1983

S. H. Bennion v. Gulf Oil Corporation, A Pennsylvania Corporation and the Utah State Board of Oil, Gas And Mining, An Agency of the State of Utah : Brief of Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

S. H. BENNION, Plaintiff and Appellant, v. GULF OIL CORPORATION, a Pennsylvania corporation and the UTAH STATE BOARD OF OIL, GAS AND MINING, an Agency of the State of Utah, Defendants and Respondents.	*	Case No. 19144

BRIEF OF RESPONDENT, GULF OIL CORPORATION

Appeal From a Judgment of the Third Judicial

District Court in and for Salt Lake County

The Honorable Timothy R. Hanson

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an action brought by Bennion in the lower court wherein Bennion contested the validity of an administrative order entered by the Utah State Board of Oil, Gas and Mining in Cause No. 139-20, October 3, 1980 as amended in Cause No. 139-20[B], October 22, 1981.

DISPOSITION OF CASE IN LOWER COURT

The trial court denied Bennion's motion for summary judgment and granted Gulf's cross motion for Summary judgment on the grounds that the Utah State Board of Oil, Gas and Mining acted

properly and within its authority as to matters complained of by Bennion.

RELIEF SOUGHT ON APPEAL

Respondent, Gulf Oil Corporation, seeks affirmation of the lower court's order granting summary judgment in favor of Gulf.

STATEMENT OF FACTS

With the exception of those matters hereinbelow specified, Respondent agrees with and accepts Appellant's statement and characterization of the facts.

On or about August 25, 1980, the Utah State Division of Oil, Gas and Mining (hereinafter referred to as the "Division") gave approval for:

> Gulf to drill the Albert Smith 2-8C5 Well, as an infill test well ... within the area spaced under the order issued in Cause No. 139-8. The above well was approved as a 60-day test drilling well and the Division's letter disallowed simultaneous production of the test well and the Albert Smith #1-8C5 well which is presently under production, beyond the period of testing allowed by the Division. (R. at p.155)

Thereafter, Bennion petitioned the Division to enjoin the drilling of the Albert Smith 2-8C5 well as being violative of the Board's spacing order in Cause No. 139-8. (R. at p. 155). The issue was ultimately resolved before the Board in Cause No. 139-20 (dated October 3, 1980), wherein the Board concluded, inter alia, that the

continued operation of the Albert Smith #2-8C5 test well during the approved 60-day test period did not violate the Oil and Gas Conservation Act nor the Board's order in Cause No. 139-8. (R. at pp. 159 and 181).

On page 4 of its brief, Appellant characterizes the Albert Smith 2-8C5 Well as a "test" well. The record clearly establishes that this well was in fact an infill test well. (R. at pp. 15 and 155).

After expiration of the 60-day test period, simultaneous production from the Albert Smith 1-8C5 Well and the Albert Smith 2-8C5 Well was expressly disallowed. (R. at pp. 15, 155 and 159). It was equally clear that upon notice and hearing, the Albert Smith 2-8C5 Well could be and was so designated as the production well for the subject drilling/spacing unit. (R. at pp. 160-161). To ensure that both wells would not simultaneously be producing after the 60-day test period, Gulf shut-in the Albert Smith 1-8C5 Well on or about March 10, 1981, (R. at pp. 200-202 and p. 211) and thereafter petitioned the Board to designate the Albert Smith 2-8C5 Well as the producing unit well for the subject drilling unit.

Respondent objects to Appellant's statement on pp. 4 and 5 of its brief that at the April 30, 1981 hearing before the Board [Cause No. 139-20(B)], only certain selective evidence was introduced

pertaining to the Albert Smith No. 1-8C5 and No. 2-8C5 Wells. Actually, the state production reports pertaining to both wells were also introduced into the record for the period of January - March, 1981. (R. at p. 236). Further, it was the testimony of an expert witness, relating to the size of the reservoir, etc., that:

> We have no idea of what the extent of the reservoir is. We can't know that at this time. * * * It's almost impossible to determine what's going to happen from one well to the next as far as correlating sands and production.

[R. at 203, 204 - Transcript of Hearing for Cause No. 139-20(B) - testimony of Mark Anthony].

