BEFORE THE
OIL & GAS COMMISSION

JOHN & ARLENE WEHR, Appellants, -vs- DIVISION OF OIL & GAS RESOURCES MANAGEMENT, Appellee, and GULFPORT ENERGY CORPORATION, Intervenor.	:	Appeal No. 947 Review of Chief's Order 2014-471 (Gulfport Energy Corporation.; Brown #9 Unit) **ORDER OF THE COMMISSION GRANTING MOTION TO DISMISS**

Appearances: Kyle S. Witucky, Brent A. Stubbins, Grant J. Stubbins, Counsel for Appellants John & Arlene Wehr; Gerald Dailey, Scott Meyers, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; John Kevin West, Counsel for Intervenor Gulfport Energy Corporation.

On August 23, 2017, Appellants John & Arlene Wehr [the "Appellants"] filed with the Oil & Gas Commission, a ***Notice of Appeal*** from Chief's Order 2014-471 [the "unitization order"]. This order approved an application for the creation of a statutory unit known as the Brown #9 Unit. The application for unitization was sought by Gulfport Energy Corporation ["Gulfport"]. Gulfport has been **granted** intervenor status in this appeal.

BACKGROUND

This matter now comes before the Commission pursuant to a ***Motion to Dismiss*** filed by the Appellee Division on August 31, 2018, a Motion for ***Summary Judgment*** filed by the Appellants on September 7, 2018, and a ***Cross-Motion for Summary Judgment*** filed by the Division on September 26, 2018. The Commission received replies and responses to these Motions from Appellants and the Division.

On October 22, 2018, the Commission heard oral arguments on these motions. On June 5, 2019, Intervenor Gulfport filed its responses to the pending motions in support of the Division.

An evidentiary hearing has not been conducted in this appeal. However, certain factual matters are contained within the pleadings and other filings of the parties. The following facts will aid in a full understanding of the issues presented and do not appear to be in dispute:

The Appellants own three tracts of land, totaling approximately 52 acres, which tracts are situated in Noble County, Ohio. Some, or all, of the Appellants' oil & gas rights associated with these 52 acres were initially leased to Trans-Atlantic Energy Corporation in 1989. The 1989 lease provided in part:

> The Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form an oil and gas development unit of not more than 40 acres, or such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon.

The 1989 lease between the Appellants and Trans-Atlantic Energy Corporation was later assigned to Gulfport.

On or about March 28, 2014, Gulfport filed an application for unitization with the

Division. Through this application, Gulfport sought the Division's approval of a 619-acre unit, to be known as the Brown #9 Unit.[1] If approved, the Brown #9 Unit would join the oil & gas rights associated with sixteen separate tracts of land located in Belmont and Noble Counties into a single drilling unit. On the Brown #9 Unit, Gulfport proposed to drill three horizontal wells from a single pad.

Gulfport included the Appellants' oil & gas rights as part of the proposed Brown #9 Unit, identifying the Appellants as voluntary lessors. Some of the leases that Gulfport proposed to include in the Brown #9 Unit contained "size restrictions." The Appellants' lease contained a 40-acre restriction and the Commission is aware that at least one other lease had a 40-acre restriction.[2] In its application for unitization of the Brown #9 Unit, Gulfport presented the Appellant property as being under a valid lease, and made no mention of any size restrictions.

In considering the Brown #9 Unit, both Gulfport and the Division seemed to divide the 16 tracts into two "piles". First, there were unleased tracts, of which there were two, totaling 12.5 acres.[3] Second, there were leased tracts, of which there were fourteen, totaling 607 acres. But, of the 607 leased acres, at least 110 acres had size restrictions in their lease language. By the time the application for unitization was filed, it appears the Appellants were simply considered voluntary lessors by the Division and Gulfport.

In accordance with the requirements of O.R.C. §1509.28, on May 14, 2014, the Division conducted a public hearing upon Gulfport's application for unitization. Having learned of the public hearing through notice published in a local newspaper, the Appellants attended the May 14, 2014 public hearing and made a statement upon the Record. It appears that the Appellants contested the inclusion of their mineral interests in the 619-acre Brown #9 Unit, because of the language in their 1989 lease which attempts to limit unit size.

On October 17, 2014, the Division issued Unitization Order 2014-471. This

[1] The actual size of the Brown #9 Unit is 618.856 acres.

[2] LL&B filed an appeal regarding this unit in November 2014. In appeal #894, LL&B made similar arguments to those made by Wehr. But, Gulfport & LL&B resolved their differences which resulting in LL&B withdrawing their appeal.

