1985

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 : Petition For Rehearing

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.David L. Wilkinson and Barbara W. Roberts; Attorneys for Defendant-Respondent Utah State Board of Oil, Gas and Mining

IN THE SUPREME COURT
OF THE STATE OF UTAH

S. H. BENNION, :

Plaintiff/Appellant, :

vs. :

GULF OIL CORPORATION, a Pennsylvania Corporation and the UTAH STATE BOARD OF OIL, GAS AND MINING, an agency of the State of Utah, : Case No. 19144

Defendants/Respondents :

PETITION FOR REHEARING

PETITION FOR REHEARING IN AN APPEAL FROM AN ADMINISTRATIVE ORDER OF THE UTAH STATE BOARD OF OIL, GAS AND MINING

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STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

The three issues presented in this petition for rehearing are:

1. Whether the Court was misled by Plaintiff-Appellant into believing that the Board's Order was founded upon facts that, in truth, were irrelevant and extraneous to the matter before the Board and, as such, were unconsidered by the Board in arriving at the decision under review.
2. Whether the Court misapprehended the Board's interpretation of, and its express intention to rely upon, the operative statute.
3. Whether the Court overlooked important Utah case law which establishes the standard of review to be

appealed [illegible] appellant's administrative [illegible].

STATEMENT OF THE CASE

Plaintiff-Appellant, [illegible], appealed the administrative order of the Board of Oil, Gas and Mining. The trial court granted summary judgment in favor of Defendants-Respondents. This Court vacated the Board's order and remanded the matter to the Board with instructions.

STATEMENT OF FACTS

The Board held four hearings on this matter. As a result of the first hearing (Cause No. 139-20, 9-25-80, Order dated October 3, 1980, R. 6-15) (attached), the Board concluded that it had, under Utah Code Ann. §40-6-6(a), the statutory authority to permit the drilling of additional wells within established spacing units to, in part, prevent waste. The Board found that only 9% of the oil in place in the Altamont Bluebell Field would be produced with the "application of present drilling techniques under the current spacing pattern." (Order in Cause No. 139-20, R. 8.) This statement is based, in part, upon the general knowledge in the industry and within state and federal regulatory agencies that this reservoir was not comprised of a "lake" of oil but instead consisted of many irregular, discontinuous sedimentary deposits [illegible]. The Board also found that the existing well, the Albert Smith #1-8C5, was "not highly productive" and [illegible] "[illegible] well [illegible] drain the 640 acre [illegible] effectively [illegible] additional oil [illegible] well." [illegible]

..., N. M. As a result of this finding, the Board permitted the completion of the Arlett Smith #2-BC5 (hereinafter the "Smith #") and the subsequent testing of its productive capacity.

On April 30, 1981 in Cause No. 139-20(B), the parties again appeared before the Board, this time for its designation, among other things, of the Smith #2 as the unit production well. Plaintiff-Appellant Bennion (hereinafter "Bennion") had "no objection to having [the Smith #2] as the second unit well." (R. 1[illegible].) His stated concern was with regard to the allocation of the costs for the second well. At this hearing, the Board heard testimony from Defendant-Respondent Gulf Oil Corporation's (hereinafter "Gulf") sole witness, Mark Anthony, that the Smith #2 produced 822 barrels of oil and zero barrels of water on the first day of production. (R. 211.) The first 24-hour test resulted in production of 512 barrels of oil, zero water and 656 [illegible] of gas with a tubing pressure of 1,300 psi. (R. 196.) Tubing pressure is a measure of the amount of compression that the surrounding rock is exerting upon the oil and gas. A high pressure usually indicates an untapped pocket of producing "sand." By the end of January, 1981, several thousand barrels of oil had been recovered.

