possible detachment of the voluntary subdivision rule after lease termination and possible reversion of a subdivided tract to “unproven territory,” the authors are referring to lease termination prior to the subdivision date, or, at the very least, lease termination at a time when the area of the subdivided tract is still unproven. In Chinn’s case, the oil and gas lease covering the acreage in the Fogle tract was still in effect on the subdivision date, and did not terminate until 2004, about 22 years later. For the reasons hereinafter discussed, it cannot be said that the acreage in the Fogle tract or its parent tract were in “unproven territory” on the subdivision date or when the lease terminated.

The fact that the parent tract for the 10.034 acre Fogle tract had been leased for oil and gas development prior to the subdivision date is conclusive enough, but there is a further reason the Fogle tract is a voluntary subdivision. The Smith & Weaver treatise summarizes the voluntary subdivision rule in Rule 37(g) as follows:

“A tract that is subdivided by lease, or subdivided by deed *after oil and gas are discovered in the area* or after the land is leased, into such size or shape that a spacing exception is required, is a voluntary subdivision and is not entitled to a spacing exception to prevent confiscation.”⁵ (Emphasis added)

The Fogle tract was subdivided by deed on March 16, 1982. At the time of the subdivision, and for 22 years prior thereto, the 10.034 acres in the Fogle tract were included in the H. E. Beatty Gas Unit No. 1 for a producing gas well and the owners of this acreage were being paid royalties from production on this unit. In addition, prior to the subdivision date, a total of 15 wells had been completed in five different reservoirs within 2.5 miles of the proposed Fogle No. 1 location. Prior to the subdivision date, a well had been completed in the L. C. G. (Page) Field about 1,875' from the proposed Fogle No. 1 location. As of the subdivision date, the Cotton Valley was a well known reservoir in the area of the Fogle tract. The evidence shows that in this area, regardless of the Commission designated field, all Cotton Valley wells are completed in basically the same interval. Prior to the subdivision date for the Fogle tract, wells had been completed within 2.5 miles of the proposed Fogle No. 1 location in the Darco, S.E. (Cotton Valley), Beckville (Cotton Valley), and Blocker (Cotton Valley) Fields. The examiners are persuaded that the Fogle tract was subdivided by deed after oil and gas had been discovered in the area, and for this additional reason, the Fogle tract is a voluntary subdivision.

Chinn postulates that the Fogle tract is a legal subdivision because the Cotton Valley field in which Chinn has elected to permit the proposed well had a discovery date after the March 16, 1982, subdivision date. This theory ignores the fact that prior to the subdivision date, statewide rules had attached to the parent tract based on oil and gas discoveries and development in the area, and the Fogle tract was substandard under statewide rules. Chinn's theory seems to suggest that the Fogle tract might be a voluntary subdivision for certain fields discovered prior to the subdivision date while maintaining legal subdivision status for the Hardwood (Cotton Valley) Field discovered after the subdivision date. Under this theory, as to any field with a discovery date following the subdivision, the voluntary subdivision rule would never be triggered, even in the case where the parent tract was in proven territory as of the subdivision date and the subdivision was made in contemplation of oil and gas development. The purpose of the voluntary subdivision rule is to prevent circumvention of the Commission's well spacing and density rules by subdivision of tracts to gain entitlement to additional wells based on a confiscation theory. In a case such as this one where there have been significant oil and gas discoveries and development in proximity to the parent tract prior to the subdivision date, it is not controlling that a particular field in which a well is later

⁵ See Smith & Weaver, *supra*, Vol. 2, Chapter 9, §9.6(B) at page 9-56.

sought to be permitted may have a discovery date later than the subdivision date.

