



Oil & Gas E-Report

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Texas Supreme Court Interprets the Scope of an Assignment of Overriding Royalty Interest

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Precise drafting is critical to a successful transaction, even a seemingly simple assignment of an overriding royalty interest. In *Piranha Partners v. Neuhoff*, 596 S.W.3d 740 (Tex. 2020), the Texas Supreme Court was called upon to determine the scope of an assignment of overriding royalty interest. The issue was whether the overriding royalty interest affected the entire oil and gas lease, or whether it was limited to the lands or wellbore described on the Exhibit A. After discussing various rules of construction and the surrounding circumstances, the court concluded that the overriding royalty interest affected the entire lease.

The overriding royalty assignment conveyed “all of [grantor’s] right, title and interest in and to the properties in Exhibit “A”. The opinion contains a depiction of the relevant portion of the Exhibit A, which reads as follows:

Lands and Associated Well(s): Puryear #1-28
Wheeler County, Texas
NW/4, Section 28, Block A-3, HG&N Ry. Co. Survey

Oil and Gas Lease(s) and/or Farmout Agreements:

Oil & Gas Lease(s)
Lessor: [the Puryears]
Lessee: Marie Lister
Recorded: Volume 297, Page 818

The first part of the description on Exhibit A identifies the “Lands and Associated Well(s)” as the NW/4 of Section 28 and the Puryear #1-28, respectively. The second part identifies the “Oil and Gas Lease” as the relevant oil and gas lease, which covers all of Section 28.

The grantor in the overriding royalty assignment is Neuhoff Oil & Gas, which owned a 3.75% overriding royalty interest on all production under the lease (various members of the Neuhoff family succeeded to the interest to Neuhoff Oil and Gas, and are referred to as “the Neuhooffs”). The grantee in the assignment is Piranha Partners.

After the overriding royalty assignment, several new wells were drilled on the lands affected by the oil and gas lease. The operator paid the overriding royalties on those wells to the Neuhooffs, believing that the overriding royalty was limited to the wellbore for the Puryear #1-28 well. However, after obtaining title opinions stating that Piranha owned the overriding royalty interest on production under the entire lease, the operator paid Piranha retroactively to first production from the new wells, and demanded a refund from the Neuhooffs for the proceeds that they erroneously received.

The Neuhooffs filed suit, claiming that the overriding royalty interest affects only production from the Puryear #1-28 well. The trial court disagreed and held that the assignment conveyed an overriding royalty interest affecting the entire lease. The court of appeals disagreed with both the trial court and the Neuhooffs and held that the overriding royalty interest affected the northwest quarter of Section 28, but not the remainder of the leased premises.

The Texas Supreme Court began its analysis with the granting language quoted above, which does not describe the interest conveyed, but instead incorporates the description found on the attached Exhibit A. The court then considered and rejected three rules of construction relied upon by Piranha Partners. Piranha argued that the deed should be construed to convey the greatest estate permissible under its language, focusing on the word “all” in the granting clause. However, the court rejected this argument and said that the deed conveyed “all” interest in the properties on Exhibit A, not “all” interest in the lease. Piranha next argued that the court should reject any alleged exception, reservation, or limitation that is not expressly and clearly stated in the deed. The court rejected this argument as well, stating that this rule is inapplicable because the assignment did not contain a reservation or exception. The relevant issue was the scope of the grant, not the extent to which a reservation or exception limits that grant. Piranha’s final argument was that if there is any doubt, the deed should be construed against the grantors. The court said that this rule is inapplicable here because the deed is not ambiguous or in doubt.

The court next turned to the circumstances surrounding the assignment. Neuhoff Oil & Gas sold the interest through an oil and gas clearinghouse auction, which involved numerous other properties in different states, and did not include any negotiations between the parties. Neuhoff argued that because certain references in the paperwork, including the invoice provided by the clearinghouse, refer to the “Puryear B #1-28” well, the intention was to convey an overriding royalty only as to lands in the northwest quarter of Section 28. In contrast, Piranha argued that the reference to the well was simply a shorthand label because that was the only producing well on the lease at the time. The court, however, noted that the circumstances fail to provide meaningful support for either party’s arguments, so it then turned its attention to the assignment itself to determine the amount of interest sold.

