

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

RANDY D. BROWN  
3742 Knox School Road  
Homeworth Ohio 44634

APPEAL 86

and

Sharon L. Herold  
2541 Knox School Road  
Alliance, Ohio 44601

Appellants

vs.

RENEE J. HOUSER, Chief  
Division of Oil and Gas  
Ohio Department of Natural Resources  
Fountain Square  
Columbus, Ohio 43224

Appellee,

Appearances: For Appellants: Mr. Francis J. Marini  
Marini & Russell  
286 North 15th Street  
Sebring, Ohio 44672

On behalf of Randy D. Brown

Mr. Bryce W. Kendall  
Fitch, Kendall, Cecil, Kendall  
& Robinson  
600 E. State Street  
Salem, Ohio 44460

On behalf of Sharon L. Herold

For Appellee:

William J. Brown, Attorney General  
By Mr. Dominic J. Hanket  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

On behalf of the Chief,  
Division of Oil and Gas.

## ENTRY

This matter came on for hearing before the Oil and Gas Board of Review on November 8, 1984 at Fountain Square, Building E, Columbus, Ohio pursuant to a Notices of Appeal, timely filed, dealing the orders of the Chief of the Division of Oil and Gas to wit:

Order No. 84-05 issued January 18, 1984 to Randy D. Brown to plug and abandon or produce five oil and gas wells on the Sharon Herold lease in Knox Township, Columbiana County, Ohio, and,

Order 84-24 issued April 12, 1984 to Sharon L. Herold to plug five oil and gas wells wells located on her property. The wells, subject to the separate orders of the Chief, are the same wells, Nos., 140 (A-7), 148 (A-8), 399-A-2, 399-A-3 and 399-A-4. The orders of the Chief were issued pursuant to applicable sections of the Ohio Revised Code.

### I. Background

The wells ordered to be produced or plugged are several of a large number of Berea Sandstone oil wells drilled prior to the existing law governing the regulation of oil and gas well drilling in Ohio. The existence of the five wells, although not drilled under a permits issued by the Division of Oil and Gas was known to ODNR inspectors since at least 1973.

The substance of the appeals before the Board lays not so much in the condition of the wells or whether they were producible or should be plugged according to the order, but rather whom should be the party liable, that i.e. who should

be the "owner" of the wells subject to the order of the Chief. An extensive hearing was held by the Board on the appeals of both orders as a combined hearing, because the facts of both appeals were essentially the same. Members of the Board who heard the appeals were: James J. Morgan, Chairman, Robert Alexander, Alan H. Coogan and George M. Hauswirth.

## II. Findings of Fact

1. The final inspection of the condition of the wells on which the orders are based took place on August 18, 1983. The wells had been incapable of producing oil or gas since 1973.

2. The decision of the Chief to order the owner of the wells to plug or produce them took place sometime between August, 1983 and the date of the issuance of the first order to Randy D. Brown on January 18, 1984.

3. The date of the finding of the Chief as to the "idle" nature of the wells is not ascertainable from the testimony of the witnesses other than it was after the last inspection in August and before the issuance of the order, see transcript p. 111, testimony of Mr. Reay, ODNR.

"Q. So in 1983 what made you decide at that point that the wells were incapable of production?

A. I don't know that we exactly decided in 1983 that they were incapable of production. It was felt by the administrative heads of the Division that we had not seen any action consistent with these wells that were going to be produced in a viable time so we ordered a produce or plug so that it gave an emphasis

to what we had verbally agreed to previously".

It is a specific finding of the Board that the Chief did not determine that the wells were incapable of production in August of 1983. The inspections during that month did not apparently differ from inspections made in prior months or years. The status of the wells did not change substantially for a decade prior to August of 1983. What made the difference in late 1983 or early 1984 was the decision within the Division to make a formal finding and issue an order.

4. The condition of the Berea wells on the Herold property had not changed substantially from 1973 to 1983 until Mr. Herold began removal of equipment.

5. The Division of Oil and Gas knew of the detailed condition of the wells before the August, 1983 inspection dates, having inspected 8 times in 1982, and 3 times in 1983. It also made numerous inspections after the issuance of the order in 1984.

6. The lease on the Herold property predated by decades the ownership by Sharon Herold, who took her property subject to the lease.