Unitization Order approved Gulfport's application to operate the Brown #9 Unit as a statutory unit under O.R.C. §1509.28. The mineral interests covered by the Appellants' 1989 lease were included as part of the Brown #9 Unit, without acknowledgement of any language within the 1989 lease that could be construed as restricting the inclusion of the Appellants' mineral interest in a unit of greater than 40 acres.

Unitization Order 2014-471 contains the following language under Section 9, item (j):

> (j) Gulfport shall notify the Division if a tract that is leased by Gulfport, or any other working interest owner, for the purposes of operating the Brown #9 Unit becomes an unleased tract. If Gulfport or the working interest owner is unable to enter into lease agreement for the unleased tract, Gulfport must submit a request to the Division for an amendment of this Order, which will include a new hearing before the Chief.

(Chief's Order 2014-471, page 6 of 8.)

Unitization Order 2014-471 was issued via Certified Mail to Gulfport Energy Corporation. The Unitization Order included instructions for filing an appeal to the Oil & Gas Commission, and specifically noted that an appeal would need to be filed "within thirty (30) days after receipt of this Order."

There is no indication on the face of Unitization Order 2014-471 that this order was mailed to John & Arlene Wehr. There is also no indication on the face of Unitization Order 2014-471 that this order was mailed to any other mineral interest owners – leased or unleased – whose interests were being included as part of the Brown #9 Unit. However, the Appellants may have received a copy of Unitization Order in the Fall of 2014.[4]

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[3] Ultimately, one of the unleased mineral owners voluntarily entered into a lease.

[4] On January 5, 2017, Gulfport conducted a deposition of John Wehr. During this deposition, the following exchange occurred:

> **Question by attorney for Gulfport: Okay. And I think that date of – I mean, the hearing was in May, it says that order, I think, is October the 17th of 2014, which I guess was five or so months after the hearing. Do you think you received the order sometime near the October time frame when it was entered?**
>
> **Answer by John Wehr: Yes, I would say it was around that time.**

On May 10, 2017, the Division submitted a copy of the Wehr deposition to the Oil & Gas Commission. This deposition was submitted

On February 3, 2016, John & Arlene Wehr filed a ***Notice of Appeal*** from Unitization Order 2014-471 with the Oil & Gas Commission.[5] In their appeal, the Appellants argue that the Division's inclusion of their oil & gas interests in Gulfport's 619-acre Brown #9 Unit was unlawful or unreasonable because it violated the 40-acre unit restriction in their 1989 lease.[6] Gulfport was **granted** intervenor status in this appeal.

In May of 2016, both the Division and Gulfport filed ***Motions to Dismiss*** the Appellants' appeal with the Commission. Among the grounds for dismissal, both the Division and

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in support of the Division's ***Motion for Summary Judgment.***

[5] On July 22, 2015, prior to filing its appeal with the Oil & Gas Commission, the Wehrs filed an action against Gulfport in the Noble County Court of Common Pleas, seeking declaratory judgment and damages. The Wehrs alleged that, by joining their acreage to other acreage and creating a 619-acre drilling unit, Gulfport has violated the 40-acre size restriction contained in the Wehrs' 1989 lease.

In the Noble County Court of Common Pleas, Gulfport moved to dismiss the Wehrs' complaint, arguing, among other things, that the complaint should be dismissed because any appeal involving the Unitization Order was required to be filed with the Oil & Gas Commission. The Noble County Common Pleas Court agreed that any challenge to an Order of the Chief had to be presented to the Commission, and remanded the case instructing the Wehrs to file their challenge with the Commission.

On January 8, 2016, the Noble County Court issued a ***Journal Entry*** stating in part:

> Plaintiffs [the Wehrs] are granted leave to file an amended complaint on or before January 19, 2016, for the sole purpose of naming the Chief of the Division as a party to these proceedings.
>
> Upon the filing of said amended complaint, and since it is conceded that Plaintiffs never received a copy of the Chief's order dated [on] or about October 17, 2014, Plaintiffs will be granted leave to appeal that October 17, 2014 order, within 30 days of filing said amended complaint.

The Wehrs' appeal to the Commission was filed within 30 days of the date on which the Wehrs filed its amended complaint with the Noble County Court of Common Pleas. It is the Commission's understanding that the action in Noble County is currently **stayed** as that court awaits the Commission's action in the immediate appeal.

