STATE OF MICHIGAN

COURT OF APPEALS

R. J. SULLIVAN, d/b/a SULLIVAN & COMPANY,

Plaintiff,

and

TEXAS WESTERN RESERVES OIL COMPANY, INC., d/b/a WESTERN RESERVES OIL COMPANY, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee.

UNPUBLISHED
May 5, 2000

No. 209842
Ingham Circuit Court
LC No. 94-078255 AV

R. J. SULLIVAN, d/b/a SULLIVAN & COMPANY,

Plaintiff-Appellant,

and

TEXAS WESTERN RESERVES OIL COMPANY, INC., d/b/a WESTERN RESERVES OIL COMPANY, INC.,

Plaintiff,

v

No. 210106

Ingham Circuit Court
LC No. 94-078255 AV

DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee.

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs Texas Western Reserve Oil Company (Texas Western) and R. J. Sullivan (Sullivan) appeal as of right from a circuit court opinion and order dismissing their claims for declaratory and injunctive relief, superintending control and mandamus. We affirm.

Plaintiffs are named on drilling permit 36115 for State Blue Lake 1-4 oil and gas well in Kalkaska County. They initiated this action after defendant refused to transfer the drilling permit in their names to Trinity Exploration Company and placed them on the "hold permits list." These actions effectively prohibited plaintiffs from conducting business in Michigan until they cleaned up an oil spill at the well that occurred while Trinity was operating it.

I

We first address plaintiffs' arguments that the circuit court erred in concluding that plaintiffs failed to exhaust their administrative remedies. The Administrative Procedures Act (APA), MCL 24.201 *et seq*.; MSA 3.560(101) *et seq*., requires parties to seek redress through an available administrative process before seeking judicial review of an agency action. MCL 24.301; MSA 3.560(201); *Michigan Supervisors Union OPEIU Local 512 v Dep't of Civil Service*, 209 Mich App 573, 576-577; 531 NW2d 790 (1995) (noting that the exhaustion requirement is premised on the separation of powers doctrine).

Plaintiffs claim that because any appeal to the Supervisor of Wells on the basis of the same uncontested facts would have been futile, they were excused them from appealing the Assistant Supervisor of Wells' decision to the Supervisor or the Natural Resources Commission, as 1979 AC, R 299.2001 *et seq*. then permitted. A plaintiff may seek judicial review before obtaining a final agency order or decision when "it is clear that appeal to an administrative body is an exercise in futility and nothing more than a formal step on the way to the courthouse," *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981), for example when a case does not require the agency's extensive findings of fact or technical expertise and the involved issue is clearly framed for the court as one of law. *Huggett v DNR*, 232 Mich App 188, 193; 590 NW2d 747 (1998).

In the instant case, the facts are not significantly in dispute, and defendant's technical expertise is not crucial to resolving any issue. Plaintiffs present purely legal questions, including whether defendant

had the authority to promulgate 1979 AC, R 299.1105 and whether defendant could act against plaintiffs because they "owned" the well. Consequently, the trial court erred in concluding that plaintiffs had to exhaust their administrative remedies prior to seeking judicial review. The trial court nevertheless reached the correct result in this case.

II

Plaintiffs next claim that the trial court erred by refusing to force defendant to transfer permit 36115 to Trinity and to remove plaintiff's names from the "hold permits list." According to plaintiffs, defendant lacked any authority to act against them under the former statutory chapter concerning oil, gas and minerals, MCL 319.1 *et seq.*; MSA 13.139(1) *et seq*. (Chapter 319), or the administrative rules that applied to oil and gas well drilling permits, 1979 AC, R 299.1101 *et seq*.[1] Whether the oil, gas and mineral statutes and defendant's administrative rules allow it to sanction plaintiffs for an oil spill that occurred during Trinity's tenure as the well's operator represents a question of law that we review de novo. *Aaronson v Lindsay & Hauer Int'l Ltd*, 235 Mich App 259, 270; 597 NW2d 227 (1999).

The primary rule of statutory construction is to determine and effectuate the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). When the Legislature enacted Chapter 319, it explicitly identified the statutory purposes.

> It has long been the declared policy of this state to foster conservation of natural resources to the end that our citizens may continue to enjoy the fruits and profits thereof. . . .
>
> . . . The interests of the people demand that exploitation and waste of oil and gas be prevented. . . .
>
> It is accordingly the declared policy of the state to protect the interests of its citizens and landowners from unwarranted waste of gas and oil and foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of these natural products. To that end this act is to be construed liberally in order that effect may be given to sound policies of conservation and the prevention of waste and exploitation. [MCL 319.1; MSA 13.139(1).]

Accordingly, the Legislature enacted a specific provision prohibiting the commission of "waste in the exploration for or in the development, production, or handling or use of oil or gas; or in the handling of any product thereof." MCL 319.4; MSA 13.139(4).