In addition to the issues regarding the Smith #2, there was sporadic discussion at the April 30, 1981 hearing of a [illegible] productive test well, the Josephine Wood 2-19C5 (hereinafter "Wood #2"), which was located in another drilling unit. This well produced only 60 barrels of oil and 30 barrels of water with a tubing pressure of 100 psi in an initial 11-hour

test. (R. 199.) During the examination of Mr. Anthony regarding this Voda #2 well the following exchange took place:

> MR. CHAIRMAN: You don't even know if it is going to be a commercial well?
>
> MR. ANTHONY: No, we don't know that. The only thing we do know is that it was making approximately 60 barrels of oil. We have no idea of what the extent of the reservoir is. We can't know at this time. We realize that this whole field is--apparently the reservoir due to the geological structure of the thing--it's almost impossible to determine what's going to happen from one well to the next as far as correlating sands and production.
>
> (Reply Brief, p. 10, Slip Op. at 4, R. 203-4, attached.)

In Bennion's Reply Brief, this quote was taken out of the context of the transcript from the April 30, 1981 hearing and held out as describing the Albert Smith #2. This was a critical misstatement. Gulf had previously established the fact of commercial production for the Smith #2 with Mr. Anthony's earlier testimony. (R. 196.) As a result of this hearing, the Board granted Gulf's uncontested request to designate the Smith #2 as the unit well. The Board took no action to redesignate the Voda #2 as the unit well for its respective drilling unit.

There were two more hearings in Cause No. 139-20(B) occurring on September 24, 1981 and October 22, 1981. The status of the Smith #2 as the unit well did not arise during these hearings.

SUMMARY OF ARGUMENT

In the instant case, this Court, in apparent reliance upon the misstatement by Plaintiff-Appellant that the Smith #2 well was a poorly producing well, erred in determining that the Board of Oil, Gas and Mining acted in an arbitrary and capricious manner in designating the Smith #2 as the one permitted production well for the drilling unit. In fact, testimony introduced to the Board and supported by production records established the Smith #2 well as a highly productive well. The quote appearing on page 10 of Plaintiff-Appellant's Reply Brief and again on page 4 of this Court's opinion in this matter is taken directly from testimony regarding the Josephine Voda #2-19C5 well, a marginally productive well unrelated to the matter before this Court. (R. 203.)

Furthermore this Court, apparently unaware of the Board's Order in Cause No. 139-20 (R. 6), erroneously concluded that the broad declaration of public interest contained in Utah Code Ann. § 40-6-1 was the sole authority upon which the Board relied in designating the Smith #2 as the unit well. In fact, the order in this Cause is replete with statutory support for the Board's action.

Finally, a great degree of deference must be afforded the Board's findings of basic fact and its construction of its operative statute. If there is any basis in reason for a statutory interpretation and any substantive evidence whatsoever to support a finding of fact, the Board's order must be sustained.

For the above reasons, the Court should grant this petition for rehearing and affirm the Board's Orders in Cause Nos. 139-20 and 139-20(B).

ARGUMENT

POINT I

IN APPARENT RELIANCE UPON FACTS INCIDENT TO AN EXTRANEOUS ISSUE, THE COURT INCORRECTLY CONCLUDED THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE BOARD'S ORDER DESIGNATING THE SECOND WELL AS THE PRODUCTION WELL

In the course of the April 30, 1981 hearing before the Board, the status of two test wells was discussed, the Albert Smith #2-8C5 and the Josephine Voda #2-19C5. It is critical to the instant case that the Court correctly perceive that the evidence before the Board on April 30, 1981 revealed that the Smith #2 was an overwhelmingly good producer. The Smith #2 produced 16,238 barrels of oil, 16,977 mcf of gas and 600 barrels of water during 46 days of testing in January and February, 1981. (R. 169.) The Smith #1 produced 1,458 barrels of oil, 2,729 mcf of gas and 17,851 barrels of water during 58 days of production in the first two months of 1981. These are the underlying facts which support the Board's decision to re-designate the Smith #2 as the production well for the unit. The evidence before the Board in April of 1981 showed the Smith #2 well to undoubtedly be a commercial well which was producing substantially more oil and gas than the Smith #1.