7. The actions of Sharon Herold and her agents were inconsistent with the leasehold rights held by the appellant R. Brown, rights which were necessary to produce the Berea wells.

8. Upon demand of the Lessor Herold, the Lessee Brown released the operating rights remaining in the old lease to the Lessor on September 13, 1983. Lessee admitted ownership of the wells (See Transcript, Page 96-97):

"Mr. C.(C): Who owns these wells now, these Berea wells?

Witness (W): I suppose we do , They were turned back to us.

C: So you own them?

W: I guess that's what you'd have to say.

C: When did you acquire this ownership?

W: On the 13th of September. Is that when it's recorded?

Mr. Kendall: Whatever the date of that document was."

9. No evidence was presented that the Lessee, R. Brown knew of the inchoate or undeclared decision of the Chief to find that the wells were incapable of production and to order that they be produced or plugged when he released his ownership to Herold.

10. The owner of the wells on the date of the issuance of the order of the Chief to R. Brown, i.e. on January 18, 1984 was Aaron L. Herold, not Randy D. Brown. In making this determination of fact, the Board follows the definition of the term "owner" as defined in R.C. 1509.,01 (K) to mean:

... the person who has the right to drill on a tract or a drilling unit and to produce from a pool and to appropriate the oil or gas that he produces therefrom either for himself or others".

### III. Issues

1. Must the Chief conduct a Section 119.06 adjudication hearing prior to issuing an order to plug?
2. Were the orders of the Chief lawful, reasonable and based on an accurate knowledge of the facts of the matter regarding the wells in question?
3. Who was the owner of the wells at the time the Chief "learned" of the failure or inability of the wells to produce?

### IV Decision

After a review of the evidence, the transcript of the hearing and having considered the pre-and posthearing briefs of counsel, the Board makes the following decisions:

1. The issue of whether a section 119.06 hearing by the Chief is required for Randy D. Brown before the issuance of an order to plug is a question of law, not to be decided by the Board, but in any case moot considering the subsequent decisions.

2. Order No. 84-05 of the Chief is overturned. Randy D. Brown is found by this Board not to have been the owner of the wells at the time when the order was issued. He was not the owner of the wells at the time the Chief learned of the failure or inability of the wells to produce. He was not the owner when the Chief discovered the necessity of plugging. The appeal of the appellant, Randy D. Brown, is affirmed.

3. Order No., 84-24 of the Chief is affirmed. Sharon Merold is found by this Board to have been the owner of the wells at the time the Chief "learned" of the failure or inability of the wells to produce or at the time when the Chief "discovered"

necessity of plugging. The appeal of the appellant, Sharon Herold is rejected and dismissed.

#### V. Legal Discussion

The physical condition of the wells in question is not in dispute. The principal controversy surrounds the question of who was the owner of the wells and consequently who is liable for the cost of carrying out the order of the Chief to plug or produce.

A prior case heard by the Board and subsequently appealed to the Court of Common Pleas, Franklin County, Ohio is styled as C-Z Company vs. State of Ohio. In that case the Court held on similar, but not identical, facts that the person properly called on to plug the well is the owner, that is, "owner of the right to call at the time the State learned of the failure or inability of the well to produce a commercially usable product..." In the prior paragraph of the opinion, Judge Gillie also stated that the right of the appellant C-Z "had terminated by the date of discovery by the State of necessity of plugging.....".

So, the Board is faced with a question of timing. In the appeals before the Board, there is no factual question as to when the State or Chief learned of the failure or inability (in the physical sense) of the wells to produce. That is clearly in 1973 or before. At that time neither of the appellants were the owners of the wells. That ownership, now extinguished by death and distribution of the estate, is not a suitable separate, practical target for an order, even if ascertainable and within the jurisdiction of the State. The appellants also acquired these very rights from the prior owners.

When then did the State "discover the necessity of  
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formulated in the minds of the administrative heads of the Division  
sometime between the date of inspection in August, 1983 and the  
date of the formal issuance of the order to Randy D. Brown in  
January, 1984. Consequently, the Board reasons that the only  
ascertainable date for the "finding" "discovery" or "learning"  
by the State (here the Chief of the Division of Oil and Gas)  
was on that date of the issuance of the first of the two orders  
to plug the wells in question, that is January 18, 1984 and that  
the owner, the person having the right to drill on that date, was  
and is, Sharon L. Herold.

