

BEFORE THE OIL AND GAS BOARD OF REVIEW
DEPARTMENT OF NATURAL RESOURCES
STATE OF OHIO

NILS P. JOHNSON, SR., TRUSTEE)
)
Appellant,)
)
v.)
)
SCOTT KELL, ACTING CHIEF)
Division of Oil and Gas)
Ohio Dept. of Natural Resources,)
)
Appellee.)

APPEAL NO. 370

CHIEF'S ORDER NO. 89-513

OIL AND GAS BOARD
OF REVIEW

NOV 30 1990

APPEARANCES: For the Appellant - Eric C. Johnson, Esq.

For the Appellee - Scott E. Farkas, Esq.

For the Interested Person - Robert S. Kleese

ENTRY

This matter came on for hearing before the Oil and Gas Board of Review ("the Board") upon timely notice of appeal filed herein under date of August 8, 1989, by the Appellant, appealing from an order of the Chief of the Division of Oil and Gas (the "Chief") ordering mandatory pooling of a tract which includes 1.4 acres owned by Appellant (See "Chief's Order" attached hereto as Appendix 1). This matter was submitted to the Board upon the aforementioned notice of appeal and evidence presented at a hearing before the Board on March 13, 1990, in the conference room of Building E, Fountain Square, Columbus, Ohio.

The facts in this matter which appear undisputed are:

1. Appellant, Nils P. Johnson, Sr., Trustee, is the owner of the surface and mineral rights of that certain property identified as the B. & V. Banerjee property on the surveyor's plat attached as Exhibit A to the Chief's Order, covering 13.4 acres, more or less (hereinafter referred to as the "Johnson Property").
2. Kleese Development Associates ("Kleese"), of Niles, Ohio, an interested person in the within matter, is the owner of oil and gas leases on the following properties: a) Eizonas, Inc. [dba Terrace Gardens] property, covering 29.41 acres, more or less, in G.L. 16, Div. 4, Canfield Township, Mahoning County, Ohio; b) Robert and Barbara Gibbs property, covering .58 acres, more or less, in Section 46, Canfield Township, Mahoning County, Ohio; c) Charles F. and Darlene L. Ware property, covering 5.5 acres, more or less, Section 46, Canfield Township, Mahoning County, Ohio; d) Daniel L. and Joy L. McKenny property, covering 6.0 acres, more or less, Section 46, Canfield Township, Mahoning County, Ohio; e) Joseph S. and Dorothy C. Moore property, covering 4.135 acres, more or less, Section 46, Canfield Township, Mahoning County, Ohio (each of these oil and gas lease properties identified on the surveyor's plat attached as Exhibit A to the Chief's Order and being referred to collectively hereinafter as the "Kleese Properties").
3. On April 17, 1989, Kleese offered to lease or voluntarily pool approximately two acres of the Johnson Property for \$100.00 per acre. On April 24, 1989, Appellant offered to purchase the lease rights of Kleese in the Kleese Properties for \$100.00 per acre. On April 28, 1989, Kleese rejected the offer of Appellant and offered to lease or voluntarily pool 1.4 acres of the Johnson Property for \$2,000.00.
4. An application for a mandatory pooling order for drilling unit requirements for the drilling of a well in Lot 15, Canfield Township, Mahoning County, Ohio to be known as the Terrace Gardens Unit #1 Well (the "Terrace Gardens Unit"), composed of the Kleese Properties and 1.4 acres of the Johnson Property was submitted by Kleese to the Chief on May 4, 1989.
5. The Kleese Properties included in the proposed Terrace Gardens Unit #1 Well unit are of insufficient shape to meet the requirements for drilling a well thereon as provided in ORC Section 1509.24.

6. A hearing on Kleese's application for a mandatory pooling order was held by the Technical Advisory Council on Oil and Gas ("TAC") on June 22, 1989, at the Division of Oil and Gas Region B Office, 3575 Forest Lake Drive, Uniontown, Ohio.
7. At the conclusion of presentation of evidence, the TAC, by a four to two vote, recommended to the Chief denial of Kleese's application for a mandatory pooling order.
8. On July 14, 1989, the Chief issued an order for mandatory pooling of the Kleese Properties and 1.4 acres of the Johnson Property, attached hereto as Appendix 1.