Respondent strenuously objects to appellant's use and interpretation of production data relating to the two wells as contained on pages 5 and 6 of its brief. We ask this Honorable Court to consider the following chronology:

April 30, 1981:	Hearing before the Board of Oil, Gas and Mining, Order in Cause No. 139-20.
October 22, 1981:	Date of Order in Cause No. 139-20(B) which reaffirms the Order in Cause No. 139-20 retroactive to April 30, 1981, but for purposes of appeal not entered until October 22, 1981.
January 10, 1982:	Complaint filed in Cause No. C-82-458 appealing the Board's Order in Cause No. 139-20(B).
December 31, 1982:	Date of Affidavit of Stephen W. Rupp which contained as attachments thereto annual monthly production reports of the Albert Smith No. 2-8C5 Well for the years 1981 through September, 1982.
January 4, 1983:	Argument held by the lower court on parties' cross motions for summary judgment.

March 3, 1983:	Mr. Rupp's Affidavit of December 31, 1982 filed in the Clerk's Office in Civil No. C-82-458.
March 3, 1983:	Lower court's Memorandum Decision granting Gulf's Motion for Summary Judgment.
March 17, 1983:	Judgment of the lower court granting Gulf's Motion for Summary Judgment and denying Bennion's Motion for Summary Judgment.

We ask this Court to note that the only evidentiary hearing in this matter was conducted by the Board of Oil, Gas and Mining on April 30, 1981. At that hearing, the only evidence introduced as to production records was that relating to the months of January to March, 1981, as to the two wells (Tr., Cause No. 139-20(B), R. at 236). The lower court in Civil C-82-458 did not conduct a trial de novo; it heard counsel argue the merits of their respective motions for summary judgment. We submit that the filing of Mr. Rupp's December 31, 1982 Affidavit on March 3, 1983 - the day of the trial court's Memorandum Decision - is a novel approach to the introduction of evidence. In presenting this factual data for the first time on appeal, Appellant violates the well known rule that matters neither raised in the pleadings nor put in issue at the trial court level (in this case, the Board of Oil, Gas & Mining) cannot be considered for the first time on appeal. Walton v Walton, 586 P.2d 446, 450 (Utah 1978); Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702, 705 (1971); Tygesen v. Magna Water Co., 13 Utah 2d 397, 375 P.2d 456, 457 (1962).

The chronology outlined above demonstrates: (a) the impropriety of Appellant's statement: "After the April 30 hearing the production of the second well steadily decreased until the well was no more and usually considerably less than production from the first well when shut in (App. Brief, page 4); and (b) the fallacy of Appellant's concluding sentence: "This fact [the knowledge of declining production after the April 30 hearing] was evident before the Board ruled" (App. Brief, page 4).

Unless the Board was blessed with an extra sensory perception, it seems unreasonable to ask it to consider on April 30, 1981, matters which were yet to transpire.

We reject out of hand Appellant's statements of these "facts" and ask this Court to consider the salient issues presented by this appeal and to disregard the irrelevencies appellant would use to cloud the real matters at hand.

ARGUMENT

I. CIVIL NO. C-80-7024 - RES JUDICATA

By Complaint dated September 9, 1980 Bennion (Appellant herein) initiated a civil action before the Third Judicial District Court (S.H. Bennion v. Gulf Oil Corp., Civil No. C-80-7024) praying for a temporary order restraining Gulf Oil Corporation from the continued drilling of the Albert Smith No. 2-8C5 Well; Bennion also prayed that the Court, upon final hearing, permanently enjoin Gulf

Oil Corporation, its agents, etc., from the continued drilling of said well under the present spacing scheme authorized under the Order in Cause No. 139-8.

On September 24, 1980, the Court continued the matter in Civil No. 80-7024 and remanded it for hearing by the Board of Oil, Gas & Mining for a ruling on the following issues:

(a) Did the Division have authority to grant the exception location to allow the drilling of a test well in this matter?;

(b) Should the Albert Smith 2-8C5 Well be enjoined from operation as being in violation of the Board's Order in Cause No. 139-8 or section 40-6-6(c), U.C.A. 1953?; and

(c) If, in the alternative, approval to drill the infill test well was properly granted, what allocation of cost should be made with respect to the production of said well? (R. at 93).

