

IN THE COURT OF COMMON PLEAS OF ASHLAND COUNTY, OHIO NOV -4 PM 1:30

JUDITHA KNIGHT
CLERK OF COURTS
ASHLAND COUNTY, OHIO

STATE OF OHIO, ex rel.
LEE FISHER
ATTORNEY GENERAL OF OHIO,

Plaintiff,

CASE NO. 34004

vs.

RICHARD L. MOUNT,
Defendant,

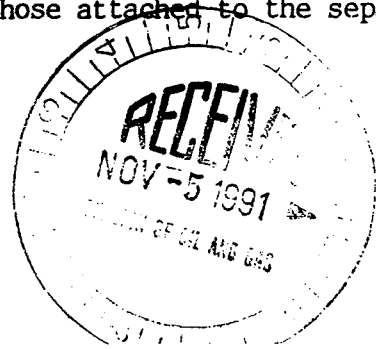
FINDINGS OF FACT, CONCLUSIONS OF LAW
OPINION AND JUDGMENT ENTRY

FINDINGS OF FACT

1. This matter came on for trial on August 8, 1991, all parties being present and represented by counsel.

2. Defendant Richard L. Mount is the owner, and operator, and producer of several oil and gas wells and a battery of tanks on the Bontrager Lease, Perry Township, Ashland county, Ohio. Each well is identified as the No. 1 well, Permit No. 1601; No. 3 well, Permit No. 1604; No. 4 well, Permit No. 1668; No. 7 well, Permit No. 1073; No. 8 well, Permit No. 3385; No. 9 well, Permit No. 3386; No. 10 well, Permit No. 3387; and No. 17 well, Permit No. 3396. These wells were purchased by Defendant in the fall of 1988.

3. An inspection of the well sites and tank battery conducted April 3, 1989, by Division of Oil and Gas Inspector Harold Moravy demonstrated that a 3/4 inch continuous flow of brine was being discharged from a 1 1/2 inch plastic brine discharge hose attached to the separator



L. Steffee
G. June

tank, which hose then extended approximately thirty feet over a hill.

4. At the time of the brine discharge, the oil and gas wells on the Bontrager Lease were in operation, causing brine to be pumped from the wells and into the separator tank, then through the plastic brine discharge hose and directly onto the land surface and subsurface.

5. The separator tank had no connection to any brine storage tank, and the end of the plastic brine discharge hose was not connected to anything, allowing brine to discharge directly onto the land surface and subsurface.

6. Defendant Mount admitted that the plastic brine discharge hose was thrown over the hill by him, but he states that he never used the hose for any purpose.

7. Defendant Mount stated that there was no production from such wells from December 8, 1988 to March 13, 1989.

8. Laboratory analyses of two fluid and three soil samples taken by Inspector Moravy and Division of Oil and Gas Investigator Tim Zimmerly shows that the fluids collected were contaminated with oil field brines.

9. The brine discharged from the plastic brine discharge hose had been discharging for at least two consecutive days or more.

10. Inspector Moravy testified that based upon his experience the brine discharging from the plastic brine discharge hose had been flowing for as long as one month.

11. Both Division of Oil and Gas Geologist Tom Tomastik and Inspector Moravy testified that the brine flowing from the plastic brine

discharge hose caused actual damage to the environment, as evidenced by a large, visual "burn" or scald contaminated area measuring approximately 30 feet by 20 feet. No vegetation will grow in this area, and there is no evidence of any vegetation. (See video tape, States Ex. Z).

12. Inspector Moravy testified that a fresh water stream is located approximately 200 feet from the contaminated area, and the fresh water stream is located downslope from the contaminated area.

13. Inspector Moravy testified that he has responded to at least one landowner complaint with regard to potential contamination of the landowner's domestic drinking water supply.

14. Geologist Tomastik testified that the brine flowing from the plastic brine discharge hose threatens the public health and safety, and the environment through potential contamination of the shallow fresh water aquifers and streams in this area.

15. Tomastik testified that these shallow fresh water aquifers consist of glacial deposits composed primarily of highly permeable sands and gravels.