#### CONCLUSION

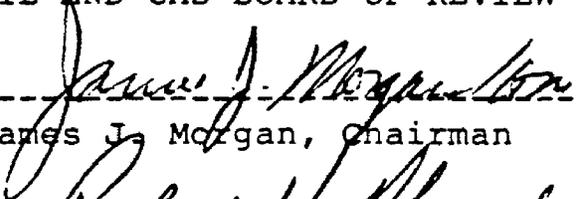
Based on the finding of fact set forth herein and the  
applicable law, the Board finds that Order 84-05 is reasonable  
and lawful but that the Appellant Randy D. Brown was not the  
owner and therefor the order was unlawful as to him.

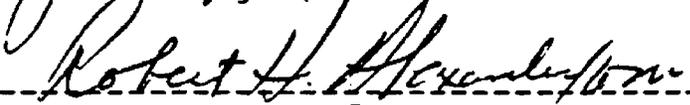
Based on the finding of fact set forth herein and the  
applicable law, the Board finds that Order 84-24 is reasonable  
and lawful. Further the Board

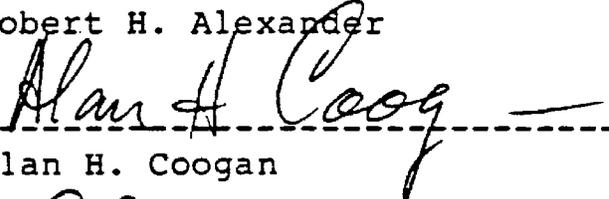
ORDERS that Order 84-05 be and hereby is REVERSED and that  
Order 84-24 be and hereby is AFFIRMED.

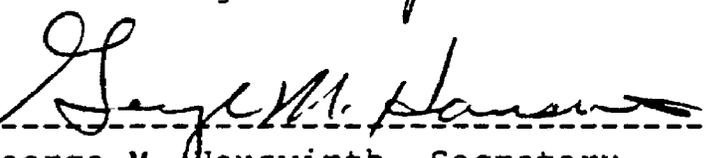
This Order effective this 19<sup>th</sup> day of April, 1985.

OIL AND GAS BOARD OF REVIEW

  
-----  
James J. Morgan, Chairman

  
-----  
Robert H. Alexander

  
-----  
Alan H. Coogan

  
-----  
George M. Hauswirth, Secretary

Bryce W. Kendall, Esq.  
May 9, 1984  
Page Two



If you have any questions regarding procedure, please give me a call at (614) 227-2113.

Very truly yours,

A handwritten signature in cursive script that reads "George M. Hauswirth".

George M. Hauswirth, Secretary  
Oil and Gas Board of Review

cc: Mr. Dominic J. Hanket

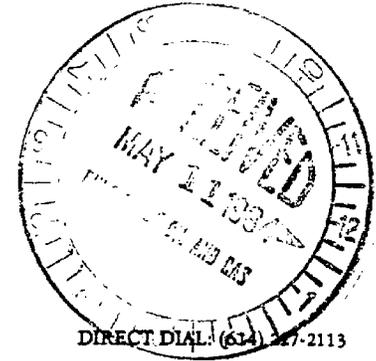
GMH/sf

PORTER, WRIGHT,  
MORRIS & ARTHUR

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MORRIS & ARTHUR  
ATTORNEYS AT LAW

37 WEST BROAD STREET, COLUMBUS, OHIO 43215-4171  
TELECOPIER: (614) 227-2100  
TWX: 810-482-1702

GEORGE M. HAUSWIRTH



May 9, 1984

Bryce W. Kendall, Esq.  
Fitch, Kendall, Cecil, Kendall  
& Robinson  
600 East State Street  
P. O. Box 590  
Salem, Ohio 44460-0590

Re: Appeal No. 86A  
Adjudication Order No. 84-24

Dear Mr. Kendall:

I received, May 9, 1984, the Notice of Appeal filed by you with the Department of Natural Resources, Division of Oil and Gas, concerning Adjudication Order No. 84-24. The Appeal has been docketed as Appeal No. 86A. A hearing on this matter has been scheduled for June 22, 1984 at 11:15 a.m. on the ground floor of the Assembly Center of Building E in the Fountain Square complex off Morse Road.