[6] Gulfport argues that the lease language allows it to include the Wehrs' acreage in a unit that is larger than 40 acres if required by law or regulation to do so. Thus, there is a dispute as to the meaning of the language contained in the Wehrs' 1989 lease, including whether asking for and receiving a unit order that is greater than 40 acres is the same as being "required by law." In the past, this Commission has held that it is not authorized to adjudicate issues of property rights. See *Bruce Doolittle vs. Transcontinental Oil & Gas, Inc.*, Franklin C.P., #94CVF02-839 (11/30/1994); *Keith J. Kerns, et al. vs. Division*, #910 (07/07/16, granting motion to dismiss); *Clarence Tussel, Jr., et al, vs. Division & Kastle Resources Enterprises*, #818 (07/16/2010, ruling upon a motion in *limine*); *Bass Energy vs. Division and Duck Creek Energy*, # 815 (01/29/2010).

Gulfport alleged that the Appellants' appeal to the Commission was untimely. On November 7, 2016, the Commission **issued** an ***Order Denying Motions to Dismiss Appeal***, indicating that this matter would proceed to hearing. Appeal #912 was subsequently dismissed by the Commission by Order dated June 15, 2017, since the Division failed to serve a certified copy of the Order on Appellants after it was initially issued on October 17, 2014. The Division and Gulfport appealed the Commission's decision to the Franklin County Court of Common Pleas. On November 6, 2017, that court affirmed the Commission's decision. On December 27, 2018, the 10th District Court of Appeals also affirmed the Commission's finding that the Division should re-serve the unitization order to all persons in the unit. *See Wehr v. Div. of Oil & Gas Resources Mgt.*, 2018-Ohio-5247. The Order was finally served on Appellants by the Division via certified mail on or about August 16, 2017.

On August 23, 2017, Appellants filed a ***Notice of Appeal*** from Unitization Order 2014-471 with the Oil & Gas Commission. Appellants contend that the Unitization Order is unlawful or unreasonable and ask that the Commission reverse its Order and deny the unitization application, or amend the order to conform to the Unit size limitation contained in the lease under which Gulfport claims rights as lessee. Appellant's grounds for appeal include the following allegations:

> Gulfport made a material misrepresentation in its unitization Application by indicating that it held Working Interest Owner rights through its lease with Appellants allowing it to request a 618.856 acre unitization, when it clearly did not. Appellants believe that other leases included contained similar unit size limitations, including one with LL&B Headwater II, L.P. Such misrepresentations should invalidate the Application.
>
> The Division of Oil and Gas Resources Management Chief has no authority under ORC §1509.28 or any other statute to amend terms of an existing lease.
>
> The application by the Division of the concept of "pool", as to a resources underlying a significant portion of the State of Ohio, does not comply with terms and definitions contained in ORC §1509.28 (A) and ORC §1509.01 (E) and/or does not apply to a Utica Shale formation.
>
> By overriding Appellants' lease unit size limitation, the Division caused a transfer of property rights in violation of ORC §1509.28

(B)(2).

The overriding of the lease unit size limitation by the Division constitutes an unconstitutional taking of private property and private property rights without due process, in violation of state and federal constitutional provisions.

The Chief's Order issued pursuant to ORC §1509.28 applies only to unleased property owners and not to leased owners such as Appellants.

Gulfport made a material misrepresentation in it unitization application by failing to provide notice to Appellants as a leased owner of its intent to utilize ORC §1509.28 to modify its prior contractual obligations with Appellants to limit unitization to 40 acres per the lease terms.

The Chief's Order as it applies to Appellants' 40-acre unitization lease provision was unreasonable and/or unlawful.

RULING UPON THE MOTION TO DISMISS

O.R.C. §1509.28 allows the Division to join separate mineral interests, for the purpose of creating a drilling unit that will produce from an identified pool or from a portion of an identified pool. In attempting to establish such unit operations, there may be properties for which the operator could not successfully negotiate voluntary leases. Where such unleased properties exist, the operator may apply to the Chief for "forced" unitization under O.R.C. §1509.28.

To apply for such unitization, the applicant must own the mineral rights to at least 65% of the land overlying the proposed pool. Also, in reviewing the application, the Division Chief must affirmatively find that:

> * * * [s]uch operation is reasonably necessary to increase substantially the ultimate recovery of oil and gas, and the value of estimated additional recovery of oil or gas exceed the estimated additional cost incident to conducting the operation.

(See O.R.C. §1509.28(A).) If these conditions are met, the Chief shall make an order providing for the

unit operation of a pool, which may include unleased mineral interest.

