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

Noble Cunningham, d/b/a Ohio Crude Oil, a limited partnership,

Appellant,

vs.

Appeal No. 7

State of Ohio, acting by and through the Chief of the Division of Oil and Gas, Department of Natural Resources,

ENTRY

Appellee.

APPEARANCES: For the Appellant - Larry E. Staats, Esq.
50 W. Broad Street
Columbus, Ohio

For the Appellee - Paul W. Brown
Attorney General
for the State of Ohio
By Gilbert L. Krone, Assistant

This matter came on for hearing before the Oil and Gas Board of Review upon notice of appeal filed herein under date of January 3, 1969, by the appellant, appealing from:

Adjudication Order #26 of the Chief of the Division of Oil and Gas cancelling permit #2710, Howard well, Morrow County, Ohio, permit #2912, Cunningham well, Morrow County, Ohio, and permit #3004 Craven well, Morrow County, Ohio, ordering that Mr. Noble Cunningham, d/b/a Ohio Crude Oil, or his agent shall cause said wells to be properly plugged and abandoned, and that application for permits to plug and abandon must be filed by December 31, 1968, and plugging and abandoning operations completed not later than February 28, 1969.

Adjudication Order #26 was issued by Wayne T. Connor, Chief of Division of Oil and Gas, Department of Natural Resources, State of Ohio.

The matters were submitted to the Oil and Gas Board of Review upon the aforementioned notice of appeal and evidence presented at a hearing before the Oil and Gas Board of Review on June 26, 1969, in Hearing Room #4, in the Ohio Departments Building, Columbus, Ohio, and upon briefs submitted at the request of the Oil and Gas Board of Review; witnesses testifying and exhibits filed in this appeal are listed in the index on page 2 of the Transcript of the aforementioned hearing.

The facts in this appeal which appear undisputed are:

1. Adjudication Order #26 concerned three wells and as to each of these wells:

   a. Permit #2710, Howard well, Morrow County, was issued by the State of Ohio on September 30, 1965 as a Trempealeau test well with a total proposed depth of 3100 feet. Drilling commenced September 30, 1965 and was completed in December of 1965 in the Gull River formation. Production equipment was placed on the well and the well produced some oil until the first part of 1967. There has been no production of oil or gas at least since March of 1967, and the surface production equipment, including the tanks, the heater treater and pump jack, were removed in March of 1967.

   b. Permit #2919, Cunningham well, Morrow County, was issued September 26, 1966 as a proposed Newburg test at approximately 1600 feet. Drilling commenced December 18, 1966. Drilling was completed in April of 1967, and there has been no activity on the well site toward completing or producing the well since April, 1967. No oil or gas in commercial quantities has ever been produced and sold from this

well. There is not now and never has been surface equipment on this well.

c. Permit #3004, Craven well, Morrow County, was issued July 18, 1967 as a proposed Newburg test to be drilled to approximately 1700 feet. Drilling commenced August 12, 1967 and drilling ceased October 24, 1967 when the tubing was cemented. On April 12, 1968, the well was perforated and no activity has taken place on the well toward completing or producing the well since April 12, 1968. No oil or gas in commercial quantities has ever been produced and sold from this well. There is not now and never has been surface equipment on this well.

2. There is little question of fact involved in this appeal according to both the attorney for the appellant and the Attorney General. Appellant and appellee agree that the three wells in question have not been in active operation for a considerable time.

3. One or more oil well inspectors of the State of Ohio were on the premises described above and found inactivity following the dates of the last activity on each well site as described heretofore. On November 8, 1968, the Chief of the Division of Oil and Gas advised appellant by letter to contact the Division of Oil and Gas by November 30, 1968 to present appellant's proposal for diligent completion of these wells. There being no response to this letter, which appellant acknowledges was received at his residence, the Chief of the Division on December 2, 1968 issued the subject Adjudication Order #26.

4. Appellant filed notice of appeal with this Board of Review January 3, 1969, reciting that Adjudication Order #26 was received by appellant December 4, 1968.

It appears to this Board that the following questions are present for its consideration:

I. Is the order of the Chief cancelling permit #2710 on the Howard property in Morrow County and ordering that such well be properly plugged and abandoned and application for permit to plug and abandon be filed by December 31, 1968 and plugging and abandoning operations completed not later than February 28, 1969, lawful and reasonable?

II. Is the order of the Chief cancelling permit #2919 on the Cunningham property in Morrow County and ordering that such well be properly plugged and abandoned and application for permit to plug and abandon be filed by December 31, 1968 and plugging and abandoning operations completed not later than February 28, 1969, lawful and reasonable?