Relying on Mr. Fogle's testimony that he purchased the Fogle tract intending to build a home there for his retirement, Chinn argues that the subdivision of this tract was not in contemplation of oil and gas development. However, whether a tract was subdivided in contemplation of oil and gas development must be determined objectively from all the relevant facts and circumstances. A tract will be a voluntary subdivision if it was created by deed after oil and gas were discovered in the area of the tract, even though the parties to the deed knew nothing about nearby oil or gas discoveries and had no intent to circumvent Statewide Rules 37 or 38. *Nash v. Shell Petroleum Corp.*, 120 S.W.2d 522, 524 (Tex.Civ.App.-Austin 1938, writ dismissed w.o.j.).⁶

In its written closing argument, Chinn also relies on the decisions in *Nash v. Shell Petroleum Corp.*, 120 S.W.2d 522 (Tex.Civ.App.-Austin 1938, writ dismissed w.o.j.) ("*Nash*"); *Brown v. Hitchcock*, 235 S.W.2d 478 (Tex.Civ.App.-Austin 1951, writ refused) ("*Brown*"); *Railroad Commission of Texas v. Humble Oil & Refining*, 245 S.W.2d 488 (Tex. 1952) ("*Humble*"); *Railroad Commission of Texas v. Delhi-Taylor Oil Co.*, 302 S.W. 2d 273 (Tex.Civ.App.-Austin 1957, writ refused n.r.e.) ("*Delhi-Taylor*"), and Oil & Gas Docket No. 05-0250329; *Application of Willowbend Investments, Inc. for A Rule 38 Exception for Its McKee's Port Unit No. 1D Well, Newark, East (Caddo Lime) and Newark, East (Barnett Shale) Fields, Tarrant County, Texas* (Final Order dated December 4, 2007) ("*Willowbend*"). These cases are distinguishable on their facts from the case at hand.

While the cases relied upon by Chinn upheld Commission orders finding certain substandard tracts to be legal subdivisions, none of the cases involved a subdivision from a parent tract that was subject to an oil and gas lease that was in effect at the time of the subdivision. This is a pivotal factor under the holding in *Railroad Commission v. Richards*, *supra*. None of the cases involved a subdivision from a parent tract that was included in a producing gas unit at the time of the subdivision. In *Nash*, the Court upheld a Commission order granting an exception for a well on a substandard tract that was subdivided by deed in 1929, about one year before discovery of oil in the East Texas Field. Apparently, the tract was in unproven territory at the time of the subdivision, because the court noted that the voluntary subdivision rule had been applied in cases where the tract was in proven territory at the time of subdivision. *Nash* simply declined to reverse the Commission's order based on the appellant's contention that all tracts subdivided after adoption of the original statewide spacing rule in 1919 were necessarily voluntary subdivisions.

In *Brown*, the Court upheld a Commission order granting an exception for a substandard tract subdivided in 1940. The Garza Field had been discovered in 1935 by a discovery well four miles south of Post, Texas. The Court found, however, that the subdivided tract north of Post was in

⁶ See also, Smith & Weaver, *supra*, Vol 2, Chapter 9, §9.6(C) at pages 9-59 and 9-60 ("The use of the adjective 'voluntary' is thus misleading, especially when it is used to connote intent. A tract will be a voluntary subdivision if it was created by deed after oil and gas were discovered in the area, even though the parties to the deed knew nothing about the nearby oil discoveries and had no intent to circumvent Rule 37.")

unproven “wildcat” territory. Several dry holes had been drilled between the location of the discovery well for the Garza Field and the location of the subdivided tract. The nearest production was 3.5 miles away. The Court’s holding was premised on a conclusion that there was no evidence that on the subdivision date, the subdivided tract was considered to be in the productive area of the Garza Field.

In *Humble*, the Court upheld a Commission order granting an exception for a substandard tract subdivided in 1926 when the owner acquired title by adverse possession. The principal issue in the case was whether the substandard tract had been owned in common with adjacent land that had first been leased for oil and gas in 1925. The parent tract, and the substandard tract itself, had never been leased for oil and gas development. The subdivided tract was in the East Texas Field, and the subdivision had occurred four years before the field was discovered.