The following questions were presented for consideration by the Board:

1. Is the Chief's Order allowing Kleese's application for a mandatory pooling order for drilling unit requirements for the drilling of the Terrace Gardens Unit #1 Well lawful and reasonable?
2. In the event the Chief's Order is unlawful and unreasonable, and therefore should be vacated, is there an order that this Board will make?

In determining whether the Chief's Order is lawful and reasonable, this Board must consider whether such Order is in accordance with the law and whether there is a valid factual foundation for such Order. See, Youngstown Sheet & Tube Co. v. Maynard, 22 Ohio App.3d 3 (Franklin County Ct. App. 1984).

Addressing first whether the Chief's Order is in accordance with the law, this Board in Jerry Moore, Inc. v. State of Ohio, Appeal No. 1 (Ohio Oil and Gas Board of Review, July 1, 1966) established two conditions precedent under ORC 1509.27 for an owner to make application to the Division of Oil and Gas for a mandatory pooling order:

that a tract of land of insufficient size or shape to meet the requirements for drilling a well thereon as provided in ORC 1509.24 or 1509.25 exists, and

the owner has been unable to form a drilling unit under agreement provided in ORC 1509.26, on a just and equitable basis. Id. at 16.

It was undisputed at the hearing before this Board that the Kleese Properties included in the proposed Terrace Gardens Unit are of insufficient shape to meet the requirements for drilling a well thereon as provided in ORC Section 1509.24.

Thus, this Board must address the evidence presented relating to the second condition precedent, whether Kleese was unable to form a drilling unit under a voluntary pooling agreement on a just and equitable basis. The standard for "just and equitable" was also addressed by this Board in Jerry Moore, Inc.:

...unless the parties themselves so agree, the Chief of the Division of Oil and Gas shall determine, preferably after advice from the Technical Advisory Council, whether the owner-applicant has been unable to form such drilling unit under voluntary pooling agreement provided in Section 1509.26, Ohio Revised Code, and whether such owner-applicant has used all reasonable efforts to enter into a voluntary pooling agreement. Using "all reasonable efforts" contemplates both a reasonable offer and sufficient efforts to advise the other owner or owners of same. (emphasis added) Id. at 19.

Appellant presented testimony that Kleese never offered to voluntarily pool the entire 13.4 acres in the Johnson Property prior to the Chief's Order. Further, Appellant presented testimony that Kleese made no offer to jointly develop the Terrace Gardens Unit #1 Well prior to the issuance of the Chief's Order. Kleese presented into evidence the April 17, 1989 and April 28, 1989 letters, both of which offer to voluntarily pool

no more than 2 acres of the Johnson Property. Kleese presented no further evidence at the hearing before this Board regarding additional offers made to Appellant for voluntary pooling prior to the issuance of the Chief's Order. Upon Appellant's cross examination of Robert Kleese, Mr. Kleese testified that Kleese never offered to voluntarily pool the entire acreage included in the Johnson Property prior to the issuance of the Chief's Order.

The State offered five exhibits and no witnesses. The State's position appears to be that the Chief's Order is lawful and reasonable because the Kleese application is in proper form and the mandatory pooling is necessary to protect correlative rights or to provide effective development, use, or conservation of oil and gas. It is true that these are conditions stated in ORC 1509.27, but such conditions relate to the Chief's considerations prior to issuing an order for mandatory pooling, after the conditions precedent for applying for a mandatory pooling order have been met. Thus, the State's position would appear to ignore entirely the importance of the conditions precedent as set out by this Board in Jerry Moore, Inc.:

A consideration of correlative rights is vital in examining mandatory pooling as mandatory pooling, by definition, forces a party who is the owner or lessee of property to use that property with another lessee and/or for a purpose or price not acceptable to him. The importance of conservation, and particularly that aspect of conservation which includes the development of the natural resources of this state, is the factor which may tip the scales in favor of forcing such person to have his property utilized against his wishes. Such mandatory pooling should occur only, however, when the statutory conditions have been complied with. (emphasis added) Id. at 20.

