1982

S. H. Bennion v. Shell Oil Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

S. H. BENNION, Plaintiff-Appellant, vs. SHELL OIL COMPANY, a Delaware corporation, and UTAH STATE BOARD OF OIL, GAS AND MINING, Defendants-Respondents.	)	Case No. 18345

BRIEF OF RESPONDENT
SHELL OIL COMPANY

Appeal From the Judgment of the
Third Judicial District Court, Salt
Lake County, State of Utah
The Honorable James S. Sawaya, Judge

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STATEMENT OF THE CASE

Plaintiff-appellant S. H. Bennion appeals from a judgment of the Third Judicial District Court for Salt Lake County, the Honorable James S. Sawaya presiding, affirming an order of the Utah State Board of Oil, Gas and Mining concerning Mr. Bennion's right to share in production from a well operated by respondent Shell Oil Company (hereinafter "Shell").

DISPOSITION IN THE LOWER COURT

S. H. Bennion commenced this action in the District Court on June 10, 1981, seeking review of an order of the Utah State Board of Oil, Gas and Mining issued on April 30, 1981. (R.2). In August 1981, Bennion filed a motion for summary

judgment asserting in effect that the order of the Board should be reversed as a matter of law. (R. 110). In November 1981, Shell moved for summary judgment contending that the Board's order should be affirmed as a matter of law. (R. 137). On December 29, 1981, the parties presented oral argument on their respective motions (R. 183 et seq.), after which the District Court took the case under advisement. On March 8, 1982, the District Court entered its Judgment and Order of Dismissal granting Shell's motion, denying Bennion's motion, and affirming the order of the Board in its entirety. (R. 172) On March 23, 1982, Bennion filed his notice of this appeal. (R. 177).

RELIEF SOUGHT ON APPEAL

Shell seeks an order of the Court affirming the judgment of the District Court.

STATEMENT OF FACTS

The statement of facts in Bennion's brief is incomplete in certain respects and misleading in others. The following, therefore, is a summary of all of the pertinent facts established in the administrative record and in proceedings before the District Court.

I. THE DRILLING UNIT AND COMMENCEMENT OF THE TEW-1B5 WELL

On June 24, 1971, the Board ordered that Section 1, Township 2 South, Range 5 West, Uintah Special Meridian, be established as an oil and gas drilling unit. The order, as

amended in 1972, authorized the drilling of one well on the drilling unit.* S. H. Bennion owns an undivided 25 percent mineral interest in one eighth of the section; his interests extend to 2.94898 percent of the entire unit. The remaining working interests in the unit are owned or leased by seven individuals or corporations, including Shell. In June 1973, Shell notified all seven other working interest owners, including Bennion, that it proposed to drill a well in the unit. (Shell Ex. 1).** In December 1973, Shell sent to all of the working interest owners a proposed operating agreement. (Shell Ex. F). This operating agreement, prepared on a standard form in common use in the area, named Shell as operator and provided for the sharing of expenses and proceeds, if any, from the well to be drilled.

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* The Board's orders were entered in Cause No. 139-3. Subsections (a), (b), (c), (d) and (e) of section 40-6-6, Utah Code Ann. (1982 Repl. Vol.), authorize the Board to establish drilling units so as to prevent waste of oil or gas, to avoid the drilling of unnecessary wells, or to protect correlative rights. The size and shape of such units is to approximate "the maximum area that can be efficiently and economically drained by one well." The drilling of any well in the unit other than the one authorized by the order is unlawful.

** References in this brief to exhibits, letters, orders or transcripts are all to portions of the administrative record certified by the Board to the District Court. The documents in the administrative record are neither indexed nor numbered. They are contained in two large envelopes on file in the office of the Clerk of this Court.

Shell and six of the other working interest owners in the unit signed Shell's proposed operating agreement, dated December 14, 1973. (Shell Ex. 8). The only working interest owner who refused to sign the agreement was Mr. Bennion, who advised Shell: "I don't want to become involved whatever, with your Company in this venture." (Shell Ex. 5). Shell therefore represented in the operating agreement that it would pay Bennion's share of expenses in drilling and operating the well.

The well, which bore the designation Tew-1B5, was commenced on December 20, 1973, and was completed as a producer on July 7, 1974. The well is located on land in which Shell owns 100 percent of the working interest. It is located more than one quarter mile away from any land in which Bennion owns an interest. In May 1976, proceeds from the well's production became sufficient to pay drilling and related costs; in other words, the well's "payout" occurred in that month. The well has continued production since that time.