In *Delhi-Taylor* the Court upheld a Commission order granting an exception for a substandard tract subdivided in 1946 and acquired to build a drive-in restaurant. The Court noted that there had been oil and gas leasing activity of surrounding acreage, but the parent tract for the subdivided tract was not subject to an oil and gas lease on the subdivision date. Although 3 wells in the McAllen field had been drilled west of the subdivided tract prior to the subdivision date, the Court considered the tract to be in unproven or “wildcat” territory because no wells had been drilled to the north, east, or south, and the limits of the field were undefined.

In *Willowbend*, the Commission concluded that a density exception was not required under Rule 38(d)(1) for a first well on a substandard drill site tract of a pooled unit because the tract was a legal subdivision. The Commission found that when the tract was subdivided in 1984, it was a part of a residential subdivision and no oil and gas leases had been taken on any lot in the subdivision. Only two oil and gas leases had been taken as of the subdivision date on any property within 1.5 miles of the subdivided tract. No well was producing from any field any closer to the subdivided tract than 3.4 miles, and this producing well was on the opposite side of Eagle Mountain Lake and in an adjoining county.

On the facts of this case, which are dissimilar from the facts of the cases on which Chinn relies, the 10.034 acre Fogle tract is a voluntary subdivision and not entitled to a Rule 37 exception to prevent confiscation. There being no claim by Chinn that an exception is necessary to prevent waste, the examiners are of the opinion that the application should be denied.

Based on the record in this case, the examiners recommend adoption of the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. At least ten (10) days notice was sent to all affected persons, who, for tracts closer to the proposed well than the greater of one-half of the prescribed minimum between well spacing distance or the minimum lease line spacing distance, included the designated operator, all

lessees of record for tracts having no designated operator, and all owners of record of unleased mineral interests.

2. Chinn Exploration Company (“Chinn”) seeks an exception to Statewide Rule 37 for its Fogle Lease, Well No. 1, Hardwood (Cotton Valley) Field, Harrison County, Texas. This would be a first well on the Fogle Lease in the subject field, and the Rule 37 exception is sought by Chinn to prevent confiscation. Chinn makes no claim that a Rule 37 exception is required to prevent waste.
3. Field rules for the Hardwood (Cotton Valley) Field provide for 467' lease line spacing and 600' between well spacing. The standard proration unit is 40 acres, with optional 20 acre units.
4. The discovery date for the Hardwood (Cotton Valley) Field was February 8, 1985.
5. The Fogle Lease on which Chinn proposes to drill Well No. 1 is a 10.034 acre tract. The proposed location is 381' from the east line and 123' from the south line of the lease. This location is near the center of the irregularly shaped Fogle tract, being 150' from the north line and 123' from the south line of the lease. Acreage in the Fogle tract east of the proposed location is four acres, and acreage to the west of the proposed location is six acres.
6. The Chinn application is opposed by Comstock Oil & Gas Company, which is the operator of the Layton Unit offsetting the Fogle tract to the south.
7. The Fogle Lease was created in its present size and shape by deed dated March 16, 1982.
 - a. On May 26, 1947, the heirs of E. L. Harrison and wife Jennie Harrison partitioned a tract of land consisting of 126 acre more or less. Tract 2 resulting from this partition, consisting of 14.3 acres, was conveyed to Emma D. Hopkins, one of the heirs of E. L. Harrison. This 14.3 acre tract included the 10.034 acres now comprising the Fogle tract.
 - b. On October 10, 1961, Emma D. Hopkins and husband W. M. Hopkins deeded one acre out of the 14.3 acre tract to their son Hershall A. Hopkins and his wife Hazel Hopkins. Emma D. Hopkins retained 13.3 acres more or less, including the 10.034 acres now in the Fogle tract.
 - c. On March 16, 1982, the heirs of Emma D. Hopkins and husband W. M. Hopkins partitioned the Emma D. Hopkins retained acreage, which was described as 12.543 acres. This partition resulted in a one tract of 2.509 acres and another of 10.034 acres, being the same 10.034 acres now in the Fogle tract. The 10.034 acre tract was conveyed by the March 16, 1982 partition deed to Hulon Hopkins, Jennie Bell Mayfield, Annie Ruth Earl, and Thelma St. Andre.