This is in contrast to the production history of the Josephine Voda #2 which is the subject of the quote appearing on

page 10 of Plaintiff-Appellant's Reply Brief. It was unknown at the time of the April hearing if that well would be a commercial producer as it had produced only 60 barrels of oil in an initial 11-hour test.

Although the statement appertaining to the perplexing characteristics of the reservoir geology is applicable to all drilling endeavors in the Altamont Bluebell field, the facts incident to the poor initial production is specific to the Josephine Voda #2. As a result of this out-of-context quote, the Court found that there was no economic justification for the Board's action. Based upon the detection of these misapplied facts, the Board urges the Court to reconsider its conclusion on this issue, grant this petition for rehearing and affirm the Board's order designating the Smith #2 as the unit production well.

POINT II

THE COURT, IN CONCLUDING THAT THE BOARD FOUNDED ITS ORDER SOLELY UPON ONE SUBSECTION OF THE OPERATIVE STATUTE, APPARENTLY OVERLOOKED THE EXTENSIVE STATUTORY AUTHORITY CITED IN THE BOARD'S ORDER IN CAUSE NO. 139-20

There are three orders of the Board in this matter, all of which are attached to Plaintiff-Appellant's Complaint filed with the trial court. (R. 6-21.) The first order, 139-20, was issued as a result of the September 25, 1980 emergency Board hearing. This hearing was prompted by questions regarding statutory authority hypothesized to the Board by the Third District Court incident to a motion for a preliminary injunction

filed by Plaintiff-Appellant against the drilling of the Smith #2.

In response to the District Court, the Board interpreted several portions of the relevant statute which it is empowered to administer by citing and underscoring what, in the Board's view, were the pivotal phrases. Two critical subsections, §§ 40-6-6(c) and (d), were expressly included as confirming the Board's authority to authorize the drilling of infill test wells.

This Court has apparently overlooked this first order of the Board as illustrated by its observation that "[t]he Board's order in the instant case did not purport to comply with [Utah Code Ann. §40-6-6(d)]." (Slip op. at 3). In fact, the Board clearly complied with its interpretation of the cited section that only one well per unit may produce oil and gas at any given time. This is a practical interpretation born of the knowledge that any other characterization would preclude the accepted and widespread practice of drilling subsequent unit wells in cases of an initial dry hole or as a result of the plugging and abandonment of the initial well due to depletion. The statutory "uniform plan" language emphasized by the Court for such additional wells as the Board deems necessary does not preclude the Board from instituting such a plan gradually. This well was but the first step in the Board's stated goal of recovering more of the heretofore unrecoverable oil and gas in the reservoir. (R. 8, 9.)

The statutory foundation for administrative action was precisely set out in the declaratory-type Board ruling in reply to the District Court's inquiry. The Board therefore urges this Court to reconsider its holding in this case, grant the petition for rehearing and affirm the Board's orders in this matter.

POINT III

THIS COURT HAS OVERLOOKED OR MISAPPREHENDED IMPORTANT UTAH CASE LAW WHICH ESTABLISHES THE STANDARD OF REVIEW TO BE AFFORDED TO ORDERS OF THE BOARD OF OIL, GAS AND MINING

In Bennion v. Shell, 675 P.2d 1135 (Utah 1983), this Court held that the separate standards of review enunciated in Department of Administrative Services v. Public Service Commission, 658 P.2d 601, 607-12 (Utah 1983) are "applicable to district court review of the decisions of the Board." Bennion v. Shell, above at 1140. In Bennion, this Court went on to adopt the rule that "no presumption of correctness" would be afforded to the district court's decision but that this Court would review the decision of the Board "just as if the appeal had come directly from the agency." Bennion v. Shell, above at 1140.

