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 : Reply Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

S. H. BENNION, Plaintiff and Appellant,	:	Case No. 19144
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.	:	

REPLY BRIEF OF APPELLANT

Appeal From a Judgment of the Third Judicial

District Court in and for Salt Lake County

Honorable Timothy R. Hansen

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

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S. H. BENNION, Plaintiff and Appellant,	:	
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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.	:	

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STATEMENT OF FACTS

In addition to the facts recited in Appellant Bennion's Brief the following additional facts are pertinent in reply to Respondent Gulf's Brief:

A. Case History of the C80-7024 litigation.

As noted in Appellant's previous recitation of facts, on or about August 25, 1980, the drilling of the Albert Smith 2-8C5 Well, the second well drilled in the same drilling unit by Gulf, was approved only by a staff petroleum engineer, not the Board of Oil, Gas & Mining (hereinafter the "Board") as an infield test well.

By letter, Mr. Bennion requested the Board to enjoin drilling of the 2-8C5. Because the Board would take no actio Bennion sought injunctive relief in Third District Court in Bennion v. Gulf Oil Corporation, No. C80-7024, pursuant to Section 40-6-9(d) U.C.A. (1953), as amended, to stop the dril of the second well (R. 126). Mr. Bennion asserted that the w was being drilled unlawfully inasmuch as the Board didn't aut ize its drilling and two wells could not be drilled in one un

After this case was filed and a hearing on plaintiff' Motion for Preliminary Injunction, the proceedings in Civil N C-80-7024 were continued on September 24, 1980 to allow the B to hold an emergency hearing the next day to address the issu whether or not drilling the second well should be stopped. N questions were certified by the Court to the Board. (See Reporter's Transcript of September 24, 1980, Hearing.)

As the hearing was held on September 25, 1980, and th Board issued Emergency Order in Cause No. 139-20 (R. 154). T Order determined that (1) the drilling of the 2-8C5 as an inf test well was lawful, (2) drilling should not be enjoined, si it was only a test well, and (3) the plaintiff was not requir to pay any costs of the well at that time because it was a te well. The Board determined further that any designation of t 2-8C5 well as the unit production well would have to be done pursuant to notice and hearing. As of the time of his hearin

however, the well was not authorized to replace the then producing unit production well.

Due to the action finally taken by the Board resulting in the Order in Cause No. 139-20 from which Bennion could appeal the parties entered into a stipulation for dismissal of Action No. C-80-7024. The Stipulation provided that:

> An Order may be entered in this cause dismissing the above-entitled 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 and Mining dated October 3, 1980.

The Order was subsequently entered.

B. The Record on Appeal includes the Rupp Affidavit dated December 31, 1982.

In addition to the above, Gulf has raised a need for further facts to be stated in regards to the record before the lower Court. Gulf has stated on pages 4-5 of its Brief that documents, including the Orders in Cause Nos. 139-8, 139-20 and 139-20(B) and Production Reports for both the Albert Smith 1-8C5 and 2-8C5 wells for the years 1980 through 1982 which were attached to an Affidavit of Stephen W. Rupp dated December 31, 1982, were not before the lower court and were not filed with the Court until March 3, 1983, the same day of the lower court's Memorandum Decision. Therefore, Gulf argues these crucial documents should not be considered by this Court.

The fact is that Mr. Rupp's Affidavit and attached documents were presented to the lower court the day of the hearing on January 4, 1983. The documents were before the lower court during argument and were part of the case file for purposes of the lower court's deliberation. (See Judge Hanson's September 30, 1983, Order contained in Supplemental Record on Appeal). Gulf's claim to the contrary is completely false and Judge Hanson's Order, prompted as a direct result of Gulf's misstatement, clarifies conclusively the Record on Appeal. (See Reporter's Transcript of September 26, 1983, hearing in Supp. Record.)

ARGUMENT

I.

WHETHER OR NOT ACTION NO. 80-7024 WAS RES JUDICATA IS NOT AN ISSUE BEFORE THIS COURT.

This case before this Court results from an appeal of the administrative Order in Cause No. 139-20(B) from which Bennion claims adverse effect due to the Board's designation of a second well in Section 8 as a production well and the assessment of all costs of the second well to owners. The most substantial argument in Gulf's brief is that a dismissal of Civil Action No. 80-7024 pursuant to Stipulation of the parties is dispositive of the issues raised in this case.

A. The trial court, by implication, has already rejected the res judicata argument and Gulf has failed to cross appeal the ruling.

Although Gulf did not plead res judicata as an affirmative defense in its answer to plaintiff's Complaint, it extensively argued the point in its Memorandum of Points and Authorities submitted to the lower court in support of its cross motion for summary judgment (R. 56-59). The lower court, however, necessarily rejected Gulf's res judicata argument inasmuch as it decided this case on the merits and granted Gulf's cross motion for summary judgment based upon its interpretation of the law pertinent to this case. The lower court's judgment plainly and clearly expresses the grounds for its decision (R. 143-144, 238-239). The court did not dismiss plaintiff's claim as being res judicata. Since a determination of the res judicata issue is a threshold question prior to determining this case on the merits, clear implication necessarily compels the conclusion that the lower court decided against Gulf on the res judicata question, or it never would have decided this case on the merits of the parties respective motions.