- d. On April 1, 1982, Hulon Hopkins, Jennie Bell Mayfield, Annie Ruth Earl, and Thelma St. Andre deeded to John Samuel Fogle the 10.034 acres partitioned to them by the March 16, 1982, partition deed.
8. John Samuel Fogle acquired the 10.034 acres with the plan in mind to build a home there for his retirement. However, on January 21, 1987, the surface estate of the 10.034 acres was conveyed by Fogle to the Veteran's Land Board, and then by the Veteran's Land Board to Fogle's cousin, Don Black. In this conveyance, Fogle reserved the mineral estate of the 10.034 acres for himself.
9. Fogle also owns a 1/40th interest in 124 adjoining acres that are included in the Comstock Layton Unit, a unit believed by Fogle to contain a total of about 350 acres.
10. Chinn currently does not have any wells in the Hardwood (Cotton Valley) Field and does not participate in any surrounding unit for Cotton Valley wells.
11. On and prior to the March 16, 1982, subdivision date, the acreage in the Fogle tract and the acreage from which it was subdivided were covered by an oil and gas lease, and this acreage was included in a 703 acre producing gas unit, the H. E. Beatty Gas Unit No. 1 pooled unit.
 - a. On April 10, 1952, the heirs of E. L. Harrison entered into a single oil and gas lease covering the entire amount of acreage that had been partitioned and conveyed to them on May 26, 1947. This oil and gas lease named La Gloria Corporation as the lessee and purported to cover a total of 124.4 acres. The 10.034 acres now contained in the Fogle tract were included in the acreage covered by this oil and gas lease.
 - b. The April 10, 1952, oil and gas lease had a term of 10 years and as long thereafter as oil, gas, or other mineral were produced from the leased premises or land pooled therewith.
 - c. On May 1, 1954, La Gloria Corporation assigned the April 10, 1952, oil and gas lease to La Gloria Oil and Gas Company. On August 3, 1960, La Gloria Oil and Gas Company assigned the lease to J. C. Trahan Drilling Contractor, Inc.
 - d. On August 17, 1960, J. C. Trahan Drilling Contractor, Inc. designated the H. E. Beatty Gas Unit No. 1 containing a total of 703 acres, which contained the 124.4 acres (including the subject 10.034 acres) covered by the April 10, 1952, oil and gas lease made by the heirs of E. L. Harrison to La Gloria.
 - e. The April 10, 1952, oil and gas lease provided that drilling and production of a well on a pooled unit in which the leased premises were included would be considered drilling and production on the leased premises.

- f. The H. E. Beatty Gas Unit No. 1, Well No. 1 was completed on July 15, 1960, and produced from the Bethany (Pettit) Field. This well first produced in August 1960, and the last production was in August 2004. The well produced for 44 years, and was plugged on July 29, 2006. Cumulative production for the well was 3.5 BCF of gas and 69,000 BO.
 - g. When John Samuel Fogle purchased the 10.034 acre Fogle tract in 1982, he began to receive royalty checks for production on the H. E. Beatty Gas Unit No. 1 because the 10.034 acres was included in the unit.
 - h. The H. E. Beatty Gas Unit No. 1, and the April 10, 1952, oil and gas lease, did not terminate until 2004.
12. Statewide rules calling for 40 acre well density took effect October 1, 1962.
13. On and prior to the March 16, 1982, subdivision date for the Fogle tract, oil and gas had been discovered and substantial oil and gas development had occurred in the vicinity of the Fogle tract and the acreage from which it was subdivided.
- a. On and prior to the March 16, 1982, subdivision of the Fogle tract, the 10.034 acres in the Fogle tract and the acreage from which it was subdivided were included in a producing gas unit, the H. E. Beatty Gas Unit No. 1.
 - b. As of the March 16, 1982, subdivision date of the Fogle tract, a total of 15 wells had been drilled in and produced from various reservoirs within 2.5 miles of the proposed location of the Fogle Lease, Well No. 1. These wells had been completed in and produced from Pettit, Travis Peak, Lower Pettit, Page, and Cotton Valley reservoirs.
 - c. As of the March 16, 1982, subdivision date of the Fogle tract, the closest well was a well completed in the L. C. G. (Page) Field, about 1,875' away from the proposed Fogle No. 1 location.
 - d. As of the March 16, 1982, subdivision date of the Fogle tract, there was existing production from wells in all compass directions within 2.5 miles of the proposed Fogle No. 1.
 - e. As of the March 16, 1982, subdivision date of the Fogle tract, the Bethany (Pettit) Field had been developed for at least 22 years, as evidenced by inclusion of the 10.034 acres in the Fogle tract in the H. E. Beatty Gas Unit No. 1 in the Bethany (Pettit) Field for this period of time.
 - f. The Cotton Valley was a well known reservoir in the area of the Fogle tract as of the March 16, 1982, subdivision date of the Fogle tract. As of that date, there was