A Chief's order authorizing unit operations must be based upon terms and conditions that are "just and reasonable." *(See O.R.C. §1509.28(A).)* The terms and conditions of a Unitization Order may include provisions for items such as royalty payments, or working interest payments, to unleased mineral owners. In this case, Unitization Order 2014-471 ultimately brought one unleased property into the Brown #9 Unit, setting forth terms and conditions applicable to the owners of the unleased minerals for this tract.[7]

In applying for statutory unitization, an applicant must set forth the relevant status of the mineral owners' interests included within the unit. Here, the Appellant's mineral interests were identified by Gulfport as "leased," based upon the existence of the 1989 lease and despite the lease unit size limitation.

Unitization Order 2014-471 addressed the mineral interests that the Appellants, or their predecessors, had leased to Trans-Atlantic Energy Corporation in 1989, which were later assigned to Gulfport. The mineral interests associated with these 52 acres were included in the Brown #9 Unit under the authority of Unitization Order 2014-471, without acknowledgment of any language within the 1989 lease that could be construed as restricting the inclusion of the Appellant's mineral interests in a unit of greater than 40 acres. The Order included specific provisions for unleased mineral owners, but is particularly devoid of any language addressing existing non-conforming leases.

Through the immediate appeal, the Appellants ask the Commission to reverse and vacate Unitization Order 2014-471. Primarily, the Appellants argue that the Chief's approval of Gulfport's application for unitization establishes unit operations without proper consideration of the Appellants' individual property rights. Appellants further contend that the Chief's order results in an

[7] On September 18, 2014, Gulfport notified the Division that it had reached voluntary lease agreements with the owners of one of the unleased tracts. Therefore, the mineral interest owners of that tract were no longer considered unleased mineral owners.

improper and unconstitutional "taking" of the Appellants' property.

The Oil & Gas Commission is a creature of statute, created under Chapter 1509 of the Ohio Revised Code. *See Keith Kerns, et al. v. Division,* (Oil & Gas Commission, #910; July 7, 2016) ; *Bass Energy v. Division and Duck Creek Energy,* (Oil & Gas Commission, #815; Jan. 29, 2010); *City of Munroe Falls v. Division and D & L Energy,* (Oil & Gas Commission, #793; Aug. 7, 2008). As a creature of statute, the Commission possesses only those powers which have been expressly conferred by the General Assembly or which are necessarily implied. *See Chesapeake Exploration v. Oil & Gas Commission* (2011) 135 Ohio St.3d 204, *quoting Delaney v. Testa,* 128 Ohio St. 3d 248, 2011-Ohio-550. Thus, the authority and jurisdiction of this Commission is both defined and limited by the express provisions of Revised Code Chapter 1509.

Questions regarding the validity of leases, as well as questions regarding other property rights disputes, are beyond the regulatory authority of the Division Chief. *See Bruce Doolittle vs. Transcontinental Oil & Gas, Inc.*, (Franklin C.P., #94CVF02-839; Nov. 30, 1994). Because these issues are beyond the Chief's regulatory authority, such issues are likewise beyond the jurisdiction of this Commission when reviewing the actions of the Chief. *Id.*

This Commission is not authorized to adjudicate property rights. *See Clarence Tussel, Jr., et al., v. Division and Kastle Resources Enterprises,* (Oil & Gas Commission, #818; July 16, 2010, ruling upon a motion in *limine); Bass Energy v. Division and Duck Creek Energy, supra.*

In this appeal, the 52 non-conforming acres at issue are, in fact, subject to leases. Since leases for the 52 acres **do** exist, these acres cannot be classified as **unleased** mineral interests. Unleased mineral owners are fundamentally different from **leased, but non-participating,** and are treated distinctly under the terms and conditions of the Unitization Order.

A lease is the essential instrument that sets forth the rights and remedies of involved parties:

> The rights and remedies of the parties to an oil and gas lease must be determined by the terms of the written instrument. Such leases are contracts and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties.

See Harris v. Ohio Oil Co. (1897) 57 Ohio St. 118; *Snyder v. Ohio Department of Natural Resources*, 2014 Ohio 392.

The Appellants may have concerns relating to the 1989 lease. But, these questions cannot be addressed by the Division or decided by the Commission. Only a court of competent jurisdiction can adjudicate property rights, can evaluate the validity of lease, or can determine the subsurface legal relationship between parties.

It is also well-settled law in Ohio that administrative agencies and tribunals may not decide constitutional questions. *See Mobile Oil Corp. v. City of Rocky River* (1974) 38 Ohio St.2d 23; State, *ex rel. Park Investment Co. vs. Board of Tax Appeals* (1972) 32 Ohio St.2d 28.