There are two levels of review set out in the Administrative Services case which are applicable to the instant case. First, Board findings on questions of basic fact should be afforded the "greatest degree of deference" and should be affirmed if they are supported by "evidence of any substance whatever". Admin. Serv. at 609. Second, the application of these findings on questions of basic fact to the law of the case and the Board's interpretations of the "operative provisions of

the statutory law it is empowered to administer" fall within the category of the reasonableness of the order. Id at 610. Great weight is to be given to Board conclusions on matters in this second classification and its decision set aside "only if it is outside 'the tolerable limits of reason.'" Id at 612, quoting Silver Beehive Telephone Co. v. Public Service Commission, 30 Utah 2d 44, 512 P.2d 1327 (1973).

The Board's underlying finding of basic fact following the April 30, 1981 hearing that the Smith #2 is capable of producing substantially more oil and gas than the Smith #1 is a finding supported by testimony in connection with completion and testing data (R. 196-97) and production records for the two wells for January and February, 1981. As a result of this substantive evidence, the Board finding regarding the production status of the two Smith wells should be affirmed.

Although Court review of findings of basic fact are at issue, the primary matter of concern is the level of review that has been applied to the Board's interpretation of the "operative provisions of the statutory law it is empowered to administer". (Admin. Serv., above at 610.) Nowhere in that order does the Board attempt to characterize general law. Each statutory section cited is drawn from the law incident to the regulation of oil and gas. These interpretations are certainly within "the tolerable limits of reason," Admin. Serv. at 612 citing Silver Beehive Telephone Co. v. Public Service Comm'n, above, and the Board's conclusions deserve affirmance by this Court.

CONCLUSION

Based upon the foregoing discussion, it appears that the Court misapprehended certain facts and either misapprehended or overlooked significant case law in determining that the Board's order lacked evidentiary and statutory support. Therefore, this petition for rehearing should be granted and the orders of the Board in Cause Nos. 139-20 and 139-20(B) affirmed.

Respectfully submitted this 10th day of September, 1985.

DAVID L. WILKINSON
Attorney General

Barbara W. Roberts
BARBARA W. ROBERTS
Assistant Attorney General

MAILING CERTIFICATE

This is to certify that on this 10th day of September, 1985, true and correct copies of the foregoing Petition for Rehearing were mailed first class, postage pre-paid, to:

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Attorneys for Plaintiff-Appellant
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Salt Lake City, Utah 84133

Hugh C. Garner
Attorney at Law
310 South Main Street, #1400
Salt Lake City, Utah 84101

Barbara W. Roberts

CERTIFICATE OF GOOD FAITH

Pursuant to Rule 35(a), Utah Rules of Appellate Procedure, counsel for Defendant-Respondent Board of Oil, Gas and Mining hereby certifies that the foregoing Petition for Rehearing is presented in good faith in accordance with counsel's understanding of the principles of law argued and not for purposes of delay.

Barbara W. Roberts

BARBARA W. ROBERTS
Assistant Attorney General
Attorney for Oil, Gas and Mining

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
AND ENERGY OF THE STATE OF UTAH

IN THE MATTER OF THE APPLICATION OF GULF OIL CORPORATION FOR AN ORDER PERMITTING THE DRILLING OF ITS ALBERT SMITH #1 WELL LOCATED IN SECTION 5, TOWNSHIP 3 SOUTH, RANGE 5 WEST, UINTA SPECIAL BASE AND MERIDIAN, DUCHESNE COUNTY, UTAH.	)	EMERGENCY ORDER AND ORDER TO SHOW CAUSE CAUSE NO. 139-20

THE STATE OF UTAH, BOARD OF OIL, GAS AND MINING TO GULF OIL COMPANY, OWNERS AND ALL OTHERS INTERESTED IN THE DRILLING OF ALBERT SMITH #1 WELL IN SECTION 5, TOWNSHIP 3 SOUTH, RANGE 5 WEST, UINTA SPECIAL BASE AND MERIDIAN, DUCHESNE COUNTY, UTAH.

