State of Michigan
Court of Appeals

Gary Cooley and Ban Michigan Fracking,

Plaintiffs-Appellants,

v

Court of Claims Case # 16-000050-MZ
Hon. Michael J. Talbot
CA Case # 334133
Appeal filed: 8-2-16

Michigan Department of Environmental Quality,

Defendant-Appellee.
_____/

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Appellants' Reply

Oral argument requested

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I. General points

DEQ's responsive argument begins:

> The permit at issue in this matter is for a mineral test well, regulated under Part 625.[1]

But this assumes the very point at issue, whether DEQ has carried its heavy burden to show that D4-11 actually is a "mineral well."

Appellants have no quarrel with the confidentiality of mineral wells under part 625. Had DEQ carried its burden to show D4-11 is a mineral well appellants would not be here.

But how could DEQ carry the burden if on the one hand it says D4-11 is a non-exploratory[2] well for testing minerals, and on the other hand it says there are no minerals to test in Crawford County,[3] particularly if it didn't even ask Marathon[4] to back up its self-interested non-notarized hearsay claim of the presence of potash or some other mineral? According to Western Michigan University, lucrative potash in this state is in counties 90 miles away and not in D4-11's Amherstburg formation.[5]

In their opening brief appellants invited DEQ to point to any of its official forms which appellants might have overlooked, which would have shown that DEQ in fact did ask Marathon to show D4-11 was a mineral well or identify the mineral.[6] DEQ's brief

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1 DEQ brief, p 5.
2 Cf appellants' opening brief, p 3.
3 Cf appellants' opening brief, p 4 nn 12, 13.
4 Cf appellants' opening brief, pp 3, 14, 16.
5 Exhibits 14-16,
6 Appellants' opening brief, pp 4, 13 n 42, 16-17.

responded with silence, in effect admitting it made no inquiry.

The definition of a "test well" under part 625 (the type of mineral well which DEQ claims D4-11 is) is quoted at complaint ¶ 6. Then at ¶¶ 45-46 the complaint states factually that D4-11 does not qualify under this definition:

> 45. DEQ agrees D4-11 is not a "test well for exploratory purposes."
>
> 46. Nor is D4-11 is simply a "test well," because it was not drilled solely for purposes related to minerals or mineral exploration or extraction. Rather it was drilled partially or completely to explore for oil and gas.

Under MCR 2.116(C)(8) the court and parties have to accept these factual statements as true. D4-11 is not a mineral well, and the confidentiality provisions of part 625 simply do not apply.

II. Convertibility of a mineral well to a gas-oil well

DEQ and the court of claims both have noted the propriety and legality of a mineral well applicant changing its mind after the start of operations, and applying with new papers to convert a well from a mineral well to a gas-oil well.

Appellants agree operators can do this, but it does not change our assertion that to qualify as a mineral well the operator's intent at the start can only be to explore for or test minerals. In this case the operator's stated intent was not to explore for a mineral, but to test one. In Michigan under the DEQ regime, that mineral would most likely be

salt, brine, or potash.[7] But as appellants noted in their opening brief,[8] the Marathon safety man's expression of hope that the company would find gas or oil at D4-11 means in the most literal commonsense sense that the company was "exploring" for gas or oil. This, even as it was claiming to test salt, brine, or potash deposits. If the safety man's statement is credited and authoritative for Marathon, mere exploration means as a matter of law that the company considered D4-11 a gas-oil well.[9]

Contentions of the court of claims and DEQ on this point would have weight if Marathon were testing a mineral such as potash and then fortuitously noted the presence of gas or oil which would trigger a conversion to part 615. But the complaint and the public documents noted below suggest by a preponderance that despite Marathon's uncorroborated assertion at the time it applied, from the start it never tested for potash and from the start DEQ never questioned this.

III. The new exhibits

Appellants' complaint attached 11 exhibits. Their opening brief attached 11 more which (except for one) were not presented to or referred to in the court of claims. All 22 are listed in an exhibit list filed with the opening brief. DEQ objects to the latter 11.

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7 Cf appellants' opening brief, p 8.
8 Appellants' opening brief, pp 6, 16.
9 Appellants' opening brief, p 16 n 47.

Of these, six[10] were public DEQ documents, two[11] were official publications of Western Michigan University, one[12] was a scholarly article of the US government, one[13] was a Crain's article cited to the court of claims on reconsideration, and one[14] was an opinion piece published by a monthly gas-oil commentator whose credentials are not stated.

Given the extremely preliminary posture of this case, where DEQ has not even filed an answer, appellants are free to make such citations. Indeed if this court remands the rules allow appellants to amend the complaint as a matter of course until 14 days after DEQ files its answer.[15] The motion for summary disposition did not qualify as its answer.[16]

IV. Marathon's safety man

DEQ attacks the admissibility of the statements of the safety man "Trace" at D4-11 in October 2015. The complaint says of him:

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10 Exhibits 12, 18-22.
11 Exhibits 14, 15.
12 Exhibit 16.
13 Exhibit 13.
14 Exhibit 17.
15 MCR 2.118(A)(1).
16 MCR 2.110(A); *Huntington Woods v Ajax Paving Industries*, 179 Mich App 600, 601 (1989).

> A worker who said he was Marathon's "safety man" came out to greet [visitors]. The name "Trace" was on his shirt. He stated that they were hoping to find gas or oil. Ensign 161 [the drill rig] was still humming loudly.[17]

These statements are admissible as present sense impressions.[18] The court of claims did not disregard them as hearsay nor should this court.

V. Conclusion

Should this court be inclined to uphold dismissal because of some omission or defect in the wording of the complaint below – as opposed to rejection of appellants' contention that D4-11 should not be governed by part 625 solely because Marathon checked the "Part 625 Mineral Wells Test" box[19] when it applied for the permit – appellants would be free respectfully to file a new FOIA request to DEQ which corrects that omission or defect. Should DEQ again deny the FOIA appellants would be free to bring the matter anew to the court of claims.

If this court is inclined to uphold dismissal for that reason, the efficient practice would be for it to remand with instructions that the complaint be dismissed absent a timely amendment which corrects the omission or defect.

Appellants ask the court to reverse the court of claims, and remand for further proceedings.

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17 Complaint ¶ 29.
18 MRE 803(1).
19 Exhibit 2.

Respectfully submitted,

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Dated: December 19, 2016

Certificate of Service

Ellis Boal certifies that on the above date he served the above counsel with the above pleading, both by email and by regular mail at his above address.

Ellis Boal