STATE OF NEW MEXICO

ENERGY, MINERALS, AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION DIVISION

IN THE MATTER OF THE HEARING CALLED
BY THE OIL CONSERVATION DIVISION FOR
THE PURPOSE OF CONSIDERING:

CASE NOS: 21213

APPLICATION OF MARATHON OIL PERMIAN LLC
TO POOL ADDITIONAL PARTIES UNDER THE
TERMS OF ORDER NO. R-20996,
EDDY COUNTY, NEW MEXICO

REPORTER'S TRANSCRIPT OF VIRTUAL PROCEEDINGS
EXAMINER HEARING
JULY 9, 2020
SANTA FE, NEW MEXICO

This matter came on for virtual hearing before the New Mexico Oil Conservation Division, HEARING OFFICER FELICIA ORTH and TECHNICAL EXAMINER DYLAN COSS and LEONARD LOWE on Thursday, July 9, 2020, through the Webex Platform.

Reported by: Irene Delgado, NMCCR 253
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A P P E A R A N C E S

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I N D E X

HEARING EXAMINER ORTH: Let's move to 21213 (audio interference) oh, someone needs to mute themselves -- someone should mute themselves. Okay. 21213, applicant Marathon Oil. This is a challenge to a compulsory pooling order. Ms. Bennett, I think I see you.

MS. BENNETT: Good morning, Madam Hearing Examiner. This is Deana Bennett on behalf of Marathon Oil Permian LLC.

(Continued audio interference.)

HEARING EXAMINER ORTH: Let me see. Please mute yourself if you are not speaking. Not sure what's happening.

And is Ms. Bradfute also making an appearance?

MS. BENNETT: She is unable to join us this morning.

HEARING EXAMINER ORTH: Okay, thank you. And then I have Cavin & Ingram on behalf of Sugar Creek. Is Mr. Cavin with us? Mr. Ingram?

MR. INGRAM: Yes. Can you hear me?

HEARING EXAMINER ORTH: Yes, now I can hear you.

MR. INGRAM: Madam Examiner, this is Steve Ingram of Cavin & Ingram on behalf of Sugar Creek Resources. I would also note that also on the line are my co-counsel who have not yet entered an appearance. That is Brady Smith and John Paul with our company.

HEARING EXAMINER ORTH: Okay. Mr. Smith (garbled audio).

Okay. Let me pause a moment to see if there are any other appearances.

(No audible response.)

HEARING EXAMINER ORTH: No.

(Continued audio interference.)

HEARING EXAMINER ORTH: And I have muted everyone else. I'm not sure where (garbled audio) comes from.

So this is motion hearing, two motions, one is to (garbled audio) Marathon Oil. And we have reply that (garbled audio) and the other one is (garbled audio).

(Continued audio interference.)

REPORTER: Madam Examiner, I'm getting a really bad echo.

HEARING EXAMINER ORTH: Thank you, Ms. Delgado. Let me ask if there is -- the echo -- I just got a text. It's coming from inside the house. I'm guessing that someone has a speaker, and that's what we are hearing. (Garbled audio) if anyone is listening to (garbled audio) speaker, would you please silence it?

TECHNICAL EXAMINER COX: Maybe it's the volume, it's picking up everything on my end.

HEARING EXAMINER ORTH: I'm sorry? Turn my volume down?

TECHNICAL EXAMINER COX: Not necessarily you, but someone's mic is picking up the audio.

HEARING EXAMINER ORTH: Right.

MS. BENNETT: Madam Examiner, this is Deana Bennett, I am listening to you and interacting using my computer speaker, and I don't have headphones to use, so hopefully it's not me causing the problem, but if it is me, I will endeavor to mute myself every time I am not speaking to try to (garbled audio) the feedback that may be occurring.

HEARING EXAMINER ORTH: All right. If you would right now mute, and we will see if that fixes it.

MS. BENNETT: Okay.

HEARING EXAMINER ORTH: All right. Has that fixed it? I think it has. All right, Ms. Bennett, I think we are going to have to work together on this.

Okay. So let's take up the motion to vacate or stay.

MS. BENNETT: Madam Examiner, if I may say one thing before I take up the motion to stay. Marathon's motion to strike is actually a threshold motion, it's dispositive of the motion to stay or vacate. And what I mean by that is if the division grants Marathon's motion to strike, then there is no need to hear the motion to stay.

So given that the motion to strike is a threshold

motion and dispositive motion, of course subject to the division's preference and Madam Hearing Examiner's preference, Marathon suggests, for efficiency's sake, that the motion to strike be heard first.

HEARING EXAMINER ORTH: I think you're right insofar as there may be a standing issue here.

MR. INGRAM: Madam Examiner, may I be heard on that?

HEARING EXAMINER ORTH: Yes, please.

MR. INGRAMp Sugar Creek suggests that we hear the motions in the order they were filed, and Sugar Creek's motion to vacate or stay was filed first, and the motion to strike of Marathon was filed after the fact. And I think it would be better to go ahead and hear the motions in the order they were filed, hear argument regarding the motion to vacate or stay, and then we can hear Marathon's procedural objection.

HEARING EXAMINER ORTH: So there is an issue here to (garbled audio) a potential issue here with standing. I mean, I'm directing that to you, Mr. Ingram, which would, as Ms. Bennett said, would be a threshold consideration.

MR. INGRAM: Well, if that were -- of course we reject that as a valid argument, and it's of course your preference, Madam Examiner, as to what order you want to have these heard, but you know, we think it would be better

to have -- that you understand the nature of the issue at hand and then can consider Marathon's procedural objection in context.

HEARING EXAMINER ORTH: All right. I think I would like to hear, actually, the motion to strike first. Again, the potential issue is (garbled audio). Ms. Bennett, if you would proceed.

MS. BENNETT: Thank you, Madam Examiner. I appreciate the opportunity to present our motion to strike first. As I mentioned a moment ago, the motion to strike is dispositive of the issue before the commission -- I'm sorry -- the division today.

The dispositive issue was whether Sugar Creek had properly filed its motion to stay, and Marathon's (garbled audio) is based on language of the regulations of the Oil & Gas Act, and commission (garbled audio) is that Sugar Creek is not properly before the division today.

Before I get too far into that, I did want to clear up a couple of things. First, Marathon is not trying to avoid any obligations here. Marathon is happy to work with the lessors, but Marathon (garbled audio) Sugar Creek has a process. But Marathon is willing to work with the lessors, if the lessors want to work with Marathon, so be it, Marathon is happy to have discussions with them.

As Sugar Creek put in its briefing, Sugar Creek

has filed a quiet title action. So if the outcome of that quiet title action is that there is a change in the ownership interest, at that point there would be an obligation on Marathon to engage with the new interest owners. Right now we don't have that, though.

At that point Marathon would enter into negotiations, and if those negotiations failed, then would reopen this case, and that's the proper process here. But what's happening now is that Sugar Creek is trying to avoid the division and commission regulations governing prehearing motion practice and post hearing motion practice.

And the division regulations are clear on that. For prehearing motions, the regulations are at Rule 19.15.4.15C, and there it says that motions can be heard before the hearing. And so all of this sort of an attempt to (garbled audio) because Sugar Creek, if it wanted to, could have appeared at the hearing, it could have intervened.

As of now it has an interest in these leases, it could have intervened. There are rules governing intervention, and yet Sugar Creek did not intervene. And it's undisputed Sugar Creek was not entitled to notice as a party in the hearing, but that doesn't mean that Sugar Creek couldn't have participated in the process for that.

