



THE ATTORNEY GENERAL OF TEXAS

PRICE DANIEL
ATTORNEY GENERAL

AUSTIN, TEXAS

April 28, 1949

Hon. William J. Murray, Jr.
Chairman, Railroad Commission
Austin, Texas

Opinion No. V-816

Re: The effect of filing a
plug and abandonment re-
port on a Rule 37 permit.

Dear Sir:

Your letter of March 21, 1949, concerns a pending application to clean out, redrill, and produce a well. The accompanying file indicates that under date of December 20, 1937, a notice of intention to drill a Number 2 well on a .49 acre tract was submitted to the Railroad Commission. It was shown at the hearing on January 14, 1938, that the well was desired as a staggered offset to a well on another tract. An exception to Rule 37 and a permit to drill was granted by order of January 25, 1938, specifying the location. No protest or attack on the order is shown in the file.

An application to plug dated May 21, 1941, received by the Commission in Austin on May 24, 1941, states that drilling was commenced October 21, 1938, and completed November 3, 1938; that the total depth was 3,561 feet; and that the well was not producing. The deputy supervisor of the district, under date of May 22, 1941, noted on the application, "OK, 18 sacks cement."

The plugging record, received by the Commission in Austin June 3, 1941, recites that the well was plugged on May 22, 1941; that it was filled with mud-laden fluid, according to the regulations of the Commission; that 22 sacks of cement were used in plugging; that the well was not shot; that 2,463 feet of casing was pulled; and that the well was not producing when plugged. It appears from testimony

that the pumping equipment, the derrick foundation and the surface pipe were left at the location. The plugging was voluntary and not under orders of the Commission.

An application to drill two feet over from the original location in the name of the original permittee, dated August 9, 1946, was heard August 23, 1946. The notice stated that:

"This location is to take the place of old well No. 2, which was plugged and abandoned due to mechanical trouble."

The position was taken at the hearing that the original well was plugged in error and that a good well could be drilled. The application was refused September 11, 1946, apparently because the No. 1 well was considered to be properly placed and would drain the tract.

An application dated April 25, 1947, to "re-drill, clean out and produce well No. 2 . . . which was voluntarily plugged on account of mechanical condition and which was a good producing well" was received in Austin on April 29, 1947. The Commission first treated the application as an application for rehearing and refused to set it for hearing. Under date of August 7, 1947, apparently under advice of this Office, notice of a hearing on August 18 was given, stating:

". . . the location being requested as follows: 25 feet northwest of Well No. 1, and 25 feet southeast of the northwest line. To be drilled to 3700 feet. This is a request to re-drill, clean out, and produce well No. 2 which was voluntarily plugged on account of mechanical condition."

The location specified is one foot closer to the northwest property line than the location specified in the original permit. The depth proposed is the same as originally applied for but is 140 feet greater than the total depth shown on the plugging record.

A memorandum by the applicant's attorney submitted on August 18, 1947, takes the position that the

applicant still has rights under the original permit and should be permitted to go back in the same hole and put the well on production.

A letter of protest dated August 22, 1947 states that the applicant is producing through its No. 1 well more oil than the amount originally in place and has a net drainage advantage; that the tract is already twenty times more densely drilled than the field average; that the application would double the density; and that old well No. 2 has been formally and finally plugged and abandoned.

The application was refused on October 21, 1947, one Commissioner stating that after conference with members of this Office, he had concluded that the application must be treated as one to drill a new well, the original permit having been cancelled by the voluntary filing of the plugging and abandonment report.

Another application by the same party was filed November 26, 1948, "to drill, clean out and produce well No. 2 . . . which was voluntarily plugged on account of mechanical condition and which was a good producer." The location applied for is again one foot closer to the northwest line than the original No. 2 permit distance. This application was treated as a motion for rehearing and was ordered granted on December 22, 1948, and set to be heard January 17, 1949.

It further appears from the Commission's files that a permit for a No. 3 well on a subdivision of the original tract was granted on December 6, 1940, "to prevent confiscation of property and to prevent physical waste." The No. 2 well had not been plugged at this time.

Your letter requests our opinion on the following question, which we quote:

"Is the Rule 37 permit originally granted . . . (for the) No. 2 well still a valid permit in spite of the fact that the well was subsequently plugged and abandoned and are they (the applicant) entitled to re-drill and produce this well under the original permit?"

You refer us to the recent case of Humble Oil & Refining Co. v. Cook, 215 S.W.2d 383 (Tex.Civ.App. 1948, error ref.n.r.e.).

The Cook case was an attack on a permit granted in January, 1947 to the fee owner to "re-drill and put back on production" an old well which had been voluntarily plugged in December, 1941, by the assignee of a former lessee. An "Application to Plug and Well Record" and a "Plugging Record" had been filed with the Commission. Cook purchased the property in August, 1946, after ascertaining that the lease had terminated and that the permit and right to produce the old well had not been challenged.

The Court of Civil Appeals held that the Cook tract was a subdivision and was not entitled to the original (1937) permit as an exception to prevent confiscation, but that Humble could not now attack it.