Gulf's argument in its Brief concerning res judicata is procedurally improper and inappropriate inasmuch as Gulf has failed to perfect any appeal with this court claiming that the lower court committed error in not dismissing plaintiff's complaint for res judicata. It is respectfully submitted that this

court is now presented with res judicata arguments on questions that are procedurally not properly before the court, and only serve to unnecessarily obfuscate the legal issues involved in deciding whether or not the lower court's ruling on the merits was correct.

Gulf's arguments on res judicata, already rejected below, are not issues legitimately before the court. It is axiomatic that issues not appealed cannot be issues for determination by this Court.

B. The C80-7024 litigation is not res judicata.

Assuming arguendo, that this Court determines res judicata to be an issue properly before this Court, it is submitted in any event the C80-7024 litigation is not res judicata.

Bennion's Complaint in Civil Action No. 80-7024 sought injunctive relief from the drilling of the 2-8C5 Well as an infield test well. The action was commenced for the reason that the Board had refused to take action concerning the drilling of this second well in Section 8 and the respective rights and obligations of parties in interest. The civil action was continued when an emergency hearing before the Board was provided. It must be remembered that the civil action and the issues addressed by the Board concerned the drilling of the 2-8C5 Well as an infield test well. There had not yet been any application or designation of the well for production.

As a result of the emergency hearing, the Board issued its Order in Cause No. 139-20 which approved the drilling of the second well as a test well. The Order further determined that the plaintiff was not required to pay any costs of drilling the 2-8C5 at that time because the well was a test well. (See Order 139-20, Paragraph III.) At that point the Board had addressed all issues before it. (See Paragraph 6, p. 3 of the same Order.)

Dismissal of Action No. 80-7024 was then proper since the Board had taken action and the issues concerning the drilling and costs of the 2-8C5 as a test well had been addressed by the Board by Order from which action might be taken pursuant to Section 40-6-10 U.C.A. (1953), as amended.

Once the Board had acted plaintiff's action for injunctive relief and the issues in that context no longer needed to be decided since there was now a Board Order addressing the issues from which action might be taken. The issues raised in Action No. 80-7024 need be viewed in the context of the Complaint for injunctive relief. That was the only remedy sought from the Court. Dismissal of the Complaint seeking injunctive relief has no res judicata effect on an action in the nature of an appeal of an administrative order taken the Board's Case No. 139-20(B) Order.

The only issues raised and properly before the Court concerned the injunction of the drilling of the 2-8C5 as a test well. There was no issue of designation for production before

the Court or Board since no designation nor application for designation had yet even occurred.

II.

CONTRARY TO GULF'S CONTENTION, THE BOARD HAD A MANDATE NOT TO DESIGNATE THE 2-8C5 WELL FOR PRODUCTION AND TO ENSURE ECONOMICAL AND EFFICIENT PRODUCTION.

A. There was no meaningful evidence taken by the Board upon which to base its evaluation.

Gulf argues that the Board is mandated by law to designate the 2-8C5 for production because of its duty to promote recovery of oil and gas. This argument completely ignores the purpose, intent and protection afforded all interested parties by law and previous Order of the Board of Oil and Gas.

Section 40-6-1, U.C.A. (1953), as amended, reads in its entirety as follows:

> 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 provide for the operations and development of oil and gas properties in such a manner that a greater ultimate recovery of all 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 landowners, the royalty owners, the producers and the general public may realize and enjoy the greatest possible good from these vital resources. (Emphasis added)

It is appellant's position that the foregoing statutory provision and other pertinent language scattered throughout the provisions of the Oil and Gas Conservation Act compel and require any unit production well to operate in an efficient and economically prudent manner. The Board must make a finding of what is economically practical and prudent in order to avoid the kind of circumstance that is before this Court in order that the "correlative rights of all owners be fully protected", and that waste is not committed.

In the case at bar, as reflected in the production records (R. 167-178), the production figures for oil recovered in the last 12 months of operation of the two wells drilled in Section 8 are as follows:

1-8C5 First Unit Well (March, 1980 - February, 1981)	2-8C5 Second Unit Well (October, 1981 - September, 1982)
10,230 total barrels	7,687 total barrels
852 barrels average per month	640 barrels average per month

The significance of the above computation is obvious. The 1-8C5 well is not only a better producing well than the 2-8C5 well, but also, as of the time it was shut in, all of its cost had been recouped. The 2-8C5, which the Board authorized as the unit well without any geologic or economic data in front of it, cost in excess of $1,400,00. The Board authorized it and shut-in the 1-8C5 well even though Gulf didn't even know it was going to be a commercial well. Gulf's only witness testified as follows:

> 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 that at this time. We realize that this whole field is ... apparently the reservoir due the geologic structure of the thing - its almost impossible to determine what's going to happen from one well to the next as far as correlating said new production. (R. 203-204)

The only relevant, though inadequate finding by the Board in reference to the producing of the well was that the 1-8C5 was at a "point of marginal recovery of further oil and/or gas." (Order No. 139-20(B) at paragraph 6.) There was a fatal lack of any finding or evidence regarding economic justification for shut-in of the 1-8C5 and production of the 2-8C5.