At the time of the hearing you should be prepared to submit testimony and evidence upon any and all relevant facts upon which the parties cannot agree. All witnesses will be sworn and all testimony will be transcribed. All witnesses and counsel can expect to be asked questions by the Board members.

The appropriate statutes and the Rules of Practice and Procedure of the Oil and Gas Board of Review shall be complied with.

The appellant shall be responsible for notifying all interested persons of the date, time and place when the hearing will be held, as set forth in Rule NPr-1-14. Notice to interested persons shall be given by registered or certified mail, return receipt requested, not less than ten (10) days in advance of the hearing unless otherwise determined by the Board of Review; the appellant shall furnish the Board of Review, at the hearing, return receipts or other sufficient proof of rendering such notice to all interested persons.

PORTER, WRIGHT,  
MORRIS & ARTHUR  
ATTORNEYS AT LAW

37 WEST BROAD STREET, COLUMBUS, OHIO 43215-4171  
TELECOPIER: (614) 227-2100  
TWX: 810-482-1702

GEORGE M. HAUSWIRTH



May 9, 1984

Francis J. Marini, Esq.  
Marini & Russell  
P. O. Box 270  
Sebring, Ohio 44672

Re: Oil and Gas Board of Review Appeal No. 86

Dear Mr. Marini:

A hearing in this matter has been set for June 22, 1984 at 11:15 a.m. The hearing will be held in the Assembly Center on the ground floor of Building E, in the Fountain Square complex off Morse Road, here in Columbus. The Fountain Square complex is just east of the Northland Shopping Center on Morse Road, which is on Morse Road east of I-71.

If there is any possibility of arriving at a settlement in this matter prior to the hearing please do so. The Board has a full load of cases set for hearing and does not appreciate waiting while parties work out settlements and agreements which could have been discussed with the Attorney General by telephone prior to the hearing. If a settlement or stipulation is possible, please contact Mr. Dan Hanket, Assistant Attorney General, at the Division of Oil and Gas, to work out the details. If Mr. Hanket is not personally handling your case he will refer you to the attorney that is handling the case. Mr. Hanket's phone number is (614) 265-6914.

If you have any questions, please give me a call.

Very truly yours,

George M. Hauswirth

cc: Mr. Dominic Hanket

GMH/sf



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

RANDY D. BROWN  
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APPEAL 86

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On behalf of Randy D. Brown

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On behalf of Sharon L. Herold

For Appellee:

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4. The condition of the Berea wells on the Herold property had not changed substantially from 1973 to 1983 until Mr. Herold began removal of equipment.

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6. The lease on the Herold property predated by decades the ownership by Sharon Herold, who took her property subject to the lease.

7. The actions of Sharon Herold and her agents were inconsistent with the leasehold rights held by the appellant R. Brown, rights which were necessary to produce the Berea wells.

8. Upon demand of the Lessor Herold, the Lessee Brown released the operating rights remaining in the old lease to the Lessor on September 13, 1983. Lessee admitted ownership of the wells (See Transcript, Page 96-97):

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Mr. Kendall: Whatever the date of that document was."

9. No evidence was presented that the Lessee, R. Brown knew of the inchoate or undeclared decision of the Chief to find that the wells were incapable of production and to order that they be produced or plugged when he released his ownership to Herold.

10. The owner of the wells on the date of the issuance of the order of the Chief to R. Brown, i.e. on January 18, 1984 was Sharon L. Herold, not Randy D. Brown. In making this determination of fact, the Board follows the definition of the term "owner" as defined in R.C. 1509.,01 (K) to mean:

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1. Must the Chief conduct a Section 119.06 adjudication hearing prior to issuing an order to plug?
2. Were the orders of the Chief lawful, reasonable and based on an accurate knowledge of the facts of the matter regarding the wells in question?
3. Who was the owner of the wells at the time the Chief "learned" of the failure or inability of the wells to produce?

### IV Decision

After a review of the evidence, the transcript of the hearing and having considered the pre-and posthearing briefs of counsel, the Board makes the following decisions:

1. The issue of whether a section 119.06 hearing by the Chief is required for Randy D. Brown before the issuance of an order to plug is a question of law, not to be decided by the Board, but in any case moot considering the subsequent decisions.

