BEFORE THE OIL AND GAS BOARD OF REVIEW
DIVISION OF OIL AND GAS
STATE OF OHIO

TRANSCONTINENTAL OIL AND GAS, INC., et al.,	:	
Appellant,	:	Appeal No. 510
v.	:	Chief' Order 92-216
DONALD L. MASON, CHIEF, DIVISION OF OIL AND GAS OHIO DEPARTMENT OF NATURAL, RESOURCES	:	

Appearances:

For Appellant - Daniel H. Plumly, Esq.

For Appellee - Kenneth L. Gibson, Esq.

For the Interested Person - Raymond J. Studer, Esq.

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 12, 1992, by the Appellants appealing from an order of the Chief of the Division of Oil and Gas (the "Chief") denying a request by Appellants for a mandatory pooling order. (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 October 22, 1992 at the offices of the Department of Natural Resources, 4435 Fountain Square, Columbus, Ohio.

I. Findings of Fact

1. The Chief's Order 92-216 is an Order denying the request of Appellants Transcontinental Oil & Gas, Inc. and Cutter Oil Company for mandatory pooling under Section 1509.27 of the Ohio Revised Code.

2. During 1991, Appellants contacted landowners in Bath Township of Summit County, Ohio to obtain non-drilling and drilling leases for the purpose of forming a unit upon which an oil and gas well could be drilled to a depth of approximately 3,900'. Of the landowners contacted, only eight were willing to grant such leases: Cross and Maria D. DiTommaso; James V. and Donna J. McCann; Anthony Olivo; Steven C. and Janice A. Brandvoid; Patrick H. and Diana S. McCullum; Salvatore J. and Karen L. Cicerello; Daniel J. Vargo; and Gillum Doolittle Trust.

3. In November, 1991 permit no. 2736 was issued for the drilling of the DiTommaso No. 1 Well (the "Well"), which was to be drilled on the voluntary unit formed by the Appellants (the "DiTommaso Unit").

4. One non-drilling lease included in the DiTommaso Unit was obtained (a lease for 13.48 acres) from Richard S. Amundsen, Vice President of National City Bank and Trustee of the Gillum H. Doolittle Trust (the "Doolittle Lease"). The entire acreage included in the Doolittle Lease underlies Interstate 77. Prior to obtaining the Doolittle Lease from Mr. Amundsen, Appellants had received a certificate of title indicating

ownership of the Doolittle property covered by the Doolittle Lease was held by the Doolittle Trust of which Mr. Amundsen was the trustee.

5. At the time Appellants applied for their drilling permit, when such permit was issued and when they drilled, Appellants believed they had full interest in a voluntarily pooled unit. They had no reason to believe that mandatory pooling was needed.

6. In February, 1992, Appellants commenced the drilling of the Well. When Appellants had drilled three quarters of the way to total depth, they were notified by National City Bank that it had concerns regarding its authority to grant the Doolittle Lease.

7. Those parties filing appearances in Appeal No. 510 as interested parties, Bruce Doolittle and Philene Engle ("Interested Parties"), had asserted they owned an interest in the Doolittle property and challenged the authority of the Trustee to grant the Doolittle Lease.

8. Appellants completed drilling of the Well to total depth (approximately 3,900') and set casing in the Well to protect it. Appellants delayed completion of the Well until they could resolve the dispute regarding the Doolittle Lease.

9. The location of the Well is less than 300' feet from the boundary of the Doolittle Lease.

10. Appellants made several attempts to obtain a lease from the Interested Parties and to voluntarily pool the interests

claimed by the Interested Parties in the Doolittle Lease. These offers included payment of $5,000 to each Interested Party as a signing bonus for a lease of their asserted rights in the Doolittle Lease and decreasing the total acreage which would be included in a voluntary unit. The decrease in total acreage in the voluntary unit would effectively increase the Doolittle royalty share of the unit.

11. All offers presented to the Interested Parties were rejected.

12. Upon failure to obtain a lease or voluntary pooling from the Interested Parties, the Appellants filed a request for a mandatory pooling order with the Division. At the time the Appellants' request for a mandatory pooling order was filed, the Well was drilled to total depth and casing was set. Further, Appellants were "owners" as defined in Chapter 1509. The mandatory pooling application filed by Appellants requested inclusion of 3.067 acres located in the southernmost portion of the Doolittle property, which was the minimum acreage needed from the Doolittle Lease to make the unit of sufficient shape to create a legal drilling unit.

13. The request for a mandatory pooling order was heard by the Technical Advisory Committee ("TAC") of the Division on June 15, 1992.

14. The TAC recommended to the Chief that the request for mandatory pooling be approved with the following provisions: i) the Doolittle acreage pool portions be comprised of 3.067

acres; ii) the unit size be limited to and not exceed 24 acres in total size; and iii) the standard pay-out provision of 150% cost recovery be used.

15. On July 29, 1992, the Chief denied Appellants request for mandatory pooling.

16. The appeal of Chief's Order 92-16 was timely filed by Appellants.

II. Issues Presented

The following questions were presented for consideration by the Board:

1. Is the Chief's Order denying Appellants' application for a mandatory pooling order for drilling unit requirements for the drilling of the Ditommaso No. 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?

III. The Applicable Law

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, 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: i) 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 ii) 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.