II. BENNION'S INITIAL APPLICATION FOR FORCED POOLING AND HIS NEGOTIATIONS WITH SHELL

On February 24, 1975, Bennion applied to the Board for "forced pooling" of the unit.* After a hearing date was set

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* Subsections (g) and (h) of section 40-6-6 authorize the working interest owners in a unit to agree on the terms for sharing expenses and proceeds from a well. (Continued)

in Cause No. 139-13 so initiated, Bennion's attorney notified the Board that he wished an indefinite continuance. (Letter from S. G. Crockett to the Board dated March 18, 1975). Several months later Mr. Bennion asked the Board to reschedule the hearing, but then again asked that the hearing be continued without date. (Letter from S. H. Bennion to the Board dated August 25, 1975). Over the next several years Bennion and Shell negotiated sporadically concerning Bennion's right to participate in production from the well, and the percentage of his interest in the unit. Bennion consistently refused to sign agreements proposed by Shell, and he refused to pay his share of costs or operating expenses on the terms to which the other working interest owners had agreed. Not only did he refuse to sign the operating agreement proposed by Shell and signed by the other owners. (Shell Ex. 8). He also refused to sign a division order proposed by Shell (Shell Ex. 7) and a one-page letter agreement prepared by Shell in response to his contention that the operating agreement was too long (Shell Ex. 10). In December 1975 Bennion tendered payment to Shell of his alleged share of expenditures, but the payment was conditioned

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(Note continued.) In the absence of agreement, these subsections authorize a "nonconsenting" owner like Bennion to seek an order of the Board decreeing the owner's rights in a share of production from the well, after the operator's recoupment of expenses. Such orders are called "forced pooling" orders.

upon Shell's agreement that his share in the unit was greater than Shell -- and later the Board -- believed to be the case.* (Shell Ex. 14). Shell had no alternative but to refuse Bennion's tender. (Shell Ex. 15).

During these negotiations, Bennion made it clear to Shell that he would not voluntarily participate in the payment of expenses until he was entitled to take what he believed to be his working interest percentage of production in kind from the date of first production. (See, e.g. Shell Ex. 14). In short, Bennion was unwilling to accept cash payments from Shell for his alleged share of past production. (Tr. of Oct.24, 1979, at 30-31). Shell consistently refused to pay Bennion in kind back to first production from the well because the parties could not agree on Bennion's percentage interest in the well, and because, in Shell's view, payment in kind long after production started would be unfair to it and other working interest owners. Shell believed that payment in kind would, in effect, have rewarded Bennion with dramatically increased oil prices even though he had refused to shoulder the risks of development along with Shell and the other working interest

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* Bennion contended that he owned a working interest of 3.125 percent of the unit. Shell believed that his working interest amounted to 2.94898 percent. In its Order in Cause No. 139-13, dated April 30, 1981, the Board concluded that Bennion's interest was as Shell contended.

owners. For these reasons, and because Shell and Bennion disagreed on other matters, the two never reached an accord.

Between September 1975 and June 1979, Bennion made no effort to bring his grievances against Shell before the Board. Until 1979 he made no effort to press his application for forced pooling of the unit.

III. BENNION'S AMENDED APPLICATION AND PROCEEDINGS THEREON

On June 7, 1979, Bennion filed an amended application in Cause No. 139-13, in which he again asked the Board to order the forced pooling of the unit, to require Shell to deliver his alleged share of production in kind from the date of first production, and to require Shell to produce its records of drilling costs and operating expenses. After hearings on July 26, 1979, and October 24, 1979, the Board entered an Interim Order (dated October 24, 1979), requiring Shell to pay expenses for Bennion, his lawyer and his accountant to travel to Houston, Texas, to review Shell's books and records concerning production and costs of drilling. This order was entered even though Shell had previously provided Bennion with complete summaries of revenues and expenses from the Tew-1B5 well (Bennion Ex. A-5, Shell Ex. 6, Shell Ex. 12), with a complete audit of the well conducted by Tenneco Oil Company, one of the other working interest owners (Shell Ex. 16 and Shell Ex. 23), and with supplemental expense and revenue information requested by Bennion's

accountants (Shell Ex. 18).

Bennion did not avail himself of the opportunity to examine Shell's records at Shell's expense. Rather, he engaged the Houston office of his own accounting firm to audit Shell's records. On July 9, 1980, Bennion's Houston accountants reported that they had reviewed Shell's records but that they could not certify their audit because certain production records were not "readily" available to them and because "the complexity of gas plant cost accounting systems" did not justify a complete review. Mr. Bennion's accountants, however, reached the "tentative" conclusion that Shell's accounts of Bennion's interest overpaid Bennion by more than $5,000. (Letter from Main Hurdman & Cranstoun to Peter Stirba dated July 9, 1980). In any event, Bennion's attorney was unable to offer the Board evidence indicating that Shell's records or summaries short-changed his account. (Tr. of Dec. 18, 1980 at 34-35).

On March 26, 1980, the Board entered a second interim order in Cause No. 139-13, this one based upon a stipulation between Shell and Bennion. The order stated first that all interests in the unit would be pooled effective July 26, 1979, the date of the initial hearing in Cause No. 139-13. Second, the order provided that Bennion would be entitled to receive his proportionate share of oil, gas, and other hydrocarbons

produced from the well in kind, but only from the effective date of the pooling order, and only upon Bennion's payment of his share of Shell's operating expenses. Third, the order provided that Shell would pay to the Board $72,222.41, which Shell had calculated as Bennion's share of total net revenue from the well from the date of first production to the effective date of the pooling order. (This sum was made up of (1) a cost-free royalty equalling one-eighth of Bennion's working interest, computed from first production until "payout" in May 1976, and (2) a working interest share of proceeds after payout, less Bennion's proportionate share of expenses.) Finally, the order provided that it was entered without prejudice to Bennion's claims that he should receive more than a 2.9489 percent working interest, and that he should receive payment in kind (rather than in cash) for production prior to the effective date of the pooling order. These claims were to be addressed later.