Cotton Valley development in all compass directions from the Fogle tract, in the Blocker (Cotton Valley), Carthage, North (Cotton Valley), Bethany (Cotton Valley), Beckville (Cotton Valley), and Darco, S.E. (Cotton Valley) Fields.

- i. The Beckville (Cotton Valley) Field was discovered in 1977, and the discovery well for this field was 7.67 miles southwest of the proposed Fogle No. 1 location. The nearest well in this field to the proposed Fogle No. 1 location as of March 16, 1982, was 2.33 miles to the southwest. As of March 16, 1982, this field had 640 acre proration units.
 - ii. The Bethany (Cotton Valley) Field was discovered in 1969. The discovery well for this field was 6.09 miles east southeast of the proposed Fogle No. 1 location. As of March 16, 1982, this field had 40 acre proration units, although on August 2, 1982, 640 acre, and optional 320 acre, proration units were adopted.
 - iii. The Blocker (Cotton Valley) Field was discovered in 1978. The discovery well for this field was 4.45 miles north northwest of the proposed Fogle No. 1 location. As of March 16, 1982, the closest well in this field to the proposed Fogle No. 1 location was 6,500' to the northwest. As of March 16, 1982, this field had 640 acre proration units.
 - iv. The Carthage, North (Cotton Valley) Field was discovered in 1981. The discovery well for this field was 5.09 miles north northeast of the proposed Fogle No. 1 location. As of March 16, 1982, this field had 40 acre proration units.
 - v. The Darco, S.E. (Cotton Valley) Field was discovered in 1979. The discovery well for this field was 3.96 miles from the proposed Fogle No. 1 location, but the first well completed in the field was about 8,500' away. As of March 16, 1982, this field had 640 acre proration units.
14. Chinn did not present, or attempt to present, evidence to establish that the requested exception is necessary to prevent waste.

CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued by the Railroad Commission to appropriate persons legally entitled to notice.
2. All things necessary to the Commission attaining jurisdiction over the subject matter and the parties in this hearing have been performed.

3. Pursuant to Rule 37(g)(2) [16 TEX. ADMIN. CODE §3.37(g)(2)], a tract that is a voluntary subdivision is not entitled to a Rule 37 exception to prevent confiscation of property.
4. The voluntary subdivision rule attached to the 10.034 acres in the Fogle tract and acreage in the parent tract from which the Fogle tract was subdivided prior to the March 16, 1982, subdivision date.
5. The 10.034 acre Fogle tract on which Chinn Exploration Company proposes to drill is a voluntary subdivision, and Chinn is not entitled to a Rule 37 exception for the proposed Well No. 1 on this tract to prevent confiscation of property.
6. Chinn Exploration Company did not establish that the requested Rule 37 exception is necessary to prevent waste.

RECOMMENDATION

The examiners recommend that the attached final order be adopted denying the application of Chinn Exploration Company.

Respectfully submitted,

James M. Doherty
Hearings Examiner

Andres J. Trevino
Technical Examiner