Sugar Creek chose not to avail themselves of that

process, and it can't be heard now after the hearing, after the case was taken under advisement, and after an order was issued, that it somehow has the right to collaterally and thwart it.

Secondly the (garbled audio) for post hearing challenges to orders as well, and that process is a process that Sugar Creek didn't follow and couldn't follow because of its prehearing conduct, or, inaction, I should say.

The process to challenge a division order is to seek de novo review with the commission, and that's set out in Rule 19.14.23A, and it has three requirements, none of which Sugar Creek met here.

First a de novo review has to be filed within 30 days of the issuance of the order. Sugar Creek did not (garbled audio) its application for de novo review with the commission within 30 days. Instead, Sugar Creek filed a motion to stay with the division, and it is untimely filed -- I'm sorry -- an application to post (garbled audio).

Sugar Creek tries to excuse its failure to comply with the 30-day requirement by alluding to an e-mail or some sort of communication with Edener's counsel, saying that Edener's counsel directed and authorized Sugar Creek to apparently untimely file its application for de novo review.

Marathon was not a party to that communication,

and their counsel, Marathon has not never seen such communication with Edener counsel, so Marathon can't opine or otherwise have any indication of whether that's an accurate state of what Edener's counsel told Sugar Creek.

But in any event, Edener's counsel, whoever that is, doesn't have the authority to extend the deadline for filing a de novo application. And, even if it did, certainly that would have to be done with notice to the party whose order is being challenged, and that was not done here.

Second under the commission rules, only a party of record has a right to seek commission review, and Sugar Creek is, plainly, not a party of record. The division, in order number 14097 cited in our material (garbled audio) the working interest owners have notice. It's like the lessors here, had notice, but didn't take -- didn't enter an appearance, didn't request a continuance, didn't do anything to participate in --

HEARING EXAMINER ORTH: Ms. Bennett, hold on, your sound disappeared all of a sudden. Is it back? Your sound disappeared. You're not muted.

REPORTER: Madam Examiner, this is Irene, I can actually hear Ms. Bennett.

MS. BENNETT: I can try calling you if that would be --

HEARING EXAMINER ORTH: Now I can hear you.

MS. BENNETT: Okay.

HEARING EXAMINER ORTH: I'm sorry to interrupt.

MS. BENNETT: I'm glad you did, and please feel free to interrupt me at any time.

So I was saying that Sugar Creek is not a party of record which is a jurisdictional requirement to seeking commission review of a de novo -- party seeking de novo application in front of the commission. And the division, in Order 14097, concluded that working interest parties that had notice of the hearing, but that didn't enter its appearance, didn't appear at the hearing, didn't file a motion for continuance to protest, was not entitled to protest after the hearing order was entered and actually quashed entry of appearance of that party's untimely filed.

So that's the division precedence that supports Marathon's position. The commission then affirmed that decision in Order 14097-A, and it held that, entities like Sugar Creek that does not take the necessary steps to become a party of record in a division proceeding does not have the right to de novo review.

And here it's undisputed that Sugar Creek did not take any attempt, did not make any attempt to become a party of record. Nor did the lessor. The lessor had notice of the hearing, they did not appear at the hearing, they did

not ask for a continuance of the hearing, they did not object to the hearing.

And also a motion for -- I'm sorry -- application for de novo review has to be filed with the commission. The motion to stay was filed with the division, so that doesn't qualify as an application for de novo review.

The -- so the first problem is they didn't avail themselves of the prehearing opportunity steps that they have. The second problem is they did not adequately seek post hearing relief by seeking -- by filing a timely application for de novo review.

The third procedural defect -- and each one of these in and of itself is enough to strike their motion or dismiss it summarily, but the third procedural defect is that the motion to stay is not properly before the division because the commission and division rules say that a motion to stay has to be filed with the commission. It's undisputed this motion to stay was filed with the division, never with the commission.

Second, the rule states that a party seeking a stay shall be (garbled audio) order to the commission. We pointed that out in our brief, and as far as I know, Sugar Creek still has not submitted a proposed final order. So it has not complied with the mandatory language of the rule

governing stays.

Also, a stay has to be requested by a party, and again the rules, the division rules are clear about who is a party. Sugar Creek is not a party, it does not comply with the rules, there is nothing in the rules that says a top lessor who allegedly stands in the shoes of the underlying lessor, or a top lessee is somehow a party. There is nothing like that, and that shouldn't be the rule, especially when the lessors themselves had notice, undisputedly, and yet they took no effort to participate in a case.

Finally, Sugar Creek hasn't demonstrated that they are entitled to a stay. A stay is warranted (garbled audio) to prevent waste, protect rights, protect public health, or prevent gross negative consequences to an affected party, and Sugar Creek seems to be relying on protect correlative rights and avoid negative consequences to an affected party.

Sugar Creek is not an affected party, first of all. The regulations define what constitutes an affected party and Sugar Creek is not an affected party. Sugar Creek tries to gloss over that by saying it's an interested party or an adversely affected party, but the regulation says an affected party. Affected party is a defined term. Sugar Creek does not fit within that defined term.

Also Sugar Creek hasn't identified the extent it's relying on its future correlative rights because it doesn't have any correlative rights right now. There aren't any correlative rights to protect. Correlative rights are defined in the Oil & Gas Act, and in the regs, and it's the opportunity to produce without waste the owner's just and equitable share of oil and gas in the pool.

Right now Sugar Creek does not have an interest in the minerals, the lessors do, and Marathon is the lessee. And importantly and recently, the division reiterated correlative rights do not include the right to operate a well or operate a unit or the right to be paid a certain amount, nor do they -- nor are correlative rights something akin to reasonable expectation.

So here where Sugar Creek hasn't identified and can't identify correlative rights that can be impacted, it has no ability to request a stay. And in its -- in one of its briefs, Sugar Creek cites to Continental, and Continental is clear that when there are jurisdictional prerequisites, this body has to follow those prerequisites.

The jurisdictional prerequisites here are embodied in the Oil & Gas act itself which governs de novo review and requires applications for de novo review to be filed within 30 days and within the rule. And here Sugar Creek cannot meet any of the procedural requirements filed

in the motion stay, so the motion to stay should be stricken or summarily dismissed. And I would like to reserve some time to reply to Mr. Ingram's arguments as needed.

HEARING EXAMINER ORTH: All right. Thank you, Ms. Bennett. Mr. Ingram, your response?

MR. INGRAM: Thank you, Madam Hearing Examiner. So the issue at hand is, can an operator pool additional parties without complying with the mandatory prerequisite that they attempt to gain voluntary agreement with those parties. Marathon undisputedly did not do that here. It is trying to avoid the fact that the order should be vacated as a result with a procedural attack on Sugar Creek.

Sugar Creek is the successor to the three, purportedly pool parties, Campos, Robbins and Aldemir (garbled audio) top lease from those parties. It has standing. It has, it has an interest as those mineral interest owners do. It is a successor to those parties of record, and it has standing to attack an order that's void on it's face for failure to find Marathon as the applicant, and it's undisputed it made no attempt to gain voluntary agreement from these parties prior to pooling them in this reopened proceeding.

Now, the -- as to the OCD's jurisdiction to hear this matter, the OCD has jurisdiction over its own orders. Just as Marathon could apply to reopen the prior pooling

proceeding, Sugar Creek can move to vacate an improvidently entered order that affects its interests, which it does.