On December 18, 1980, the Board conducted its third and final hearing in Cause No. 139-13, following which it issued the order that is the subject of this appeal. That final order, dated April 30, 1981, held in pertinent part that since Shell was willing to let Bennion share in the well's cash proceeds from first production to the effective date of the pooling order, Bennion would be entitled to the $72,222.41 previously paid to the Board. But the Board held that Bennion was

not entitled to a share of production in kind for that period. The Board likewise rejected Bennion's other claims against Shell.

On June 8, 1981, Bennion filed his complaint in this case, asking the District Court to set aside the Board's April 30 order on the ground that it was "unreasonable, unjust, arbitrary, capricious, without legal or factual basis, and otherwise constitutes an abuse of the Board's discretion." As noted above, the District Court rejected Bennion's contentions and affirmed the Board's last order in its entirety.

ARGUMENT

I.

THIS COURT MAY ONLY SET ASIDE THE BOARD'S DISCRETIONARY DETERMINATIONS IF IT CONCLUDES THAT THE BOARD ACTED ARBITRARILY OR CAPRICIOUSLY

This appeal raises important questions of first impression concerning construction of the Oil and Gas Conservation Act, Utah Code Ann. §40-6-1 et seq. (1982 Repl. Vol.), together with equally important questions concerning the scope of the Board's discretion in matters committed to its expertise. The Board exercised its discretion -- we believe soundly -- in holding that S. H. Bennion was not entitled to receive oil and gas in kind as his share of past production. (See Part II B of this argument.) The Board also exercised its sound discretion in refusing to require Shell to deliver its

well records to Salt Lake City. (See Part V.) Bennion seeks reversal of both determinations.

In resolving the issues on appeal, therefore, the Court must not only construe the Act but also apply established standards governing review of discretionary administrative orders. In other words, the Court must pay the decisions of the Board the degree of deference usually owed to administrative agencies expert in a complex regulatory field:

> "In the field of administrative law the assumption is indulged that the administrator (or administrative tribunal) possesses superior knowledge and expertise because of specialized training and experience, and the focus of interest within the particular field. For this reason the well-established rule is that the courts indulge him considerable latitude in determinations he makes on questions of fact and also in the exercise of his discretion with respect to the responsibilities which the law imposes upon him; and they will not interfere therewith unless it appears that he acted in excess of his powers, or that he so abused his discretion that his action was capricious or arbitrary."

Central Bank & Trust Co. v. Brimhall, 28 Utah 2d 14, 18, 497 P.2d 638, 641 (1972) (footnotes omitted). Accord: Beirne v. Mitchell, 587 P.2d 153, 155 (Utah 1978); Hardy v. State Tax Commission, 561 P.2d 1064, 1066 (Utah 1977); Peatross v. Board of Commissioners, 555 P.2d 281 (Utah 1976).

The Board conducted three hearings in this case. It considered many pages of briefs submitted by the parties. The members of the Board brought their collective expert judgment

to bear on Mr. Bennion's grievances in rendering the three written decisions in the administrative record. Unless Bennion can demonstrate a violation of the Oil and Gas Conservation Act or that the Board acted arbitrarily, this Court must affirm the District Court's ruling.

II.

BENNION IS NOT ENTITLED TO PAYMENT OF OIL AND GAS IN KIND

In Parts I, II and III of his brief, Bennion sets forth his position on the most important issue in this appeal: whether a mineral interest owner who refuses to enter into a voluntary pooling arrangement with the operator of a state-ordered drilling unit is entitled to retroactive payment of his share of production in kind. Shell, of course, voluntarily paid Bennion his share from the date of first production in cash. Bennion, however, contends that section 40-6-6 of the Oil and Gas Conservation Act and the Utah Constitution require the Board to order payment in kind.

There are two serious problems with this contention. First, Bennion has no statutory, constitutional or common law right to any payment whatsoever -- whether in cash or in kind -- for his presumed share of production between the date of first production and the effective date of the Board's pooling order. Second, retroactive payment to Bennion in kind would reward him with a windfall for refusing to take the risks borne

by Shell and six other working interest owners and for refusing to take the simple steps established by the Oil and Gas Conservation Act to share in the well's production. If Bennion is right in asking for payment in kind years after the fact, then working interest owners will have no inducement to comply with the terms of the Act, and the Act itself will become a dead letter.

