



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

GERALD C. MANN
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ATTORNEY GENERAL

AUSTIN

Mr. Olin Calberson, Commissioner
Railroad Commission of Texas
Austin, Texas

Dear Sir:

Opinion No. O-4360

Re: Authority of the Railroad
Commission to take an oil
well off production while
suit attacking the permit
to drill said well is
still pending.

This is in reply to your letter requesting an
opinion. Your letter reads as follows:

"With reference to Cause No. 9016, Stan-
olind Oil and Gas Company versus Midas Oil
Company, et al, in the District Court of Travis
County and with particular reference to the
judgment of the Court of Civil Appeals of the
Third Supreme Judicial District, dated July 3,
1940, and reported in 143 S. W. (2nd) 138, and
in which opinion the following language is used:
'The invalidity of said permit as not being au-
thorized to prevent confiscation, and as being
in violation of the Commission's own rule of
May 29, 1934, relating to voluntary subdivisions,
has now been twice definitely adjudicated by
this court; and is now foreclosed.'

"I wish you would please answer the follow-
ing question:

"QUESTION

"Does the opinion, as cited, authorize or
justify the Commission in taking the well in
question off production schedule?"

In order to answer your question it is necessary to examine the history of the case about which you ask, to-wit, the case of Stanolind Oil & Gas Company v. Midas Oil Company, et al. That case was originally filed on October 19, 1935, by the Stanolind Oil & Gas Company to cancel a permit issued on June 10, 1935, by the Railroad Commission of Texas to Midas Oil Company authorizing the drilling of an oil well in the East Texas field as an exception to the Railroad Commission's Rule 37. The well was drilled before the case was filed. On the original trial of the case in the District Court, judgment was entered for the defendants, the Midas Oil Company, and the Railroad Commission of Texas, upholding the permit. That judgment was appealed to the Court of Civil Appeals at Austin; and that court wrote an opinion reversing the judgment and remanding the case for new trial. That opinion is reported as Stanolind Oil & Gas Co. v. Midas Oil Co., 123 S. W. (2d) 911. From that judgment of the Court of Civil Appeals application for writ of error was dismissed by the Supreme Court of Texas.

The case was tried a second time in the District Court, and judgment was again entered for the defendants upholding the permit. The judgment was on the motion of the defendants at the close of the plaintiff's evidence. The case was again appealed to the Court of Civil Appeals at Austin; and the Court of Civil Appeals again reversed the trial court's judgment and remanded the case for new trial on the sole issue of estoppel, that is, on the sole issue of whether or not the plaintiff, Stanolind Oil & Gas Company, was estopped by its conduct from complaining about the permit to drill said oil well. The court held that the permit to drill the well was invalid, but that in view of the fact that no one complained about the permit for more than four months and that the plaintiff, Stanolind Oil & Gas Company, did not file said suit to cancel the permit for more than four months after it was granted and that in the meantime the permittee, Midas Oil Company, "incurred heavy expense towards drilling such well" it was a question of fact "to be determined under all the facts and circumstances" whether the plaintiff waited an unreasonable length of time before filing its suit and thereby permitted the Midas Oil Company to act under the permit and incur such heavy expense that the plaintiff was barred under the doctrine of estoppel from complaining. That opinion of the Court of Civil Appeals is reported as Stanolind Oil & Gas Co. v. Midas Oil Co., 143 S. W. (2d) 138; and the court, speaking through Justice Baugh, said:

" . . . The permit in question was . . . clearly invalid.

"The only remaining question is that of estoppel

"Can the Stanolind, whose primary interest and objective in bringing such suit is to protect its own property rights, sit silently by for four months after such permit is granted, apparently acquiescing in its presumed validity, until the holder thereof has, as he had a clear legal right to do, incurred heavy expense towards drilling such well, and then be permitted to assert that drilling it will injure Stanolind's property rights? . . .

"On the second trial hereof the defendants pleaded estoppel against appellant's right to have said permit set aside for the protection of its own property rights. Manifestly that constituted an affirmative defense. And when the appellant showed, as it clearly did, that the permit was arbitrarily granted by the Commission, it was entitled to have it set aside unless the Midas by pleading and proof showed that Stanolind had, by its own conduct, become estopped from doing so. This burden, as an affirmative defense, therefore clearly rested upon the Midas. It was predicated upon acts and conduct occurring subsequent to the granting of the permit, . . .

" . . . Appellee did not by proof undertake to show estoppel as against an invalid order. Its contention in the trial court, and its motion for an instructed verdict at the close of plaintiff's evidence, was predicated entirely on the contention, and its motion affirmatively so shows, that 'the plaintiff has wholly failed to discharge the burden of proof placed upon it,' to show that there was not before the Railroad Commission sufficient evidence to sustain said permit. Manifestly this was the ground on which the trial

court based his judgment. On that ground it cannot be sustained, and the issue of estoppel, wherein the burden rested upon appellee, was not adjudicated.

"What constituted a reasonable time, none being fixed by statute, in which a protestant must act in suing to set aside such permit; and whether an unreasonable delay in doing so has damaged the holder of such a permit, are fact questions to be determined under all the facts and circumstances of the particular case.

