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

John S. Kidd, Sr.,

Appellant,

vs.

Appeal No. 8

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 - Hanna, Middleton & Roebke
By Thomas S. Middleton, Esq.
161 North Main Street
Bowling Green, Ohio 43402

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

This matter came on for hearing before the Oil and Gas Board of Review upon notice of appeal filed herein under date of May 12, 1969, by the appellant, appealing from:

Adjudication Order #56 of the Chief of the Division of Oil and Gas ordering that "Mr. John S. Kidd, Sr., or his agent, shall cause the existing oil and/or gas wells drilled on property known as Greenwood Gardens, and located in Section 23, Plain Township, Wood County, to be properly plugged and abandoned," with necessary actions and plugging and abandoning operations completed no later than sixty (60) days after receipt of the order.

Adjudication Order #56 was issued by Wayne T. Connor, Chief of the 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. According to Mutual Exhibit 1, a plat of Greenwood Gardens, there were five (5) wells considered in the subject hearing. These wells were indicated on Mutual Exhibit 1 (the plat) as wells #1, 5, 7, 9 and 10. Well #7 was agreed to be a water well; the other four were drilled as oil wells in the Trenton formation some time prior to 1952, probably during the early 1900's. The wells were drilled at a time when no permit for drilling was required from the State of Ohio, and none of the persons testifying have knowledge of when the wells were first drilled. Neither well #9 nor well #10 have produced since the appellant acquired the property from a Mr. Valentine in 1952, although appellant made some efforts to cause well #9 to produce early in the 1950's.

2. Oil was produced from either one or both of the #1 and #5 wells in 1961, 1962, 1963, 1964, 1965 and 1966. All of the oil which has been produced and sold from the wells has been sold to Gladieux Refinery, Inc. of Fort Wayne, Indiana. No gas in commercial quantities has been produced from any of the wells.

3. The Chief of the Division of Oil and Gas and one of the inspectors of the Division of Oil and Gas visited the subject property in July of 1968, and advised the appellant that the wells should be put into operation or should be plugged and abandoned. The appellant advised Mr. Grover Blauser, an inspector of the Ohio Division of Oil and Gas, by letter dated July 21, 1968, that they were "planning to fix up our lease" . . ."and will do it just as soon as possible."

4. Adjudication Order #56 was issued April 29, 1969 by the Chief of the Division of Oil and Gas, and appellant filed a notice of appeal from Adjudication Order #56 with this Board of Review by instrument dated May 12, 1969.

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

I. Is the order of the Chief directing that Mr. John S. Kidd, Sr., or his agent, shall cause the existing oil and/or gas wells drilled on property known as Greenwood Gardens to be properly plugged and abandoned and that necessary actions and plugging and abandoning operations shall be completed no later than sixty (60) days after receipt of the order lawful and reasonable?

II. In the event that Adjudication Order #56 is unlawful and/or unreasonable and therefore should be vacated, is there an order or orders that this Board will make?

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

I. Appellant offered testimony which it claimed should establish that Adjudication Order #56 was unreasonable or unlawful and should be vacated.

Appellant claimed that oil had been produced from wells #1 and #5 for years prior to 1961 and for years 1961 through 1967, inclusive. Appellant further claimed that he had attempted to produce said wells #1 and #5 on several occasions during 1968 and 1969 and had, in fact, produced some oil (nearly fifty-five (55) barrels, he thought) from these wells in April of 1969. Appellant claimed that the reason no more oil had been produced from these two wells in 1968 and 1969 and that none had been sold was because he had been sick a portion of the time, that the truck, tools, flow line and other equipment which he used in connection with operating the wells had been damaged or taken by third parties, that for certain periods the ground had been very wet and he was not able to get in to the wells, and that his storage tank had been set fire to and planks had been moved.

Appellant acknowledged, however, that at the present time the #1 well would not produce until it had a cup job and the #5 well would not produce until a joint of tubing was replaced. Appellant claimed that some gas from one of the wells was used for domestic purposes "in that the gas from these wells is used to run the power equipment that pump wells on an adjoining lease."

Appellant claims the State has not produced evidence to show that the wells should be plugged. Appellant appears to be claiming that although no oil and gas have been produced and sold from the premises for at least two (2) years, the mere fact that Appellant claims to have produced almost fifty-five (55) barrels of oil in a one-month period during this two years (although there is no evidence that such oil was sold, and no other evidence than appellant's testimony that it was produced) and that appellant believes these are good wells and he intends to pump them in the future, should lead this Board to find that the Order of the Chief of the Division of Oil and Gas was unlawful or unreasonable.