A. Bennion Has No Right to Payment Measured Retroactively From the Date of the Forced Pooling Order

One of the purposes of Utah's Oil and Gas Conservation Act was to provide a means by which mineral interest owners could share in oil and gas drained from their property by wells on adjacent property. Before the Act, mineral owners in that position had no judicial remedy against their neighbors. In other words, a neighbor who drilled a well on his own land and who drained the pool had just as much right to the oil as the person from whose property it migrated toward the well. This rule, known as the "rule of capture," prevailed in most jurisdictions and presumably in Utah as well. See McKay and Conder, "Statutory Needs in Utah Oil and Gas Law," 1950 Utah L. Rev. 33, 34. See also 1 Williams & Meyers, Oil & Gas Law §204.4 at 55-56 (1981); Desormeaux v. Inexco Oil Co., 298 So.2d 897 (La. App. 1974), writ ref., 302 So.2d 37 (1974). "If an adjoining owner drills his own land and taps a deposit

of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property." Brown v. Spillman, 155 U.S. 655, 669-70 (1895). The only remedy of the adjoining landowner was to drill a well on his own land to capture as much of the pool as he could. 1 Williams & Meyers, op cit., at 57.

The Utah Oil and Gas Conservation Act changed the "rule of capture" to this extent: Where a spacing order or drilling order is entered permitting only one well on a unit covering separately owned parcels, the non-drilling mineral owner may obtain a share of the oil or gas in one of two specific ways. He may agree with the other mineral owners in the unit on a basis of sharing, thus voluntarily pooling the unit. See Utah Code Ann. §40-6-6(f) (1982 Repl. Vol.). Or he may petition the Board for an order compelling the pooling of all interests in the unit, thus force pooling the unit. See id. §40-6-6(f) and (g). If the mineral owner does neither, he is left where he was before the Oil and Gas Conservation Act, that is, with no rights in oil for which he has not drilled. Thus, the rule of capture continues to apply to any owner who neglects to avail himself of the remedies in the Act.

Although the Utah Supreme Court has never had occasion to consider the question, this has been the repeated conclusion of courts in other jurisdictions with conservation acts like

Utah's. See, e.g., Gruger v. Phillips Petroleum Co., 135 P.2d 485, 488 (Okla. 1943) ("The law of capture... still obtains ... except as it has been or may be regulated or restricted under the laws passed in the exercise of the police power .... [Those laws] simply authorize administrative boards to issue orders that have the effect of regulating or abrogating in a measure the law of capture."); California Co. v. Britt, 154 So.2d 144, 147-48 (Miss. 1963); Anderson v. Ellison, 285 F.2d 484, 486 (10th Cir. 1960) ("without the spacing statute and the Commission's pooling order he would have no right to share in the oil and gas produced from the well."); Wood Oil Co. v. Corporation Comm'n., 239 P.2d 1023, 1026 (Okla 1950).

Bennion's assertion of a vested right to a share of production from commencement of the well simply ignores the rule of capture and its relation to the Oil and Gas Conservation Act. He infers from subparagraphs (g) and (h) of section 40-6-6 of the Act that he is entitled as a matter of right to a share in production irrespective of any order of the Board and irrespective of any voluntary pooling arrangement to which he may agree. But these provisions refer in their entirety to the contents of forced pooling orders which are issued by the board and which become effective when the Board specifies. These provisions do not refer, as Bennion supposes, to rights of

landowners that exist independently of the Board's pooling orders.

In short, Bennion's share of production originated with the forced pooling order of the Board. It did not exist, accrue or vest before the Board's order. Precisely the same is true of Bennion's one-eighth "landowner's royalty."* In asserting a "right" to production in kind before the effective date of the Board's pooling order, Bennion mistakes the source of his entitlement. The Oil and Gas Conservation Act is clear that Bennion had no such right to share in production before the effective date of the Board's order, which created and determined his share in the pool.

Although it had no legal obligation to do so, therefore, Shell paid Bennion more than $72,000 as his share of production receipts from the date of first production to the effective date of the pooling order. Shell made this payment voluntarily in an attempt to honor previous offers to Bennion, in an attempt to induce Bennion's cooperation, and in an attempt to treat him fairly. But Shell is convinced, on the

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* Like the nonconsenting mineral owner's working interest share, his "landowner's royalty" originates with an order of the Board and does not accrue independently of proceedings before the Board. Subparagraph (h) of section 40-6-6 provides that "under a pooling order ... a non-consenting owner of a tract in a drilling unit ... shall be deemed to have a basic landowner's royalty of 1/8, or 12-1/2%, of the production allocated to such tract."

basis of the foregoing statutes and other authorities, that it had no obligation to share with Bennion in the proceeds of production before the effective date of the Board's pooling order. Since it had no such obligation, it could hardly be saddled with the more severe obligation to pay Bennion in kind.

B. It Would be Neither Just Nor Reasonable for Bennion to Receive Retroactive Payment in Kind

The Board ordered Shell to pay Bennion his working interest in kind after July 26, 1979, the effective date of the pooling order. Bennion complains, in effect, that the Board's refusal to make this order retroactive to the time of first production was an abuse of discretion. The Board, however, is obligated to issue pooling orders on "terms and conditions that are just and reasonable." Utah Code Ann. §40-6-6(f) (1982 Repl. Vol.). Bennion's request for retroactive payment in kind was neither just nor reasonable.