2. Order No. 84-05 of the Chief is overturned. Randy D. Brown is found by this Board not to have been the owner of the wells at the time when the order was issued. He was not the owner of the wells at the time the Chief learned of the failure or inability of the wells to produce. He was not the owner when the Chief discovered the necessity of plugging. The appeal of the appellant, Randy D. Brown, is affirmed.

3. Order No., 84-24 of the Chief is affirmed. Sharon Herold is found by this Board to have been the owner of the wells at the time the Chief "learned" of the failure or inability of the wells to produce or at the time when the Chief "discovered"

necessity of plugging. The appeal of the appellant, Sharon Herold is rejected and dismissed.

#### V. Legal Discussion

The physical condition of the wells in question is not in dispute. The principal controversy surrounds the question of who was the owner of the wells and consequently who is liable for the cost of carrying out the order of the Chief to plug or produce.

A prior case heard by the Board and subsequently appealed to the Court of Common Pleas, Franklin County, Ohio is styled as C-Z Company vs. State of Ohio. In that case the Court held on similar, but not identical, facts that the person properly called on to plug the well is the owner, that is, "owner of the right to plug at the time the State learned of the failure or inability of the well to produce a commercially usable product..." In the prior paragraph of the opinion, Judge Gillie also stated that the right of the appellant C-Z "had terminated by the date of discovery by the State of necessity of plugging.....".

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When then did the State "discover the necessity of gging"? Clearly the evidence shows that this "discovery" was formulated in the minds of the administrative heads of the Division sometime between the date of inspection in August, 1983 and the date of the formal issuance of the order to Randy D. Brown in January, 1984. Consequently, the Board reasons that the only ascertainable date for the "finding" "discovery" or "learning" by the State (here the Chief of the Division of Oil and Gas) was on that date of the issuance of the first of the two orders to plug the wells in question, that is January 18, 1984 and that the owner, the person having the right to drill on that date, was and is, Sharon L. Herold.

#### CONCLUSION

Based on the finding of fact set forth herein and the applicable law, the Board finds that Order 84-05 is reasonable and lawful but that the Appellant Randy D. Brown was not the owner and therefor the order was unlawful as to him.

Based on the finding of fact set forth herein and the applicable law, the Board finds that Order 84-24 is reasonable and lawful. Further the Board

ORDERS that Order 84-05 be and hereby is REVERSED and that Order 84-24 be and hereby is AFFIRMED.

This Order effective this 19<sup>th</sup> day of April, 1985.

OIL AND GAS BOARD OF REVIEW

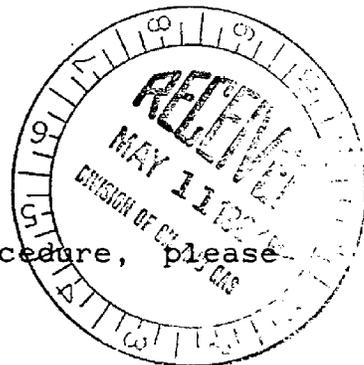
*James J. Morgan*  
-----  
James J. Morgan, Chairman

*Robert H. Alexander*  
-----  
Robert H. Alexander

*Alan H. Coogan*  
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Alan H. Coogan

*George M. Hauswirth*  
-----  
George M. Hauswirth, Secretary

Bryce W. Kendall, Esq.  
May 9, 1984  
Page Two



If you have any questions regarding procedure, please give me a call at (614) 227-2113.

Very truly yours,

A handwritten signature in cursive script that reads "George M. Hauswirth".