There are no OCD regulations that prohibit Sugar Creek from moving to vacate an order that's void on its face for failure to find, based on -- and based on a lack of evidence as to any attempt to gain voluntary agreement prior to entering the pooling order. There -- the OCD has entertained such motions to vacate or stay a pooling order before in a prior proceeding, Case Number 15072, Energen filed a motion to vacate its own parts of it -- a prior order regarding pooling relief it had obtained before the OCD years after the fact.

In its reply, I believe, Marathon raised this issue about irreparable harm and that Sugar Creek, as a condition of its seeking to stay the order, has to show irreparable harm. That's not the case. In Case Number 11348 that was cited by Marathon in its motion, the OCD in fact stayed its own order and ultimately entered an order contrary to Marathon's argument that didn't find that immediate irreparable harm wasn't demonstrated as a basis for the denial of the motion and did in fact extend the time for the movant to participate in the well.

The point being, Sugar Creek does not have to show immediate irreparable harm to seek a stay of the order, rather, that its correlative rights are impacted, which they

are. Now, Marathon seems to spend most of its time arguing about whether or not the -- this follow-on pooling order should be stayed, you know. Of course, the primary thrust of Sugar Creek's motion here is to seek the vacating of that order.

The stay is as a result of the parallel district court proceeding that Sugar Creek does have pending to seek the declaration by the court that the lease that Marathon claims to hold from Campos, Robbins and Aldemir has in fact expired for lack of production. But that's the alternative to the primary thrust of Sugar Creek's position, which is that the order is void because there is no compliance with the mandatory requirements that it seek -- it attempt to gain voluntary agreement from these parties. It didn't do it.

And it argues four different ways about why it shouldn't have to do it, but it's a mandatory requirement and it wasn't met. The OCD has jurisdiction over its own orders and that order should be vacated. Sugar Creek has standing to raise this issue before the court. The -- before the hearing examiner -- and the -- its motion is no more irregular than, than Marathon's reopened pooling proceeding.

So it's not a collateral attack that's being brought here seeking review by the issuing agency of its own

order. Ms. Bennett spends time regarding the de novo application, and the circumstances behind that were simply that we were -- MRC Permian, who was also a party that appeared in this matter, filed a de novo application to the OCC from this very same order, and we filed, Sugar Creek filed its motion to vacate.

We were contacted by Eric Ames and were directed to file a de novo application with OCC to be heard with the MRC Permian de novo application. We don't dispute it was filed after 30 days of issuance of the subject order, but we took that as a -- a grant of continuance to file that application and did so.

I will be happy to submit that. I wasn't aware that Marathon wasn't a party to the e-mail, but we'll be happy to submit that after this hearing as an additional exhibit to those that were filed with our, our reply brief on our motion to vacate to make it clear that we were simply directed to, to do so, and so we did.

But to the extent that there is an attack on whether or not the OCC de novo application was properly brought, it seems like it could be brought before the OCC and not the division.

In any event, we believe Sugar Creek has standing. This order is void on its face for the failure to to have complied with the mandatory prerequisites for

pooling. The OCD has jurisdiction over its own orders, and this matter should be heard because of the important issue presented. Thank you.

HEARING EXAMINER ORTH: All right. Thank you, Mr. Ingram. (Garbled audio.) Ms. Bennett -- I'm muting you until I finish my sentence. I would ask, if you have a reply, but only to add to what you already said. We have definitely heard what you have already said here.

MS. BENNETT: Thank you, Madam Examiner. I just want to clarify a couple of things that Mr. Ingram stated. He says that Sugar Creek is a successor to the lessor, but the top lease that Sugar Creek entered into with the lessor is clearly a contingent positional or diversionary interest. It's a future interest that is not yet vested.

So it may turn out that it is vested at the end of the quiet title action, but certainly right now we saw the clear language of the top leases. If those leases say that the top leases, both to the existing lease and to vest any possession upon expiration of the existing leases or the day of this oil and gas lease, which I will bring up later.

So it is not currently a successor in terms of being in possession, as a future conditional right that only matured if in fact the bottom leases have expired, which is the issue in the quiet title action.

The other quick point that I wanted to touch on

in rebuttal, really, is that, again, Mr. Ingram says (garbled audio) the primary issue here which is that Sugar Creek had the opportunity to participate in this case before the hearing, and they chose not to.

And Mr. Ingram spends time discussing the irreparable harm standard, well, whether that standard applies or not, Sugar Creek has not complied with the statutory and regulatory prerequisites that entitle it to a stay much less to vacate.

We just heard a moment ago a case that is being brought to challenge, I think, the cost with Mr. Bruce and Ms. Shaheen. And there the parties who challenged the order, did not file a motion to stay or motion to vacate, that party filed an application which triggers the OCD filing process, the notice requirements, all of those sort of procedural processes that are attendant to those applications.

And I'm not saying that Marathon would have agreed to that process, but at least it's compliant with division regulations. So to just file this motion and that there is no regulations that prohibit completely ignores that there are regulations that set forth very specific requirements for prehearing, post hearing conduct, neither of which Sugar Creek has complied with.

For those reasons Sugar Creek's motion to

strike -- I'm sorry -- Sugar Creek's motion to stay or vacate should be stricken or dismissed summarily. Thank you.

HEARING EXAMINER ORTH: All right. Thank you, Ms. Bennett. So because these are legal arguments, I won't call on our technical examiners, but I believe we are joined by Mr. Ames.

Mr. Ames, do you have questions of Ms. Bennett or Mr. Ingram?

MR. AMES: Yes, thank you, Ms. Orth. I had a couple of questions for Mr. Ingram. Good morning, Mr. Ingram. Can you hear me.

MR. INGRAM: Yes.

MR. AMES: Mr. Ingram did those lessees Campos, Robbins or Aldemir get notice of the hearing and in 21213.

MR. INGRAM: Based on the evidence submitted by Marathon, they did receive notice, yes.

MR. AMES: Did any of those lessees enter an appearance in Case 21213?

MR. INGRAM: No.

MR. AMES: If the lessees aren't parties, or weren't parties to case 21213, how is it that Sugar Creek can step into their shoes in order to move to stay the order in that case.

MR. INGRAM: They took top leases after the time

that the application was filed by Marathon, before the time that the division's order was entered, at that time were interested parties, they did not receive, Sugar Creek did not receive notice itself of the proceeding. But, you know, when it, it was aware of the order being entered, it acted, you know, once it did, once it was a party with an affected interest and filed this motion.

MR. AMES: But at the time, at the time that Marathon issued the notice for the hearing, was Sugar Creek -- had Sugar Creek stepped into the shoes of the lessees? Had the lease been signed over?

MR. INGRAM: Mr. Ames, I can't tell you offhand at that -- on that date if they had. I think they may have had -- they may have been the top lessee of record, I'm not sure, though. I can't tell you offhand, Mr. Ames.

I think that information may be in our filings, but, you know, we were in the process of -- our client was in the process of negotiating these, these top leases at the time the proceeding was ongoing.

MR. AMES: Right. As I read the pleadings, you may have been in the process of negotiating the transfer of the leases or the assumption of the leases, but it had not been consummated at the time that Marathon filed its notice. I didn't see anything in there where you said that Sugar Creek had become the -- the lessee of record.

So Sugar Creek says in, I think, it's response that the lessees were -- had granted Sugar Creek Resources the authority to challenge the leases and take other action. If the lessees weren't parties to case 21213, how does that argument for Sugar Creek Resources ending to move for a stay of the order in this case?