Bennion argues, in effect, that he should receive the advantage of 1982 oil and gas prices for his share of production beginning in 1974. Shell and the other working interest owners, of course, obtained their share of production as production occurred and at the lower prices that prevailed at that time. Bennion demands the advantage of increased oil prices even though he refused to undertake the risks of development along with the other working interest owners and even though he wait- ed years to obtain an order of the Board establishing his

interest. Indeed, Bennion waited seven years after Shell proposed a cooperative agreement for drilling the unit and six and a half years after production began before he asked the Board to take action on his application for a forced pooling. During this entire period Shell was willing to share its production with Bennion on the same terms as to which the other working interest owners agreed. But Bennion refused to cooperate and to pay his share of development expenses -- not, we submit, merely because he was obstreperous. Rather he wished to let the others risk their money in drilling the well which, if successful, would benefit him. As the years passed and the price of oil and gas climbed dramatically through the mid-1970's, Bennion saw the opportunity to reap a windfall at the expense of the other working interest owners, by demanding payment of his alleged proportionate share in new oil and new gas. Bennion played a similar waiting game and made similar demands in at least ten other units in eastern Utah.* But the Board

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* Bennion made similar claims against Gulf Oil Corporation, as operator of ten other units in Duchesne County in which Bennion refused to pool his interest voluntarily. In those units, as in this case, Bennion waited for years to demand retroactively his share of production in kind. As in the present case, the Board refused Bennion's requests holding: "The applicant has failed to bring the present petition before the Board until several years after the drilling units were first initiated.... [A]pplicant had several opportunities to participate in voluntary pooling arrangements on these properties. Failure to either petition the Board or take other action at an earlier date has jeopardized applicant's equitable position...." Order in In re Bennion, Cause No. 139-18 (Jan. 24, 1980) at 4.

refused to let Bennion succeed here, as in those units, because his failure to obtain a forced pooling order promptly at the outset of the well's development jeopardized his equitable position.

Courts in other jurisdictions have uniformly rejected similar claims on the same equitable grounds. For example, the Nebraska Supreme Court in Baumgartner v. Gulf Oil Corp., 168 N.W.2d 510, 518 (Neb. 1969), held:

> "Plaintiff was given every opportunity to secure his just and equitable share of the oil in the pool by being offered fair, reasonable and equitable participation with the other interested parties in [the unit]. He refused to participate as he had every right to do. As an oil operator we must assume that he was fully aware of the consequences of his refusal. While we agree he had a perfect right to refuse to join the project, he should not be rewarded because he did. Neither should he be permitted to recover what he would have received if he had assumed the risks of the project. To hold either way would serve to defeat the purpose of our conservation act . . ."

Accord: Desormeaux v. Inexco Oil Corp., supra; Superior Oil Co. v. Humble Oil & Rfg. Co., 165 So.2d 905, 910-11 (La. App. 1964); Anderson v. Corporation Comm'n, 327 P.2d 699, 702 (Okla. 1958); Wood Oil Co. v. Corporation Comm'n, supra, 239 P.2d at 1026. See also United Petroleum Exploration, Inc. v. Premier Resources, Ltd., 511 F.Supp. 127, 131 (W.D. Okla. 1980).

Bennion relies upon two cases for the proposition that

he is entitled to production in kind from the date of first production. Neither case, however, supports Bennion's position; in fact both cases demonstrate its legal and equitable flaws. In the first of those cases, Ward v. Corporation Comm'n, 501 P.2d 503 (Okla. 1972), the court held that a non-drilling owner was entitled to participate in the proceeds of production, but only back to the date upon which the administrative agency's spacing order was issued. (Under an Oklahoma statute, the statutory royalty is pooled as of the date of the spacing order.) Since the subject well produced for months before the spacing order was entered, the Ward court in effect affirmed an order denying the type of relief that Bennion seeks here. More importantly, the nonconsenting owner in Ward did not seek production in kind, and the court's decision had nothing to do with that issue.

In the other case Bennion cites, In re Application of Farmers Irrigation District, 194 N.W.2d 788 (Neb. 1972), the Nebraska court held that a pooling order was correctly made retroactive to the date of first production from the well. The court, however, was careful to limit its ruling to avoid exactly the type of claim that Bennion now makes. At the close of its opinion the court in Farmers Irrigation District stated:

> "We do not mean to say that this [i.e. retroactive pooling] should be done in every instance. All pertinent factors affecting the particular case under review must be considered. There is

> ordinarily no good reason why an adjoining owner should not ask for a voluntary pooling agreement at the time his neighbor starts to drill and thereby share in the expense, as well as in production, whether or not the well proves successful. The statutes clearly intend that rights shall be resolved upon an equitable basis. To permit an adjoining owner to sit back and await the successful outcome of drilling operations without asking for a pooling agreement would place the entire risk and the entire expense upon the party drilling in the event of an unsuccess ful operation. This would ordinarily be inequitable and not justify a retroactive order. [The Nebraska statute comparable to section 40-6-6] contemplates that when an adjoining owner fails to enter into a voluntary pooling agreement, a spacing and pooling order may be entered on the application of any interested party. The drilling party may recover the share of the expense allocated to the adjoining owner by deducting it from the adjoining owner's share of the oil or gas produced. This enhances the risk taken by the drilling party who may encounter a dry well and is a factor which must also be considered in weighing equities." (Emphasis added.)