Notice is hereby given that this cause came before the Board of Oil, Gas and Mining at 10:00 a.m., on September 25, 1980, at the Executive Conference Room, Airport Holiday Inn, 1659 West North Temple, Salt Lake City, Utah, as an emergency hearing by order of Judge Kenneth Rigtrup, Third Judicial District Court in and for Salt Lake County, Utah, in the matter of S. H. Bennion v. Gulf Oil Corporation, Civil No. C-80-7024, September 24, 1980.

Appearances for the Board were made by:

Charles R. Henderson, Chairman

Max Farnham, Board member

C. Steele McIntyre, Board member

John L. Bell, Board member

Edward T. Beck, Board member

Appearances for the Division were made by:

Cleon B. Feight, Director

Mike Minder, Geological Engineer

Thomas A. Dragos, Special Assistant Attorney General

Claudia Frank, Docket Secretary

Appearances for the parties were made by:

Calvin Sudweeks, Attorney for S. H. Bennion

Hugh C. Garner, Attorney for Gulf Oil Company

1. The Board has jurisdiction over the matter in dispute pursuant to the Oil and Gas Conservation Act, Section 40-6-1 etseq., U.C.A., 1953.

2. The Board has authority to issue an emergency order in this matter pursuant to Section 40-6-8(c), U.C.A., 1953, which provides:

> When an emergency requiring immediate action is found by the Commission to exist, it is authorized to issue an emergency order without notice or hearing, which shall be effective upon promulgation, provided that no such order shall remain effective for more than fifteen (15) days.

3. In that the Third Judicial District Court has been requested to enjoin the operation of Gulf's Albert Smith 2-8C5 well and has continued such proceedings until the Board rules on this matter at the September 25, 1980 Board Hearing, the Board finds that an emergency situation exists requiring immediate administrative action and therefore issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On September 20, 1972, the Board entered an Order in Cause No. 139-8 spacing the location and drilling of wells on 640 acre units in the Altamont Bluebell Field, Duchesne County, Utah, and requiring "that no more than one well shall be drilled on any such unit for the production of oil, gas and associated hydrocarbons from the common source of supply ..."

2. On August 25, 1980, the Division granted approval to Gulf to drill the Albert Smith 2-8C5 as an infill test well located within the area spaced under the Order issued in Cause No. 139-8. The above said 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.

3. On September 2, 1980, the Division received a letter from Peter Stirba on behalf of his client S. H. Bennion, a non-consenting land owner in this matter, requesting the Division to take action pursuant to 40-6-9(c), U.C.A., 1953, within 10 days of receipt of the letter to enjoin the drilling of Gulf's Albert Smith 2-8C5 well as being in violation of the Board's spacing order in Cause No. 139-8.

4. In response to the above mentioned letter, the Division informed Mr. Stirba that the Board and not the Division had authority to grant injunctive relief and indicated that the matter should be set before the Board at its September hearing.

5. Mr. Stirba appeared on behalf of his client S. H. Bennion to request injunctive relief from the Third Judical District Court to stop the drilling of Gulf's Albert Smith 2-8C5 well on September 24, 1980.

6. Judge Kenneth Rigtrup continued judicial proceedings in this matter until the Board rules upon the following issues:

> 1. Did the Division have authority to grant the exception location to allow the drilling of a test well in this matter?
>
> 2. Should the Albert Smith 2-8C5 well be enjoined from operation as being in violation of the Board Order in Cause No. 139-8, or Section 40-6-6(c), U.C.A., 1953?
>
> 3. If, in the alternative, approval to drill the infill test well was properly granted, what allocation of costs should be made with respect to production of said well?

Conclusions of Law

I. Authority to Approve Infill Test Wells.

A. General Purpose and Intent of the Oil and Gas Conservation Act.

The Board and Division of Oil, Gas and Mining are charged by the Oil and Gas Conservation Act, Section 40-6-1 etseq., U.C.A., to promote the public interest in the development of oil and gas resources in the State

> ... in such a manner as will prevent waste, to authorize and provide for operations and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners be fully protected....
> (Section 40-6-1, U.C.A., 1953, emphasis added)

State and Federal regulatory authorities, as well as those individuals with an interest in producing oil and gas from the [illegible] Altamont-Bluebell field in which the wells in controversy [illegible], have been aware of the fact that application of present [illegible] techniques under the current spacing pattern will result in only [illegible] recovery of the oil in place in that reservoir.