Appellee offered testimony to show that inspectors of the Division of Oil and Gas had visited the Greenwood Garden premises on seven (7) occasions as follows: June 26, 1968, July 9, 1968, July 30, 1968, October 30, 1968, December 23, 1968, April 3, 1969 and May 21, 1969. The inspector who visited the site of these wells testified that the wells were not in operation on any of his visits nor was there any indication at the time of his visits that any of the wells had produced within any recent period of time.

Gladieux Refinery, Inc., of Fort Wayne, Indiana, has advised that there were no purchases of oil or gas from the subject wells or payment for production during the years 1967, 1968 and 1969. Gladieux Refinery, Inc. also advised that it purchased oil and made payments for same from the subject wells (#1 and #5) in the years 1961 through 1966 as follows:

YEAR	BBLS	PRICE	TOTAL AMOUNT	1/8 LANDOWNERS ROYALTY
1961	214	2.50	535.00	66.87
1962	428	2.50	1070.00	133.75
1963	423	2.50	1057.50	132.18
1964	390	2.50	975.00	121.87
1965	152	2.50	380.00	47.50
1966	86	2.50	215.00	26.87

and that their Gladieux Refinery, Inc. records indicated John and Lillian Kidd of Bowling Green, Ohio were the producers, and that the royalty owners were Greenwood Gardens, Inc., in care of Douglas T. McKnight.

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.

This Board reviewed a similar question in Appeal #7 heard the same day as the captioned appeal, and this Board's Entry in Appeal #7 indicated as follows:

> "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 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."

This Board makes the following findings of fact and application thereof concerning question I:

1. This Board finds that the facts are as set forth in paragraphs 1, 2, 3 , and 4 on page 2 of this Entry.

2. This Board finds that wells #9 and 10 on the plat have not produced any oil or gas since prior to 1960.

3. This Board finds that if in fact well #7 is a water well as claimed by appellant, that such well is not then within the purview of Adjudication Order #56; and as written, such Order applies only to "oil and/or gas wells."

4. This Board finds that production from wells #1 and #5 is as set forth in the information received from Gladieux Refinery, Inc. on page 4 of this Entry.

5. This Board further finds that inspectors of the Division of Oil and Gas of the State of Ohio visited the subject property on the seven (7) occasions recited on page 4 of this Entry, and found no production or evidence of recent production.

6. This Board further finds that the Chief of the Division of Oil and Gas and an inspector visited with appellant and requested that the wells be put into production or abandoned in July of 1968, and that appellant advised the Division by letter of July 21, 1968, as noted on page 2 of this Entry.

7. This Board further finds that wells #1 and 5 have not produced oil or gas in commercial quantities since at least December 31, 1966.

8. This Board finds that the Chief had reasonable grounds to believe that wells 1, 5, 9, and 10 were and are incapable of producing oil or gas in commercial quantities.

9. This Board finds that there was no shut-in commercial gas well involved in this appeal, and that there was no well being used to produce oil or gas for domestic purposes.

The appellant objected in his brief submitted following the June 26, 1969 hearing "to the entire proceeding, as not all the owners of the wells are a party to this appeal, and further that not all of the owners were notified." This Board finds that such objection is not well taken for the reason that Rule NRr-1-06 of the Rules and Regulations of the Oil and Gas Board of Review provides: "the appellant shall be responsible for notifying all interested persons. . . of the place where and the date and time when the hearing will be held. . ." Further the appellant and the appellant's attorney were notified by letter of June 6, 1969 from the Oil and Gas Board of Review of Rule NRr-1-06 of the Rules of Practice Procedure of the Oil and Gas Board of Review and that appellant would be responsible for notifying all interested persons. Further, this Board is unaware of any persons other than appellant and Greenwood Gardens, Inc., the royalty owner who appeared at the hearing, who might be adversely affected by the Entry in the appeal.

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 two questions set forth on page 3 of this Entry.

A. The Board affirms the order of the Chief directing Mr. John S. Kidd, Sr., or his agent, to cause the existing oil and/or gas wells drilled on property known as Greenwood Gardens located in Section 23, Plain Township, Wood County, to be properly plugged and abandoned, and that all necessary actions and plugging and abandoning operations must be completed no later than sixty (60) days after date of this Entry of the Oil and Gas Board of Review.

B. Inasmuch as this Board affirms Adjudication Order #56 of the Chief of the Division of Oil and Gas, as set forth in order A, 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 #8.

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 is a true and correct copy of the Entry in the above matters of the Oil and Gas Board of Review effective September 10, 1969.