Section 1509.24 of the Ohio Revised Code provides that the Chief may adopt rules relative to minimum acreage and distance requirements for drilling units. Section 1501:9-1-04(C)(3) of the Ohio Administrative Code requires that a well drilled to a depth of two thousand to four thousand feet must be drilled on a unit containing no less than 20 acres, may be no closer than 600 feet from any well drilled, producing or capable of producing from the same pool and may be no closer than 300 feet from any boundary of the subject drilling unit. If the Doolittle Lease is not included, the existing borehole would not be 300' from the boundary. Therefore, the unit would be of insufficient shape.

The Interested Parties submitted evidence that the DiTommaso Unit contained a location other than where the Well was drilled which would comply with the requirements of §1501:9-1-

04. This evidence, however, ignored that the Well was in fact drilled and was drilled in good faith belief that the Appellants owned the Doolittle Lease. Without the inclusion of some portion of the Doolittle Lease, the Well does not meet the spacing requirements of §§1509.24 and 1501:9-1-04. Thus, Appellants' application for mandatory pooling met the first condition precedent.

Appellants presented testimony that they offered to lease and/or voluntarily pool the mineral rights which the Interested Parties asserted they owned. Such offers included leasing or unitizing the entire 13.8 acres with payment of a $5,000 lease bonus to each Interested Party, royalty payments in the event of a lease or production payments and a right to participate in the Well in the event of a voluntary pooling. The offers also provided for a revision of the DiTommaso Unit to retain the entire 13.8 acres in the Doolittle property while reducing the total acreage in the Unit, thereby increasing the share of royalty payment for the Doolittle property. The Interested Parties presented no evidence as to why they believed these offers were not just and equitable.

This Board has previously addressed the "reasonable efforts" required to voluntarily pool prior to an application for mandatory pooling. The Board stated "[U]sing "all reasonable efforts" contemplates both a reasonable offer and sufficient efforts to advise the other owner or owners of same." Jerry Moore, Inc. at 19. Based upon the testimony and other evidence

and the findings set forth herein, this Board is of the opinion that Appellants did make all reasonable efforts to voluntarily pool, and therefore, complied with the second condition precedent to make application to the Division for a mandatory pooling order.

Once the conditions precedent have been met, the Chief is to issue the mandatory pooling order, if he is satisfied the application is in proper form and mandatory pooling is necessary to protect correlative rights or to provide effective development, use or conservation of oil and gas. Correlative rights is defined in §1509.01 as the reasonable opportunity to recover oil and gas under tracts without having to drill unnecessary wells or incur unnecessary expense. The Chief testified that wells in existence around the Well would deplete the resources of the tract at issue. The mandatory pooling application requested inclusion of 3.067 acres in the southernmost portion of the Doolittle property. That acreage is the minimum necessary to make the existing Well a legal unit. It also leaves 10 contiguous acres which could be pooled by the owners of the Doolittle property to comprise half of another 20 acre unit. Therefore, the mandatory pooling order recommended by the TAC protects and maximizes both the Appellants and Interested Parties correlative rights. If mandatory pooling is not allowed, Appellants, as "owners" of the tracts (as defined in §1509.01), will not have the opportunity to recover oil and gas under their tracts without drilling unnecessary wells or at unnecessary

expense. Therefore, the Appellants correlative rights will be harmed without the mandatory pooling.

Appellee and the Interested Parties raised the argument that a request for mandatory pooling must be made at the time of application for the permit to drill. Appellee's witness testified that when a well which originally met all spacing requirements is to be deepened and such deepening will result in additional spacing requirements, mandatory pooling may be used if needed to meet the new spacing requirements. The purpose of mandatory pooling is to promote effective use of our State's natural resources and to protect the correlative rights of all interested parties.

These Appellants believed they had proper leases. Appellants exercised due diligence of a reasonably prudent operator by confirming that belief with a title opinion. Thus, the site selection of the Well, when drilled, was reasonable and prudent. After material resources had been committed to the Well, a previously unknown interestholder refused numerous and reasonable offers to lease or be pooled. Without a grant of mandatory pooling, that refusal would cause the other interested parties economic loss and loss of correlative rights. These Appellants have as much economic and logistic difficulties as an applicant who would be deepening a well. To distinguish the fact of this case from a "deepening" case would be an arbitrary and unreasonable distinction.

IV. Order

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

i) The Board vacates Chief's Order No. 92-216 and finds that such Order was unlawful and unreasonable.

ii) The Board makes the following order which it finds the Chief should have made:

The Chief shall issue a mandatory pooling order in compliance with the recommendations of the TAC effective as of the date of execution by the Chief. Such order shall include the following exception: the sharing of production and adjustment of the original costs of drilling, equipping and completing the Well shall be from the effective date of the mandatory pooling order issued.

This Entry and Order effective this 20th day of January, 1994.

James H. Cameron
James H. Cameron per phone authorization 1/18/94

Gail Ignatz Hoover
Gail Ignatz-Hoover per phone authorization 1-20-94

William J. Taylor
William J. Taylor, Chairman per phone authorization 1/19/94

recused due to conflict
Benita Kahn, Secretary

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served on Kenneth Gibson, 234 Portage Trail, P.O. Box 535, Cuyahoga Falls, Ohio 44222, Mr. Ray Studer, Division of Oil and Gas, 4435 Fountain Square, Bldg. A, Columbus, Ohio 43224 and Daniel Plumly, P.O. Box 488, 225 North Market Street, Wooster, Ohio 44691-0488 by certified mail, postage prepaid, this 21ST day of January, 1994.

