

BEFORE THE OIL & GAS COMMISSION

JOHN & ARLENE WEHR,	:	
	:	Appeal No. 912
Appellants,	:	
	:	
-vs-	:	Review of Chief's Order 2014-471
	:	(Gulfport Energy Corporation; Brown #9 Unit)
DIVISION OF OIL & GAS RESOURCES MANAGEMENT,	:	
	:	
Appellee,	:	<u>ORDER OF THE COMMISSION</u>
	:	<u>DISMISSING APPEAL FOR</u>
and	:	<u>LACK OF STATUTORY</u>
	:	<u>AUTHORITY TO ACT</u>
GULFPORT ENERGY CORPORATION,	:	
	:	
Intervenor.	:	

Appearances: Mark W. Stubbins, Kyle S. Witucky, Counsel for Appellants John & Arlene Wehr; Brian Becker, Gerald Dailey, Assistant Attorneys General, Counsel for Appellee Division of Oil & Gas Resources Management; John Kevin West, Zachary M. Simpson, Counsel for Intervenor Gulfport Energy Corporation.

Background

On February 3, 2016, Appellants John & Arlene Wehr [the "Wehrs"] filed with the Oil & Gas Commission, a *Notice of Appeal* from Chief's Order 2014-471. Through Order 2014-471, and pursuant to O.R.C. §1509.28, the Division of Oil & Gas Resources Management ["the Division"] approved the creation of a statutory unit known as the Brown #9 Unit.¹ The application for this unit was sought by Gulfport Energy Corporation ["Gulfport"]. Gulfport has been **granted** intervenor status in this appeal.

¹ O.R.C. §1509.28 addresses unitizations in the state of Ohio, and requires that unitization orders issued by the Division Chief be made upon terms and conditions that are just and reasonable.

Factual Background²

The Wehrs own three tracts of land, totaling approximately 52 acres, which tracts are situated in Noble County, Ohio. Some, or all, of the Wehrs' oil & gas rights associated with these 52 acres were 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 Wehrs and Trans-Atlantic Energy Corporation was later assigned to Gulfport Energy.

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.³ 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. Gulfport proposed to drill three horizontal wells from a single pad on the Brown #9 Unit.

Gulfport included the Wehrs' oil & gas rights as part of the proposed Brown #9 Unit, identifying the Wehrs as voluntary lessors.

² As no merit hearing has yet been conducted in this matter, factual information is taken from the pleadings and from the filings of the parties.

³ The actual size of the Brown #9 Unit is 618.856 acres.

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 Wehrs attended the May 14, 2014 public hearing and made a statement upon the Record. It appears that the Wehrs 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 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 Wehrs' 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 Wehrs' mineral interests in a unit of greater than 40 acres.

Unitization Order 2014-471 was issued via certified mail to Gulfport Energy. 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 whose interests were being included as part of the Brown #9 Unit. However, the Wehrs may have received a copy of Unitization Order 2014-471 during the Fall of 2014.⁴

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 John Wehr's deposition to the Oil & Gas Commission. This deposition was submitted in support of the Division's *Motion for Summary Judgment*.

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 Wehrs assert 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 has been **granted** intervenor status in this appeal.

In May of 2016, both the Division and Gulfport filed *Motions to Dismiss* the Wehrs' appeal before the Commission. Among the grounds for dismissal, both the Division and Gulfport alleged that the Wehrs' appeal to the Commission was untimely.

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 had 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. The Court instructed 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 thirty days of the date on which the Wehrs filed an 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 is awaiting 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 unitization order encompassing more 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 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 & Duck Creek Energy*, #815 (01/29/2010).

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 scheduled for merit hearing on August 24, 2017.

On April 27, 2017 and May 10, 2017, Gulfport and the Division, respectively, filed *Motions for Summary Judgment* with the Commission. Mentioned in Gulfport's *Motion for Summary Judgment*, and attached to the Division's *Motion for Summary Judgment*, was the January 5, 2017 deposition of John Wehr. During this deposition, Mr. Wehr indicated that he may have obtained a copy of Unitization Order 2014-471 during the Fall of 2014 (see footnote #4).⁷

DISCUSSION

Unitization Orders are issued by the Division Chief upon application of an oil & gas operator. Such orders allow an operator to join separately-owned oil & gas interests, in order to form a single drilling unit for the development of oil & gas resources. A statutory unit, created pursuant to O.R.C. §1509.28, may include both leased and unleased mineral rights.

⁷On May 16, 2017, Gulfport also filed a *Petition for Writ of Prohibition* against the Commission and the Commission's individual members. This original action was filed in the 10th District Court of Appeals (#17AP358). In the prohibition action, Gulfport argues that the Commission lacks jurisdiction in appeal #912, and asks the Court to prevent the Commission from proceeding in appeal #912.