194 N.W. 2d at 792. Bennion not only "sat back and awaited the successful outcome of drilling operations;" he has also awaited the escalation of oil and gas prices so as to press a claim for payment in kind at the most advantageous moment. Significantly, the landowner in Farmers Irrigation District was not permitted to share production in kind, but only the proceeds of production. See 194 N.W.2d at 789.

Bennion, then, has given the Court no authority for his claims in this case. He has failed to show the Court a single instance in which a non-drilling mineral interest owner was permitted production in kind retroactively from the date of

first production. He has not advanced a single reason which, in equity, would entitle him to that extraordinary relief. And he has most assuredly not shown that the Board's decision was arbitrary or capricious.

C. The Word "Production" in Section 40-6-6 Does Not Entitle Bennion to Payment In Kind Back to First Production

Bennion asserts (at page 11 of his brief) that section 40-6-6(g)'s use of the phrase "share of production" signifies a legislative "mandate" that the Board's pooling orders must grant nonconsenting owners a share of oil and gas in kind and forecloses the Board from ordering such owners to share in the cash proceeds of production. Bennion's interpretation of the statute is wrong because he has an incorrect conception of the meaning of the word "production." Bennion's interpretation of the statute, moreover, would defeat the essential goals of the Oil and Gas Conservation Act.

In the first place, "production" does not always or even usually mean "product." The word "production" is often used to refer to the value of production or the process of producing. Thus "production taxes" (a term frequently used to denote taxes like the Utah mining occupation tax, the Utah oil and gas conservation gas, or the Utah ad valorem tax) refers to taxes based on the value of production. See, e.g. 15 U.S.C. §3320(a) (providing for producer reimbursement of severance, production or similar taxes levied on "production of

natural gas"). Section 40-6-6(g) itself contemplates exactly this use of the term "production" by requiring costs of surface equipment, drilling and operation to be subtracted "from the nonconsenting owner's share of production." Bennion's own lawyers use "production" in this sense when they tell the Court: "[T]he issue before this Court is not whether or not Mr. Bennion is entitled to receive production prior to the date of the entry of the pooling order ... but rather whether or not he is entitled to receive production in kind." (Appellant's Brief at 8). In short, the word "production" does not necessarily mean "product" unless the qualifying words "in kind" are added.

In the second place, the Oil and Gas Conservation Act's essential goal of inducing owners to agree promptly with operators as to the division of costs and production would be frustrated if the Board had no choice but to require retroactive sharing of production in kind in its pooling orders. If this were the rule, every owner would (like Bennion) simply refuse to risk his money for drilling costs, would wait until the operator completed a successful well, and would continue to wait until the price of oil increased, before approaching the Board for a pooling order. The Oil and Gas Conservation Act cannot be interpreted in a way that rewards owners for refusing to comply with the Act. This was the point of the Nebraska

court's decision in In re Application of Farmers Irrigation District, supra, cited by Bennion in support of his position.

D. The Board's Order Does Not Violate Bennion's Right to "Possess and Protect Property"

With no pertinent authority to support him, Bennion makes the sweeping charge that the Board's order denies him the right to "possess and protect property" guaranteed in Article I, Section 1 of the Utah Constitution. Significantly, Bennion does not contend that he has been insufficiently compensated for his share of oil and gas production for periods before the effective date of the Board's pooling order. Rather he argues that the Board's refusal to award him retroactive payment in kind denied him the "liberty to contract with others respecting the use to which he may subject his property." (Appellant's Brief at 17-18).

The first problem with this contention is that Bennion never raised this argument in the District Court or before the Board, but raises it for the first time on appeal. The general rule in this jurisdiction is, of course, that "matters not raised in the trial court will not be considered on appeal." Chumney v. Stott, 14 Utah 2d 202, 203-04, 381 P.2d 84, 86 (1963). There is reason to depart from that rule in the present case.

More fundamentally, the Board deprived Bennion of nothing; certainly the Board did not prevent him from entering

into whatever contracts he wished for the sale of his proportionate share of oil and gas from Shell's well. If Bennion wished to take his oil and gas in kind and to sell it as it was produced, he had only to do one of two things. First, he could have entered into an operating agreement with Shell and the other working interest owners before production began. In this connection, the December 14, 1973 operating agreement executed by those other working interest owners inequivocally gave each party the right to take oil and gas in kind. (Shell Ex. 8 at 6). Second, Bennion could have obtained a forced pooling order from the Board, thus establishing his interest in the unit, before production began or at least during the early years of production. But Bennion availed himself of neither option. If anyone deprived Bennion of the opportunity to sell "his" oil and gas, that person was Bennion himself.