Humble argued that the 1947 permit to "re-drill and put back on production" should be tested by the rules governing original permits, that since the original well had been abandoned, the permit therefor must have terminated. The appellees, in a brief signed by a member of this Office, answered that the Commission could not in 1947 have reviewed the granting of the original permit, but could only hear and determine (1) the physical status of the well; (2) the proposed "rework" operations; and (3) the degrees of deviation from the vertical of the proposed redrilling; all so that the Commission's records might reflect what was proposed to be done with the well, so that the Commission could control the "rework" operations, and so that, when completed, the Commission could place the well "back on production" by assigning it an allowable. The following statement is quoted from the appellees' brief:

"We believe this case must be affirmed on this ground: It is admitted that the well went off production purely because of mechanical defects. When it went off, it was a legal well, so held and regarded by all. A mechanical defect does not change a legal well into an illegal one. The Railroad Commission has unlimited power to permit mechanical defects to be remedied, and whatever

those defects may be in nature or scope or costs is the concern of the operator. The order was broad enough to permit any repairs necessary to be made as long as the same, or practically the same, hole was used. We perceive that such repairs are usually made by an operator, even without an order, and certainly without opening up the question of the validity of the original order made nine years previously."

The Court of Civil Appeals affirmed the trial court judgment, refusing to invalidate Cook's permit. In its opinion, the Court said:

"A permit of the Railroad Commission to drill a test well for oil or gas, on its face, grants this permission and nothing more. Strictly speaking, it might be said that when the well is drilled, the office of the permit is terminated and the permit "exhausted." We know that this is not the full nature of an application to drill a well nor the extent of the rights conferred by a permit to drill. As a necessary consequence such permit carries with it the right, in the event of production, to operate the well and to produce the oil or gas under the rules and regulations of the Railroad Commission. The life of such permit and the privileges conferred by it are not limited by any law or rule of the Commission.

"This record does not show that the rights and privileges granted by the original permit have been actually or factually terminated and we have found no legal basis for holding that they have expired as a matter of law. (215 S.W.2d at 386).

" . . .

"Abandonment is principally a matter of intention which must be established by

clear and satisfactory evidence. . . .
An intention to abandon involves an
intention not to return and reoccupy
the property. . . .

"Measured by these standards
the evidence does not conclusively
show an abandonment. At most an issue
of fact was raised which under the im-
plied findings of the Commission and
trial court have been resolved against
appellant. These findings are support-
ed by substantial evidence." (215 S.W.
2d at 387).

In Respondent's reply to Humble's application,
it was argued that writ of error should not be granted
because the order of the Commission granting the original
permit necessarily found that there was no illegal sub-
division, and such order was not now open to attack.

The Supreme Court refused the application
with the notation, "Refused. No Reversible Error,"
thereby indicating (Rule 483, Tex. Rules Civ. Proc.)
that ". . . the Supreme Court is not satisfied that the
opinion of the Court of Civil Appeals in all respects has
correctly declared the law but is of the opinion that the
application presents no error which requires reversal. . . ."

In Humble's Motion for Rehearing of the applica-
tion for writ of error, it was argued that the Court of
Civil Appeals had gone beyond the stipulation of the
parties (quoted 215 S.W.2d at 384) and the record on the
issue of whether the old permit was still in effect af-
ter the well was abandoned.

Even if the Court of Civil Appeals opinion in
the Cook case be taken as deciding that a Rule 37 permit
is still valid as a matter of law in spite of the fact
that the well is subsequently plugged and abandoned, some
doubt is cast on such decision by the disposition of the
application by the Supreme Court and by the alternative
theory for denial of the writ suggested by Respondents.
Too, Humble strongly urged that any decision as to the
original permit was outside the record.

We deem it best, in view of the foregoing, to
construe the Cook case as deciding that an order of the
Commission granting a permit "to redrill and put back

on production" a plugged and abandoned well will not be set aside if there is substantial evidence to support a finding of fact that the original permit had not been abandoned. So considered, the Cook case is authority for the Commission to determine, regarding the present application, the issues of abandonment and feasibility of redrilling the well. As a preliminary, it must necessarily be decided that the instant application is, in fact, an application to redrill the former permit and is not for a new well.

As a corollary, it is our opinion that an order of the Commission refusing such a permit would be sustained if there is substantial evidence to support a finding that the original permit had been abandoned, or that it was not feasible to redrill the well and put it back on production.

Since the instant application requires the determination of factual issues, we cannot pass on it as a matter of law. We do point out, however, the marked similarity between the instant case and the Cook case. Determination of the factual issues herein should be made in the light of the legal tests laid down therein.

SUMMARY

An application "to drill, clean out, and produce" a well drilled under an unattacked permit granted as an exception to Rule 37 may be granted although the tract was not originally entitled to an exception and although the well was plugged and reported eight years ago, if the Railroad Commission finds from substantial evidence that the original permit has not been aban-

done and that it is feasible to
redrill the well and put it back
on production.

~~Yours very truly~~

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