

BEFORE THE OIL & GAS COMMISSION

VELMA J. NEUHART, ET AL.,	:	Appeal No. 996
	:	
Appellants,	:	Review of Chief's Order 2021-50
	:	(Gulfport Appalachia, LLC; Brown #9 Unit)
-vs-	:	
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	<u>ORDER OF THE COMMISSION</u>
	:	<u>DISMISSING APPEAL</u>
Appellee,	:	
	:	
and	:	
	:	
GULFPORT APPALACHIA, LLC,	:	
	:	
Intervenor.	:	

Appearances: J. Benjamin Fraifogl, David J. Wigham, & Jeremy D. Martin, Counsel for Appellants; Matthew Meyer, Scott Myers, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; Kevin West, John Ferrell, Melanie Norris, Counsel for Intervenor Gulfport Appalachia, LLC.

On June 10, 2021, Appellants filed a *Motion to Dismiss* Appeal #996 and attached an *Order of The Commission Dismissing Appeal #996 as Moot*.

On May 6, 2021, Gulfport Appalachia, LLC filed a *Petition to Intervene and to File Motion to Dismiss Instantly* in this matter. Gulfport requested its *Motion to Dismiss* be deemed filed on the date its *Petition to Intervene* was granted. Gulfport Appalachia, LLC was granted Intervenor status on June 10, 2021 and its *Motion to Dismiss* was deemed filed with the Commission on the same date.

On December 7, 2021, Appellants' *Motion to Dismiss* and Gulfport Appalachia, LLC's *Motion to Dismiss* came on for oral arguments before the Commission. All parties participated in these arguments and argued for dismissal. Having heard the parties' arguments and having reviewed all filings, the Commission hereby **DISMISSES** appeal #996.

Date Issued: 1/5/2022

Phillip L. Parker CH
PHILLIP L. PARKER, *Secretary*

ANDREW R. THOMAS, *Acting Chairman*

Frank J. Reed CH
FRANK J. REED

Brian M. Chavez CH
BRIAN M. CHAVEZ

CONCURRENCE:

I concur with the decision by this Commission. This appeal must be dismissed because all parties agree it should be, albeit for differing reasons. I would have preferred for the Commission to retain this matter to determine the appropriate royalty rates and non-consent penalties set forth in an amended order resulting from reclassification of property in the unit. The Division should consider carefully the effects of applying its standard royalty and penalty provision to properties that are forced into a unit later because the operator mistakenly listed the property as leased in its original application.

The Appellants in this case were improperly listed as "leased" by Gulfport in its original unit application. Appellants contested the validity of the lease in a court of law, and ultimately prevailed (the trial court has yet to determine damages). The Division thereafter amended its order to list the Appellants as being forced into the unit by statute. In so doing, the Division granted the Appellants a 1/8 royalty interest plus a working interest in the unit equal to the Appellants' pro rata contribution to unit production, the latter being first subject to a recoupment by the operator of 200% of drilling and operating costs.

All parties agree that damages for Gulfport having produced and sold Appellants' natural gas without first properly making it part of the unit should be determined by a court of law, and not by the Division. The dispute between the Appellants and Gulfport relates to the effects of the Amended Order, if any, on the damages before the trial court.

The Appellants would like the Commission to dismiss this appeal, but in so doing, make clear that the penalties and royalties in the Amended Order may only apply to oil and gas produced *after* the Amended Order. The Division agrees that its Amended Order can only be prospectively applied, but has not requested that the Commission confirm this in dismissing the appeal. Gulfport also seeks dismissal of the appeal, but disagrees with the view that the Amended Order may only apply prospectively, and opposes the Appellants' request that the Commission confirm this principle in its dismissal.

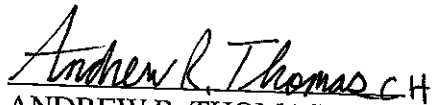
The reason why all of this matters is that Appellants expect that Gulfport will argue to the trial court that the Amended Order must be applied retroactively, and damages must therefore be limited to a 1/8th royalty on the sale of Appellants' share of hydrocarbons produced. Appellants presumably plan to argue at trial that Gulfport should disgorge a full 8/8ths of the value derived from the property through the date of the Amended Order based upon common law theories of trespass.

I agree with the Division and the Appellants that the Division has no authority to apply the Amended Order retroactively. A property cannot, as a matter of law, be retroactively placed into a unit. However, I would have preferred that the Commission retain this matter to consider the Division's policy of applying its standard royalty and penalties to prospective production allocable to properties not listed properly in the original application.

If the Division places penalties on the working interests of forced landowners that are not properly listed in the original application, it incentivizes predatory behavior by landmen and operators. Already, too many operators fail to plug old wells that are no longer commercially viable to maintain tenuous held-by-production claims on old leases, creating a massive environmental problem. But more importantly to landowners, when operators fail to plug their wells or release expired leases, landmen can use this to strong arm landowners during lease negotiations. Landowners in Ohio are all-too-familiar with this tactic: "if you don't sign this new lease, the operator will list you in its unit as leased, you will get no bonus, you will be tied up in litigation for years, and you will get nothing in the end but a 1/8th royalty."

Nor should the Division be asked to assess, upon amending its original order, whether the failure to properly list the landowner as forced was in good or bad faith. The operator is in the best position to know the validity of its leases, and should bear the risk of improperly including disputed leases. If there is no risk for improperly listing landowners as leased, aggressive land companies will be incentivized to peddle tainted leases to operators, held by spurious claims of commercial production, in a conspiracy to cheat landowners out of bonus money and royalties.

Accordingly, while I concur with the decision of the Commission to dismiss this appeal, I regret we do not have an opportunity to consider the implications of applying standard royalties and penalties for acreage forced into a unit through an amended order. The Division, however, should consider its practices in this regard. It should develop and adopt policies that promote fair lease negotiations as well as the timely plugging of noncommercial wells.


ANDREW R. THOMAS, *Acting Chairman*

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Common Pleas for Franklin County, within thirty days of your receipt of this decision, in accordance with Ohio Revised Code §1509.37.

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