16. Defendant Mount removed the contaminated soil on the surface. However, because of the sandy, permeable geology of the area, it is probable that brine leached through the land surface into the subsurface, posing a threat to the shallow, freshwater aquifers.

17. Defendant Mount's disposal of brine directly onto the land surface and subsurface caused pollution and contamination of the land surface and subsurface.

18. Inspector Moravy contacted defendant Richard Mount's son Todd Mount on April 3, 1989 concerning the discharge of brine on the Bontrager Lease in Perry Township Ashland County, Ohio. It was mutually agreed between Todd Mount and Moravy that they would meet at the sight the morning of April 4, 1989 to address the problem.

Defendant Mount was out of state at thhe time but was apprised of the situation. Repairs were made as scheduled: the well was shut down; a valve ostensibly damaged by weathering was replaced; lime was applied to the ground. Todd Mount received instructions from Moravy who did not stay while Mount completed his work at the site, but the well was not restarted until further improvements were made to the site.

The broken valve through which the brine discharged was not in use at the time of the discharge and had never been used in the Defendant's operation. Defendant Mount had purchased the leases in October 1988 and this lease had been in disrepair from previous holders and Mount reconditioned the properties. Even tank placement was ultimately changed.

19. Inspector Moravy returned to the site April 4, 1989, and accompanied by Investigator Zimmerly, videotaped the brine flowing directly from the plastic brine discharge hose directly onto the land surface and subsurface. (See States Ex. Z)

20. A second violation occurred on July 29, 1991, whereby defendant Mount allowed brine to be continuously discharged directly from a valve on the brine storage tank onto the land surface and subsurface for approximately two consecutive days.

21. Defendant Mount's disposal of brine directly onto the land surface and subsurface in the manners described above violates defendant Mount's brine disposal plan.

22. Defendant Mounts' disposal of brine directly onto the land surface and subsurface is not an approved disposal method pursuant to Revised Code Chapter 1509.

23. Defendant Mount has never submitted production records to the Division of Oil and Gas, as required by Revised Code Section 1509.11, demonstrating the amounts of oil and brine produced and the method of brine disposal.

24. Defendant Mount owns numerous oil and gas wells within the State of Ohio, and currently conducts business within the State of Ohio.

25. The Division's total extraordinary enforcement costs are approximately \$800.00.

26. There is evidence from Wes Martin, another oil and gas Division Inspector that he has no problems with Defendants performance and that Defendant has put in new production lines, new electric lines and has cured the pits around the wells involved in this case. Martin rated Defendant as an above average oil and gas well producer.

CONCLUSIONS OF LAW

1. Revised Code Section 1509.22 (A)(2) provides that no person shall place or cause to be placed brine in or on the land in such quantities, or in such manner as actually causes or could reasonably be anticipated to cause damage or injury to public health or safety or the

environment.

2. Revised Code Section 1509.22(B) provides that no person shall store or dispose of brine in violation of a brine disposal plan approved pursuant to Revised Code 1509.06(I).

3. Revised Code Section 1509.22(C)(1) provides that the storage and disposal of brine and the Chief's rules relating thereto are subject to the following standards: 1) Brine shall be disposed of only by injection; by surface application in accordance with Revised Code Section 1509.226; in association with a method of enhanced recovery; or by other methods approved by the Chief of the Division of Oil and Gas.

4. Ohio Administrative Code 1501:9-1-07 provides that all persons engaged in any phase of operation of any wells shall conduct such operations in a manner which will not contaminate or pollute the surface of the land or water on the surface or subsurface.

5. Revised Code Section 1509.03 provides that no person shall violate any rule adopted or term or condition of a permit issued by the Chief of the Division of Oil and Gas under this Chapter.

6. Revised Code Section 1509.22(E) provides that the owner holding a permit and the operator of a well shall be liable for a violation of this section or any rules adopted or orders or terms or conditions of a permit issued under this Section.