C. Conclusion

In conclusion, the Board finds that the Board and Division have a mandate under Section 40-6-1 of the Oil and Gas Conservation Act to maximise recovery of oil and gas from the Bluebell Altamont Field. Further, the Board finds that the Division was within the scope of its delegated authority to approve the Albert Smith #2-8C5 as an infill test well.

II. 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?

The Plaintiff has asserted that the Division's approval of and Gulf's drilling of the Albert Smith #2-8C5 infill test well should be enjoined as violative of the Board's Order in Cause No. 139-8. This Order established a spacing pattern which enables an operator to drill one well in a 640-acre drilling unit. The Plaintiff maintains that approval and drilling of the second well, Albert Smith #2-8C5, violates Section 40-6-6(c), U.C.A., 1953, which requires that:

> Subject to the provisions of this Act, the Order establishing drilling units shall direct that no more than one well shall be drilled for production from the common source of supply on any unit ... (Emphasis added)

In that the Albert Smith #2-8C5 infill test well was approved by the Division as a 60-day test well which was not to be produced simultaneously with the Albert Smith #1-8C5 production well after the 60-day test period, it is clear that the second well violates neither the Board Order in Cause No. 139-8 nor Section 40-6-6(c), U.C.A., 1953. The approval letter from the Division dated August 25, 1980, expressly states that

> ... Unless otherwise authorized by the Board of Oil, Gas and Mining, production will be limited to the Albert Smith #1-8C5 well after the approved testing period.

Therefore, in that the Albert Smith 2-8C5 well is a test well, rather than a production well, the continued operation of that well during the approved test period does not violate the Oil and Gas Conservation Act nor the Board's Order in Cause No. 139-8 and should not be enjoined.

III. Costs of Drilling

In that the Albert Smith #2-8C5 well is a test well and not a production well, the Plaintiff non-consenting owner is not required to pay any of the costs of drilling such well at this time, whether the Gulf test well is a dry hole or a producing hole operating during the 60-day test period.

After proper notice and hearing, the Board could designate the Gulf test well for production if the well substantially improves recovery of oil and gas from the Bluebell Altamont Field. Such a designation could occur as an exception location to the present location to the present spacing pattern, as an order shutting-in the Albert Smith #1-8C5 well and designating the Albert Smith #2-8C5 well as the producing well for the unit, or as an order designating the test well as the producing well in a drilling unit of decreased [illegible] that ordered in Cause No. 139-8. In any case, after notice and hearing and issuance of a Board Order designating the Albert Smith #2-8C5 as a producing well, the plaintiff, as a non-consenting owner will be required to pay Gulf for his proportionate share of the costs of the well under Section 40-6-6, U.C.A., 1953, and implementing rules and regulations. Oil and gas produced during the test period from the Albert Smith #2-8C5 well, if any there be, shall offset production costs of the Albert Smith #2-8C5 well if said well is designated as a production well.

ORDER

1. The Division of Oil, Gas and Mining was acting within the scope of its authority under the Oil and Gas Conservation Act and Board policy concerning the Bluebell Altamont Field in granting Gulf Oil Company's application for the infield test well Albert Smith #2-8C5.

2. The approval and drilling of the infield test well Albert Smith #2-8C5 was not violative of either the Board Order in Cause No. 139-8 nor [illegible] U.C.A., 1953. Therefore, production of said well for the

test period approved by the Division shall not be enjoined.