The court acknowledged that, standing alone, the Exhibit A is ambiguous because it does not adequately identify the interest assigned, but that taking a holistic and harmonizing approach required it to consider all provisions in the assignment. It then engaged in a detailed analysis of several specific clauses and phrases throughout the assignment, and the manner in which they aid in interpreting the Exhibit A. One clause found after the grant states that it includes “All oil and gas leases, mineral fee properties or other interests, INSOFAR AND ONLY INSOFAR AS set out on Exhibit A ... whether said interest consists of leasehold interest, overriding royalty interest, or both ... which [interest] *shall include any* working interest, leasehold rights, overriding royalty interests and reversionary rights held by [Neuhoff Oil], as of the Effective Date” (emphasis added). The court determined that even though the paragraph limits the interest to that found on the Exhibit A, the italicized language states that the Exhibit A includes any overriding royalty held by Neuhoff. The assignment also includes a grant of contracts “to the extent that they affect the Leases,” and the court stated that if the conveyance included only Neuhoff’s overriding royalty in the well or the northwest quarter, there would have been no reason to convey all contracts that affect the lease. Finally, the court made reference to language stating that the overriding royalty was payable pursuant to the terms of the oil and gas leases described on Exhibit A, and that the interest is to be proportionately reduced to the interest in the oil and gas leases described on Exhibit A owned by the assignor or if said leases cover less than the entire mineral estate, and concluded that the reference to the oil and gas leases meant that the interest assigned was an overriding royalty in the oil and gas lease itself, even though the exhibit also made reference to lands and a well.

After construing the assignment in its entirety and harmonizing all provisions, the court concluded that the overriding royalty included production from the entire lease, and was not limited to the lands or well listed on the Exhibit A.

There is a vigorous dissent by Justice Bland, who was joined by Justice Lehrmann, which argues that the court should have held the property description to be ambiguous and remanded the case for a jury to determine the meaning. The dissent states that the majority should not seek “clues from snippets of unrelated words found in other phrases in the assignment to resolve the case.”

The *Piranha* case illustrates the importance of careful drafting of assignments of overriding royalties, which can be limited to certain lands or wellbores. Although not at issue in the case, overriding royalties can also be depth limited, adding yet another dimension. These same issues are important in conveyances of other mineral interests, including leasehold assignments and mineral and royalty deeds.

Ohio Courts Continue to Decide Royalty Cases

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Courts in producing states across the country are addressing the issue of whether post-production costs may be considered when calculating a mineral owner's royalties, and Ohio is no different. A recent example is *Gateway Royalty, L.L.C. v. Chesapeake Exploration, et al.*, where the Seventh District Court of Appeals affirmed the lessee's calculation of royalties based on amounts received at the wellhead from an affiliate marketer.¹

In *Gateway*, Chesapeake Exploration, LLC (Chesapeake), produced and sold natural gas at or near the wellhead to an affiliate, Chesapeake Energy Marketing, LLC (Marketer). Marketer then had the raw gas processed into methane and natural gas liquids, which it sold downstream to third-party purchasers. Marketer paid Chesapeake based upon the price it received from those third-party purchasers, less the costs incurred between the wellhead and the downstream sale, and Chesapeake paid royalties based on that received price. Gateway Royalty filed suit, alleging that royalties had been underpaid because they were based on the amount received from Marketer rather than the downstream sales price received from the purchasing third parties.

The lease royalty provision stated that "for the gas marketed and used off the premises ... [the royalty shall be] the sum of one-eighth (1/8) of such gas so marketed and used at the price paid to Lessee ... less any charges for transportation, compression, and/or dehydration to deliver the gas for sale." Gateway argued that the only price paid was the price received from the third-party purchasers, and that the only gas that was marketed off the premises was marketed by Marketer, not Chesapeake, meaning that the royalty should have been paid on that downstream price. Moreover, Gateway argued that no post-production cost deductions were allowed because those costs were incurred by Marketer, not Chesapeake, and they were incurred after title to the production passed from Chesapeake to Marketer. The court of appeals rejected each of these arguments.