7. Defendant Mount violated Revised Code 1509.22(A)(2); Revised Code 1509.22(B); Revised Code 1509.22(C)(1); Revised Code 1509.03; and Ohio Administrative Code 1501:9-1-07, by: 1) disposing of brine by pumping

brine from a separator tank through a plastic brine discharge hose directly onto the land surface and subsurface causing injury and damage to the environment and threatening damage or injury to public health and safety; 2) disposing of brine in violation of a brine disposal plan; 3) disposing of brine in an illegal manner or method; and 4) disposing of brine in a manner which caused contamination and pollution of the land surface and subsurface.

8. Defendant Mount is liable for each violation of law set forth in the Complaint.

9. Pursuant to Revised Code 1509.33 the Court may impose upon defendant Mount a civil penalty for each violation of law.

10. The purpose of civil penalties assessed pursuant to Revised Code 1509.33 is to compensate the State of Ohio for harm, or threat of harm done to the public health and safety and the environment, and to deter persons from future violations of law.

11. In determining civil penalties, the Court is to consider the recalcitrance of the defendant, the harm or threat of harm posed to the environment as a result of defendant's conduct, any gain defendant might have realized from non-compliance, the defendant's ability to pay a substantial civil penalty, and extraordinary and unnecessary expenses associated with enforcement, and mitigating factors, if any. (See **State v. Dayton Malleable** (1982), 1 Ohio St.3d 151.)

12. On the evidence adduced Defendant Mount was negligent or indifferent but not recalcitrant by allowing brine to flow from the plastic

brine discharge hose directly onto the land surface and subsurface causing pollution and contamination and damage to the environment for a continuous two day period of time, and likely for at least one month prior to discovery of the violations.

13. Defendant Mount allowed a same or similar violation to occur again over a two day period of time on July 29, 1991.

14. Defendant Mount's conduct caused some actual damage to the environment, polluted and contaminated the environment to some degree and threatened public health and safety to some degree.

15. Defendant Mount realized a benefit from his non-compliance by not incurring expenses for the lawful and proper disposal of brine.

16. The ongoing nature of defendant Mount's violations of the environmental protection and public health and safety laws resulting in the illegal dumping of oil field brine causing damage to the environment and pollution and contamination of the land surface and subsurface does not show an attitude on the part of defendant Mount of total indifference to Ohio's environmental protection statutes. However, a civil penalty of modest proportions is indicated here.

17. Defendant Mount has substantial holdings in the State of Ohio in the form of numerous oil and gas wells, although defendant is now partially retired.

18. Defendant Mount offered no evidence with regard to his financial condition.

19. Revised Code 1509 is a strict liability statute, therefore,

motive, intent, and knowledge are irrelevant, and defendant Mount allowed the violations of Ohio's environmental laws to occur over a period of at least four days.

20. The Division's extraordinary expenses associated with enforcement are in the amount of \$800.00, and the Division is entitled to reimbursement of those costs.

OPINION

The Division of Oil and Gas is the regulatory agency charged by the General Assembly with statutory authority for administering the oil and gas environmental laws of Ohio for the use and benefit of the people, for protection of public health, safety and environment and to conserve natural resources. The Chief of the Division of Oil and Gas was given the authority by the General Assembly to issue orders and to request the Attorney General to prosecute civil and criminal enforcement proceedings against persons to prevent threatened violations, and correct existing violations of R.C. Chapter 1509.

In this case at bar the Attorney General on June 23, 1989, at the request of the Chief of the Division of Oil and Gas filed his environmental lawsuit against defendant Richard Mount for his violations of Ohio's environment oil and gas laws by allowing, over a consecutive two day period of time, oil field brine to flow uncontrolled from a thirty foot plastic brine discharge hose attached to a separator tank. The contaminated fluids flowed in a 3/4 inch stream from the plastic brine discharge hose over a hill directly in and onto the land surface and subsurface, causing

pollution and contamination and requiring restoration of the surface and subsurface soils.