III. Is the order of the Chief cancelling permit #3004 on the Craven property in Morrow County and ordering that such well be properly plugged and abandoned and application for permit to plug and abandon be filed by December 31, 1968 and plugging and abandoning operations completed not later than February 28, 1969, lawful and reasonable?

IV. In the event that Adjudication Order #26 is unlawful and/or unreasonable as to one of the wells described above and therefore should be vacated, is there an order or orders that this Board will make?

Testimony and other evidence presented concerning each of the questions presented to the Board, numbered as are the questions, follow:

I. There was no testimony or other evidence presented in this appeal toward establishing that Adjudication Order #26 was unreasonable or unlawful as to the Howard well, permit #2710. The Appellant stated that he did not care whether he plugged that well or kept it to attempt

another acid job on the well, and that he was ceasing active resistance to the Adjudication Order as to the Howard well, although he did not want to voluntarily submit to the Adjudication Order on that well.

As to the Howard well, the Board makes a finding that the facts as to such well are as set forth in #1 a. on page 2 of this Entry. The Board also finds that the Chief had reasonable grounds to believe that the well was incapable of producing oil or gas in commercial quantities.

II. Appellant offered testimony which it claimed should establish that Adjudication Order #26 was unreasonable or unlawful and should be vacated as to the Cunningham well, permit #2919.

Appellant's claim is that under Ohio Revised Code §1509.12, from which we quote the pertinent portion:

> "Unless written permission is granted by the chief, any well which is or becomes incapable of producing oil or gas in commercial quantities shall be plugged, but no well shall be required to be plugged under this section which is being used to produce oil or gas for domestic purposes, or which is being lawfully used for a purpose other than production of oil or gas. When the chief finds that a well should be plugged, he shall notify the owner to that effect by order in writing and shall specify in such order a reasonable time within which to comply."

that the test of whether a well "is or becomes incapable of producing oil or gas in commercial quantities" is "whether there is a technical or proprietary hope that a well can produce in commercial quantities."

While admitting the facts as stated at #1 b. on pages 2 and 3 of this Entry, and that no activity had occurred on the well site since April, 1967, appellant claims that it hopes to establish commercial production at the Cunningham well and has future plans for acidization of the well which might make the Cunningham well a commercially producing gas well. Mr. Cunningham stated that the plans for acidization were not firmed up, and that the reasons for the delay between April, 1967 and

December, 1968 were that "it takes money, it takes time" and there was a question of laying a line to the area. Appellant did state that money was available at all times to perform the acidization but that he was involved in drilling and completing wells in other parts of the state and did not get back to the Cunningham well. At no time in the presentation of its case did the appellant claim that the Cunningham well was a shut-in commercial gas well nor, in fact, that the well was ever completed at all. Appellant's claim is that the activity which was performed concerning the Cunningham well between April, 1967 and the Adjudication Order of December 2, 1968 was that appellant was "thinking about it". Appellant stated that after an acid job, he received two hundred thousand mcf, but that the well was not open flow and there is now water in the well. After issuance of Adjudication Order #26 on December 2, 1968 and receipt of same, appellant contacted a company in the acidizing business, and a petroleum engineer with that company, although not appearing at the hearing, advised appellant by letter of April 4, 1969:

> "It is our belief the Craven well and the Cunningham well drilled on permits 2919 and 3004 respectively could merit further testing before abandonment.
>
> "An evaluation of the electric logs and cutting samples of the Newburg of Morrow County indicate more stimulation work could be justified.
>
> "Further stimulation work would include an improved acid and placement techniques not available on the original treatments.
>
> "These jobs may be done at Mr. Cunningham's convenience."

The position of the Attorney General, on behalf of the appellee, was stated in his brief as follows:

> "Amended Section 1509.12, Revised Code, imposes an absolute statutory duty upon the owner of prudent operation, and authorizes the Chief to order any well to be plugged when he has reasonable grounds to believe that it is incapable of producing oil or gas in commercial quantities.
>
> "Section 1509.12, Revised Code, as originally enacted in 1965, provided in part that:
>
> > 'Unless written permission is granted by the chief of the division of oil and gas, no

> owner of any oil well shall permit said well to stand more than six months without diligently pumping or flowing same.'

"This particular provision seems to indicate that the General Assembly of Ohio intended to impose an absolute statutory duty of operation upon the owner, as a substitute for the owner's common law duty of prudent operation. Petroleum Conservation in Ohio, 26 O.S.L.J. 591, p. 596.