Benita Kahn

BEFORE THE OIL AND GAS BOARD OF REVIEW
DIVISION OF OIL AND GAS
STATE OF OHIO

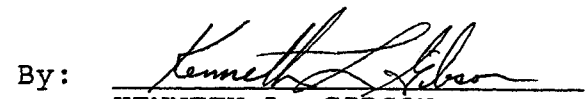
TRANSCONTINENTAL OIL & GAS, INC., et al.	)	APPEAL NO. 510
	)	
	)	Chief's Order 92-216
Appellants	)	
	)	
vs.	)	
	)	
DONALD L. MASON, CHIEF DIVISION OF OIL AND GAS OHIO DEPARTMENT OF NATURAL RESOURCES	)	**NOTICE OF APPEAL BY INTERESTED PARTIES TO COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO**
	)	
Appellee	)	

Now comes Bruce Doolittle and Philene Engel "the 'interested parties" in the proceedings below and hereby give notice of their appeal to the Court of Common Pleas, Franklin County, Ohio from the decision of the Oil and Gas Board of Review in Appeal No. 510 reversing the decision of the Chief of the Division of Oil and Gas and granting the Appellants' application for Mandatory pooling. The order was issued and effective as of January 20, 1994 and this appeal is timely made. This appeal is on both questions of law and fact and is made pursuant to Ohio Revised Code 1509.37.

ASSOCIATED
LAW OFFICES
WEICK, GIBSON & LOWRY
234 WEST PORTAGE TRAIL
CUYAHOGA FALLS, OHIO
44221
(216) 929-0507

The Board is requested to prepare and file a complete record of its proceedings within 15 days as required by law.

WEICK, GIBSON & LOWRY

By: 

KENNETH L. GIBSON
Attorney for Interested Parties
I.D. #0018885
234 Portage Trail
P.O. Box 535
Cuyahoga Falls, OH 44222
(216) 929-0507

CERTIFICATE OF SERVICE

I hereby certify that the foregoing motion was sent this 25th day of January, 1994 to the following:

Donald L. Mason
Chief Division of Oil and Gas
Dept. of Natural Resources
4435 Fountain Square, Bldg A.
Columbus, Ohio 43224-1387

Ray Studer
Asst. Attorney General
Attorney for Appellant
4435 Fountain Square
Bldg A
Columbus OH 43224

Daniel H. Plumly
Attorney for Appellees
Transcontinental Oil & Gas
and Cutter Oil Company
P.O. Box 488
Wooster, Ohio 44691-0488

Benita Kahn, Secretary
Oil & Gas Board of Review
Vorys, Sater, Seymour and Pease
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008

KENNETH L. GIBSON
Attorney for Interested Parties
Bruce Doolittle and Philene Engel

ASSOCIATED
LAW OFFICES
WEICK, GIBSON & LOWRY
234 WEST PORTAGE TRAIL
CUYAHOGA FALLS, OHIO
44221
(216) 929-0507

510

IN THE COURT OF COMMON PLEAS
CIVIL DIVISION
FRANKLIN COUNTY, OHIO

BRUCE DOOLITTLE, et al.	:	Case No. 94 CVF 02 839
Appellants	:	Judge J. Bessey
v.	:	
TRANSCONTINENTAL OIL & GAS, INC., et al.	:	MOTION TO DISMISS AND MEMORANDUM IN SUPPORT
Appellees	:	

Now come Appellees, Transcontinental Oil & Gas, Inc., and Cutter Oil Company, and move this Honorable Court to dismiss the appeal of Bruce Doolittle and Philene Engel, as they are not real parties in interest and have no standing to bring this appeal, and because National City Bank's motion to intervene filed 72 days after the order of the Oil and Gas Board of Review was entered does not constitute a timely perfected notice of appeal pursuant to either Revised Code Section 119.12 or Revised Code Section 1509.37. A memorandum in support of this motion is attached.

Respectfully submitted,

CRITCHFIELD, CRITCHFIELD
& JOHNSTON

By: Susan E. Baker

Susan E. Baker
Ohio Sup. Ct. #0059569
Attorney for Appellees,
Transcontinental Oil & Gas,
Inc., and Cutter Oil Company

CRITCHFIELD,
CRITCHFIELD
& JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Statement of the Facts.

The property in question in this dispute is a 13.48 acre parcel of land located in Bath Township, Summit County, Ohio ("Doolittle Property"). In January of 1973, this property was titled in the name of Gillum H. Doolittle ("G. H. Doolittle"), Bruce Doolittle and Philene Engel's father (hereinafter "Doolittle" and "Engel"). G. H. Doolittle died testate on January 24, 1973. G. H. Doolittle's Last Will and Testament provided that Akron National Bank & Trust Company nka National City Bank ("NCB") was to be and remains the co-executor under the Will and the trustee of the G. H. Doolittle Trust ("Trust") The Will provided that all property owned by G. H. Doolittle vested at the time of his death in NCB. A copy of the Will is attached hereto and made a part hereof as Exhibit 1 The terms of the Trust provide for three beneficiaries, Bruce Doolittle, Philene Engel, and a separate trust for G. H. Doolittle's two grandsons. Legal title to the Doolittle Property vested in NCB at the time of G. H. Doolittle's death. At the time the inventory of the estate was filed, the Doolittle Property was inadvertently excluded from the inventory.