Specifically, defendant Mount has been found to have violated four sections of Revised Code Chapter 1509: 1) R.C. 1509.22(A)(2) by disposing of brine in or on the land in such quantities, or in such manner as actually causes or could reasonably be anticipated to cause damage or injury to public health or safety or the environment; 2) R.C. 1509.22(B) by disposing of brine in violation of a brine disposal plan approved pursuant to R.C. 1509.06(I); 3) R.C. 1509.22(C)(1) by failing to properly dispose of brine in accordance with that section; and 4) R.C. 1509.03 and Ohio Administrative Code 1501:9-1-07 by conducting his oil field operations in a manner which contaminated and polluted the surface of the land.

It should be noted that Defendant Mount admitted at trial, held on August 8, 1991, that he placed the thirty foot plastic brine discharge hose over the hill. He further admitted that fluid flowed from the plastic brine discharge hose, and that the fluid was oil field brine and that the brine caused damage to the environment. The violations were witnessed by an inspector and investigator of the Division and were videotaped, still photographed and fluid and soils were sampled and analyses showing the fluids to be oil field brines and showing contamination all of the same being admitted as State's Exhibits J through Y, State's Exhibit Z and State's Exhibit NN and OO.

This Court is finding that the environmental damage and threat of damage posed by Defendant Mount's conduct in this case is the type of

damage Revised Code Chapter 1509 was specifically designed to protect against. Division Geologist Tomastik testified that the oil field brine that flowed from the plastic discharge hose visually "scalded" or "burned" the land surface causing a scar approximately 30 feet by 20 feet. He further testified that the underground fresh water aquifers in this area are shallow, consisting of glacial deposits composed primarily of loose and highly permeable sands and gravels that would provide a quick avenue for the oil field brine to leach through the sandy soil directly into the shallow underground fresh water aquifers. In addition, Division Inspector Harold Moravy testified that he has responded to at least one complaint from a nearby landowner regarding potential contamination of a domestic water supply. He further testified that a fresh water stream is located approximately 200 feet from the contaminated area and the fresh water stream is located downslope from the contaminated area. Inspector Moravy further testified that based upon his experience, the oil field brine had been flowing from the plastic brine discharge hose for as long as one month.

With respect to Defendant Mount's conduct it should be noted that the same or similar type violation was discovered by Inspector Moravy during another routine inspection on July 29, 1991, whereby Defendant Mount allowed oil field brine to flow continuously directly from a valve on the brine storage tank onto the land surface and subsurface for at least two consecutive days. It should further be noted that even though Inspector Moravy testified that the wells were in operation and could be heard

operating on the videotape during his visit to the site on April 4, 1989, there was no method for the lawful and proper disposal of brine on the site other than through the plastic brine discharge hose. No production records exist on file with the Division of Oil and Gas as required by R.C. 1509.11 demonstrating the amounts of brine produced and defendant Mount's proper and lawful brine disposal method for this site. The Court can only conclude that Defendant Mount has no valid brine disposal plan at all for the lawful disposal of this unwanted, toxic by-product.

Revised Code Chapter 1509 is a general police regulation designed "to protect public health and safety and to conserve natural resources." See **State v. Tipka** (1984), 12 Ohio St.3d 258. See also, **State v. Dayton Malleable** (1979) 1 Ohio St. 3d 151.

In the case at bar, Revised Code Section 1509.22(A)(2), provides in pertinent part as follows:

"... No person shall place or cause to be placed brine in surface or ground water or in or on the land in such quantities or in such manner as actually causes or could reasonably be anticipated to cause...(2)damage or injury to public health or safety or the environment."

R.C. 1509.22(B) provides in pertinent part as follows:

"No person shall store or dispose of brine in violation of a plan approved under division (1) of section 1509.06 of the Revised Code..."

R.C. 1509.22(C)(1) provides in pertinent part as follows:

"...The storage and disposal of brine and the chief's rules relating thereto are subject to the following standards:

(1) Brine...shall only be disposed of by injection into an under-ground formation, including annular disposal if approved by

rule of the chief...by surface application in accordance with section 1509.226 of the Revised Code; in association with a method of enhanced recovery as provided in section 1509.21 of the Revised Code; or by other methods approved by the Chief for testing or implementing a new technology or method of disposal..."