MR. INGRAM: Well, we are -- our position is that Sugar Creek was granted the right and authority to take any and all action with regard to the mineral interest rights that were granted, which would include taking action regarding what Sugar Creek's lease was a wrongfully entered pooling order of that interest.

MR. AMES: Right, but that agreement was between lessees, Campos, Robbins and Aldemir and Sugar Creek Resources doesn't necessarily convey standing before the OCD if in fact the lessees were not parties. Isn't that correct?

MR. INGRAM: Well, it conveys whatever rights that they stepped into the shoes of.

MR. AMES: Right. Thank you. The leases themselves, I didn't see anything in the pleadings indicating that the leases have expired by their own terms; is that correct?

MR. INGRAM: You are talking about the underlying lease that Marathon claims?

MR. AMES: Yes. The leases of Campos, Robbins and Aldemir.

MR. INGRAM: It's our position that those leases have expired by their terms or for lack of production of paying quantities.

MR. AMES: You asked the court for a declaration of that; is that correct?

MR. INGRAM: That's correct.

MR. AMES: You also say that OCD doesn't have any power to make the declarations about the validity of leases; correct?

MR. INGRAM: Yes, because it's a title issue.

MR. AMES: So we need to accept the leases as they are presented to us; correct?

MR. INGRAM: The -- well, you need to -- they are subject to challenge. I mean, I think what it is is the OCD had the lease presented that is being challenged in another jurisdiction, and the issue remains to be determined, you know, by the court.

MR. AMES: Thank you. I'm going to reserve questions about the stay requested, typically whether or not Marathon submitted written evidence of the effort to gain voluntary agreement and the nature of the harm for the, for argument on the next motion.

HEARING EXAMINER ORTH: Thank you, Mr. Ames.

Mr. Ingram, if you would then, please, move in to the motion to vacate. You have already addressed some of that.

MR. INGRAM: Yes.

HEARING EXAMINER ORTH: But please add whatever you would like to.

MR. INGRAM: Thank you, Madam Examiner, I will try not to be duplicative.

To frame the issue is this: Can an operator pool additional parties without complying with the mandatory prerequisite of the attempt to gain voluntary agreement with those additional parties. In this proceeding, in this reopen proceeding, Marathon, there, there is no evidence in the record where they sent any proposed revised agreement or any type of documentation.

It's -- we are not disputing that they appear to have given notice to these three mineral interest owners, but that doesn't satisfy the mandatory prerequisites of a party coming to the division seeking a pooling order. They have to attempt to gain voluntary agreement. It's undisputed in this case that Marathon did not do so.

The fact this is a reopen proceeding does not excuse its obligation to, you know, again, attempt to gain voluntary agreement with the additional parties it seeks to pool. There is no correspondence in the record. The affidavit doesn't recite any attempt to do so, and the order

makes no finding of an attempt to gain voluntary agreement.

In a previous proceeding this morning that question was asked of one of the parties, was there proof of an attempt of voluntary agreement. And that underscores the critical nature of that requirement, it's not something to be glossed over, but it has been here, and that's what Sugar Creek seeks to remedy by its appearance in this matter and its attack on this order.

Now, Marathon claims that it's pooled overrides before, and so this should be okay somehow. But again, it's a mandatory prerequisite to any pooling, any pooling of any type of interest, there is not a distinction made in the Oil & Gas Act and in the regulations in this regard.

Further, the OCD cases that Marathon does cite as support for its position that, well, it's pooled royalty interests before, all, all were situations where in fact the applicant did make an attempt for voluntary agreement and submitted evidence of that in the record.

The exhibits attached to Sugar Creek's reply on its motion to vacate, Exhibits 1 through 3 concern Case Number 20211 cited by Marathon, and that's -- and in those exhibits there is an affidavit, there is an application and there is a letter, because in that case they were seeking voluntary joinder in a pooling designation and there was attempts made with the mineral interest owner, with the

royalty interest owner and override owners to attempt to gain their voluntary agreement to that pooling.

Similarly, in Exhibits 4 through 5 to our reply, and that concerns Case Number 15679, also cited by Marathon, the operator in that situation sent a call agreement to royalty interest owner because there was an issue regarding the pooling language in the leases there.

And in Exhibits 6 through 8 to Sugar Creek's reply, those concern Case Number 15268, again cited by Marathon in its briefing, and those exhibits are in an application, transcript and order, in which Anschutz sought a voluntary joinder in a pooling and sent proposed lease amendments out.

So, you know, all of this underscores the fact that even though when you are attempting to pool a royalty interest owner, you must make an attempt to gain voluntary agreement. Mandatory prerequisite, Marathon just sidesteps it, and the cases it cites in support of its proposition it didn't have to do so in fact supports Sugar Creek's position that they were required to make an attempt to obtain voluntary agreement and did not do so in this case.

Marathon's prior practice that it alludes to does not excuse this noncompliance with this mandatory prerequisite. The fact that Marathon gave notice to Campos Robbins and Aldemir and that they didn't appear is not the

same thing as making an attempt to gain voluntary agreement with those parties. They have to do that. It's a separate requirement, they didn't do it. And that undercuts the validity of the pooling order in this issue. There is no evidentiary support because -- for having attempted to gain voluntary agreement. There is a reason for that requirement, and it was not met by Marathon.

And again Marathon relies on procedural attacks, and it relies on the fact that, well, it gave notice, but it didn't make an attempt to gain voluntary agreement. It never answers the question of why it pooled these additional parties. That's never clearly stated in their briefing, and it never states how it's excused from complying with this mandatory requirement.

Instead it filed this follow-on pooling application. It didn't make attempt to gain voluntary agreement. It alludes to something about there being some ambiguity in these underlying leases. Well, if it believed the pooling language wasn't sufficient, then it should have made an attempt to send a proposed lease amendment to these parties. That's what was done in Case Number 20211, Exhibits 1 through 3 to our reply. It should have proposed something; it didn't do it.

So, you know, if the -- if the leases were valid and sufficient as is and there was no issue with pooling

language, then there was no reason for this pooling proceeding to have been brought. If the leases weren't valid or did not contain sufficient pooling language, then there was a reason for that, and they had to follow the mandatory prerequisites. They can't have it both ways.

So the OCD has jurisdiction over its own orders. We believe the order is invalid on its face, and it should be vacated and Marathon should be required to follow the mandatory prerequisites to obtain pooling relief.

Thank you.

HEARING EXAMINER ORTH: Thank you, Mr. Ingram. Ms. Bennett?

MS. BENNETT: I unmuted myself, if that's okay.

HEARING EXAMINER ORTH: Yes.

MS. BENNETT: Good morning, again. I appreciate -- well, before we start, I want to address Mr. Ames question a moment ago about the timing of Sugar Creek's acquisition of the top leases in respect to Marathon's application which shows again Sugar Creek does not have standing to make this argument on behalf of -- purportedly on behalf of the lessors.

Marathon filed its application on March 3, 2020. The lessors, it's undisputed that they received notice on March 16, 2020. The hearing was actually originally scheduled for April 2, but due to Covid considerations, the

hearing was postponed until April 30. So between the time that the lessors received notice on March 16 and the time the hearing was held, that was 45 days, 45 days in which Sugar Creek was in communication with the lessors, but Sugar Creek didn't do anything during that time.

And the leases were not recorded until after the application was filed. The leases were recorded in April and May. One of the leases wasn't executed until May 13, so that lease wasn't even executed before the order was issued.