Sometime in April of 1991, NCB became aware of the Doolittle Property and thereafter began negotiations with agents of Transcontinental Oil & Gas, Inc., and Cutter Oil Company (hereinafter collectively referred to as "Transcontinental") for the leasing of the Doolittle Property for the purpose of composing a unit on which to drill an oil and gas well On or about December 12, 1991, NCB, as trustee, entered into a nondrilling oil and gas lease with Transcontinental for the Doolittle Property

The Doolittle Property was unitized with other leases Transcontinental had obtained, and in February of 1992 Transcontinental

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

began drilling the DiTommaso Well No 1 After drilling was commenced, Doolittle and Engel filed suit in the Summit County Court of Common Pleas, claiming a one-third interest each in the property, disputing the validity of the lease, and seeking an injunction against further production of the well. Transcontinental continued to drill the well to total depth; but by agreement of the parties, the well was not completed or put into production. The case in Summit County is currently stayed pending the outcome of this appeal.

Transcontinental subsequently requested a mandatory pooling order from the Chief of the Division of Oil and Gas of the Ohio Department of Natural Resources A hearing was held before the Technical Advisory Committee of the Ohio Department of Natural Resources, Division of Oil and Gas, on June 15, 1992. The Technical Advisory Committee recommended to the Chief that Transcontinental's request for mandatory pooling be approved with the following provisions·

1. The Doolittle acreage pool portions be comprised of 3 067 acres;

2. The unit size be limited to and not exceed 24 acres in total size; and

3. The standard pay-out provision of 150 percent cost recovery be used.

On July 29, 1992, the Chief issued an order denying Transcontinental's request for a mandatory pooling. On August 12, 1992, Transcontinental timely appealed from the Chief's order to the Oil and Gas Board of Review (hereinafter "Board") A hearing was held on October 22, 1992, before the Board. Appearances were made at that hearing by Doolittle and Engel as "interested persons" through their counsel, Kenneth Gibson. On January 20, 1994, the Board reversed the order of the Chief and granted Transcontinental's request for a mandatory pooling order, including 3 067 acres of the Doolittle Property Although NCB did not appear as an

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

interested person at the hearing before the Board, they were made aware of all the administrative proceedings by counsel for Transcontinental. When the order of the Board was issued on January 20, 1994, a copy of that order was sent via facsimile transmission to NCB's counsel of record in the Summit County case. (See Affidavit of Susan E. Baker attached hereto and made a part hereof as Exhibit 2 and Affidavit of Daniel H. Plumly attached hereto and made a part hereof as Exhibit 3.)

Law.

The court should dismiss the appeal of Doolittle and Engel because they have no standing to bring this cause of action. They were not parties to the administrative adjudicative hearing before the Board. Pursuant to Revised Code Section 1509.37, only parties may appeal from an Order of the Board. Parties are specifically defined by Revised Code Section 1509.36 and Ohio Administrative Code Section 1509-1-14 as the appellant from the Chief's order and the Chief. Their appearance as "interested persons" before the Board does not bootstrap them into standing as a party The specific provisions of Revised Code Section 1509.37 and Section 1509.36 should prevail over the general provisions of appeals from state administrative agencies set forth in Revised Code Section 119.01. Revised Code Section 1.21.

Even under the general provisions of Revised Code Section 119 01(A), which defines a "party", Doolittle and Engel have no standing to appeal Revised Code Section 119 01 defines "party" as the "person whose interests are the subject of an adjudication by an agency." Doolittle and Engel, by their own admission, have only an equitable title to some portion of the Doolittle Property The Trust holds legal title to the property and the trustee is the only person who can enter into an oil and gas lease which transfers the mineral rights of the property

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

> [W]here the testator devises real estate to a trustee, the trustee upon his appointment takes title thereto which relates back to the date of the death of the testator, and such trustee is entitled to collect rents and profits from the real estate after the death of the testator . . .
>
> Barlow v. The Winters Nat'l Bank & Trust Co., Trustee, 145 Ohio St. 270, 276 (1945).

Absolute legal title vests in the trustee of a trust. The equitable title to real property vests in the beneficiaries of a trust. Finkbeiner v. Finkbeiner, 111 Ohio App 64 (Hamilton Co. 1959). Only the legal interests of the trustee and its ability to enter into an oil and gas lease for the Doolittle Property will be affected by the outcome of any appeal from the Board's Order

Doolittle and Engel's interests will be indirectly affected by the amount of royalties the Trust is able to collect They have no legal interest to form a lease which would be directly affected by the order They have only an equitable interest in the proceeds of the lease

Because they have no legal interest which will be directly affected, Doolittle and Engel are not the real parties in interest, and therefore have no standing to appeal. "Every action shall be prosecuted in the name of the real party in interest." Civil Rule 17(A).

> 'Real party in interest' is one who has a real interest in the subject matter of the litigation and not merely an interest in the action itself, i.e., one who is directly benefitted or injured by the outcome of the case.
>
> West Clermont Ed. Ass'n. v. West Clermont Bd. of Ed., 67 Ohio App. 2d 160, 162 (Clermont Co. 1980). (emphasis in the original)

Only Doolittle and Engel's equitable interests in the proceeds of the trust will be affected by the outcome of this case, because they have no ability to enter a lease for the mineral rights to the Doolittle Property

CRITCHFIELD
CRITCHFIELD
& JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

As beneficiaries of the Trust, Doolittle and Engel may not bring this appeal in their own name A beneficiary to a trust may not bring a cause of action in his own name, but must first make a demand upon the

trustee. Firestone v Galbraeth, 976 F 2d 279 (6th Cir. 1992). Only the trustee may bring an action on behalf of a trust. Saxton v. Seiberling, 40 Ohio St. 554 (1891). Doolittle and Engel have not made a demand that NCB bring this appeal and they have no standing to bring a civil action in their own name.