"The invalidity of said permit as not being authorized to prevent confiscation, and as being in violation of the Commission's own rules of May 29, 1934, relating to voluntary subdivisions, has now been twice definitely adjudicated by this court; and is now foreclosed. Since, however, the trial court erroneously rendered judgment in favor of the defendant without requiring it to make any proof on its affirmative defense of estoppel, a defense available to it as against Stanolind even on an invalid permit, we think it should be permitted to have that issue determined. The judgment will therefore be reversed and the cause remanded for trial solely upon the issue of estoppel pleaded by the defendant"

From that judgment of the Court of Civil Appeals application for writ of error was refused by the Supreme Court of Texas.

The case was tried a third time in the District Court on the sole question of whether or not the plaintiff, Stanolind Oil & Gas Company, was barred by estoppel from maintaining the suit. The Railroad Commission of Texas and its members, although named as defendants in the plaintiff's petition and having appeared in the two previous trials, did not appear or participate in the third trial. The plaintiff, Stanolind Oil & Gas Company, and the defendant, Midas Oil Company, each appeared by their attorneys, and each offered evidence, on the third trial. The jury answered two special issues, finding that (1) "the plaintiff, Stanolind Oil & Gas Company, delayed for an unreasonable time the bringing of

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this suit against the defendant, Midas Oil Company," and (2) "that defendant, Midas Oil Company, has incurred heavy expense which it otherwise would not have incurred." Based upon those findings, the trial court entered judgment against the plaintiff and for the defendant, Midas Oil Company, said judgment being dated December 3, 1941.

The case was again appealed by Stanolind Oil & Gas Company, and is now on appeal in the Court of Civil Appeals at Austin.

As we interpret your question, you want to know whether or not the Railroad Commission of Texas has authority by virtue of what was said in the opinion of the Court of Civil Appeals to take the well in question off production schedule. In other words, does the Railroad Commission have authority to enter an order or to take action that will stop production of oil from the well in question?

In view of the appellate court decisions in this State we are convinced that the Railroad Commission does not have authority at this time to enter an order or to take any action that will stop production of oil from this particular well, other than to enter an order that will apply to all wells generally. The Commission does not have authority at this time to enter an order that has the effect of modifying or changing the terms of the permit to drill the well, that was originally issued by the Commission on June 10, 1935, because the Commission does not have jurisdiction over the subject matter by virtue of the fact that the suit attacking the validity of the permit is still pending. Such was the holding of the Supreme Court of Texas in the case of Stewart v. Smith, 126 Tex. 292, 83 S. W. (2d) 945, in which the court said:

"Plaintiff in error suggests that this cause may be moot, because after the trial of the cause in the district court, and while it was pending in the appellate courts, the Railroad Commission granted plaintiff in error a permit to drill a well on the land in controversy, and the well has been drilled. We presume from the foregoing statement that after the judicial arm of the state had assumed jurisdiction of the matter, the Railroad Commission undertook to act again thereon. If this

be true, the Railroad Commission was without jurisdiction."

The same holding was made by the Court of Civil Appeals at Austin, in the case of Edgar v. Stanolind Oil & Gas Co., 90 S.W. (2d) 656, in which it was said:

"After procuring two wells on said strip of land, Edgar applied to the Railroad Commission for a permit to drill well No. 3, here involved. This application was by the commission refused on October 21, 1933. Edgar thereupon filed suit in the district court of Travis County to enjoin the commission from interfering with his drilling said Well No. 3. That suit was filed on April 6, 1934. While that suit was pending, Edgar filed a motion with the Railroad Commission for a rehearing of his application. That motion was heard by the commission, and on September 24, 1934, the Railroad Commission, by what it designated as an amended order, granted Edgar a permit to drill said well No. 3. Thereafter Edgar dismissed his suit in the district court of Travis County, obviously on the assumption that he had, after he had filed it, obtained from the Railroad Commission the relief he had theretofore invoked the jurisdiction of the district court to obtain.

"Thereupon the appellees herein brought this suit to annul the so-called 'amended order' of the commission dated September 23, 1934, and to restrain the operation by appellant of the well drilled thereunder

"From the facts above recited it is manifest and has been expressly so held, that while the suit involving the subject-matter of this controversy was pending in the district court of Travis County, the Railroad Commission lost jurisdiction of its order of October 21, 1933. . . . the order of the commission dated September 24, 1934, and herein attacked, was void for

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want of jurisdiction in the commission over the subject-matter thereof. Stewart v. Smith (Tex. Sup.) 83 S. W. (2d) 945."

A similar holding was made in the case of Barnsdall Oil Co. v. Railroad Commission, 90 S. W. (2d) 663, in which the court cited the cases of Stewart v. Smith, supra, and Edgar v. Stanolind Oil & Gas Co., supra, as authority.

Our answer to your question is that the Railroad Commission of Texas does not have authority at this time to take the well in question off production schedule.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By (Signed)
Cecil C. Rotsch
Assistant.

APPROVED MAY 2, 1942

(Signed) Grover Sellers

FIRST ASSISTANT
ATTORNEY GENERAL

CGR:db:JMc

APPROVED OPINION COMMITTEE
BY B. W. B.
CHAIRMAN.