"The implied covenant to develop leased land with reasonable diligence exists after production and during the primary term as well as after such term (Gregory v. Sohio Pet. Co., 261 S.W. (2d) 623). And, upon discovery of oil or gas in paying quantities, a further implication follows that exploration, development and production will be prosecuted with such diligence as may reasonably be required to accomplish the object of the lease. (Knight v. Chicago Corp., 188 S.W. (2d) 564).

"In 1967, Section 1509.12, Revised Code, was amended to provide that:

> 'Unless written permission is granted by the Chief, any well which is or becomes incapable of producing oil or gas in commercial quantities shall be plugged. . .'

"The purpose of this amendment was not to abrogate the statutory duty of operation imposed in the original enactment. This view is supported by the following statement, taken from the Report of the Oil and Gas Law Committee, as published in the October 24, 1966 issue of the Ohio State Bar Association Report, at page 1227:

> 'This amendment constitutes legislation designed to promote reform in the law. The existing statute suggests that an owner may permit a well to stand almost six months and if written permission is granted by the chief of the division of oil and gas, may go longer than six months without diligently pumping or flowing same. Oil and gas cases dealing with the implied covenant to diligently operate a lease impose a prudent operator standard upon all operators. In some instances a prudent operator would not permit a well to stand for thirty days without diligently pumping same. An arbitrary six months figure creates confusion and could encourage litigation over the question whether the statutory language intended to permit a six months delay in operations.'

"The Oil and Gas Law Committee recommended that the six months requirement be deleted because of the possibility that it would be improperly interpreted as authorizing a six months delay in operations. It is suggested that the Committee was, in fact, trying to eliminate a possible defense that could be used by the owner when charged with a failure to perform his common law duty of prudent operation.

"It is the State's position that the 1967 Amendment, which requires the plugging of wells incapable of producing in commercial quantities, should not be interpreted as a substantive change in the statute or in the common law duty to diligently operate. As the committee stated in its report, at page 1225,

> '. . .The thrust of our work has been towards amendments which we believe are necessary to avoid litigation over ambiguous sections and not to achieve substantive changes involving private rights. . .'

"A literal interpretation of the 1967 Amendment to Section 1509.12, Revised Code, would not only result in an unintended substantive change but would also, in effect, impose upon the State a duty to establish scientific proof that an idle well was not capable of producing oil or gas in commercial quantities. Surely, the legislature did not intend to impose such an unreasonable burden upon the division of oil and gas.

"The only reasonable construction of Amended Section 1509.12, Revised Code, is one which is consistent with the public policy previously established by the original enactment, that is, that an owner has an absolute statutory duty of prudent operation. An analysis of Section 1509.12, Revised Code on this basis would allow the Chief to issue an order requiring the plugging of a well when the chief has reasonable grounds to believe that such well is incapable of producing oil or gas in commercial quantities. The implicit assumption in this interpretation is that a reasonably prudent operator would diligently develop all wells which are capable of producing oil or gas in commercial quantities. This assumption is valid since it is not in the public interest nor in the national interest that property be kept out of commerce and undeveloped (Romero v. Humble Oil & Refining Co., et al., 93 F. Supp. 117.) Chapter 1509 gives the Division of Oil and Gas, through the Chief, the duty to protect the public interest in petroleum conservation by direct regulation."

It should also be noted that the Ohio Revised Code Section 1509.12, as originally enacted, also contained the following paragraph:

> "Unless written permission is granted by the chief, all gas wells which have ceased to be productive of gas for domestic or commercial purposes and have not been operated for a period of six months shall immediately be plugged and abandoned by the owner."

It appears clear that under Section 1509.12, as originally enacted, there was an absolute requirement that "unless written permission" was granted by the Chief of the Division of Oil and Gas, no oil or gas well

would be permitted to stand for more than six months. This Board is of the opinion that Professors Williams and Meyers were correct that the legislature had established "an absolute statutory duty of operation as a substitute. . .for the common law duty of prudent operation." Petroleum Conservation in Ohio, 26 O.S.L.J. 591, p. 596.