George M. Hauswirth, Secretary  
Oil and Gas Board of Review

cc: Mr. Dominic J. Hasket

GMH/sf

PORTER, WRIGHT,  
MORRIS & ARTHUR

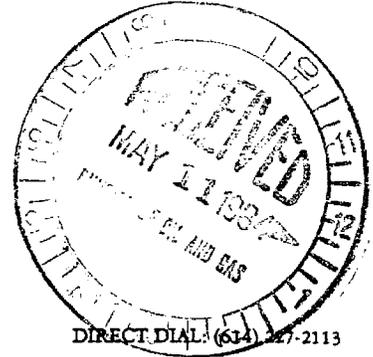
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GEORGE M. HAUSWIRTH



May 9, 1984

Bryce W. Kendall, Esq.  
Fitch, Kendall, Cecil, Kendall  
& Robinson  
600 East State Street  
P. O. Box 590  
Salem, Ohio 44460-0590

Re: Appeal No. 86A  
Adjudication Order No. 84-24

Dear Mr. Kendall:

I received, May 9, 1984, the Notice of Appeal filed by you with the Department of Natural Resources, Division of Oil and Gas, concerning Adjudication Order No. 84-24. The Appeal has been docketed as Appeal No. 86A. A hearing on this matter has been scheduled for June 22, 1984 at 11:15 a.m. on the ground floor of the Assembly Center of Building E in the Fountain Square complex off Morse Road.

At the time of the hearing you should be prepared to submit testimony and evidence upon any and all relevant facts upon which the parties cannot agree. All witnesses will be sworn and all testimony will be transcribed. All witnesses and counsel can expect to be asked questions by the Board members.

The appropriate statutes and the Rules of Practice and Procedure of the Oil and Gas Board of Review shall be complied with.

The appellant shall be responsible for notifying all interested persons of the date, time and place when the hearing will be held, as set forth in Rule NPr-1-14. Notice to interested persons shall be given by registered or certified mail, return receipt requested, not less than ten (10) days in advance of the hearing unless otherwise determined by the Board of Review; the appellant shall furnish the Board of Review, at the hearing, return receipts or other sufficient proof of rendering such notice to all interested persons.

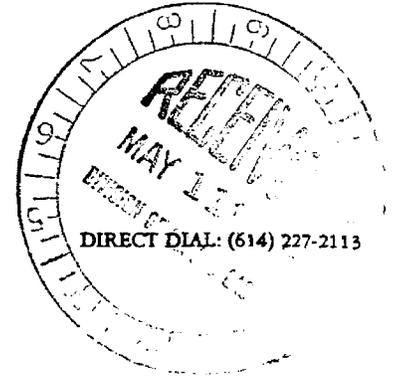
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GEORGE M. HAUSWIRTH



May 9, 1984

Francis J. Marini, Esq.  
Marini & Russell  
P. O. Box 270  
Sebring, Ohio 44672

Re: Oil and Gas Board of Review Appeal No. 86

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If you have any questions, please give me a call.

Very truly yours,

George M. Hauswirth

cc: Mr. Dominic Hanket

GMH/sf

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Renee J. Houser, Chief, Division :  
of Oil and Gas, Ohio Department :  
of Natural Resources, :

Appellant-Appellant, :

v. :

Randy D. Brown, :

Appellee-Appellee. :

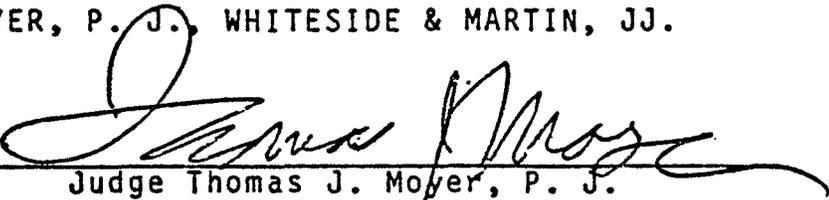
85CV-OS 250)  
No. 86AP-230  
(REGULAR CALENDAR)

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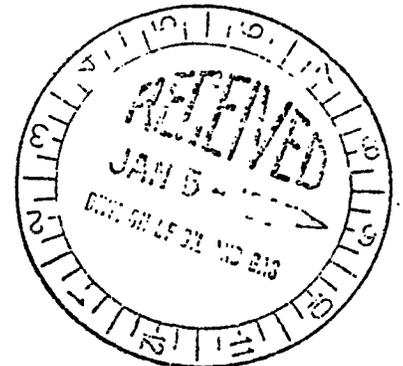
For the reasons stated in the opinion of this court rendered herein on December 30, 1986, the first and third assignments of error are sustained, and the second assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion.

MOYER, P. J., WHITESIDE & MARTIN, JJ.

By   
Judge Thomas J. Moyer, P. J.