On May 22, 2017, Gulfport filed a *Motion for Immediate Stay* in the prohibition action. The Commission opposed the stay. On June 6, 2017, the Court issued a *Magistrate's Order*, which concluded:

A tribunal having general subject-matter jurisdiction in a case will always possess the inherent authority to determine its own jurisdiction and rule on challenges thereto. *State ex rel. Rootstown Local School Dist. Bd. of Edn. vs. Portage Cty. Court of Common Pleas*, 78 Ohio St.3d 489 (1997). Based upon application of this principle, the magistrate denies the motion for stay.

Therefore, the Commission may consider the pending *Motions for Summary Judgment*, and may determine its own jurisdiction in this matter.

O.R.C. §1509.28 requires the Division Chief to conduct a hearing upon an application for unitization:

The chief of the division of oil and gas resources management, upon the chief's own motion or upon application by the owners of sixty-five per cent of the land area overlying the pool, shall hold a hearing to consider the need for the operation as a unit of an entire pool or part thereof. ...

Following an application hearing, the Division Chief will issue an order creating a statutory unit, upon certain findings:

The chief shall make an order providing for the unit operation of a pool or part thereof if the chief finds that such operation is reasonably necessary to increase substantially the ultimate recovery of oil and gas, and the value of the estimated additional recovery of oil or gas exceeds the estimated additional cost incident to conducting the operations. The order shall be upon terms and conditions that are just and reasonable and shall prescribe a plan for unit operations

See O.R.C. §1509.28.

O.R.C. §1509.28 does not set forth a specific method by which the Chief must issue a Unitization Order. However, O.R.C. §1509.03(D) addresses the Division Chief's general authority to issue orders, and provides:

The chief may issue orders to enforce this chapter, rules adopted thereunder, and terms or conditions of permits issued thereunder. Any such order shall be considered an adjudication order for the purposes of Chapter 119. of the Revised Code. No person shall violate any order of the chief issued under this chapter. No person shall violate a term or condition of a permit or registration certificate issued under this chapter.

Under O.R.C. §119.09, adjudication orders that result from agency hearings are to be issued in the following manner:

After such order is entered on its journal, the agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be mailed to the attorneys or other representatives of record representing the party.

Orders issued by the Division Chief may be appealed to the Oil & Gas Commission pursuant to O.R.C. §1509.36, which provides *inter alia*:

Any person adversely affected by an order by the chief of the division of oil and gas resources management may appeal to the oil and gas commission for an order vacating or modifying the order.

The person so appealing to the commission shall be known as appellant and the chief shall be known as appellee. Appellant and appellee shall be deemed to be parties to the appeal.

The appeal shall be in writing and shall set forth the order complained of and the grounds upon which the appeal is based. The appeal shall be **filed** with the commission **within thirty days after the date upon which the appellant received notice by certified mail** and, for all other persons adversely affected by the order, within thirty days after the date of the order complained of. Notice of the filing of the appeal shall be filed with the chief within three days after the appeal is filed with the commission.

(Emphasis added.)

In their *Motions for Summary Judgment*, the Division and Gulfport advocate for strict adherence to the procedural requirements for filing an appeal with the Oil & Gas Commission. Specifically, both argue that the Wehrs have "missed" the thirty-day deadline for filing an appeal of Unitization Order 2014-471 with the Oil & Gas Commission.

This Commission has held in previous appeals that, where a statute confers the right of appeal, adherence to the conditions imposed thereby is essential to the enjoyment of that right. *American Restaurant and Lunch Co. vs. Glander*, 147 Ohio St. 147 (1946); see also *Kellough v. Ohio State Board of Education*, 10th Dist. Franklin No. 10AP-419, 2011-Ohio-431, P 43.

The Commission has viewed filing deadlines for notices of appeal as mandatory and jurisdictional, and has dismissed appeals based upon an appellant's failure to file within the statutorily-mandated thirty-day period. See: *Stephen J. Svetlak, LLC vs. Division*, appeal #896 (November 12, 2015); *Thomas & Belle Blair vs. Division*, appeal #791 (November 6, 2008); *Hall & Horning vs. Division & Alan H. Coogan, et al.*, appeal #787 (October 31, 2008).