The court found the lease language to be clear and unambiguous. Consistent with other recent Ohio decisions, the court noted that "[a]ccording to Merriam-Webster's online dictionary, to 'market' is 'to expose for sale in a market' or to 'sell.'" Thus, when [Chesapeake] sold the gas and NGLs to [Marketer], it 'marketed' the product." When Chesapeake paid royalties on the netback amount that it received on its sales to Marketer, therefore, it was doing precisely what the royalty provision contemplated – paying royalties on the price lessee received on sales of gas at the wellhead. And the court supported its decision by noting that the federal district court in *Henceroth v. Chesapeake Exploration, L.L.C.*,² had approved this very method, as had an arbitration panel in *Hale v. Chesapeake Exploration, L.L.C.*³

¹ 2020-Ohio-1311.

² 2019 WL 4750661 (Sept. 30, 2019) (finding that the lessee had "marketed" the production at the wellhead; observing that to "[m]arket is 'to expose for sale in a market' or to 'sell'").

³ 2019 WL 1863670 (Apr. 25, 2019).

Daily Rate for Employee's Work on Offshore Rigs Does Not Satisfy FLSA Exemptions Requiring Compensation on a "Salary Basis"

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Hewitt v. Helix Energy Sols. Grp., Inc., 956 F.3d 341 (5th Cir. 2020) held that paying a daily rate for each day worked is not paying on a "salary basis" under 9 C.F.R. § 541.602(a), which is required for an employee to qualify for certain exemptions under the Fair Labor Standards Act (FLSA). *Hewitt* settled an issue that initially split an earlier panel whose revised opinion left the issue unresolved. See *Faludi v. U.S. Shale Sols.*, 936 F.3d 215 (5th Cir. 2019), *opinion withdrawn*, 950 F.3d 269 (5th Cir. 2020).

Facts

Helix's employee, Michael Hewitt, worked as a tool pusher whose duties included managing other employees during approximately month-long "hitches", i.e., time on an offshore oil rig.¹ Hewitt received biweekly paychecks and was paid a fixed amount for each day that he worked.² Because he worked over 40 hours a week, Hewitt "would ordinarily be entitled to overtime unless he was an exempt employee."³ Helix argued that Hewitt was "an exempt executive or highly compensated employee."⁴ Both such exemptions required, *inter alia*, payment on a "salary basis."⁵ Hewitt argued that he was not paid on a salary basis because his pay was calculated based on a daily, not weekly, rate; and, Helix countered that, under Labor Department regulations, Hewitt was paid on a "salary basis" because he received more than the weekly salary requirement if he worked a single day during a week.⁶ The case largely turned on 29 C. F.R. § 541.602(a), which states:

An employee will be considered to be paid on a "salary basis" within the meaning of this part if the employee *regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount* constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.⁷

The district court had granted summary judgment for Helix, ruling that Hewitt was either an executive or highly compensated employee. See *Hewitt v. Helix Energy Sols. Grp., Inc.* 2018 WL 6725267, at *4 (S.D. Tex. Dec. 21, 2018).⁸

Decision

The Fifth Circuit panel began by noting that "§ 541.602(a) requires that an employee receive for each pay period a 'predetermined amount' calculated on a 'weekly, or less frequent' pay period."⁹ This meant, "[t]o put it plainly: The salary basis test requires that an employee know the amount of his compensation for each weekly (or less frequent) pay period during which he works, *before* he works."¹⁰ As an example of being able to know in advance, the Court noted that an employee with an annual salary being paid biweekly could determine the amount of each paycheck before working a pay period by dividing the annual salary by 26.¹¹ But, Hewitt's pay was unknowable in advance of a pay period; instead, "he had to take the number of days he worked (past tense) and multiply by the operative daily

¹ *Hewitt*, 956 F.3d at 342.