In response to the Court's direction, the Board, on September 25, 1980, convened an emergency hearing which resulted in the issuance of its Order in Cause No. 139-20 holding that: (1) the Board and Division had a mandate under Section 40-6-1 of the Oil & Gas Conservation Act to maximize recovery of oil and gas from the Bluebell-Altamont Field and that the Division was acting within the scope of its delegated authority to approve the Albert Smith No. 2-8C5 as an infill test well; (2) that the Albert Smith No. 2-8C5 Well was a test well, rather than a production well, the continued

operation of which, during the approved test period, did not violate the Oil and Gas Conservation Act nor the Board's Order in Cause No. 139-8 and the drilling thereof should not be enjoined; and (3) that the plaintiff as a nonconsenting owner was not required to pay any of the costs of drilling such well at that time, whether the Gulf test well was a dry hole or a producing hole operating during the 60-day period. Said Order was issued on an emergency basis and was to remain effective for 15 days from the date of issuance with any objection to the Order to be received not later than October 17, 1980 with the further stipulation that the Board, in the absence of objection, would accept the Emergency Order as a final Order at the Board's October 23, 1980 hearing. Said order in Cause No. 139-20 was dated October 3, 1980 (R. at 6-13).

Under a Stipulation, Motion and Order for Dismissal, the parties to Civil No. C-80-7024 stipulated that an order be entered in said cause dismissing the action with prejudice and on the merits upon the grounds, that said action had been rendered moot and the issues raised therein decided by the Board of Oil, Gas & Mining. Said action was dismissed with prejudice and upon the merits with each party to bear its own costs. (R. at 99).

The issues raised by appellant in the lower court in Civil C-82-458 are moot and have been settled by the Emergency Order of the

Board of Oil, Gas & Mining dated October 3, 1980, as reaffirmed by the Board on October 22, 1981.

The matters raised in Civil No. C-82-458 (the case on appeal to this Court) are res judicata. The Order of Dismissal of october 8, 1980 in Civil C-80-7024 was predicated upon the stipulation of the parties which specified "that an Order may be entered in this cause dismissing the above entitlted action with prejudice and on the merits upon the grounds that said action has been rendered moot and the issues raised herein decided by an emergency order of the Board of Oil, Gas & Mining dated October 3, 1980**". (R. at 99).

The Order of the Court in dismissing Civil C-80-7024 was dispositive of the issue as to whether the Utah State Board of Oil, Gsa & Mining erred as a matter of law in determining that the drilling of the Albert Smith 2-9C5 infill test well was appropriately approved.

The Order of the Court in Civil C-80-7024 was dispositive of the question as to whether said Board erred as a matter of law in designating the Albert Smith 2-8C5 Well as the unit production well within the parameters of those strictures imposed by the Division against its simultaneous production with the Albert Smith No. 1-8C5 Well.

Said Order of Dismissal in Civil C-80-7024 was also dispositive of the question as to whether the Utah State Board of Oil, Gas & Mining erred as a matter of law in determining that Bennion was required to pay Gulf Oil Corporation, as operator, any part of the drilling, completing or equipping costs of the Albert Smith 2-8C5 Well.

Since the matters raised in Civil No. C-82-458 have been decided in Civil No. 80-7024 and have been found moot, and the issues decided by Emergency Order dated October 3, 1980, Appellant became bound by that Order. We are not talking about a single issue or several issues; we are talking about the issues in that litigation which went to the heart of the Division's authority to authorize the drilling of the second well, allocation of costs, etc. This appeal should, accordingly, be dismissed on jurisdictional grounds.

II. CIVIL NO. C-82-458

It is important to consider what Bennion sought in his appeal from the Board's Order. In his prayer in Civil No. C-82-458 Bennion asked the Court to set aside the Order of the Board (the Order in Cause No. 139-20(B)) and asked that it remand said cause to the Board directing:

> (a). That the production and operation of 2-8C5 Well is presently being done in violation of Section 40-6-6, U.C.A. (1953), as amended, Rule C-4 and the September 20, 1972, Order establishing the drilling unit, and that the well should therefore be shut-in and the

> original production well in said section be reinstated as a designated production well for Section 8. (R. at 5).