Indeed, acknowledging the strict standards for filing appeals, this Commission has dismissed untimely appeals brought by unrepresented appellants, who were likely unfamiliar with the procedures employed in administrative appeals. See: *Andrew & Kristi Stalker vs. Division & Chesapeake Exploration, LLC*, appeal #844 (January 9, 2013); *James & Mary Riordan vs. Division*, appeal #703 (January 18, 2002); *Calvin & Paula Adkins vs. Division*, appeal #631 (February 25, 1998); *John & Gladys Spillman vs. Division*, appeal # 604 (May 12, 1997); *Beverly Jo Dobbins Williams vs. Division*, appeal #528 (April 26, 1994); *Charles & Loretta Mertens vs. Division*, appeal #494 (July 16, 1992);

If this Commission is to strictly apply the filing requirements to appellants, it is equally important that this Commission require that the appellee Division strictly comply with the legal requirements imposed upon an agency relative to its issuance of appealable orders. *Hughes vs. Ohio Department of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877.

The thirty-day period for appealing to the Oil & Gas Commission is triggered under O.R.C. §1509.36 by the Division's issuance, via certified mail, of an order to the appellant:

The appeal shall be filed with the commission within thirty days after the date upon which the **appellant received notice by certified mail ... of the order complained of.**

In appeal #912, John & Arlene Wehr are the "appellants." However, it has not been established that the Division ever delivered Unitization Order 2014-471 to the Wehrs via certified mail. Significantly, neither the Division nor Gulfport has established that the Wehrs do not qualify as "appellants" under O.R.C. §1509.36 or under the Commission's procedural rules.⁸

Moreover, there is no question but that the Division was required to serve the Wehrs with a copy of the Unitization Order. O.R.C. §119.09 requires that an "agency shall serve by certified mail, return receipt requested, upon the party affected thereby, a certified copy of the order and a statement of the time and method by which an appeal may be perfected." Unitization Order 2014-471 sets forth the division of interests, or "unit participation," for each separately-owned tract in the Brown #9 Unit. Thus, all members of this unit, regardless of whether they have voluntarily leased their interests or not, are "affected" by the Unitization Order, and must - as such - be served with the order.

In determining the timeliness of an appeal, there are two critical dates: (1) the date on which the underlying appealable order was properly issued, and (2) the date on which the appellant filed its notice of appeal. The appeal period cannot be triggered unless, and until, an appealable order is properly issued. *American Water Management Services, LLC vs. Division of Oil & Gas Resources Management*, No. 16AP-4 (10th District Court of Appeals, Franklin County; May 5, 2016).⁹

⁸ O.R.C. §1509.36 provides an appeal to "any person adversely affected by an order" of the Division Chief, and defines an appellant as "the person so appealing to the Commission."

Commission Rule O.A.C. §1509-1-02(B) provides the following definition:

"Appellant" means a person, claiming to be aggrieved or adversely affected by an order of the chief of the division of oil and gas resources management, who is applying or petitioning for review or relief, and who is requesting a hearing before the commission.

⁹ In the *American Water Management Services* case, the 10th District Court of Appeals found that a decision issued by this Commission did not properly trigger the thirty-day period for appealing a Commission decision to the Franklin County Court of Common Pleas. See O.R.C. §1509.37. In *American Water Management Services*, the Oil & Gas Commission sent its final decision (via certified mail) to counsel, rather than directly to the parties. The Court required the Commission to re-issue its decision, and serve it properly upon the parties, which then triggered a "new" thirty-day the appeal period. Thus, this Commission is acutely aware of the importance of properly issuing the appealable order, which will act to trigger the appeal period.

In this case, Appellants John & Arlene Wehr were never properly served with Unitization Order 2014-471. Therefore, the Wehrs' thirty-day period for appealing this order to the Commission has never begun to run. Given that no appealable order has been issued to the Wehrs, this Commission lacks the statutory authority to proceed in this matter. Once the Wehrs are properly served, they may perfect an appeal by filing their notice of appeal with the Oil & Gas Commission within thirty days of their receipt, via certified mail, of said order.

ORDER

WHEREFORE, based upon the foregoing, appeal #912 is hereby **DISMISSED**. The Wehrs may, if they choose, appeal an order creating the Brown #9 Unit, pursuant to the protocols set forth for this purpose, once the Division has properly served such a Unitization Order upon the Wehrs.

Date Issued: June 15, 2017

Robert C. Smith
ROBERT C. SMITH, Chairman *WZ*

J. Brandon Davis
J. BRANDON DAVIS, Vice Chairman *WZ*

Andrew R. Thomas
ANDREW R. THOMAS, Secretary *WZ*

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:

Any party adversely affected by an order of the oil and gas commission may appeal to the court of common pleas of Franklin county. Any party desiring to so appeal shall file with the commission 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 the notice also shall be filed by appellant with the court and shall be mailed or otherwise delivered to appellee. Such notices shall be filed and mailed or otherwise delivered within thirty days after the date upon which appellant received notice from the commission by certified mail of the making of the order appealed from. No appeal bond shall be required to make either an appeal on questions of law or an appeal on questions of law and fact effective.

See Ohio Administrative Code §1509-1-24 for further instructions.

DISTRIBUTION:

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