Ohio Administrative Code 1501:9-1-07 provides in pertinent part as follows:

"All persons engaged in any phase of operation of any well or wells shall conduct such operation or operations in a manner which will not contaminate or pollute the surface of the land, or water on the surface or in the subsurface."

Revised Code Chapter 1509 imposes a continuing and ongoing duty to operate, maintain and monitor oil field operations in such a manner that will prevent the dangers present in oil field operations and will not violate any provisions of that Chapter. Implicit in such duty is the assumption that a reasonably prudent operator will diligently develop, maintain and monitor his oil field operations. Thus, when an operator has caused a violation of R.C. Chapter 1509, or failed to monitor his operations in such manner that results in a violation of that Chapter, then the operator has a continuing, ongoing and absolute statutory duty to remediate the violation. It is against this backdrop that a review of the established facts in this case are considered by this Court.

The only issue properly before this Court is whether defendant Mount violated provisions of R.C. Chapter 1509 by illegally disposing of oil field brine over a consecutive two day period of time onto the land surface and subsurface causing pollution and contamination and damage to the environment. Mitigating factors, motive, intent, and knowledge are irrelevant and do not present a defense to the claims set forth in the

Complaint. The Court can only determine that Defendant Mount is liable for his violations of Ohio's oil and gas environmental laws and an appropriate civil penalty for these violations should be assessed.

The purpose of a civil penalty is not only to compensate the State for harm done, but to deter the defendant and others from future violations of law. In order to assess the proper amount of civil penalty, the trier of fact must exercise his "informed discretion" upon the facts in evidence rather than picking a totally arbitrary number. In determining what this civil penalty should be the Court may consider a number of factors in exercising its informed discretion: 1) a defendant's indifference to the law or a defendant's recalcitrance or defiance; 2) the harm or risk of harm to public health or the environment; 3) the economic considerations including defendant's ability to pay and the removal of any benefit from non-compliance; 4) the recovery of unnecessary or extraordinary enforcement costs, and 5) mitigating factors, if any.

Because the purpose of a civil penalty is to deter wrongful conduct, the nature of the defendant's conduct becomes important. A defendant who exhibited bad faith or recklessness in his violations is not likely to respond to a penalty that would deter someone who unintentionally violated the law after taking care of to avoid the violations. Thus, defendant's attitude, must be taken into account in order to encourage future compliance. The Court in this case cannot find that this defendant was recalcitrant or defiant but merely appeared to be indifferent to the law with regard to these wells.

Again since the function of the penalty is to deter future violations it is not necessary for the State of Ohio to prove a specific quantity of actual environmental harm in order to justify the imposition of a penalty. Since failure to penalize a violator's disregard of an environmental statute will undermine the entire regulatory process by setting a dangerous precedent for others, the violation in themselves pose potential harm to the environment, even in the absence of actual harm.

In the case of **Dayton Malleable**, 1 Ohio St.3d 151 we have a determination which provides an instructive precedent for the lawsuit at bar. The defendant in that case discharged iron into the Ohio River and while the Court found that actual damage to the river could not be proven and further found that the defendant's discharges were not toxic and had little effect on water quality the Court still noted that if all other manufacturers along the river discharged the same amount of pollution into the river serious harm would result. Although the harm from, **Dayton Malleable's** discharges could not be quantified in actual damages, the court recognized its responsibility to assess a penalty to redress environmental harm, and penalized the company on a per-day basis, that amounted to only 10% of the maximum penalty allowed.

In the case sub judice, protection and prevention of contamination and pollution of the shallow underground fresh water aquifers is precisely what R.C. Chapter 1509 was designed to protect and prevent, and what Defendant Mount has contaminated and threatened by his illegal brine operation. Actual damage to the environment is evidenced by the "scald"

area. In addition, a fresh water stream is located approximately 200 feet from the contaminated area, and the fresh water stream is located downslope from the contaminated area. As Division Geologist Tom Tomastik testified, brine threatens human health and safety, kills vegetation and fish, and contaminates fresh drinking water.