Bennion was asking the lower court to disregard the conclusion of the Board of Oil, Gas and Mining (predicated upon its expertise and the evidence adduced) expressed in its Order entered in Cause No. 139-20 that:

> State and Federal regulatory authorities, as well as those individuals with an interest in producing oil and gas from the Greater Altamont Bluebell Field in which the wells in controversy are located, have been aware of the fact that application of present drilling techniques under the current spacing pattern will result in only a 9% recovery of the oil in place in that reservoir. To promote the greatest possible economic recovery of oil and gas from this region, the Board and Division have permitted numerous experiments, the drilling of test wells within the 640 acre unit to determine whether the Board's 640 acre spacing of this field was draining the area in the most effective manner. For example, Shell Oil Company was permitted to drill two experimental infill wells in the field on the basis of experimental 320 acre spacing. After testing these wells over a period of time, Shell Oil determined the area was being drained by the original wells and the test wells were uneconomic for that particular area. These test well have been shut-in to protect the correlative rights of others in compliance with the terms of the experimental permit issued by the Board and Division of Oil, Gas and Mining. In the present case, it is postulated that due to the fact that the present Albert Smith No. 1-8C5 Well is not highly productive that a new infield well may drain the 640 acre tract more effectively and recover sufficient additional oil to be an economic well. Therefore, consistent with the mandate of the Board and Division to promote greater ultimate recovery of this resource, as

> long as there exists a possibility for recovery for a greater portion of the 90% of the oil in place of this field, it is a policy of the Board that every effort should be made by the Board and Division to maximise [sic] recovery in this area. However, where such efforts prove unsuccessful, test wells will be shut in to protect the correlative rights of other interest owners in the field. (Emphasis supplied]. (R. at 8-9).

In other words, Bennion was asking the lower court to re-legislate the statutory mandate given to the Board, i.e.:

> ***to foster, encourage, and promote the development, production and utilization of natural resources of oil and gas in the state of Utah in such a manner as will prevent waste; to authorize and to provide for the opeartion and development of oil and gas properties in such a manner that a greater ultimate recovery of oil or gas may be obtained and that the correlative rights of all owners be fully protected***. (Section 40-6-1 U.C.A. (1953) as amended) (Emphasis ours).

What Bennion sought was an order directing the Board to make an order for which it lacks authority to enter; he was asking the lower court to order the Board to defy the mandate of the legislature.

In the State Land Department vs. Painted Desert Park, Inc., 3 Ariz. App. 568, 416 P.2d 989 (1966), the court, in treating an appeal from a decision of the Board of Appeals of the State and Department, ennunciated a vital rule, saying:

> In solving the problems before this court, we believe it is essential to keep in mind the nature of this proceeding. This is not an action arising in the Superior Court under the

> broad, general jurisdiction of that court, but rather on an appeal from an administrative agency. As such, we believe that the Superior Court on appeal could not enter a judgment which the administrative agency below had no authority to enter. 416 P.2d at 992 (Emphasis ours).

The generally accepted principle is that when the court finds that an administrative agency has acted in compliance with a valid statute and has violated no principles of law applicable to the proceedings, it is the duty of the court to enforce the administrative order in the manner provided by statute. The court is required to grant enforcement of the order where the agency has acted properly within its designated sphere, has not acted contrary to law, and its findings are sutained by adequate evidence; or where the administrative agency has acted within its power, held a hearing comporting with procedural due process, made findings based on substantial evidence and provided an appropriate remedy. See 2 Am. Jur. 2nd, Administrative Law, §516 and cases cited.

In his second, remaining prayer in Civil No. C-82-458, Bennion asked the Court to set aside the Order in Cause No. 139-20(B), and to remand the cause to the Board directing it to enter an Order providing that:

> (b) In the alternative, if this Court determines that the production of the 2-8C5 Well is being lawfully done, that Gulf provide an accounting to Bennion on any and all salvage from the 1-8C5 Well and that Bennion receive a credit on his

account for the present fair market value of said salvage. (R. at 5).

By specific Order of the Board of Oil, Gas and Mining, the Albert Smith No. 1-8C5 Well was, and presently is, "shut-in" pending further order of the Board. It is a non-producing well; it is "shut-in", but has not been plugged and abandoned.

At such time as the Albert Smith No. 1-8C5 Well is plugged and abandoned (and only at such time) and the equipment and material therein recovered, saved, identified and sold, Bennion will be entitled to an accounting from Gulf of the salvage and will be entitled to a credit to his account for his proportionate share of the material and equipment so recovered, saved, identified, etc., less whatever amounts have been charged against said account by the operator, such as operating and production costs.

Any such demand by Bennion for a credit to his account for the "present fair market value of the salvage" is improper and premature. Only at such time as the well is plugged and abandoned and the salvage operation is undertaken, can such a value determination and accounting be made.