3. Until such time as the Albert Smith #2-8C5 well is approved by the Board of Oil, Gas and Mining as a producing well, the Plaintiff shall not be charged for production costs. At such time as the Board, after notice and hearing, designates the test well as a production well, the Plaintiff as non-consenting owner, will be required to pay Gulf for his proportionate share of the cost of the well pursuant to applicable laws and regulations governing the allocation of such costs. If the Albert Smith #2-8C5 well is designated as a producing well, all oil and gas produced during the test period shall offset the production costs of the well.

4. This Order is issued on an emergency basis pursuant to Section 40-6-8, U.C.A., 1953, and shall remain effective for 15 days from the date of issuance. Notice is hereby given that any objection to this Order must be received Friday, October 17, 1980, as to why the Board should not accept this Emergency Order as a final order at the Board's hearing on October 23, 1980, at 10:00 a.m., in the Wildlife Resources Auditorium, 1596 West North Temple, Salt Lake City, Utah.

SO ORDERED this 3rd day of October, 1980, by the Board of Oil, Gas and Mining.

By Charles R. Henderson
Charles R. Henderson
Chairman

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

S. H. Bennion,
Plaintiff and Appellant,

v.

Gulf Oil Corporation, a Pennsylvania Corporation and the Utah State Board of Oil, Gas & Mining, an agency of the State of Utah,
Defendants and Respondents.

No. 19144

FILED
August 19, 1985

Geoffrey J. Butler, Clerk

HOWE, Justice:

Appellant S. H. Bennion appeals from a summary judgment granted in favor of respondents Gulf Oil Corporation and the Utah State Board of Oil, Gas, and Mining. He seeks reversal of the judgment and contends that summary judgment in his favor should have been granted.

Bennion holds mineral interests which without his consent were made part of an oil drilling unit designated by the Board, as permitted by the Oil and Gas Conservation Act, U.C.A., 1953, §§ 40-6-1 to -19 (1981). By a 1972 order of the Board, Gulf was the producer authorized to drill the single production well allowed on the 640-acre unit. As a nonconsenting interest owner, Bennion was entitled under the act to his proportionate share of the oil and gas produced from the unit minus his proportionate share of the cost of drilling, production, and maintenance.

Gulf drilled a producing well on the 640-acre unit and recouped its drilling costs. Bennion was thus entitled to receive and in fact was receiving his proportionate share of the oil and gas produced on the unit minus the relatively low cost of production and maintenance. Without notice or hearing, but with permission given by a staff engineer of the Division of Oil, Gas, and Mining on August 25, 1980, Gulf commenced drilling a second well as an infill test well within the 640-acre unit. Bennion petitioned the Board to enjoin the drilling on the basis that a second well was in violation of the Oil and Gas Conservation Act and the Board's prior unitization order. The Board determined that the drilling of a second well as a test well was not in violation of its prior order and that, inasmuch as it was a test well, Bennion was not required to pay any of its drilling costs. However, the Board added that if it were to redesignate the test well as a production well, Bennion would then be responsible for his proportionate share of those costs. Subsequently, Gulf "shut in" the first well and applied to have the second well

designated as the production well. After a hearing, the Board changed the designation of the second well from a test well to that of the unit's production well and ordered Bennion to pay his share of the $1.4 million drilling cost. Bennion appealed the Board's order to the district court.

Pursuant to U.C.A., 1953, § 40-6-10(b), appellant was entitled on his appeal to a determination of the "issues on both questions of law and fact" by the district court. On the parties' cross-motions for summary judgment, the court determined from the transcript of the hearing before the Board that the Board had acted properly and within its authority. Summary judgment in favor of Gulf was entered.

For purposes of this opinion, we shall assume that the Oil and Gas Conservation Act allows a staff engineer to authorize the drilling of a test well on a producing unit. We note that the issue is raised, but not argued, in the briefs of counsel and that the act is not clear on the issue. See U.C.A., 1953, § 40-6-3. However, even assuming that the statute allows such a delegation of authority, we cannot agree with the district court's affirmance of the Board's order redesignating the test well as the production well and holding Bennion responsible for a proportionate share of the cost of drilling the second well.