The Campos lease was recorded on April 28, actually April 25, but for Covid, that would have been executed well after the original hearing date. And the Robbins lease was recorded on April 6, 2020. So all of those leases were recorded and executed, for that matter, after Marathon's application was filed.

Turning to this kind of Sugar Creek argument that Marathon was somehow required to send the lessors some sort of proposal, which, to be frank, Sugar Creek hasn't even identified what it thinks was required to be sent. At first Sugar Creek said we need to send the JOA, the AFE, a lease.

Now they say you don't have to send a JOA, an AFE or a lease, but something, you have to send something. Well, that in and of itself proves there is no requirement. If there was a requirement that Marathon or others provide voluntary -- seek voluntary joinder in a pooling order, you

would think that Mr. Ingram would be able to point to a specific type of document that Marathon is required to send.

Instead it can't do that, and that's because there is nothing in the regulations under the division -- I'm sorry -- under the Oil & Gas Act that requires an operator to send a royalty interest owner, which is what we are talking about here, a non-cost-bearing, non-risk-bearing interest an AFE, that doesn't make sense; a JOA, that doesn't make sense. A non-cost-bearing interest owner has no interest, for lack of a better word, in the cost of the well.

It's not going to be able to elect into the well, it can't elect into the well. So we are facing a moving target here, too, because we did try to provide evidence to the division showing that no AFE was been required, no JOA has been required. Certainly in the cases Mr. Ingram discussed, there was some sort of -- there was some documentation that was sent to a royalty interest owner, but that proves the point rather than -- Marathon's point rather than Mr. Ingram's point because there are a lot of other cases where operators have never been required and have not sent any type of notice to royalty interests.

And so I think the best -- well, before I get to that, one of the things I wanted to point out is that Sugar Creek's argument that's almost entirely on

19.15.4.12A(1)(b)(4), and that's the provision of the rule that is part of the alternative procedure.

And that alternative procedure is a streamlined procedure for the division to follow if certain prerequisites are met. Importantly, though, that -- get my rule book out here -- that provision applies to owners. It doesn't apply to royalty interest owners, it doesn't apply to overrides, it applies to owners.

It says, and I'm reading from D here, "When the applicant has given notice as required in Subsection A, then as those owners the applicant has located do not oppose the application, the applicant may file under the following alternative procedure. An owner is a defined term in both the regulations and the Act, and royalty interest owner is not an owner as that term is defined in the act. An owner is a person who has the right to drill into and produce from the pool and to appropriate production either for himself or for another."

And so first of all, I think Mr. Ingram and Sugar Creek are expanding rule 19.15.12A beyond its limits. But beyond that, the idea of entering into a voluntary agreement with a non-cost-bearing, non-risk-bearing royalty interest is not consistent with the obligation in the rule. There is no need to enter into a voluntary agreement with that type of interest.

And, in fact, the OCD compulsory pooling checklist that the OCD has prepared and that we are required to file with each pooling application support the very proposition that pooling checklist which I filed in this case has a provision that says, joinder, and then it says, "Chronology of contact with non-joined working interest," I checked n/a there or I marked n/a because there is no contact with non-joined working interest owners.

But use of the term non-joined working interest owner there was intentional. That shows the parties to whom OCD understands applicants have to negotiate and reach voluntary agreement with, and that is clear, non-joined working interest, and that's consistent with the intent of the rule.

HEARING EXAMINER ORTH: Ms. Bennett, sorry, this is Felicia, I'm to mute you for just a moment. So, I'm sorry about this, we have a conflict here between 10 and 11, and I imagine Mr. Ames has additional questions of you. Is that true, Mr. Ames?

MR. AMES: That's right, Ms. Orth, I do have a couple of questions for both Mr. Ingram and Ms. Bennett. Unfortunately I have another meeting that was previously scheduled from 10 to 11, so I apologize for the inconvenience, but I would like to request that we continue this hearing for one hour and reconvene at 11 o'clock.

HEARING EXAMINER ORTH: Okay. Again, I'm sorry, counsel, for the interruption. What I would like to do is adjourn this session. I know that the sign-in information will be the same. Staff and I have already practiced resigning in using the same sign-in information, so I know that it works.

And I apologize to everyone for the interruption, but we are going to adjourn now and reconvene at 11 a.m., and it will be solely for the purpose of finishing argument and questions in 21213, Marathon Oil and Sugar Creek. Thank you all very much.

MR. INGRAM: Thank you.

(Recess taken.)

HEARING EXAMINER ORTH: Okay. This is Felicia Orth. (Garbled audio) for the July 9 OCD hearing docket. We adjourned at approximately 10 a.m. this morning, and we have no reconvened at 11 to finish the arguments and questioning in Case 21213, Marathon Oil being the applicant, Sugar Creek being the party seeking or challenging the compulsory pooling order.

We were hearing argument on the cross motion, Sugar Creek's motion to vacate the stay order and Marathon's motion to strike that motion, and again sorry for the interruption.

Ms. Bennett, when we broke, you, I believe, were

finishing up your argument on Sugar Creek's motion to stay or vacate. So I invite you to finish that and we will proceed from there.

MS. BENNETT: Thank you, Madam Hearing Examiner. Yes, I was finishing up, and I just have a few final points to make. First I wanted to be clear that Sugar Creek has not and cannot (garbled audio) in the Oil & Gas Act that require an applicant to attempt to negotiate with a royalty interest owner prior to filing a pooling application.

The Oil & Gas Act, which Sugar Creek relies, on does not require anything about an attempt to reach voluntary agreement. What it does say is that the commission shall pool under these circumstances (garbled audio) and that's why Marathon is here.

An order cannot be (garbled audio) if there is a specific requirement that Marathon has to follow, and that's what our discussion of the case law or the precedent Mr. Ingram was discussing as well as what we put in or reply brief.

So he mentioned the COG case, Case Number 15679, and it's true in that case COG did send a letter to royalty interest owners, but it wasn't a letter asking for voluntary agreement in the OCD's (garbled audio) it was a letter asking the parties to ratify a lease agreement which is a BLM agreement. It had nothing to do with the OCD process.

And it's -- it doesn't say, and we will negotiate with you, it's a directed letter, it says, "Sign here and return to me."

The Anschuz cases, in those cases, the parties who sent the letter to the royalty interest owner was seeking lease modification, lease amendments, those are outside of OCD's jurisdiction. So sending a lease modification can't be what OCD would require compliance with the OCD.

We also (garbled audio) to our reply that lists a number of recently cited cases, and what we were trying to do there is that companies like Marathon pay different tax with respect to notices or pay prefiling communications with royalty interests. About 50 percent of -- in more recent cases in which orders have been issued -- about 50 percent of those cases don't include any communication with the royalty interest owners other than the notice letters.

In fact in one of the cases, the WPX case, WPX'S counsel submitted a compulsory pooling checklist just like I did in this case, and put n/a besides the proposal letter and n/a beside the requirement to include a summary of communications with non-joined working interest owners. In that case all that was seeking to pool was royalty interest owners.

So that's a specific example that we cited in our

reply that shows that Marathon isn't trying to avoid an obligation and sidestep something under the rules. This is Marathon's practice. The practice, like I said, the practice we reviewed is to not communicate with the royalty interest owners and to identify that to the division, and that's what we did.

The practice that I have seen in the time I have been at the division is to provide royalty interest owners with notice of the hearing, and that's it. And that's what most -- or 50 percent of the cases there are. The other 50 percent that we cited in the chart have some form of communication with the royalty interest owner, and it varies. It's not a specific form and sometimes it's seeking ratification of (garbled audio). Other times it's a simple letter that is a thumbs-up or thumbs-down. It doesn't give any kind of opportunity to negotiate.