The Legislature charged defendant, acting as the Supervisor of Wells, with administering and enforcing the regulation of oil and gas wells to prevent waste and conserve these natural resources. MCL 319.5; MSA 13.139(5). To that end, it granted defendant broad authority to promulgate rules under the APA, "to enforce such rules and to do whatever may be necessary with respect to the subject matter herein to carry out the purposes of this act, whether or not indicated, specified, or enumerated in

this or any other section thereof." See MCL 319.6(a); MSA 13.139(6)(a). If a well owner or operator failed to comply with the statutes or any rules promulgated under the Supervisor's authority, defendant could hold hearings, issue orders or institute an action in the circuit court. See MCL 319.7, 319.18; MSA 13.139(7), 13.139(18). See also MCL 319.2(g); MSA 13.139(2)(g) ("'Owner' means the person who has the right to drill into and produce from any pool, and to appropriate the production either for himself or for himself and another or others.").

Defendant promulgated a number of rules to govern the drilling and operating of wells. 1979 AC, R 299.1101 *et seq*.[2] At issue in this case are 1979 AC, R 299.1104 ("Rule 104"), R 299.1105 ("Rule 105") and R 299.1105a ("Rule 105a").

Rule 104 conditioned drilling permit eligibility on compliance with Chapter 319, the rules promulgated thereunder and the Supervisor's orders. This rule specifically allowed defendant to withhold drilling permits as an enforcement technique. Rule 105 governed the process of transferring a drilling permit issued under 1979 AC, 299.1101 ("Rule 101"), and stated, in pertinent part, as follows:

> (2) Should the person who has obtained a permit to drill dispose of his interest in the well to a new owner before drilling is commenced, while the well is being drilled, or after the well has been completed, a notice of the change of ownership and a request for the transfer of the permit to the new owner shall be submitted to the supervisor . . .
>
> (3) Should the owner of record or the acquiring operator fail, neglect or refuse to file a notice of change of ownership and request the transfer of a permit for a producible well, the supervisor may require suspension of production from the well until the request for transfer has been filed and approved.
>
> (4) Should the owner of record be under notice because of unsatisfactory conditions on the lease involved with the transfer of a permit, the supervisor may require suspension of production from the well on said lease until:
>
> (a) The owner of record has corrected said unsatisfactory conditions and the permit has been transferred to the new owner; or until
>
> (b) The acquiring operator by written agreement with the supervisor has corrected said unsatisfactory conditions and the permit has been transferred as provided herein.

Rule 105a represented an additional enforcement provision that permitted defendant to suspend a well's oil or gas production to ensure compliance with subrule 105(2)'s change of ownership/ permit transfer requirements.

In February 1993, defendant informed Texas Western that it had violated Rule 105 by failing to seek a transfer of its drilling permit to Trinity, and that defendant was prepared to take action under Rule 105a. Subsequent letters to Texas Western and Sullivan advised that defendant found them to be in violation of substantive rules prohibiting oil and gas waste.

We conclude that Rule 105 authorized defendant's specific actions in this case. Both Rules 105 and 105a applied under the facts of this case because Sullivan and Texas Western, each of whom constitutes an "owner of record" or "person who obtained a drilling permit," in 1992 transferred ownership of the well to Trinity. 1979 AC, R 299.1105(2), (3), R 299.1105a. There is no doubt that plaintiffs are the last owners of record for the well. Both plaintiffs' names appear on the 1987 transfer of permit form within a space labeled "Name(s) of Acquiring Owner(s)." Plaintiffs not only fail to challenge defendant's assertion that they transferred ownership of the well to Trinity, they rely on that fact to support their argument that they cannot be penalized because they no longer "own" the well.

Sullivan contends, however, that no unsatisfactory condition in the operation of the lease existed that would have permitted defendant to sanction plaintiffs under subrule 105(4). Even absent brine or salt contamination, water contamination, or Sullivan's inexcusable failure to report a spill, as defendant alleged in the final noncompliance letter, plaintiffs acknowledge that there was an oil spill at the well. This spill appears to have violated 1979 AC, 299.1906, which demanded that "[e]very precaution shall be taken to prevent the escape of oil." Consequently, if Trinity, the acquiring owner, was unwilling to agree to clean up the spill as contemplated by subrule 105(4)(b), then defendant had the authority shut down the well pursuant to subrule 105(3) and require the "owner[s] of record," plaintiffs, to bring the well into compliance pursuant to subrule 105(4)(a). The existence of the oil spill also supported defendant's withholding of other drilling permits under Rule 104.

III

Sullivan also argues that defendant lacked authority to promulgate Rule 105 because MCL 319.23; MSA 13.139(23) referred only to the issuance of permits to *drill* wells, while Rule 105 expands defendant's authority over permits to cover drilling and *operating* wells. Defendant had broad authority to promulgate rules under Chapter 319. MCL 319.6; MSA 13.139(6). In *Dykstra v DNR*, 198 Mich App 482, 484; 499 NW2d 367 (1993), this Court explained that when

> an agency is empowered to make rules, the validity of those rules is to be determined by a three-part test: (1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary or capricious.