Chief's Exhibit 2 submitted into testimony at the hearing before the Board is the transcript of the TAC meeting of June 22, 1989 in which the TAC considered the Kleese application for mandatory pooling. Testimony was presented to the TAC regarding the Orr Well (drilled by the Johnson family oil and gas company), which the Terrace Gardens Unit #1 Well would offset by approximately 1,100 feet. Mr. Eric Johnson testified to the TAC that the Orr Well had produced 68,000 Mcf of natural gas in its first thirteen months of production. This fact is relevant to the determination of whether the second condition precedent for an application for mandatory pooling order has been met. In setting the standard to determine the reasonableness of an offer for voluntary pooling, this Board has stated that "...the more the well approaches being a rank wildcat, the lower the offer of override, money, etc. the party drilling the well should have to make to have made a reasonable offer, and the more the well approaches being an offset well, the higher the value of the offer which must be made to the party who is forced to contribute to the mandatory pooling." (emphasis added) Jerry Moore, Inc. at 21.

The Board makes the following finding of facts concerning whether the Chief's Order allowing Kleese's application for a mandatory pooling order for drilling unit requirements for the drilling of the Terrace Gardens Unit #1 Well is lawful and reasonable:

- A. The Kleese Properties included in the proposed Terrace Gardens Unit #1 Well unit are of insufficient shape to meet the requirements for drilling a well thereon as provided in ORC Section 1509.24.
- B. Kleese offered only two alternatives for Appellant to voluntarily pool the Johnson Property into the drilling unit for the Terrace Gardens Unit #1 Well: to lease or voluntarily pool approximately two acres of the Johnson Property for \$100.00 per acre pursuant to the terms of a non-drilling oil and gas lease; or to lease or voluntarily pool 1.4 acres of the Johnson Property for \$2,000.00 pursuant to the terms of a non-drilling oil and gas lease.
- C. Prior to the issuance of the Chief's Order, Kleese made no specific offer of any basis of participation by Johnson.
- D. The proposed Terrace Gardens Unit #1 Well would offset by approximately 1,100 feet the Orr Well drilled by the Johnson family oil and gas company.
- E. The burden of going forward in making efforts to voluntarily pool is on the party who wishes to drill the well, and, if so made, the other party must make reasonable efforts to negotiate in good faith.
- F. Based upon the testimony and other evidence and the findings set forth herein, this Board is of the opinion that Kleese did not make all reasonable efforts to voluntarily pool, and, therefore, did not satisfactorily comply with the conditions precedent to make application to the Division of Oil and Gas for a mandatory pooling order.

Based upon the applicable law and the facts submitted and giving due consideration to conservation and correlative rights, as applicable in this Appeal, this Board hereby makes the following order:

The Board vacates Chief's Order No. 89-513 and finds that such Order was unlawful and unreasonable.

This Entry and Order effective this 30th day of November
____, 1990.

Recused due to conflict
Alan H. Coogan, Chairman

Benita Kahn
Benita Kahn, Secretary

Robert H. Alexander per phone authorization
Robert H. Alexander

Gail Ignatz-Hoover - Hoover - per phone authorization
Gail Ignatz-Hoover

William G. Williams per phone authorization
William G. Williams

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Entry was served on Eric C. Johnson, Suite 1110, Mahoning Bank Building, Youngstown, Ohio 44503, Robert S. Kleese, Kleese Development Associates, 45 North Road, Niles, Ohio 44446, Scott E. Farkas, Assistant Attorney General, Environmental Enforcement Section, Division of Oil and Gas, Fountain Square, Building A, Columbus, Ohio 43224 by certified mail this 30th day of November, 1990.

Benita Kahn
Benita Kahn

CERTIFICATION

As Secretary of the Ohio Oil and Gas Board of Review, I hereby certify that the foregoing Entry is a true and accurate copy of the November 30, 1990 Entry and Order issued by the Ohio Oil and Gas Board of Review in Appeal No. 370.

A handwritten signature in cursive script, reading "Benita Kahn". The signature is written in black ink and is positioned above a horizontal line.

Benita Kahn, Secretary
Ohio Oil and Gas Board of Review