Despite the fact that they have no legal interest which is directly affected by the order of the Board, Doolittle and Engel have persisted to attempt to elevate themselves to the level of a party in both the administrative proceedings below and this appeal to a court of law. They are not parties as defined by Chapter 1509. They are not parties as defined by Chapter 119. They are not the real party in interest pursuant to Civil Rule 17(A). They do not even have a financial stake in this litigation outside their equitable interests in the proceeds of the Trust because, as is reflected in the record at page 124 and 125 of the transcript of the hearing before the Board, their legal fees are being paid by an oil and gas producer who is also represented by Doolittle and Engel's counsel. Doolittle and Engel have no standing to bring this appeal and it should be dismissed.

This appeal should be dismissed because NCB's motion to intervene does not constitute a timely perfected notice of appeal. Ohio Revised Code Section 119.12 governs generally the appeal of administrative rulings and states in pertinent part:

> Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by the appellant with the court Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within 15 days after the mailing of the notice of the agency's order as provided in this section.

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

The statutes governing appeals from the Board provide for a longer time for filing of a notice of appeal. Ohio Revised Code Section 1509.37 provides in pertinent part:

> Any party adversely affected by an order of the Oil and Gas Board of Review may appeal to the Court of Common Pleas of Franklin County. Any party desiring to so appeal shall file with the Board a notice of appeal designating the order appealed from and stating whether the appeal is taken on questions of law or questions of law and fact. A copy of such notice shall also be filed by the appellant with the court and shall be mailed or otherwise delivered to the appellee. Such notices shall be filed and mailed or otherwise delivered within 30 days after the date upon which appellant received notice from the Board by registered mail of the making of the order appealed from.

NCB had notice of Transcontinental's appeal from the Chief's denial of its mandatory pooling order request Despite this notice, NCB failed to appear at the hearing before the Board as an interested person as provided for in Administrative Code Section 1509-1-14 NCB also had immediate notice of the order issued by the Board. Although NCB was not a party to the appeal and did not appear as an interested person, on January 20, 1994, when counsel for Transcontinental received a copy of the order of the Board granting its request for mandatory pooling, counsel for Transcontinental transmitted via facsimile a copy of the Board's order. Despite actual knowledge of all of the administrative adjudicative procedures involving this drilling unit, NCB has failed to appear as an interested person at either the technical advisory committee hearing or the appeal before the Board and did not appeal from the Chief's order denying the mandatory pooling order

NCB has failed to properly perfect an appeal from an order of the Board. It has sent no notice to Transcontinental, who is a proper party, nor has it sent notice to the Board. NCB has only moved to intervene 72 days after the order was issued by the Board Such delay should estop NCB from exercising any right it may have to appeal from the Board's

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 468
WOOSTER, OH 44691-0488
(216) 264-4444

order. NCB cannot circumvent procedure by now deciding to ride in on the coattails of Doolittle and Engel who, although they had no standing, did at least comply with the statutory requirements to perfect their attempted appeal.

Even if NCB had timely perfected its appeal, NCB does not have standing to bring an appeal from this order for the same reasons that Doolittle and Engel have no standing. NCB is not a "party" as defined by Revised Code Section 1509.36 and Ohio Administrative Code Section 1509-1-14. Its failure to appeal, even as interested parties, although it could have appealed the Chief's order and been a party, indicates its intent to waive any administrative remedies it might have employed. Its failure to exhaust or even attempt to exercise any of its administrative remedies bars it from even the bootstrap argument of Doolittle and Engel to establish standing to appeal

There is a need for closure to adjudication and a need for a point at which the parties may rely on the final ruling of the agency Only Transcontinental will be prejudiced if the Court denies its motion to dismiss this appeal. Doolittle and Engel's equitable interests in the proceeds of the Trust are protected in their suit in Summit County Court of Common Pleas. Their legal fees are being paid by another client of their counsel.

NCB has affirmatively elected not to participate in the administrative proceedings. It has failed to exhaust its administrative remedies.

Neither Doolittle nor Engel nor NCB has standing to bring an appeal from the Board's order. NCB, having notice and opportunity to appeal from the Chief's order waived its opportunity to become a party It should not be permitted to use Doolittle and Engel's inappropriate appeal

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
NORWALK, OH 44691-0488
(216) 264-4444

to toll the statute of limitations on the time in which it could arguably have properly perfected an appeal.

The time has come when Transcontinental should be able to rely upon the final administrative adjudicative order of the Board. Based on the foregoing law and argument, this court should dismiss the appeal and affirm the order of the Oil and Gas Board of Review granting Transcontinental's request for a mandatory pooling order.