Rule 105 satisfies each element of this test.

First, Sullivan assumes, without explanation or authority, that the relevant enabling statute is specifically MCL 319.23; MSA 13.139(23), which governed drilling permits, instead of Chapter 319 as a whole or any other section of the act. MCL 319.6; MSA 13.139(6) very broadly defined the scope of the rules that defendant could promulgate under Chapter 319. Defendant's authority extended to promulgating rules that aided in the identification of well owners, which Rule 105 attempted to do by requiring that well owners notify the Supervisor of Wells when well ownership changed. MCL 319.6(n); MSA 13.139(6)(n). It makes no difference whatsoever in the context of this appeal that drilling permit 36115 expired before ownership transferred or that no new drilling could occur under its

auspices because the permit serves a second regulatory purpose by officially recording the past and current well owners. We conclude that Rule 105 fell within the scope of Chapter 319.

The second part of the three-part test articulated in *Dykstra*, *supra*, looks at whether the rule serves the purpose of the enabling statute. The Legislature in MCL 319.1; MSA 13.139(1), explicitly stated that Chapter 319 intended to "protect the interests of [Michigan] citizens and land owners from unwarranted waste of gas and oil and foster the development of the industry along the most favorable conditions and with a view to the ultimate recovery of the maximum production of these natural products." Rule 105 carried out this legislative purpose by tracking a well's owner of record and limiting the transfer of ownership until the well complied with Chapter 319 standards. Rule 105 appears intended to prevent the very circumstances that exist in the present case, in which all parties related to the polluting well disclaim responsibility for the pollution.

Finally, Sullivan does not explicitly argue that Rule 105 is arbitrary or capricious. See *Bundo v City of Walled Lake*, 395 Mich 679, 703, n 17; 238 NW2d 154 (1976) (defining "arbitrary" as "[f]ixed or arrived at through an exercise of will . . . without consideration or adjustment with reference to principles, circumstances, or significance," and "capricious" as "apt to change suddenly; freakish; whimsical"); *Dykstra*, *supra*. We assume that Sullivan believes that it is arbitrarily being held responsible for the spill, having already transferred its ownership interest in the well. As defendant argues, however, Rule 105 was necessary to prevent individuals and entities from transferring their ownership interests in wells merely to avoid their statutory duty to prevent or remedy waste. Furthermore, Rule 105 is unambiguous on its face and was in effect as far back as the time when Sullivan purportedly lost its interest in the well to Finders, and at every ownership transfer thereafter. We see nothing unanticipated or unprincipled in holding plaintiffs accountable for what amounts to a continuing violation of the duty to apprise the state of the well's ownership. *Bundo*, *supra*.

IV

Lastly, plaintiffs argue that defendant could not take action against them under Rule 105 because they did not own the well during the period when the spill occurred, and contend that the circuit court erred by refusing to grant them equitable relief from defendant's continuing sanctions. Plaintiffs rely on the punctuation between the names on the drilling permit, the joint operating agreement, the ordinary distinction between an owner and operator of a well, the definition of an owner in Chapter 319, MCL 319.2(g); MSA 13.139(2)(g), the statutory provision of an owner's liability under what is now the remediation chapter of Natural Resources and Environmental Protection Act (NREPA), MCL 324.20126(1); MSA 13A.20126(1), and general property law concepts.

Rules 105 and 105a specifically referred to "owner[s] of record" and a "person to whom a permit has been issued." Chapter 319 did not define these terms, even though it defined the term "owner." MCL 319.2(g); MSA 13.139(2)(g). The term "person to whom a permit has been issued" is unambiguous. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996) ("If the plain and ordinary meaning of a [rule]'s language is clear, judicial construction is normally neither necessary nor permitted."). Furthermore, the only logical meaning of an "owner of record," as used in Rules 105 and 105a in the context of drilling permit transfers, is the person or entity

listed as an owner on a drilling permit. Plaintiffs are both clearly listed as "owners" on the form approving the last transfer of permit 36115, and are precisely the individuals or entities defendant may take action against under Rules 105 and 105a.

Therefore, the lower court did not err when it refused to issue an injunction, declaratory judgment, writ of mandamus, or order of superintending control compelling defendant to transfer permit 36115 to Trinity and remove plaintiffs' names from the "hold permits" list.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] Chapter 319 was repealed and superseded by Article III, Chapter 3, subchapter 2 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.61501 *et seq*.; MSA 13A.61501 *et seq*., after plaintiffs commenced this action. We address the merits of plaintiffs' claims under Chapter 319, which applied in 1993 and 1994 when defendant took action against plaintiffs.

[2] Although amended after plaintiffs brought this action in the circuit court, these rules were in force through 1994, when defendant commenced its enforcement actions against plaintiffs.