Perhaps the simplest answer to Bennion's constitutional claim is that Bennion received the full cash value of his alleged share of production from the first day of production, that is, $72,222.41. In receiving the full cash value of his alleged share, Bennion has already received more than he is entitled to receive under the provisions of section 40-6-6 and proportionately more than Shell and the other working interest owners received. Without taking any of the risk borne by Shell and the others, Bennion has nevertheless been paid not only his

net share of revenue but a one-eighth royalty for production up to the payout date -- a royalty that the other working interest owners had no right to receive. Under these circumstances, Bennion cannot rationally complain that he has been deprived of any property right.

III.

THE OIL AND GAS CONSERVATION ACT REQUIRES BENNION TO PAY HIS PROPORTIONATE SHARE OF THE WELL'S EXPENSE

As the Board's calculation of Bennion's royalty accumulations shows (Order of April 30, 1981 at 5), no costs were deducted from his 12-1/2 percent royalty computed on production until the well's payout. As to production after payout, Bennion received 100 percent of his working interest share of proceeds less his proportionate share of drilling and operating expenses. Bennion complains that the Board erred in subtracting these expenses from his working interest share of proceeds. He argues that his statutory royalty is not "cost free" if expenses incurred before payout are deducted from his working interest accumulation.

The Board subtracted a portion of the drilling and operating costs from Bennion's working interest share of proceeds because the Oil and Gas Conservation Act required it to do so. The last sentence of the current section 40-6-6(g) requires, as part of each pooling order, that the nonconsenting

owner's share of production be diminished by an amount equal to (1) 100 percent of his share of surface equipment and operating costs from first production, and (2) up to 150 percent of his share of the costs of wellsite preparation, drilling, testing, completing and reworking the well. The pre-1977 version of the same statute required a similar deduction, but in less detail. Thus the superseded version of section 40-6-6(g) provided:

> "The order shall determine the interest of each owner in the unit, and may provide in substance that ... as to each owner who does not agree, he shall be entitled to receive from the person ... drilling and operating the well on the unit his share of the production applicable to his interest, after the person or persons drilling and operating said well have recovered the share of the cost of drilling and operating applicable to such nonconsenting owner's interest plus a reasonable charge for supervision and storage." (Emphasis added.)

Bennion therefore incorrectly supposes that the pre-1977 statute does not require subtraction of his share of expenses. The Court need not decide whether the old or new statute applies here, for both versions require subtraction of at least 100 percent of the portion of expenses attributable to Bennion's working interest.

IV.

BENNION IS NOT ENTITLED TO PREJUDGMENT INTEREST ON HIS WORKING INTEREST ACCOUNT

Bennion claims Shell should have been required to pay him, in effect, prejudgment interest on his $57,887.93 working

interest accumulation. He argues that since the Board awarded him interest on his royalty accumulations, it should have treated his working interest the same.

In Utah, prejudgment interest is awarded as "damages due to the opposing party's delay in tendering the amount owing under an obligation." L&A Drywall, Inc. v. Whitmore Construction Co., 608 P.2d 626, 629 (Utah 1980). Bennion had no right to share in the proceeds of production -- and Shell had no obligation to pay Bennion such proceeds -- until the Board entered its interim pooling order of March 26, 1980. (See discussion in Part IIA of this argument.) Since Shell deposited Bennion's working interest accumulations in an interest-bearing account for Bennion's benefit immediately after the issuance of the March 1980 interim order, he cannot logically claim interest on an antecedent debt. In short, Shell had no obligation to pay Bennion his working interest prior to the time when Shell in fact paid him the full sum determined by the Board.

As to why the Board treated Bennion's royalty and working interest differently for purposes of accruing interest, we need only point out that the Board has historically viewed royalty as an obligation preexisting its own pooling orders. As demonstrated by the Board's decision in In re Bennion, Cause No. 139-18 (a copy of which appears as Appendix No. 8 to Bennion's brief), the Board is of the view that the landowner's

right to a royalty exists irrespective of any action that the Board might take, while his right to a full working interest is entirely dependent upon the entry of a pooling order. Although Shell does not agree with the Board's analysis of the Oil and Gas Conservation Act in this regard (see discussion at page 15 and accompanying note, supra), it explains the reason why the Board refused Bennion interest on his working interest accumulations.* Significantly, both Shell and the Board agree that since Shell had no obligation to pay Bennion his working interest until the interim pooling order was entered herein, it had no obligation to pay interest on those accumulations prior to the entry of that order.

V.