MARTIN, J., of the Court of Common Pleas of Carroll County, sitting by assignment in the Tenth Appellate District.

cc: Dominic J. Hanket  
Francis J. Marini



IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT



Renee J. Houser, Chief, Division of :  
Oil and Gas, Ohio Department of :  
Natural Resources, :  
Appellant-Appellant, :  
v. :  
Randy D. Brown, :  
Appellee-Appellee. :

No. 86AP-230  
(REGULAR CALENDAR)

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O P I N I O N

Rendered on December 30, 1986

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MR. ANTHONY J. CELEBREZZE, JR., Attorney General,  
and MR. DOMINIC J. HANKET, for appellant.

MESSRS. MARINI & RUSSELL, and MR. FRANCIS J.  
MARINI, for appellee.

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APPEAL from the Franklin County Common Pleas Court.

MOYER, P.J.

This matter is before us on the appeal of Renee J. Houser, Chief, Division of Oil and Gas, Ohio Department of Natural Resources, from a judgment of the Franklin County Court of Common Pleas affirming an order of the Oil and Gas Board of Review (the board).

The board had reversed an order of the chief of the Division of Oil and Gas issued to Randy D. Brown requiring him to plug or put into production five oil wells. The oil wells were located on property owned by

Sharon Herold in Columbiana County, Ohio. The order was issued January 18, 1984 following an on-site inspection on August 18, 1983. The investigation revealed that the wells were idle and not capable of producing oil or gas in commercial quantities and that Randy D. Brown was the "owner" as defined in R.C. 1509.01(K).

The chief of the Division of Oil and Gas subsequently found out that Mr. Brown had cancelled his oil and gas lease on the subject premises on September 18, 1983. The chief then issued a second plug or produce order on April 12, 1984 to Sharon Herold as the owner of the premises.

Both Randy Brown and Sharon Herold appealed these orders to the Oil and Gas Board of Review. The appeals were consolidated and, following a hearing, the board issued its decision on April 9, 1985. In its decision, the board reversed the order to Randy Brown, finding that he was not the "owner" of the wells at any relevant time. In addition, the board affirmed the order to Sharon Herold, finding that she was the "owner" when the chief learned of the inability of the wells to produce and the necessity of plugging the wells.

The chief appealed the decision reversing the Brown order to the court of common pleas. Sharon Herold did not appeal the order. A hearing was held before a referee. The referee issued a report recommending Randy Brown be found to be the "owner" of the wells and thus responsible for plugging them. Following objections to the referee's report, the trial court approved the report as to the findings of fact but modified it as to the conclusions of law and held that the owner of the well, for purposes of R.C. 1509.12, is the owner at the time of the issuance of the order to plug.

The chief has timely appealed from that judgment and raises the following assignments of error:

"1. The trial court erred in holding that the 'owner' as that term is defined in R.C. 1509.01(K) responsible for plugging the subject wells pursuant to R.C. 1509.12 is the person who has such status at the time the chief issues the order.

"A. In enacting R.C. 1509.12, the General Assembly intended to require that persons who drill and produce oil and gas wells meet their responsibilities to plug oil and gas wells that are incapable of producing oil and gas in commercial quantities.

"B. Jurisdictions confronting the issue of whether an owner of a well may absolve himself from responsibility for plugging a well by a simple lease cancellation have held that such person cannot avoid his responsibilities in such fashion.

"C. The person who has the right to drill on a tract or drilling unit and to drill into and produce from a pool and to appropriate the oil or gas that he produces therefrom either for himself or for others is the person responsible for plugging a well that is or becomes incapable of producing oil or gas in commercial quantities.

"E. [sic] Mr. Brown could not sidestep his responsibility to plug the wells by simply assigning his interest in the wells back to the landowner prior to the issuance of the plugging order.

"F. The trial court's conclusion that safety orders should run with the land has no basis in law and constitutes judicial legislation which should be refuted by this court.

"G. To adopt the holding of the trial court that an owner of a well can avoid his responsibility to plug a well by simply transferring his interest back to the landowner prior to the issuance of the plugging order leads to absurd consequences.

"2. The trial court erred in holding that the decision of the Oil and Gas Board of Review is supported by some evidence in the record and therefore, just and reasonable.