CRITCHFIELD, CRITCHFIELD
& JOHNSTON

By: Susan E. Baker

Susan E. Baker
Ohio Sup. Ct #0059569
Attorney for Appellees,
Transcontinental Oil & Gas,
Inc., and Cutter Oil Company
P O. Box 488
Wooster, OH 44691-0488
Phone. 216/264-4444

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion and Memorandum of Law was mailed by regular U. S. Mail this 22nd day of April, 1994, to the following:

1. Donald L. Mason, Esquire
   Chief Division of Oil and Gas
   Department of Natural Resources
   4435 Fountain Square, Bldg. A
   Columbus, OH 43224-1387

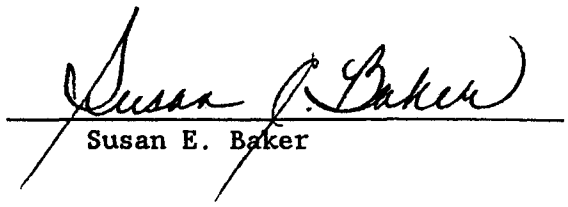
2. Ray Studer, Esquire
   Assistant Attorney General
   4435 Fountain square, Bldg. A
   Columbus, OH 43224

3. Ms. Benita Kahn, Secretary
   Oil and Gas Board of Review
   Vorys, Sater, Seymour and Pease
   52 East Gay Street
   P.O. Box 1008
   Columbus, OH 43216-1008

4. Kenneth L. Gibson, Esquire
   Attorney for Bruce Doolittle and Philene Engel
   234 Portage Trail
   P.O Box 535
   Cuyahoga Falls, OH 44222

CRITCHFIELD, CRITCHFIELD & JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

5. Ronald E. Kopp, Esquire
Attorney for National City Bank
Roetzel & Andress
75 East Market Street
Akron, OH 44308-2098



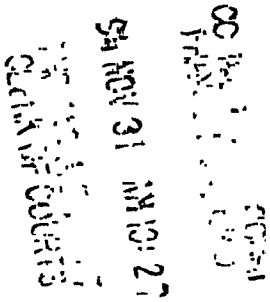
Susan E. Baker

CRITCHFIELD,
CRITCHFIELD
& JOHNSTON
ATTORNEYS AT LAW
225 NORTH MARKET STREET
P.O. BOX 488
WOOSTER, OH 44691-0488
(216) 264-4444

THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

510

E DOOLITTLE, et al,	]	
Appellant,	]	
	]	CASE NO. 94CVF02-839
SCONTINENTAL OIL & GAS, et al.	]	JUDGE BESSEY
Appellees.	]	



DECISION

Rendered this 30th day of November, 1994.

Bessey, J.

This case is before the Court on an *R.C. §1509.37* appeal from the Decision of the Oil & Gas Review Board granting a mandatory pooling order to Appellee. The Board's Decision reversed the Order of the Chief of the Division of Oil and Gas which had denied the request for mandatory pooling.

The Court is confined to the record presented at the Board except under the following circumstances:

"The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the board." *R.C. §1509.37.*

The case file in the within cause contains affidavits, depositions, *ex parte* communications by letter to the Court, and allegations within the briefs which are neither newly discovered nor contained within the record from the Board. To a great extent they pertain to the related case pending in Summit County Common Pleas Court between

Appellants and Intervenors in this case. They complicate the issues i unnecessarily. The only issue before this Court is whether the Order of the Board is lawful and reasonable. *R.C. §1509.37*. For the following reasons th determined that it is not. On September 6, 1994, Intervenor withdrew its ap

The property involved is located in Bath Township, Ohio. The portio Board ordered to be pooled is 3.067 acres of a 13.48 acre tract which wa Gillum H. Doolittle, now deceased. Doolittle died testate leaving the propert children and his two grandchildren. Each child (the Appellants herein) was to receive a 1/3 interest and the grandchildren each received a 1/6 interest which was to be held in trust by the trustee National City Bank (NCB). However, the title to the property never passed to the beneficiaries, but rather was listed as still being owned by Doolittle.

In 1991, Appellee, Transcontinental Oil & Gas, Inc. (TOG), sought a lease concerning oil and gas rights on the Doolittle property. It was ultimately entered into by NCB as trustee on December 12, 1991. NCB did not advise Appellants that they were taking this action. Before the lease was signed, TOG obtained a permit to drill an oil well near the Doolittle property in anticipation of the execution of the lease. In February, 1992, the well was drilled to depth. After the well was started, but before it was drilled to total depth, TOG became aware that NCB was now questioning its authority to enter into the lease as trustee because Doolittle and Engel (the children of Gillum Doolittle) had voiced objections. TOG proceeded to drill to depth, cased, and capped the well. TOG then attempted to negotiate a voluntary pooling agreement with Doolittle and Engel but was unsuccessful. It then applied for a mandatory pooling order on June 15, 1992. The Chief denied the request on July 29, 1992. The Oil & Gas Review Board held its hearing

on the objections of TOC on October 22, 1992, but did not issue its Order granting the mandatory pooling request until January 21, 1994.

R.C. §1509.27 sets out the prerequisites for a mandatory pooling order:

> "If a tract of land is of insufficient size or shape to meet the requirements for drilling a well thereon as provided in section 1509.24 or 1509.25 of the Revised Code, whichever is applicable, and the owner has been unable for form a drilling unit under agreement provided in section 1509.26 of the Revised Code, on a just and equitable basis, the owner of such tract may make application to the division of oil and gas for a mandatory pooling order.
>
> Such application shall include such data and information as shall be reasonably required by the chief of the division of oil and gas and shall be accompanied by an application for permit as required by section 1509.05 of the Revised Code. The chief shall notify all owners of land within the area proposed to be included within the order of the filing of such application and of their right to a hearing if requested. After the hearing or after the expiration of thirty days from the date notice of application was mailed to such owners, the chief, if satisfied that the application is proper in form and that mandatory pooling is necessary to protect correlative rights or to provide effective development, use, or conservation of oil and gas, shall issue a drilling permit and a mandatory pooling order complying with the requirements for drilling a well as provided in section 1509.24 or 1509.25 of the Revised Code, whichever is applicable, which shall:
>
> (A) Designate the boundaries of the drilling unit within which the well shall be drilled;
>
> (B) Designate the proposed drilling site;
>
> (C) Describe each separately owned tract or part thereof pooled by the order;
>
> (D) Allocate on a surface acreage basis a pro rata portion of the production to the owner of each tract;
>
> (E) Designate the person to whom the permit shall be issued.