Thus, any contention by the Appellants that O.R.C. §1509.28, or the Chief's application of O.R.C. §1509.28 to the immediate facts, infringes upon the Appellants' constitutionally protected rights must also be taken up before a court of competent jurisdiction, and simply cannot be determined by this Commission. *See Bass Energy, Inc. v. Division & Duck Creek Energy, Inc., supra*; *Clewell Family Farm, LLC v. Division*, #862 (July 1, 2014, ruling on order on partial summary judgment).

Frankly, both the Parties appear to acknowledge the jurisdictional limitations of this Commission with regards to property rights and constitutional questions. As evidence of that point, the parties are currently engaged in a lawsuit involving similar issues in Noble County. *John P. Wehr, et al. v. Gulfport Energy Corp*, et al, case no. CV215-0068 To decide the merits of this appeal, the Commission would be required to evaluate whether the efforts of Gulfport to create the Brown #9 Unit, and the Division's approval of that unit, renders the 1989 lease invalid, changing Appellants from a "leased" to an "unleased" mineral owner. This question requires consideration of the property rights held by Appellants and Gulfport. The Commission's jurisdiction does not allow such inquiry.

Significantly, O.R.C. §1509.36 anticipates that some issues attendant to the regulation of oil & gas operations may be more appropriately reviewed by the courts in the first instance. Thus, the jurisdiction of the Commission under O.R.C. §1509.36 is not exclusive, and O.R.C. §1509.36 expressly provides:

> Sections 1509.01 to 1509.37 of the Revised Code, providing for appeals relating to orders by the chief or by the commission, or relating to rules adopted by the chief, do not constitute the exclusive procedure that any person who believes the person's rights to be unlawfully affected by those section or any official action taken thereunder must pursue in order to protect and preserve those rights, nor do those section constitute a procedure that that person must pursue before that person may lawfully appeal to the courts to protect and preserve those rights.

See State ex rel. Fisher v. Nacelle Land & Mgt. Corp. 90 Ohio App.3d 93 (11th Dist., 1993).

Given the fact that this appeal must be dismissed based upon the Commission's lack of jurisdiction to consider property rights issues, the Commission need not reach the question of whether the Appellant's property should be listed as "leased" or "unleased." Moreover, the Commission need not evaluate whether the Division's issuance of Unitization Order 2014-471, without specific permission from Appellants, violated the express or implied terms of the 1989 lease.

Notably, Appellants are not prejudiced by this dismissal. Should the Ohio courts ultimately determine that the terms of the 1989 lease have been violated and that the lease must be cancelled, then the provisions of section 9(j) of Unitization Order 2014-471 apply. Pursuant to section 9(j), Gulfport would be required to advise the Division that the Appellant's mineral rights have been rendered "unleased."

This change in the status of these mineral rights would re-open the application process involving the Brown #9 Unit. Gulfport would be expected to attempt to obtain a voluntary lease from Appellants, and, if that failed, Gulfport would be required to submit a request to the Division for an amendment of Unitization Order 2014-471. It is the Division's position that the application would essentially start anew. Indeed section 9(j) specifically requires that a second hearing upon the Brown #9 Unit application would be conducted by the Chief.

Moreover, any changes to the Unitization Order that reallocate funds realized from the sale of hydrocarbons can be accounted for retroactivity, in the event that production begins

before this matter is finally decided, should this Commission decision be appealed into the courts.

The Division represents that, to date, it has not had to respond to applications that have, either in good faith or bad, improperly listed unleased properties as leased. The Division accepts the representation of the applicant as to the status of such mineral interests, without looking into the merits or veracity of the applicant's claims. Like the Commission, the Division has no jurisdiction to determine whether mineral rights are, or are not, validly leased. This scenario, however, raises some critical issues to consider if, and when, a unitization matter is reopened based upon a change in the "leased" versus "unleased" status of unitized properties. It is incumbent upon the Division to make clear the ramifications for operators who improperly list unleased property as leased.

ORDER

FOR GOOD CAUSE SHOWN, and based upon the forgoing, the Commission **FINDS** the Division's ***Motion to Dismiss*** well-taken and hereby **DISMISES** appeal #947. The dismissal of this matter renders the pending ***Motions for Summary Judgment*** **moot.**

Date Issued: 12/11/19

J. BRANDON DAVIS, *Chairman*

RECUSED
BLAKE T. ARTHUR, *Vice Chairman*

ANDREW T. THOMAS, *Secretary*

PHILLIP L. PARKER

JEFFREY E. FORT

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.

DISTRIBUTION:

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