² *Id.*

³ *Id.*

⁴ *Id.* at 342-3. See 29 C.F.R. §§ 541.100 (executive employees) & 541.601 (highly compensated employees).

⁵ *Id.* at 343. The salary test has two parts: (1) "employer must pay the employee a minimum per-week rate" and (2) "the employer must pay the employee on a "salary basis". *Id.* Both exemptions also have a "duties test". *Id.*

⁶ *Id.*

⁷ *Id.* All italicized words in this Article, including in the quoted regulation, are italicized in the Court's opinion.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* The court noted that certain deductions from "salary basis" pay were allowed by § 541.602(b). *Id.*

¹¹ *Id.* The Court noted that such a calculation would be approximate because "there are 52 weeks *plus one day* in a 365-day year." *Id.* at n. 2. However, the point was that the employee in the example could "count on receiving at least that predetermined amount for each biweekly paycheck". *Id.*

rate to determine how much he earned.”¹² Hence, “Hewitt knew his pay only *after* he worked through the pay period.”¹³ Accordingly, “he did *not* receive a “predetermined amount” “on a weekly or less frequent basis”—rather, he received an amount contingent on the number of days he worked each week”.¹⁴

The second reason for the Court’s decision was that § 541.602(a)(1) requires that “[a]n exempt employee must receive the *full* salary for any week in which the employee performs any work *without regard to the number of days or hours worked.*”¹⁵ The Court concluded that such language “cannot be squared” with Hewitt’s pay because “he was paid ‘*with*’ (not ‘*without*’) ‘regard to the number of days or hours worked.’”¹⁶ Thus, again, Hewitt was not paid on a salary basis.¹⁷

Finally, in a footnote, the Court dispensed with an argument that Helix met the “alternative requirements of 29 C.F.R. § 541.604(b), which governs employment compensation based on [*sic*] minimum weekly guarantee in addition to hourly or daily rates.”¹⁸ That regulation could not apply because: (1) it also requires payment on a salary basis, and (2) it requires “a reasonable relationship... between the guaranteed amount and the amount actually earned,” a test which Helix did not claim to meet (instead arguing its inapplicability).¹⁹

Having held that an employee paid on a daily rate is not paid on a “salary basis” under 29 C.F.R. § 541.602(a), the Fifth Circuit panel reversed the summary judgment and remanded for further proceedings.²⁰

Conclusion

In the Fifth Circuit, employees paid a daily rate for days worked will not qualify as exempt employees under an exemption requiring payment on a “salary basis” under 29 C.F.R. § 541.602(a); and, therefore, such an exemption will not shield an employer from overtime rules as to such employees.

¹² *Id.* at 344.

¹³ *Id.*

¹⁴ *Id.* The Court noted that had the length of each hitch been agreed beforehand, “there could be an argument that Hewitt’s salary was “predetermined””; however, the Court did not consider that argument because it had not been raised in the district court. *Id.* at n. 3.

¹⁵ *Id.* at 344.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at n. 4.

¹⁹ *Id.*

²⁰ *Id.* at 342 & 344-345.

Louisiana Third Circuit Issues New Decision Involving Prescription and Breach of Contract in Oilfield “Legacy” Case

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The Louisiana Third Circuit Court of Appeal recently issued an opinion involving issues of prescription and breach of contract claims in the context of “legacy lawsuits” and Act 312 that oil and gas companies must remain cognizant of going forward. Act 312, codified at Louisiana Revised Statute 30:29, is a procedural statute that governs claims for alleged contamination due to historical exploration and production activities. In *State of Louisiana, et al. v. Louisiana Land & Exploration Co., et al.*, the Third Circuit affirmed the Vermilion Parish School Board’s authority to sue on behalf of the state, rejected a prescription defense on the basis of prescription immunity under the Louisiana Constitution, and concluded that a finding of “environmental damage” as defined under Act 312 is sufficient to trigger a breach of contract claim.