The deterrent effect of any given amount of penalty may vary depending upon the financial resources of the defendant. A sizable penalty may deter a defendant of modest financial resources but may be no more than a mere slap on the wrist to a defendant with larger financial resources. This is a small operation conducted by defendant and is in no way comparable to a large corporation involved in the production of oil and gas. Evidence of defendant's economic status thus can be used to ensure that the deterring value of the penalty is accomplished.

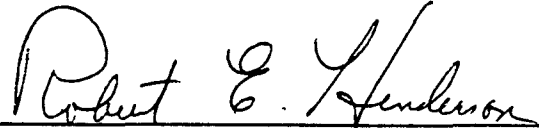
In this case, State's Exhibit RR is a list of wells owned by defendant Mount in the State of Ohio. This exhibit demonstrates substantial oil and gas assets within the State, indicating that defendant Mount's economic condition is good. Currently, defendant Mount does operate oil and gas wells within this State and according to his own testimony these operations are only part time. It is interesting to note in this case that defendant Mount offered no contradictory evidence and, in fact, offered no evidence at all, with regard to his financial condition. There is no reason for this Court to conclude other than that defendant is a competent businessman, who, by his own testimony, has been in the oil and gas business, and who has the financial ability to redress this State for the harm that he has created.

The extraordinary and unnecessary enforcement expenses incurred by the State of Ohio for this defendant's non-compliance were evidenced by each State witnesses' statement of costs, which total approximately \$800.00. The Court is finding that the State is entitled to be redressed for these costs, and that the figure submitted to wit: \$800.00 is reasonable and the Court will be including this as a factor in determining civil penalties.

Based upon all of the evidence before this Court, this Court cannot say that defendant Mount's operations resulted from recalcitrance or defiance but merely show indifference toward the law. On the first occasion involved defendant was in the State of Florida, since this occurred in the winter season, and his son made arrangements with Inspector Moravy to be present the next morning the son having received notice of the problem upon returning from his work during the evening season. The second occasion, indicates merely that a valve had gone bad and the Court cannot find that this is a blatant disregard toward the law in this particular area.

The General Assembly has expressly allowed for a civil penalty of up to \$10,000.00 for each violation of Revised Code Section 1509.22(A)(2), and up to \$4,000.00 for each violation of Revised Code Section 1509.22(B), Revised Code Section 1509.22(C)(1), and Ohio Administrative Code 1501:9-1-07. This Court finds that the violations which did occur here all resulted out of the same fact situation and the Court is assessing as a penalty the sum of \$2,500.00 for all violations plus the cost of \$800.00 for the

extraordinary and unnecessary enforcement expenses incurred by the State of Ohio for defendants' non-compliance with Chapter 1509.22.

A handwritten signature in cursive script, reading "Robert E. Henderson". The signature is written in dark ink and is positioned above a horizontal line.

COMMON PLEAS JUDGE



Attorney General
Lee Fisher

MEMORANDUM

TO: All EES Attorneys

FROM: Laura J. Steffee, Assistant Attorney General,
Division of Oil and Gas

DATE: November 13, 1991

SUBJECT: State of Ohio, ex rel. Fisher, v.
Richard L. Mount, Case No. 34004,
Ashland County Court of Common Pleas.

I have attached with this memo a copy of a recent decision from the Ashland County Court of Common Pleas for your files. The case concerned a defendant who illegally disposed of brine through a thirty-foot plastic brine discharge hose in violation of a brine disposal plan. Defendant had been discharging brine over a consecutive two-day period of time, perhaps longer, and he was caught again illegally discharging brine just prior to the trial. The Court held in our favor on all violations, however, did not assess a substantial civil penalty for the reason that, in the Court's opinion, this particular defendant was not recalcitrant, merely indifferent to Ohio's oil and gas laws (isn't that the same thing?). In any event, the Court found Revised Code 1509 to be a strict liability statute, designed to protect the public health, welfare and environment. The Court also followed the Dayton Malleable decision in determining the assessment of the civil penalty.

Finally, it is interesting to note that the Court added the reimbursement costs owed to the Division onto the civil penalty assessment, similar to what the Court of Common Pleas did in Medina County in the Nova Christman case.

LJS:ac

Att.