So I raise these points to show that to the extent Sugar Creek is saying it's a requirement, that does not -- is not supported by precedent, even recent precedent of the parties' practice in the division.

Now, you know, if -- and I reiterate that recent orders were issued where no communication was had with the royalty interest owners. So I want to just say, if OCD wants to implement this as a rule, wants to implement a rule that the applicants have to agree to pooling applications to

the royalty interest owners, Marathon will comply with that. Marathon, as I mentioned earlier, Marathon is willing to work with -- but that pooling should be applied going forward because it can't be applied retroactively.

If it's applied retroactively, based on our quick review, 50 percent of our OCD's case would be subject to attempt on grounds that, you know, that complying with OCD practice and on grounds afforded by the regulations for the Oil & Gas Act.

What I wanted to just point out, Sugar Creek hasn't (garbled audio) leases with Marathon. Marathon is willing to (garbled audio) of course, and by the same token Sugar Creek doesn't have an interest that requires Marathon to negotiate with them, and today Sugar Creek has not demonstrated that, although Sugar Creek has been authorized to take action on behalf of the lessors, that's irrelevant, because, as we discussed earlier, the lessors didn't take any actions to preserve their rights, so Sugar Creek is stepping essentially into empty shoes.

The other thing I wanted to point out about the Rule 19.15.4.12 is that, as I mentioned earlier, it applies to owners, and owner is a defined term, and it should be (garbled audio) but beyond that, it specifically allows an interested person, and that's the term it uses, to request a hearing.

So again, Sugar Creek could have, as an interested person, not a party that was entitled to notice, it didn't even have to (garbled audio) it could have asked for a hearing if it truly felt it was entitled to a (garbled audio) or entitled to notice, it had the opportunity to do that before we got to this date and it didn't.

The order that was issued in this case in R-20996, the first order which is (garbled audio) here, also demonstrates the fallacy in Sugar Creek's argument because that order was consistent with the Oil & Gas Act allows for challenges to orders (garbled audio) such as costs, and those costs are only imposed on parties with interest. A non-cost-bearing interest wouldn't have a reason to challenge an AFE or the reasonable costs, for example, in (garbled audio) the Act says, "In the event that any such costs, the division shall determine the proper costs after notice to interested parties and hearing thereon."

There is nothing in the Act that says, you know, there's -- there is another reason for opening or reopening, and consistent with Marathon's overall brief here which is that these costs (garbled audio) the working interest owners are entitled to both letters, they are entitled to JOAs and AFEs, and that makes sense because they are the parties that are going to bear the cost, and they are the parties who cna challenge the order. A non-cost-bearing interest owner,

however, doesn't have that (garbled audio), and so it makes perfect sense that it would not need to have a prefiling notice.

The notice of hearing that was sent complying with the division's regulations, that is (garbled audio) participate in the hearing, so there is no reason now for Sugar Creek to assert that these, that the order is void, and appoints to an affirmative duty in the regulations that this division has upheld consistently or has even required.

And so for that reason -- oh, I also wanted to point out, I made this point earlier, so I'm not going to repeat it, for completeness Sugar Creek has not demonstrated it is entitled to a stay because it has not met the (garbled audio) with the commission, not the division. A stay requires a formal (garbled audio) shall is used which (garbled audio) Mr. Ingram reiterate, and the stay has certain requirements showing that Sugar Creek cannot (garbled audio) correlative rights to protect, and Sugar Creek is not an affected party which is a defined term, and so cannot meet the standard for a stay under the commission and division rules. Thank you.

HEARING EXAMINER ORTH: Thank you, Ms. Bennett. Mr. Ingram, without feeling the need to repeat the arguments you have already made, do you have any reply to Ms. Bennett?

MR. INGRAM: Regulations for --

(Audio interference.

HEARING EXAMINER ORTH: Can you log out and log back in?

MR. INGRAM: I will log out, and log back in.

HEARING EXAMINER ORTH: All right. We will wait a moment.

(Pause.)

HEARING EXAMINER ORTH: Mr. Ingram, it appears you have logged back in. Can you hear me?

MR. INGRAM: I can. Can you hear me?

HEARING EXAMINER ORTH: Yes, I can.

MR. INGRAM: Okay. So I don't have video up yet, I'm sorry.

HEARING EXAMINER ORTH: It is unnecessary.

MR. INGRAM: All right. So we are not -- Sugar Creek doesn't seek to attempt any new requirement for new law, we were simply seeking to require that Marathon follow the mandatory requirements. Shall, means shall. If Marathon thought it needed to pool Campos, Robbins and Aldemir and it determined that it did, then, you know, we are not talking about the notice requirements of 19.15.4.12A(1)(a), you know, do we then step into, okay, if they need to be pooled, then there are other requirements for pooling.

And part of those, under the procedure followed

by, purportedly followed by Marathon was the requirement that the application shall include written evidence in an attempt to gain voluntary agreement.

We are not seeking to dictate what type of attempt to gain voluntary agreement it was, but there is none. Their affidavit doesn't include it. There is no letters. We are not talking about notice of the proceeding, we are talking about the attempts, the substantive attempts to gain voluntary agreement.

And, again, the cases they cite, and I will go back to 15 -- Case Number 15679, you know, that operator contacted Tap Rock. The examiner wanted to see that they had negotiations with them even though they were a royalty owner, and in that case there was a royalty -- the pooling clause was insufficient, so they wanted to see if they had negotiations with them regarding that.

Here, Marathon, although it won't tell us exactly why it sought to pool these interest owners still haven't said so in this case, seems to allude there was an insufficiency in the pooling language. Well, again, the -- both the practice and the regulatory requirement is that you attempt some vol -- attempt to gain voluntary agreement with the interest owner, be it be an interest owner or royalty interest owner if there is a reason to need to pool to attempt to gain agreement. It wasn't done here.

MRC was another interest owner who complained of this order apparently after. After it sought de novo review, some agreement was come to between it and Marathon, we don't know what it is because they won't disclose it, haven't similarly sought to work out something with either the underlying interest owners, the mineral interest owners from whom Sugar Creek took a top lease for which Sugar Creek as the top lessee.

The failure of those underlying mineral interest owners to appear doesn't convert an order that is void on its face into a valid order. It's not valid because it didn't comply with law in requiring attempts to gain voluntary agreement before pooling. We are seeking nothing more than what is the requirement that voluntary agreement attempt be made prior to pooling. It's not just a notice issue. If they sought to pool these interest owners, then they haven't met the requirements what it took to obtain an interest to pool in order to pool their interests.

That's what this order purports to be, an order that pools these interest owners' interests, in order to do so, they had to file that requirement, they didn't do so. It's, you know, Sugar Creek is simply seeking to bring this matter to the OCD's attention. If it doesn't succeed here, if an application is necessary, so be it, but it is -- it's clear that the order doesn't meet the stat -- the regulatory

requisites, and you know, does need to be set aside, and Marathon does need to be required to go through those steps before a valid pooling order of these interests can be issued. Thank you.

HEARING EXAMINER ORTH: All right. Thank you Mr. Ingram. Mr. Ames, do you have questions?

MR. AMES: Yes, I do, thank you.

Ms. Bennett, if I understand you correctly, you argued that the voluntary agreement requirement doesn't apply as that term is defined in the statute. Looking at the rule, though, it refers to -- it appears that that requirement applies to owners of an interest in the mineral estate. My understanding is that term, owner of interest in mineral estate would be royalty interest owner; correct?