Vermilion Parish School Board (“VPSB”) filed a petition for alleged damage to Sixteenth Section School lands on its own behalf and on behalf of the state. VPSB urged various causes of action such as negligence, strict liability, and breach of contract in seeking damages and remediation of the property. This case boasts a lengthy and varied procedural history, but the opinion at issue came after a jury found Unocal responsible for “environmental damage” as defined under Act 312 and awarded \$3.5 million for a regulatory cleanup to the requisite state standards. In addition, the jury found Unocal strictly liable to the plaintiffs (but not liable for negligence or breach of contract), awarding \$1.5 million in private damages.

Unocal appealed, asserting that VPSB did not have authority to sue on behalf of the state and that VPSB’s claims were prescribed (time-barred). VPSB also appealed, arguing primarily that the verdict was inconsistent insofar as the jury found environmental damage, but no breach of contract. The Third Circuit ultimately affirmed the decision that VPSB’s claims were not prescribed and reversed and remanded for a new trial on the basis that the jury verdict was inconsistent.

The Court first addressed Unocal’s contention that VPSB lacked authority to sue on behalf of the state with a short review of its own and U.S. Fifth Circuit jurisprudence. Reasoning that VPSB was acting in furtherance of its duty to function as the state in the state’s capacity as trustee of Sixteenth Section lands, the Court determined that VPSB has the right to bring any action to protect said lands. Thus, the Court concluded that VPSB was allowed to bring the claims at issue and affirmed the trial court’s denial of Unocal’s exception of no right of action.

Second, the opinion turned to Unocal’s assignment of error that VPSB’s claims were prescribed because its strict liability claim—the claim on which VPSB prevailed at trial—was filed more than one year after it knew of the claim (even more than one year after VPSB retained counsel to file suit). The Court began with a discourse on the jurisprudential history of prescription relative to the state and state agencies. Ultimately, the Court found that Sixteenth Section lands are private, corporeal, immovable things, that the relationship between said lands, the state, and the school boards is that of trust for the benefit of public use, and that said lands fall within the public trust doctrine. As a result of these findings, the Court concluded that VPSB’s claim was immune from prescription under Article 12, Section 13 of the Louisiana Constitution.

Third, the Court analyzed VPSB’s contention that the judgment was based on an inconsistent jury verdict. Notably, as expressly authorized by Act 312, Unocal had entered into a pre-trial limited admission of “environmental damage” and that limited admission was presented to the jury. Ultimately, the Third Circuit cited to Unocal’s limited admission, as well as both parties’ expert testimony that there were regulatory exceedances on the property, to conclude that no reasonable jury could have found that Unocal did not breach its leases.

The case involved two leases: a 1935 mineral lease and a 1994 surface lease. The 1935 lease, as the Court recognized, did not contain any language with respect to remediation and/or restoration

obligations. However, the Court cited an earlier decision from the Louisiana Supreme Court in this very case, 110 So. 3d 1038 (La. 2013), to find that Unocal had an implied obligation under the Louisiana Civil Code to restore the land to its previous condition minus “normal wear and tear.” The Court held that the finding of “environmental damage” meant that Unocal failed to return the property with only “ordinary wear and tear,” which “can only be reasonably found to be a breach of the 1935 lease.”

As to the 1994 lease, the Court found that Unocal had an express duty to restore the property “to the same or similar condition existing at commencement of the lease as nearly as practicable” as well as a duty to comply with all applicable governmental regulations. Without referencing the time period of any alleged violation, the Court reasoned that Unocal’s failure to abide by state regulations (evidenced by Unocal’s expert’s testimony that saltwater escaped from disposal wells) necessarily dictates that Unocal breached the 1994 lease.

Based on the findings above, the Court concluded that the jury’s failure to find Unocal in breach of both the 1935 and 1994 leases was inconsistent with its finding that Unocal was responsible for “environmental damage” to the property and its award to restore the property to state regulatory standards. Further, finding that the trial court committed legal error in entering judgment based on the inconsistent verdict, the Court remanded the case for a new trial as to these issues.