The basic legal questions in this appeal are then: (1) whether by revision of 1509.12 and the omission of the "six months" term and utilization of the word "incapable", the legislature intended to eliminate any statutory duty of operation and revert to a common law duty of prudent operation (which had been upheld in Ohio in the case of Harris v. Ohio Oil Company, 57 Ohio State, 118, 48 N.E. 502 (1897)) or (2) whether the legislature was attempting to correct language which might be improperly interpreted as authorizing a six months delay in operations, and to give the Chief more latitude in which to act, and (3) in the event question 1 is answered affirmatively, does the term "incapable" mean (a) a "technical or proprietary hope" that the well will produce in commercial quantities or (b) that in the opinion of a reasonably prudent operator the well will produce in commercial quantities, or (c) does the Chief have reasonable grounds to believe that the well is "incapable of producing oil or gas in commercial quantities".

This Board is of the opinion that the legislature did not intend to eliminate the six months period and the statutory duty of operation and revert to the common law duty of prudent operation. There are several valid reasons for this opinion. The first is that the proposed amendment to Section 1509.12 was drafted originally by the Special Committee on Oil and Gas Law of the Ohio State Bar Association, and the Report of that Committee is quoted above which indicates the reason for the amendment. It is further recognized by the Board that when Amended Substitute House Bill 224 of 1965 (Chapter 1509, Ohio Revised Code) was first enacted there were

fears among oil and gas producers in the State of Ohio that the Chief of the Division of Oil and Gas would be an administrator who did not recognize that the development of oil and gas resources within the state was a part of conservation, but after several years of operations by the Division of Oil and Gas created by such statute, effective October 15, 1965, oil and gas producers within the state have found that this Division was sympathetic to the problems of the oil and gas industry, as well as being cognizant of the interests of the public and landowners. The Board also recognizes that the Division of Oil and Gas and the landowners and others within the State of Ohio were faced with several difficult problems following the Morrow County oil boom. One of the significant problems was that a large number of out-of-state operators had come into the state, begun drilling wells, had not completed the wells and/or produced the wells with diligence, and then fled the state prior to the expiration of the six months period provided in the original statute. It is also recognized that there are many instances when wells should not be allowed to stand idle for more than a few days and certainly not a six months period; in cases of such oil and/or gas wells, there may be fire hazards, the possibility of leakage or seeping and even other hazards from open but uncompleted wells.

This Board is further of the opinion that the legislature did not intend the word "incapable" to mean that there is no "technical or proprietary hope" that the well will produce in commercial quantities. This Board is of the opinion that the test is whether the Chief of the Division of Oil and Gas has reasonable grounds to believe that such well is not or will not produce oil or gas in commercial quantities. It should be noted that the Ohio Revised Code Section 1509.12 does not apply in the opinion of the Board to a "shut-in commercial gas well" nor will such statute apply where a well is being used to produce oil or gas for domestic purposes. In this appeal we have present neither of these exceptions. In fact, in this appeal, all of the wells had stood idle for a period in excess of six months and the

Chief had taken the further step, not required by statute, of corresponding with the appellant to allow him the further opportunity to obtain the required written permission of the Chief for wells to stand idle.

Where a determination must be made whether the Chief had reasonable grounds to believe that a well is incapable of producing oil or gas in commercial quantities, this Board suggests the criteria for such determination might be as follows:

1. Has the owner of the well requested permission from the Chief for the well to stand idle and presented firm, reasonable plans which he is capable of carrying out to produce oil or gas in commercial quantities?

2. How recently the well has, in fact, produced oil or gas in commercial quantities and how much oil or gas has been sold?

3. Is the well equipped sufficiently with both surface and inhole equipment to allow for commercial production.

4. How recently have actual good faith on site attempts been made to produce the well in commercial quantities?

5. Has the state caused investigation to be made on the well site?

This Board is of the opinion that the basic intent of the revised Section 1509.12 was to allow the Chief more latitude in carrying out the initial legislative mandate of not allowing wells to stand idle, and that the Chief, under the presently effective 1509.12, would have power to grant written permission to an operator to allow a well to stand idle beyond the six months period.

The Board makes the following findings of fact and application thereof concerning question II:

1. As to permit #2919, Cunningham well, this Board finds that the facts are as set forth in paragraph 1 b. on pages 2 and 3 of this Entry.

2. The Board further finds that there was no on site activity on this property for a period of approximately eighteen months prior to the Adjudication Order, that the well has never produced oil or gas in

commercial quantities, that the state has caused investigation to be made on the well site, that this well has not been and is not a shut-in commercial gas well, and that the well is not being used to produce oil or gas for domestic purposes.

3. This Board further finds that the Chief had reasonable grounds to believe that the well is incapable of producing oil or gas in commercial quantities.