MS. BENNETT: Thank you, Mr. Ames? You are correct in Subsection A does say -- A(1)(a) does say that the applicant should give notice to each owner of its interest in the mineral estate. Subsection B, which is the section that Mr. Ingram is relying on, does not have that same language.

It says when the applicant has given notice required in Subsection A, and again remember this is an alternative procedure, so this is the -- more (garbled audio) procedure, so this should be read separately from A. And so it says, "When the applicant has given notice of its

intent to file a pooling application, and those owners the applicant has located does not oppose the application, the applicant may file under the following alternative procedure," and then it outlines the following alternative procedure.

An owner -- so I misspoke -- owners is a defined term. It's defined in the Act, and it's defined in the regulation, An owner is a working interest owner. It's a person who has the right to drill, and Sugar Creek does not have the right to drill, and the lessors do not have the right to drill, so they do not fall under the definition of the parties to whom Subsection B would apply.

But even if they did, Subsection B clearly says that the division can set a hearing (garbled audio) person's request, and that didn't happen here.

MR. AMES: So, Ms. Bennett, you are arguing that the reference to those owners in A(1)(b) is not the same as the owner of an interest, a mineral interest -- the owner of an interest in the mineral estate referenced in (1)(a)?

MS. BENNETT: That's right, Mr. Ames, because the provisions of B are more streamlined proceedings, and if the division or the commission intended to use owners of a mineral interest in B, it could have done so, and owners -- if owners were a defined term, certainly I would understand your perhaps skepticism of my argument.

But owner is a defined term in both the Act and the regulation. If it weren't, I would understand where you are coming from, but it is, so it has to have some meaning here in some alternative procedure requirement.

MR. AMES: Okay. Did Marathon make any effort to seek a voluntary agreement with lessees Campos Robbins or Aldemir?

MS. BENNETT: Prior to filing the pooling application, the answer to that is no. After the pooling application was filed, I did have communication with Mr. Robbins and offered the landman's contact information to Mr. Robbins to discuss the lease (garbled audio).

MR. AMES: Did you submit any written evidence with your application or in connection with the case regarding that communication?

MS. BENNETT: No. That was post filing of the application, and it's Marathon's experience those types of communications aren't necessary under division practice. As I mentioned earlier, there are several cases that were on the docket today, cases that were heard over the summer where applicants routinely did not include and do not have prefiling communications with royalty interest owners. And so Marathon was acting consistent with that prior practice (garbled audio) so it did not include any of that information with its application.

MR. AMES: Okay. And there was no contact with Campos or Aldemir, period?

MS. BENNETT: Not that I know of.

MR. AMES: So if I understand correctly, you are arguing Subsection B of 19.15.4.12A is not applicable to Marathon's application in Case 22213?

MS. BENNETT: I'm arguing, Mr. Ames, something more broadly than that, which is that the division has never required applicants to submit proof of attempts the applicant has made to gain voluntary agreement with interest owners as was evidenced, for example, on the checklist.

It doesn't apply, and if it does apply to all cases, then the cases that we cite in our briefing are subject to (garbled audio) for failure to comply with an unwritten (garbled audio) requirement.

MR. AMES: Thanks, Ms. Bennett. I understand that part of your argument, but my question was and is, are you saying that Subsection 2 of subpart -- of Subsection B of Subsection A of 19.15.4.12 does not apply to Marathon in this case?

MS. BENNETT: Thank you, Mr. Ames. The plain language of that regulation makes it clear that it doesn't apply. It uses the word owners. If the division seem (garbled audio) yes.

MR. AMES: My question is, are you saying that

Subsection B does not apply to Marathon's application in this case?

MS. BENNETT: Yes. Yes.

MR. AMES: Okay. I had a couple of questions about the stay itself, the (garbled audio) element. Sugar Creek Resources noted in one of its briefs, I think in the reply, I'm not sure exactly which one, but -- and Marathon on July 5 it filed, I believe, an SEC report saying that suspension had been -- excuse me -- that drilling had been suspended in the Northern Delaware. Is that true?

MS. BENNETT: I don't have any knowledge of what Mr. Ingram put in his request.

MR. AMES: Mr. Ingram, do you have any more information about that?

MR. INGRAM: Can you hear me.

MR. AMES: Yes.

MR. INGRAM: None other than what we have in our reply brief.

MR. AMES: Okay. If in fact Marathon has suspended drilling in the Northern Delaware for the foreseeable future, why do we need to issue a stay at all?

MR. INGRAM: Well, the stay is primarily -- is sought because we don't want -- we are seeking a determination of the validity of the underlying lease and would like to proceed to be able to do that not impacted by

this, this pooling order.

So you know, we think the stay would still be appropriate, but, you know, again, it is alternative to the primary thrust of our argument which is to seek to set aside the order.

MR. AMES: (Audio interference) Ms. Bennett this question. If Marathon suspended drilling in the Northern Delaware, why should we not issue a stay?

MS. BENNETT: Thank you, Mr. Ames. The burden is not on Marathon to demonstrate that stay is warranted or not warranted. The burden is on Sugar Creek to show that it has met the requirements for a stay, and it has not. And your question about why a stay is warranted if Marathon is not in fact (garbled audio) true, but its telling because what his answer was, "Well, we want time to go to the quiet title action."

Well, the quiet title action isn't a reason to stay the division -- the effect of a division order, and certainly it's squarely on Sugar Creek, and they cannot comply with the burden, the procedural aspect or substantive aspect of demonstrating why a stay is warranted.

MR. AMES: Mr. Ingram, can you explain in more detail why you believe there would be harm if the stay is not issued, even though Marathon has not (garbled audio).

MR. INGRAM: Well, it still impacts development,

and, I mean, it is an order purporting to, you know, pool these interests, these interest owners from whom we have taken a top lease, and you know, it's -- we don't want the pooling just, you know, preventing us or some other party from developing it.

MR. AMES: Is there any evidence that development is imminent?

MR. INGRAM: Mr. Ames, I'm not saying that if Sugar Creek is not an operator as Marathon has pointed out as of yet, but that doesn't mean it could not participate in other developments, and Sugar Creek seeks to promote development. We are not trying to prevent that, we are just trying to, you know, we are trying to correct an improvident pooling order regarding this interest. You know, it's simply, there wasn't an attempt to gain agreement, and until such time that's done, we don't believe that this order should stand.

MR. AMES: (Garbled audio) so you are saying correlative rights, I'm still not hearing what that harm is.

MR. INGRAM: Well, if our interest is being pooled under -- on the basis of a lease that we claim has been -- has expired for lack of production and are seeking to prove that in court, it's, you know, Marathon's lease -- it's, from the division's perspective, Marathon's lease stands on the same footing as our lease. And you know, the

court will have to determine which is valid and whether that lease has in fact expired.

But, you know, if -- if this pooling order is allowed to stand that is based on the contention by Marathon that, you know, it has -- these are royalty interest owners, and it was entitled to pool them in the manner that it did, I mean that affects our interests.

MR. AMES: I'm not asking whether your interest was affected by the order you claim is invalid, I'm asking what harm to correlative rights do you seek to prevent by requesting the stay.

MR. INGRAM: We have had no opportunity, nor these underlying mineral interest owners had the opportunity to participate or to, you know, to determine whether there is a lease amendment that should be entered in this case, you know, have had no opportunity to participate or negotiate regarding these mineral interests.