Thus, under the statute, there are two prerequisites to a mandatory pooling order:

> 1. The tract of land must be of insufficient size or shape without including the land sought to be pooled.
>
> 2. The developer must have been unsuccessful in his attempts to get voluntary pooling agreements.

Johnson v. Kell (1993), 89 Ohio App.3d 623.

The evidence presented to the Board through Mr. Craddock indicated that there was another tract of land which TOG had previously leased which would have been a site which was sufficient in size and shape to accommodate the well. This is the McCann property. This should have been the end of the inquiry since the first prerequisite for mandatory pooling was not met.

While the Board in its opinion recognized the fact that the McCann property was sufficient in size and shape, it found that fact to be irrelevant since TOG had already gone to the expense of drilling the well on the Doolittle property. The Board considered the size and shape of the tract of land on which the well had been drilled without the Doolittle property in granting the mandatory pooling order. This is contrary to the statute which requires that the application for mandatory pooling accompany the permit to drill the well. It was not meant to protect those who drill a well improperly. The Board exceeded its authority in attempting to mitigate the damages that TOG would suffer. It also did not consider the adverse effect the use of only three acres of the 13 contained in the Doolittle property would have on Appellants. For that reason alone, it did not protect Appellants' correlative rights in violation of the statute. ***Johnson, 89 Ohio App.3d at 627-28.*** In fairness to TOG, it did not anticipate needing mandatory pooling since it believed it had a valid lease with NCB. It was at the point that the Appellants

questioned the authority of the trustee to execute the lease that the Summit County case had to have been resolved. That court has the only jurisdiction to decide those matters and the Chief and the Board both exceeded their authority in considering the legality of the lease. TOG, absent an injunction against use of the well, could have begun production. There was no need to go to the Chief for a mandatory pooling order since TOG already had existing voluntary leases the invalidity of which had not been shown.

The Chief's testimony at the hearing before the Board was that he believed there was a valid lease in place as executed by the bank.[1] TOG should have operated under that premise and continued drilling or resolved that lawsuit in the Summit County Common Pleas Court. The Chief felt that the prerequisites were not there for mandatory drilling since the lease had been executed for the Doolittle property. The Chief should not have considered the legality of the lease. His only inquiry should have been whether or not there was a lease which made the tract large enough to preclude mandatory pooling. Neither the Board nor this Court has any jurisdiction to decide the legality of the voluntary lease. That issue has to be resolved in Summit County. Thus, the decision of the Chief while correct for the wrong reasons, was correct and the Board was incorrect in granting the mandatory pooling for reasons of good faith.

Since this Court has found that the Board should not have considered good faith, it will not specifically discuss those issues since they are better left for Summit County. This Court does not intend to make issues not before it *res judicata*. Certainly, however, there are issues which the Board did not address which were relevant to any good faith issue.

[1]The Chief's opinion does not state this as his reason for denying the mandatory pooling, but rather states that TOG failed to show that they could not obtain sufficient leases. His order is not clear what he means, but his testimony indicates that his research revealed that the lease with the bank was valid.

The decision of the Oil & Gas Board is **REVERSED.** At the time the mandatory pooling request was made there were leases in effect, valid or not, which provided a tract of land large enough to prohibit the involuntary taking of land. The validity of the lease must be determined in Summit County Common Pleas Court.

If the leases are deemed invalid, there was another tract of land, the McCann property, on which the well could have and should have been drilled. This alone would preclude the mandatory pooling of Appellants' property.

Counsel for Appellants shall prepare and submit an appropriate Judgment Entry reflecting this Decision pursuant to Loc. Rs. 25.01 and 25.02.

John P Bessey

JOHN P. BESSEY, JUDGE

Appearances:

Ronald S. Kopp, Esq.
Scott Salsbury, Esq.
Counsel for Appellant

Kenneth L. Gibson, Esq.
Counsel for Appellants

Daniel H. Plumly, Esq.
Susan Baker, Esq.
Counsel for Appellees

Jeffrey T. Knoll, Esq.
Leonard W. Stauffenger, Esq.
Counsel for Appellants

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

NATIONAL CITY BANK, NE,	:	
	:	
Appellant,	:	
	:	
v.	:	CASE NO. 94CVF-05-3170
	:	
RICHARD J. SIMMERS, ACTING CHIEF, DIVISION OF OIL & GAS, OHIO DEPARTMENT OF NATURAL RESOURCES,	:	JUDGE TRAVIS
	:	
Appellee.	:	

TERMINATION NO. 4
BY MK

Appeal NO 510
Transcontinental
Bruce Doolittle

ENTRY

This is an appeal pursuant to R. C. 119.12, from an order of the Ohio Department of Natural Resources, Division of Oil and Gas. Pursuant to Local Rule 39.01, upon the filing of this appeal, appellant was provided with a copy of the case scheduling order which set forth the briefing schedule and date of submission of this case to the court for decision. Pursuant to the case scheduling order, the record was to be filed on or before June 2, 1994; appellant's brief was due by July 17, 1994; appellee's brief by July 28, 1994; appellant's reply brief, and the date of submission to the court for decision, August 4, 1994.