The decision therefore has significant implications not only for cases involving Sixteenth Section lands, but also on the interplay between limited admissions, “environmental damage,” and lease claims in the context of legacy lawsuits and Act 312.

Texas Supreme Court Holds That Rule Against Perpetuities Rendered Invalid an ORRI That Would Have Arisen Under a New Lease by Virtue of Anti-Washout Clause

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A mineral owner granted a mineral lease to Aikman Oil in 1986. Later, Aikman Oil assigned the lease to Jay Haber, reserving a 2.25% overriding royalty interest (ORRI). The assignment contained an anti-washout clause (sometimes called an “extension and renewal clause”), which stated that the ORRI would apply to any extension or renewal of the lease, or to any new mineral lease obtained by Haber or his successors in interest, that covered the same area.

Through a series of conveyances, various persons (collectively, the “Yowells”) acquired the ORRI, and Upland Resources, Inc. acquired the 1986 lease. In 2007, the mineral owner granted a top lease to Amarillo Production Company. A few months later, Amarillo sued Upland, asserting that the 1986 lease had terminated and that the 2007 top lease had gone into effect. Amarillo and Upland settled the litigation. The settlement provided for: termination of the 1986 lease; allowing the 2007 top lease to go into effect; assignment of the 2007 lease from Amarillo to Upland; and payment of certain compensation to Amarillo. Upland later became Granite Operating Company.

Granite quit paying the Yowells’ ORRI, contending that it did not apply to the 2007 lease, notwithstanding the anti-washout clause in the assignment that created the ORRI. The Yowells sued and their case reached the Texas Supreme Court in *Yowell v. Granite Operating Co.*, ___ S.W.3d ___, 63 Tex. Sup. Ct. J. 1070, 2020 WL 2502141 (Tex. 2020), with a major issue being whether their ORRI violated the rule against perpetuities. As the court noted, the Texas Constitution prohibits “perpetuities” in Article I, § 26, which states in part: “Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. ...”

The Constitution does not define “perpetuities,” however, so the interpretation of this term has been left to the courts. The Texas Supreme Court has stated, “A perpetuity is a restriction on the power of alienation that lasts longer than a prescribed period.”¹ As for the “prescribed period,” the court has adopted the period provided in the common law’s rule against perpetuities (the “Rule”), which provides that “no [property] interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance.”²

The Rule does not bar present property interests or future property interests that vest at the time they are created. Further, it does not prohibit future property interests that do not vest at the time they are created, provided that, at the time the future interest is created, there is a complete certainty that it will vest within the period prescribed by the Rule. If, on the other hand, it is possible that a future will never vest or will not vest within the period prescribed by the Rule, the interest violates the Rule.

Yowell noted that many types of mineral interests do not violate the Rule. For example, a lessee’s right under an oil and gas lease does not violate the Rule because it is a present interest—in particular, a fee simple determinable. Further, a lessor’s possibility of reverter does not violate the Rule because, although it is a future interest, it vests at the time of its creation, when the lease is granted. Similarly, a nonparticipating royalty interest (NPRI) carved out of the mineral estate owner’s interest does not violate the Rule, even if there is no production and no lease in existence at the time the NPRI is created. Such an NPRI does not violate the Rule because it is a present interest that vests at the time it is created, even though it is a present interest in future production.

To the extent that the Yowells’ ORRI applied to the original 1986 lease, it was a present interest and therefore did not violate the Rule. Indeed, to the extent that the ORRI would apply to any

¹ *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 866–67 (Tex. 2018).

² *Yowell*, 2020 WL 2502141 at *3 (quoting *Peveto v. Starkey*, 645 S.W.2d 770, 772 (Tex. 1982)).

extension or renewal of the 1986 lease, the Texas Supreme Court stated that the ORRI was a present interest and therefore did not violate the Rule. But the 2007 lease did not qualify as an extension or renewal of the 1986 lease. The 2007 lease was a new lease, and to the extent the ORRI applied to it, the Yowells' ORRI interest in the 2007 lease was an unvested future interest at the time it was created.