MR. AMES: And you chose to raise those issues before the OCC?

MR. INGRAM: As necessary, yes.

MR. AMES: Why do you need a stay from the OCD if you are bringing the issues before the OCC?

MR. INGRAM: Well, we are seeking all appropriate relief, Mr. Ames, and if that's a stay before the division it's that, if it's the division recognizing that this order

is invalid because of the failure to meet prerequisites to pooling, then that, if it's to the OCC for de novo review, then, then, you know, we would bring these matters to the commission's attention.

MR. AMES: In evaluating an issue of harm to correlative rights in this context, would OCD be considering harm to the correlative rights of other interested persons?

MR. INGRAM: Well, it's -- obviously the goal is to protect correlative rights. We are seeking to vindicate the correlative rights of Sugar Creek and these underlying mineral interest owners. I mean, the division can certainly take into account other correlative rights in doing so. We're not seeking to harm other's correlative rights, but we are seeking to vindicate ours.

MR. AMES: Thank you. That's all the questions I have.

HEARING EXAMINER ORTH: Mr. Ames, I don't want to step on anyone's toes, but could I briefly respond to some of the questions you asked Mr. Ingram?

MR. AMES: I will leave it for Ms. Orth whether she wants to allow a surreply to questions I have asked.

HEARING EXAMINER ORTH: Go ahead, Ms. Bennett.

MS. BENNETT: Thank you. I just wanted to clarify two things. Mr. Ingram stated that the underlying lessors, Sugar Creek didn't have an opportunity to

participate, I'm assuming he means in the unit, but again, as they're non-participating interest owners, they don't have a right to participate.

The other -- I just wanted to point out, too, he seems to suggest that the right to participate in and of itself with a right to operate may be a correlative right that the division can protect, but what the division recently ruled it's not a correlative right as that term is used in the Oil & Gas Act.

And finally, there is no provision for, in the regulation, for the division to issue a stay. The remedy is to petition the commission for a stay. That did not happen here, it still hasn't happened here, and so Mr. Ingram's -- excuse me -- Sugar Creek's request to the division to stay the effect of the division's order has no basis in the regulation, even if all of the other procedural deficiencies are overlooked, which they should not be. Thank you.

HEARING EXAMINER ORTH: Thank you, Ms. Bennett. Mr. Ames, do you have any further questions of either Ms. Bennett or Mr. Ingram.

MR. AMES: Just for Ms. Bennett on her last point, are you saying that an application to the OCC for de novo review deprives the division of the authority or the jurisdiction over its own orders?

MS. BENNETT: No, I'm not. What I'm relying on

is regulation 19.15.4.23 which says, which covers stays of division or commission orders, and it says, "A party requesting a stay of a division order," which is what's happening here, "Shall file a motion with the commission clerk, not the division clerk, and serve copies upon -- upon the other parties who appeared in the case. The parties shall attachment the proposed stay order."

And the -- Sugar Creek has emphasized again today the mandatory nature of the word "shall." And I'm not saying that filing of an OCC application deprives the division of jurisdiction over the orders, what I am saying is that the oil and gas regulations set forth a proscribed mechanism for seeking the relief that Sugar Creek has requested. Sugar Creek has not followed that mandatory process.

MR. AMES: So you are saying that because Sugar Creek filed its motion with OCD, with Ms. Salvidrez, as opposed to Ms. Davidson, that determines whether OCD has jurisdiction to consider a motion to stay the order?

MS. BENNETT: There -- yes, because there is nothing in the regulations that say a party seeking relief of a division order may file a motion with the division clerk. It says shall file a motion with the commission clerk.

MR. AMES: What if I told you that the division

clerk is serving under the commission clerk?

MS. BENNETT: (Garbled audio) the caption of the case and the posture of the case, if it was -- it would be a different posture than what's happening here. I understand that Florene and Marlene are oftentimes -- and I don't mean this pejoratively -- interchangeable and Florene used to be the clerk for both. But the caption of the case would be different, and the mechanism for it to proceed would be different. It would be going to the director, not the division.

It says, the parties shall propose -- it says shall, which Sugar Creek did not do here, the director may grant the stay. It does not say the division may grant the stay, the director may grant the stay. And so that's my point is that it contemplates an orderly process that Sugar Creek has not complied with here.

MR. AMES: So you are saying that the reference to the commission clerk signifies that the application or the motion (garbled audio) something specific in the caption directly to the commission?

MS. BENNETT: Yes.

MR. AMES: So you are arguing that the division -- that the OCD has no jurisdiction to consider a motion to stay its own order despite the language in the order itself that says, "We retain jurisdiction (garbled

audio) further orders."

MS. BENNETT: I suppose that's the logical conclusion that I'm arguing, but I would also note that as I mentioned earlier, OCD retains jurisdiction over its orders for things such as challenges to the reasonableness of costs, the application to reopen orders. So it doesn't render superfluous that language in the OCD order, what it does do is, and what I'm referring to here is 19.15.4.23, what that does do is say, "Here is how it's supposed to be done."

If OCD wants to says, "No, we think we have jurisdiction notwithstanding," then that's your prerogative. But our position is that 19.15.4.23B sets out the process, and the process is to file with the commission. That doesn't render in any way OCD's ongoing authority superfluous or meaningless, instead that ongoing authority can be invoked by a reopener of the application (garbled audio).

MR. AMES: Great, thank you.

HEARING EXAMINER ORTH: All right. Thank you, Mr. Ames. If there is nothing else, we will add adjourn this session here on July 9 having brought to a close the argument on the cross motion to (garbled audio).

TECHNICAL EXAMINER LOWE: I want to bring up -- this is Leonard Lowe.

HEARING EXAMINER ORTH: Mr. Lowe?

TECHNICAL EXAMINER LOWE: Yes, I want to bring up a reference to the exhibits that were submitted pertaining to these cases in whatever manner it's going to come out to be, but the exhibits need to be legible and readable for any case that comes into an OCD hearing. So I just want to ensure that all applicants, everybody that's involved, make sure that your exhibits are as legible as possible for the reason that when OCD makes a decision on anything, any order that we give out that are, our evidence is at least legible.

So for the benefit of the whole process, if you could please ensure your exhibits are legible, and in particular to this case, Pages 4, 5, 7, 8, 9, 10, 11 and 12, from what I saw, and I think the last page, 32 of 32, is not you know, it's not legible. So I would like to see if you could update these exhibits to make it more legible for us to review if we come to that point that, you know, OCD decides to -- whatever is going to happen, but this is in reference to all exhibits that are submitted.

HEARING EXAMINER ORTH: Okay. Thank you very much, Mr. Lowe, for that reminder. If there is nothing else, we will adjourn this session at 11:42, and we will talk with you all again in two weeks. Thank you all very much.

MS. BENNETT: Thank you so much. I appreciate

your time today.

HEARING EXAMINER ORTH: Thank you.

(Concluded.)

STATE OF NEW MEXICO

COUNTY OF BERNALILLO

REPORTER'S CERTIFICATE

I, IRENE DELGADO, New Mexico Certified Court Reporter, CCR 253, do hereby certify that I reported the foregoing virtual proceedings in stenographic shorthand and that the foregoing pages are a true and correct transcript of those proceedings to the best of my ability.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case and that I have no interest in the final disposition of this case.

I FURTHER CERTIFY that the Virtual Proceeding was of extremely poor quality.

Dated this 9th day of July 2020.

/s/ Irene Delgado
_____
Irene Delgado, NMCCR 253
License Expires: 12-31-21