III. Appellant offered testimony which it claimed should establish that Adjudication Order #26 was unreasonable or unlawful and should be vacated as to the Craven well, permit #3004. Appellant acknowledged that the facts were as set forth in #1 c. on page 3 of this Entry, and that no activity had occurred on the well site since April, 1968. Appellant's claims concerning this well are substantially the same as to the Cunningham well, i.e. that appellant has future plans for acidization of the well which might make the Craven well a commercially producing gas well, that the plans for acidization are not firmed up, that the claims and reasons for delay are the same as set forth on pages 5 and 6 concerning the Cunningham well except for a change in dates and that the Craven hole does not contain water, although appellant acknowledged that in its present location it was not a commercial well.

The Board makes the following findings of fact and application thereof concerning question III:

1. As to permit #3004, Craven well, this Board finds that the facts are as set forth in paragraph 1 c. on page 3 of this Entry.

2. The Board further finds that there was no on site activity on this property for a period in excess of six months prior to the Adjudication Order, that the well has never produced oil or gas in commercial quantities, that this well has not been and is not a shut-in commercial gas well, that the well is not being used to produce oil or gas for domestic

purposes, and that the state has caused investigation to be made on the well site.

3. This Board further finds that the Chief had reasonable grounds to believe that the well is incapable of producing oil or gas in commercial quantities.

There were two objections made concerning admission of evidence at the hearing on June 26, 1969 on which the Board advised it would permit the presentation of testimony to be made at the hearing but would rule later as to admissibility, as follows:

1. The appellee objected to the admission by the Board of any evidence that related to the condition of the wells or the actions or activities of the appellant subsequent to the order of the Chief of the Division of Oil and Gas on December 2, 1968. It is the opinion of this Board that such objection is overruled and that such evidence, which was allowed to be presented and was considered by this Board, is admissible in this hearing for the reason that facts may develop subsequent to the entry of an adjudication order which would give the Chief reasonable grounds to believe that a well is capable of production so that the Chief might give the written permission described in the statute.

2. Appellant objected to appellee's question to Noble Cunningham of whether the said appellant would say that an operator has a duty to pursue operations of exploration, development or production in a reasonable and diligent manner. After objection was made, appellee did not seek an answer to that specific question so this Board does not rule on the objection.

Based upon the applicable law and the facts submitted, and giving due consideration to conservation, safety and correlative rights, as applicable in this appeal, the Board hereby makes the following orders which correspond to the four questions set forth on page 4 of this Entry:

A. The Board affirms the order of the Chief cancelling permit #2710, Howard well, Morrow County, Ohio, and requiring that said well

be properly plugged and abandoned, with the applications for permits to plug and abandon to be filed by October 9, 1969 (which is the same period of days following this Entry that the plugging application was to be filed following the December 2, 1968 Order of the Chief) and that all plugging and abandoning operations must be completed not later than the 8th day of December, 1969 (which is the same period which the Chief allowed for plugging and abandoning operations to be completed in his Order of December 2, 1968).

B. The Board affirms the order of the Chief cancelling permit #2919, Cunningham well, Morrow County, Ohio, and requiring that said well be properly plugged and abandoned, with the applications for permits to plug and abandon to be filed by October 9, 1969 (which is the same period of days following this Entry that the plugging application was to be filed following the December 2, 1968 Order of the Chief) and that all plugging and abandoning operations must be completed not later than the 8th day of December, 1969 (which is the same period which the Chief allowed for plugging and abandoning operations to be completed in his Order of December 2, 1968).

C. The Board affirms the order of the Chief cancelling permit #3004, Craven well, Morrow County, Ohio, and requiring that said well be properly plugged and abandoned, with the applications for permits to plug and abandon to be filed by October 9, 1969 (which is the same period of days following this Entry that the plugging application was to be filed following the December 2, 1968 Order of the Chief) and that all plugging and abandoning operations must be completed not later than the 8th day of December, 1969 (which is the same period which the Chief allowed for plugging and abandoning operations to be completed in his Order of December 2, 1968).

D. Inasmuch as this Board affirms Adjudication Order #26 of the Chief of the Division of Oil and Gas, as set forth in orders A, B, and C,

above, finds that such order is lawful and reasonable, and vacates none of such order, then this Board does not make any new orders in this Appeal #7.

These orders effective this 10th day of September, 1969.

OIL AND GAS BOARD OF REVIEW

By _____
J. Richard Emens, Secretary, who certifies that the foregoing in a true and correct copy of the Entry in the above matters of the Oil and Gas Board of Review effective September 10, 1969.