III. PROTECTION OF CORRELATIVE RIGHTS

If we understand Appellant's argument in his Point I, he is suggesting that the original order in Cause No. 139-8 which established 640-acre spacing be modified to decrease the size of the drilling units (App. Brief, page 9). In some way, this would give

consideration to the owners' economic concerns and presumably protect correlative rights.

Section 8, Township 3 South, Range 5 West, U.S.M. was communitized under Communitization Agreement of September 11, 1974, recorded September 16, 1974 in Book 136 M.R., pages 497-508. That Agreement was introduced in Civil No. C-80-7024 which file was incorporated at the direction of the lower court with the file in C-82-458.

That document discloses that there are at least 62 owners of mineral interests in said Section 8; appellant is the owner of an unleased, undivided 0.53153% mineral interest in and under the subject section; there are 59 separate leaseholds committed to the communitization agreement. The mineral interest ownerships are not undivided interests throughout the entire sections; rather, they are divided interests and their participation in the production of oil and gas is had on the basis of the ratio their respective ownerships bear to the whole.

The costs of drilling, equipping and operating the No. 1 Well allocated to these various ownerships have long since been paid out. The costs and expenses of drilling and completing the No. 2 Well have been advanced by Gulf Oil Corporation, the operator, on behalf of its various lessors and non-participating parties such as Mr. Bennion, Appellant herein.

When Bennion complains of the economic concerns of the mineral owners and the further expense to such parties it becomes a mockery - he has paid nothing. It is true that a portion of the production allocated to his mineral ownership is being credited against his share of those costs for drilling and completing the No. 2 Well.

There are three aspects of this situation which appellant's argument skirts and cannot address: (a) His suggestions would create an incredible confusion in the accounting for and payment of the development costs and expenses; (b) It ignores the accumulation of a huge amount of evidence presented to the Board in numerous causes since the promulgation of the order in Cause No. 139-8 which confirms the wisdom of the Board in establishing 640-acre spacing units; and (c) it would violate the correlative rights of the parties who are mineral interest owners in the subject section and would erase the contractual rights and interests of those mineral ownerships whose interests were pooled under the communitization agreement of September 14, 1974.

Appellant would re-write the law to his own dictates but if he were to accomplish his stated end the question remains: Wherein lies the benefit to him? His is the best of all possible worlds. Someone else (Respondent) has advanced every penny for the drilling of Well No. 1 and Well No. 2; someone else (Respondent) has taken

all of the risks; if he (Bennion) is to enjoy the fruits of someone else's efforts and risks, he should be expected to pay the share of costs and expenses attributable to his 0.53153% mineral ownership. But that payment is not taken out of his pocket. Rather, it is recouped by the operator out of a share of the production allocated to Bennion's interest. We emphasize not the entire share, because he is entitled to the landowner's royalty of 1/8th. Paragraph (8) of the Order in Cause No. 139-20(B) provides that:

> S. H. Bennion is entitled to receive and Gulf shall tender a 1/8th cost-free royalty in kind beginning with the first production of said Albert Smith No. 2-8C5 Well. (R. at 17).

All these protections afforded by the legislature to the parties, be they lessor, lessee, operator, or unleased mineral owner, Appellant would destroy by his rewriting of the language of the Oil and Gas Conservation Act. He is a modern-day Sampson bent on bringing down on his head and the heads of his co-mineral owners the walls of a legislative scheme that has worked and worked well.

CONCLUSION

The Order of Dismissal in Civil No. C-80-7024, entered with prejudice, is dispositive of the issues raised in Civil No. C-82-458 and said latter action is barred thereby.

Assuming, arguendo, that said action was not so barred, the lower Court properly held that the Board acted properly and within the scope of its authority in granting its Order in Cause No.

139-20[B]. The lower court properly refused to order the Board to violate the mandate of the statute under which it was created; it properly refused to direct the Board to disregard its own findings, conclusions and order, based upon evidentiary hearings which conformed with procedural due process, to reinstate the production of an uneconomic well (No. 1 Well) and shut-in a well (No. 2 Well) which was then in production and capable of commercial production. The judgment of the lower court should be affirmed.

RESPECTFULLY SUBMITTED this 10th day of August, 1983.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 1983, a true and correct copy of the foregoing Brief of Respondent, Gulf Oil Corporation, was Hand Delivered to the following:

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