"3. The trial court erred in failing to find that Mr. Brown was responsible for plugging the subject wells pursuant to R.C. 1509.15."

The first and third assignments of error are interrelated and will be discussed together. Appellant contends, for several reasons, that Brown, the lessee, is the party responsible for plugging the wells. R.C. 1509.12 provides:

"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 \*\*\*. 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. No owner shall fail or refuse to plug a well within the time specified in the order. Each day on which such well remains unplugged thereafter constitutes a separate offense."

Owner is defined in R.C. 1509.01(K) in the following manner:

"'Owner,' unless referring to a mine, means the person who has the right to drill on a tract or drilling unit and to drill into and produce from a pool and to appropriate the oil or gas that he produces therefrom either for himself or for others."

Appellant contends that Randy Brown is responsible for plugging the wells, as he was the person who had the right to drill, produce and appropriate the oil from the wells in question. Mr. Brown secured this right in 1979, when he acquired the leases by assignment as part of a real estate transaction. Brown then assigned part of his drilling rights to Bill Blair, Inc., in February 1980. On September 3, 1983, the Herolds disconnected Brown's surface operating equipment from the wells. Brown subsequently filed a partial cancellation of the lease and, within a few days, received a letter from the Herolds' attorney requesting Brown cancel the lease.

The evidence presented at the hearing also established that the subject wells had not produced since 1973. Further, the evidence revealed that the division had been aware of the dormant condition of the wells since at least 1973.

Brown contends that he was no longer the owner within the meaning of R.C. 1509.01(K) when the order from the Division of Oil and Gas was issued on January 18, 1984 due to the cancellation of the lease.

Nonetheless, R.C. 1509.12 establishes the duty to plug any well "which is or becomes incapable of production." Thus, a new lessee or new owner may, in essence, inherit the duty to plug a well if, in fact, he leases a well which is incapable of producing. The plain language of the statute requires this result, as does the policy of requiring the plugging of unproductive wells. This result is further bolstered by the reality of the oil and gas business, where many wells were drilled during the turn of the century. Several of these companies are now out of business and to hold only the original "owner" responsible for plugging the nonproductive wells would defeat the purpose of the statute.

Additionally, the duty created by R.C. 1509.12 is a continuing duty. Once the well becomes incapable of producing in commercial quantities, the duty to plug attaches. An owner's later transfer of the right to produce does not absolve that person of the continuing obligation to plug the well. Therefore, assuming the subject wells were incapable of production in commercial quantities when Brown was assigned the lease in 1979, Brown had a duty at that time to plug the wells. Brown could not escape that duty by cancelling the lease prior to the chief's January order.

The chief correctly issued an order against both Brown and Herold. Upon appeal, the board's decision was predicated solely upon an erroneous conclusion of law that Brown has no duty to plug because he is no longer the owner. The common pleas court affirmed based upon the same erroneous conclusion of law.

The issue as to whether Herold or Brown should bear the expense of plugging the well is not before us, this being a private matter between them. However, both have a statutory duty to the public to plug the well. For protection of the public interest, it makes no difference who plugs the well (Brown or Herold), the important issue is that one does so promptly. The chief correctly ordered both to plug the well. The board erred in reversing the chief's order to Brown upon the basis he has no duty to plug since he does have such a statutory duty to the public.

The first and third assignments of error are therefore sustained.

In the second assignment of error, appellant contends that there was no evidence to support the finding of the board that the wells were incapable of production in January of 1984. The appellant claims this finding was against the manifest weight of the evidence, as there was testimony that the wells had been incapable of production since 1973. Although there was conflicting testimony, there was evidence to support the board's finding that the chief discovered the well's condition in January 1984. The board based this finding on the fact that the chief issued the order on January 18, 1984.

Accordingly, the court correctly determined that the decision of the board of review was supported by evidence in the record and;

therefore, just and reasonable. The second assignment of error is not well-taken.

The first and third assignments of error are sustained in accordance with this opinion, the second assignment of error is overruled, and the judgment of the court of common pleas is reversed.

Judgment reversed and cause remanded.

WHITESIDE and MARTIN, JJ., concur.

MARTIN, J., of the Carroll County Court of Common Pleas, sitting by assignment in the Tenth Appellate District.

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