THE BOARD CORRECTLY REFUSED TO REQUIRE SHELL TO TRANSPORT ITS RECORDS TO SALT LAKE CITY

Bennion's final and most remarkable contention in this appeal is that the Board should have required Shell to transport its well records from Houston, Texas, where they are kept and continuously used, to his lawyer's office in Salt Lake

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* In In re Malnar, Cause No. 131-26 (Sept. 17, 1975), the Board did not award interest on the applicant's working interest account, as Bennion contends. At page 3 of the Board's order in that case (reproduced as Appendix 6 to Bennion's brief), the Board stated that interest would only be applied to the applicant's royalty. In re Armstrong, Cause No. 140-8 (Sept. 14, 1975), which Bennion also cites, involved neither royalties or working interest, and is completely inapposite.

City. This contention is remarkable because Bennion offers no plausible explanation (1) why his Houston accountants did not perform an adequate audit of Shell's records in Houston, where they were given full access to those records, (2) why the voluminous accounting records already provided Bennion's counsel did not apprise him of the facts he requires, and (3) why, if Bennion was dissatisfied with his Houston accountants, he did not take advantage of the Board's order that Shell pay the expenses of his lawyer, his Salt Lake City accountant and of Bennion himself, to travel to Houston to review Shell's records in person. Nor does Bennion suggest a single reason why his desire to look at Shell's records in Salt Lake City would outweigh the enormous inconvenience to Shell of sending its working files to Salt Lake City.*

Bennion argues that he was treated unfairly because he was "compelled to employ accountants he was unfamiliar with" and because all of the well's records were not "available" to

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* Shell's accounting supervisor testified before the Board that Shell's original cost documents (invoices, drop tickets, etc.) are not maintained on a well basis, but are maintained on a chronological basis in one of two locations in Houston, depending on the age of the document. (Tr. of Dec. 18, 1980 at 19-20). Revenue records are located in another facility in Houstin (id. at 26), and are likewise maintained on a chronological basis rather than a well basis (id. at 29). Shell codes all such data with well designations, which enables Shell to produce computer summaries of revenue and expense on a well basis. Shell Ex. 23 is this type of summary.

those accountants. (Appellant's Brief at 23). Neither Shell nor the Board, however, compelled Bennion to hire anyone; the identity of his accountants is his affair. The accountants he hired, moreover, had unrestricted access to Shell's records and the assistance of Shell's accounting staff to perform their audit. Shell's accounting supervisor testified to the Board that Bennion's audit team received Shell's full cooperation. (Tr. of Dec. 18, 1980 at 25-27). During Bennion's Houston audit, one set of allocation records was not readily available, but Shell retrieved the records and notified Bennion's auditors that they were available. His auditors, however, never returned to review them. (Id. at 26-27). The only "evidence" before the Board of the alleged inadequacy of Shell's accounting was a statement by Bennion's counsel. Asked whether Bennion believed there was a discrepancy between Shell's summaries and the audit report prepared by Bennion's accountants, Mr. Stirba replied:

> "The only think I can say about that ... is this is what we got from [Bennion's accountants] and ... it is by and large unsatisfactory. There are some aspects of this accounting which may very well be unsatisfactory because of the performance of the gentlemen who performed the audit, but there are also indications, at least in this, that there were certain documents they couldn't get. So far as a huge discrepancy, quite frankly, I would have to say, "No," but based upon this information, it's not very easy for us to ascertain exactly what these gentlemen are saying."

(Id. at 34-35).

Neither the "unsatisfactory performance" of Bennion's chosen accountants nor his problems in communicating with them, need concern this Court. Bennion had the opportunity to examine Shell's records; regardless whether he took full advantage of that opportunity, no purpose would be served now in requiring Shell to deliver its records to Salt Lake City. Although courts and administrative bodies usually have the discretion to specify the place for the examination of a party's records, the general rule is that inspection should take place at the producing party's office during regular business hours "so as to interfere as little as possible with the carrying on of the producing party's business operations." 83 A.L.R. 2d 309 (1963). See also 23 Am. Jur. 2d, Deposition and Discovery §298 (1965); 27 C.J.S. Discovery §82 (1959); Mid-American Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497 (E.D. Wisc. 1978); Beryl v. U.S. Smelting, Rfg. & Mining Co., 34 Misc.2d 382, 228 N.Y.S.2d 394 (1962). The Board made every effort to assist Bennion in examining Shell's records, and this Court cannot second-guess the Board without some showing of extraordinary need on Bennion's part. The Board's order was in this respect perfectly reasonable.

CONCLUSION

Mr. Bennion has tried to take unfair advantage of every effort of Shell and the Board to resolve this dispute.

His claim for production in kind from the date of first production would give him a huge bonus for shirking the risks of exploration and drilling--risks undertaken by Shell and six other mineral interest owners in the unit. Utah law provides no basis for his claims, and he has failed to demonstrate that the Board acted arbitrarily or capriciously in any respect. The judgment of the District Court dismissing Bennion's claims should be affirmed.

Respectfully submitted this 6th day of July, 1982.

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CERTIFICATE OF MAILING

THIS IS TO CERTIFY that two copies of the foregoing Brief of Respondent Shell Oil Company were mailed, postage prepaid, this 6th day of July, 1982, to each of the following:

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