Although the Oil and Gas Conservation Act was first enacted in 1955, we have had little opportunity to construe its provisions. A cursory reading of the act discloses, however, that in at least two places it is contemplated that only one well should be drilled per unit. For example, section 40-6-6(b) provides:

> In establishing a drilling unit, the acreage to be embraced within each unit and the shape thereof shall be determined by the board from the evidence introduced at the hearing but shall not be smaller nor greater than the maximum area that can be efficiently and economically drained by one well.

(Emphasis added.) Subsection (c) provides:

> Subject to the provisions of this act, the order establishing drilling units shall direct that no more than one well shall be drilled for production from the common source of supply on any unit . . . .

(Emphasis added.) We find nothing in the act which expressly allows a test well to displace the production well from a common source of supply on the unit. The only reference to the drilling of additional wells is found in subsection (d) where it is provided:

> When found necessary for the prevention of waste, or to avoid the drilling of unnecessary wells, or to protect correlative rights, an order establishing drilling units in a pool may be modified by the board to increase the size of drilling units in the pool or any zone thereof, to decrease the size of drilling units or to permit the drilling of additional wells on a reasonably uniform plan in the pool, or any zone thereof.

The Board's order in the instant case did not purport to comply with this subsection. The order did not authorize the drilling of additional wells on a uniform plan "in the pool or any zone thereof."

The Board made its order approving the second well as the production well for the unit and charging Bennion for his proportionate share of the cost of drilling in reliance on section 40-6-1, which is entitled "Declaration of Public Interest:"

> It is declared to be in the public interest 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 operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners be fully protected; to encourage, authorize, and provide for voluntary agreements for cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers, and the general public may realize and enjoy the greatest possible good from these vital natural resources.

The Board further justified its action on its finding that the first well at the time it was shut in was at the point of marginal recovery of further oil or gas or both of them. At the hearing before the Board, Gulf introduced production reports of the second well for the first three months of its operation which showed higher production than the first well. However, Gulf did not know if the second well would be a

commercial well or even if its total production would exceed that which would still be produced by the first well. Gulf's expert witness testified:

> We have no idea of what the extent of the reservoir is. We can't know that at this time. We realize that this whole field is--apparently the reservoir due to the geological structure of the thing--it's almost impossible to determine what's going to happen from one well to the next as far as correlating sands and production.

We acknowledge the legislative mandate in section 40-6-1 to promote the development of our state's oil and gas resources. We do not believe, however, that the broad declaration of public interest contained therein was meant to override the specific statutory restrictions on the drilling of an additional well on any unit.[1] Moreover, we note that the declaration of public interest calls for "the greatest possible economic recovery of oil and gas," which provides the basis for Bennion's complaint that the evidence is lacking as to whether the second well will ever pay out. We also note the legislative intent expressed in section 40-6-6(a) that the drilling of unnecessary wells be avoided. Thus, aside from the fact that there does not appear to be any statutory authority for the action of the Board, the evidence was insufficient to demonstrate that it was more equitable or reasonable to shut in the first well and redesignate the second well as the production well. More importantly, the evidence fails to justify the trampling of a nonconsenting mineral interest owner's correlative rights in charging him with the added and speculative expense of drilling the second well.

We have examined Gulf's res judicata defense and find it to be without merit.

The Board erred in its redesignation of the second well as the production well for the unit, and the district court erred in affirming the Board's order. We vacate the Board's order in cause number 139-20(B) and remand the cause to the Board with the instruction to enter an order that the second well is and has been producing in violation of U.C.A., 1953, § 40-6-6(e) and relieve Bennion of all obligation to share in the cost of drilling.

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1. In 1983, two years after the hearing before the Board in the instant case, extensive amendments were made to the Oil and Gas Conservation Act. Properly, we have not considered them in our analysis and decision.

WE CONCUR:

Gordon R. Hall, Chief Justice

Christine M. Durham, Justice

Michael D. Zimmerman, Justice

Stewart, Justice, concurs in the result.