Thus, even though the 2-8C5 well is apparently less productive than the 1-8C5 well and cost a tremendous amount of money to drill, the Board shut in the well whose costs had been totally recouped and authorized as the unit well a more expensive unproductive well upon which there was no evidence that it was to be a commercial well. Clearly, if the Board considered the necessary relevant available data, it would have been in a better position to evaluate the economic merit of designating 2-8C5 well as the unit production well. Section 40-6-6(d) required that enough evidence be presented to justify a modification of the Unit Drilling Order. This was not done, nor required, and the

production of the second well should be found to be in violation of the Act.

Furthermore, Gulf's interpretation of § 40-6-1, pertaining to what it considers the Board's mandate, would require that the Board must approve every application to designate another well for production. This kind of reasoning defeats the purpose of drilling units and would virtually never allow disapproval since another well, even though it might only produce one barrel of oil, and thus provide "greater ultimate recovery."

B. Gulf Should be Required to Account and Credit Bennion For the Salvage Value of the 1-8C5 Well.

Gulf has argued further that Bennion should not be credited with any salvage value of the 1-8C5 until the well is plugged and abandoned. Gulf offers no support for such a contention. The argument also fails to address the obvious consequences and implications of such a ruling.

First, Gulf could repeatedly drill and equip wells at the total cost of owners without even abandoning a previous well, the cost of which it has fully recouped. There is obviously no incentive to abandon the well.

Second, if in fact the supposed sufficient justification for production of the second well and shut-in of the first existed, there would seem to be no question that the first should be abandoned. Gulf's argument would leave such a decision completely to its own whim.

Third, adopting defendants' reasoning demonstrates the necessity of seeking modification of the Unit Drilling Order. In the case of modification the owner is not subject to duplicative cost since all the costs of each one well on each unit has been justified. In this case if modification had been sought and approved, the owners would still be receiving their return on the paid out 1-8C5 and there would have been a finding that the Drilling Unit Order should be modified so as to allow the 2-8C5 to be a producing well for another smaller unit. In that case the owners' rights would be protected. In this case they are not.

III.

THE BOARD'S PROCEDURE COMPLETELY DISREGARDS ITS STATUTORY MANDATE TO PROTECT CORRELATIVE RIGHTS.

In response to point 3 of Gulf's Brief, appellant preliminarily submits that the comunitization agreement covering Section 8 and 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" are not part of the record on appeal in this case. For purposes of argument, however, appellant concurs with respondent's claim that Section 8 is composed of numerous mineral interest owners, some leased and some unleased. Gulf's argument, if it is understood correctly, is that the correlative rights of the working interest owners have not been prejudiced as a result of the Board's procedure in

authorizing the production of the No. 2 well and concomitant imposition of its cost upon the interest owners. Gulf's argument completely ignores the facts of this case inasmuch as Mr. Bennion and the other interest owners in the unit have been deprived of the right to receive the oil and gas production from the No. 1 well without any concomitant costs, in exchange for what apparently is production from a less productive well which will take many years to pay out in order that the interest owners receive the production free of costs.

Mr. Bennion, of course, is now being deprived of his full share of production inasmuch as Gulf now has the right to deprive him of seven-eights of his share of production to pay for his proportionate share of the costs of the No. 2 well. Mr. Bennion, through his proportionate share of production, pays his proportionate share of the costs of the second well in its entirety. Gulf's claim that he has not risked a penny is beside the point because that claim does not provide justification for unreasonably and imprudently depriving Mr. Bennion and all of the other interest owners in the unit from the production of a more productive paid out well. Such a claim also completely fails to recognize the fact that the position Mr. Bennion finds himself in vis-a-vis Gulf is statutorily defined in Sec. 40-6-6-(g) (h) of the Oil and Gas Conservation Act . If respondent believes Mr. Bennion's position is so untenable, its argument is with the Utah Legislature, not with Mr. Bennion.

CONCLUSION

To a great extent Gulf's arguments demonstrate the impropriety of the Board's Order designating the 2-8C5 for production. Gulf recognizes at page 16 of its Brief the huge amount of evidence confirming the wisdom of 640-acre spacing units and at page 4, in quoting their own expert, the lack of evidence to change such spacing. Gulf, however, fails to recognize the additional concern in the establishment of that size of unit that the recovery from the unit would justify the expense of drilling one well. Obviously had the potential recovery justified the costs of drilling two wells, the units would have been so spaced. Now Gulf argues that even though the potential recovery does not justify the modification of the spacing unit another well should be designated for production anyway since it made the irreversible error of unilaterally seeking approval and drilling a less than marginally productive test well.

The lower Court should be required to enter summary judgment for Bennion requiring the Board to shut in the second well, determine its production and the assessment of its costs to be error, and to reinstate the operation of the first well.

RESPECTFULLY SUBMITTED this 6th day of October, 1983.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 1983, I mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, postage prepaid, to the following:

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