Appellant failed to file a demand for the record of proceedings. As a result, no record has been filed. No briefs have been filed. Therefore, this appeal is DISMISSED for want of prosecution at appellant's costs.

ALAN C. TRAVIS, JUDGE

Copies to:

Ronald S. Kopp, Esq.
Scott Salsbury, Esq.
Counsel for Appellant

Richard J. Simmers
Acting Chief of the Division of Oil and Gas

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

NATIONAL CITY BANK, NE,	:	
	:	
Appellant,	:	
	:	
v.	:	CASE NO. 94CVF-05-3170
	:	
RICHARD J. SIMMERS, ACTING CHIEF, DIVISION OF OIL & GAS, OHIO DEPARTMENT OF NATURAL RESOURCES,	:	JUDGE TRAVIS
	:	
Appellee.	:	

TERMINATION NO. 4
BY MK

Appeal
510

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SEP -6 AM 11:12

Copies to:

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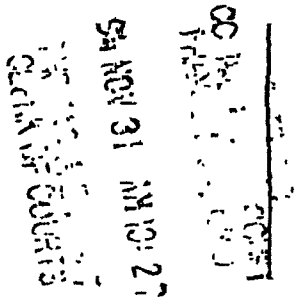
Scott Salsbury, Esq.
Counsel for Appellant

Richard J. Simmers
Acting Chief of the Division of Oil and Gas

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

510

BRUCE DOOLITTLE, et al,	]	
Appellant,	]	
vs.	]	CASE NO. 94CVF02-839
TRANSCONTINENTAL OIL & GAS, INC., et al.	]	JUDGE BESSEY
Appellees.	]	



DECISION

Rendered this 30th day of November, 1994.

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The case file in the within cause contains affidavits, depositions, *ex parte* communications by letter to the Court, and allegations within the briefs which are neither newly discovered nor contained within the record from the Board. To a great extent they pertain to the related case pending in Summit County Common Pleas Court between

Appellants and Intervenors in this case. They complicate the issues in this case unnecessarily. The only issue before this Court is whether the Order of the Oil & Gas Board is lawful and reasonable. *R.C. §1509.37*. For the following reasons this Court has determined that it is not. On September 6, 1994, Intervenor withdrew its appeal.

The property involved is located in Bath Township, Ohio. The portion which the Board ordered to be pooled is 3.067 acres of a 13.48 acre tract which was owned by Gillum H. Doolittle, now deceased. Doolittle died testate leaving the property to his two children and his two grandchildren. Each child (the Appellants herein) was to receive a 1/3 interest and the grandchildren each received a 1/6 interest which was to be held in trust by the trustee National City Bank (NCB). However, the title to the property never passed to the beneficiaries, but rather was listed as still being owned by Doolittle.

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While the Board in its opinion recognized the fact that the McCann property was sufficient in size and shape, it found that fact to be irrelevant since TOG had already gone to the expense of drilling the well on the Doolittle property. The Board considered the size and shape of the tract of land on which the well had been drilled without the Doolittle property in granting the mandatory pooling order. This is contrary to the statute which requires that the application for mandatory pooling accompany the permit to drill the well. It was not meant to protect those who drill a well improperly. The Board exceeded its authority in attempting to mitigate the damages that TOG would suffer. It also did not consider the adverse effect the use of only three acres of the 13 contained in the Doolittle property would have on Appellants. For that reason alone, it did not protect Appellants' correlative rights in violation of the statute. ***Johnson, 89 Ohio App.3d at 627-28.*** In fairness to TOG, it did not anticipate needing mandatory pooling since it believed it had a valid lease with NCB. It was at the point that the Appellants

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The Chief's testimony at the hearing before the Board was that he believed there was a valid lease in place as executed by the bank.[1] TOG should have operated under that premise and continued drilling or resolved that lawsuit in the Summit County Common Pleas Court. The Chief felt that the prerequisites were not there for mandatory drilling since the lease had been executed for the Doolittle property. The Chief should not have considered the legality of the lease. His only inquiry should have been whether or not there was a lease which made the tract large enough to preclude mandatory pooling. Neither the Board nor this Court has any jurisdiction to decide the legality of the voluntary lease. That issue has to be resolved in Summit County. Thus, the decision of the Chief while correct for the wrong reasons, was correct and the Board was incorrect in granting the mandatory pooling for reasons of good faith.

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[1]The Chief's opinion does not state this as his reason for denying the mandatory pooling, but rather states that TOG failed to show that they could not obtain sufficient leases. His order is not clear what he means, but his testimony indicates that his research revealed that the lease with the bank was valid.

The decision of the Oil & Gas Board is **REVERSED.** At the time the mandatory pooling request was made there were leases in effect, valid or not, which provided a tract of land large enough to prohibit the involuntary taking of land. The validity of the lease must be determined in Summit County Common Pleas Court.

If the leases are deemed invalid, there was another tract of land, the McCann property, on which the well could have and should have been drilled. This alone would preclude the mandatory pooling of Appellants' property.

Counsel for Appellants shall prepare and submit an appropriate Judgment Entry reflecting this Decision pursuant to Loc. Rs. 25.01 and 25.02.

John P Bessey

JOHN P. BESSEY, JUDGE

Appearances:

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Counsel for Appellant

Kenneth L. Gibson, Esq.
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Daniel H. Plumly, Esq.
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