The court therefore had to analyze whether, at the time the ORRI interest was created, it was certain that the ORRI in the 2007 lease would vest within the period prescribed under the Rule. At the time the ORRI interest was created, the 2007 lease had not yet been negotiated. Under the Rule, it was not sufficient that the 2007 lease did, in fact, come into existence within the prescribed period. For purposes of the Rule, the important point was that there was no certainty that the interest would ever come into existence, much less that it would come into existence during the period prescribed by the Rule. Because it was not guaranteed to come into existence within that period, the Yowells' ORRI interest in the 2007 lease violated the Rule.

As a general rule, property interests that violate the Rule are invalid. *Yowell* noted, however, that *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. 2018) recognized a narrow exception to the general rule that a property interest that violates the Rule is invalid. *Yowell* therefore analyzed whether the Yowells' ORRI interest in the 2007 lease would qualify for the *Koopman* exception.

In *Koopman*, a landowner who owned the minerals in her land sold the land to the Koopmans, reserving a NPRI that would last for fifteen years and as long thereafter as there was production in paying quantities, after which time the NPRI would terminate, thereby benefitting the Koopmans. A dispute later arose regarding whether the Koopmans' interest in the termination of the seller's NPRI violated the Rule. The Texas Supreme Court concluded that it did because the Koopmans' interest was a future interest that would not vest until the seller's NPRI terminated, and that the termination (and hence the vesting of the future interest) was not guaranteed to occur within the period prescribed by the Rule. The court created, however, a narrow exception to the general rule that a property interest that violates the Rule is invalid. The court did so based on the following reasoning.

First, *Koopman* noted that, for purposes of the Rule, "[t]he word 'vest' ...refers to an immediate, fixed right of present or future enjoyment of the interest." The Koopmans' interest was a "springing executory interest," explained the court, further noting that "[a]n executory interest is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate," and that "[a] springing executory interest is one that operates to end an interest left in the transferor." An executory interest is not deemed to vest at the executing of the instrument that created it, but instead is deemed to vest upon the happening of the occurrence or event that terminates the third person's interest. In this case, the Koopmans' interest in the termination of the NPRI was a springing executory interest that would not come into existence until the seller's NPRI terminated. Further, the termination of that NPRI and hence the vesting of the Koopmans' interest was not certain to occur within the period prescribed by the Rule. Therefore, the Koopmans' interest violated the Rule.

An interest that violates the Rule typically is invalid, but *Koopman* quoted prior decisions that explained the purpose of the Rule, including a case that stated: "The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil." *Koopman* reasoned, however, that recognizing the validity of the Koopmans' interest would not interfere with the marketing of the interest and even could increase it by simplifying the ownership structure for the land and minerals.

The court also noted that, if the seller had sold the land to the Koopmans without reserving an interest, and immediately thereafter the Koopmans had granted the seller an NPRI that would last for fifteen years and as long thereafter as minerals were produced in paying quantities, the Koopmans' interest in the termination of the NPRI would have been an interest in the possibility of reverter. Such

an interest is deemed a present interest, not an executory interest, because the grantor (the Koopmans in this hypothetical) is deemed never to have divested itself of the reverter interest. Therefore, such a reverter interest would not violate the Rule.

But such a reserved reverter interest in the termination of an NPRI would be, functionally, essentially identical to the springing executory interest that the Koopmans actually had. The court saw no reason to hold that the Koopman's springing executory interest was invalid when it functioned in virtually the same way that a possibility of reverter interest that would not violate the Rule. The court held, therefore, that the Koopmans' interest was valid, stating: "For the reasons stated above, it is appropriate to hold that in this oil and gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest."

Yowell discussed the *Koopman* exception, but concluded that the exception did not and should not apply. The court reasoned that the Yowells' interest was subject to multiple contingencies and that public policy interests served by the Rule applied. Therefore, the Yowells' ORRI in the 2007 lease was invalid.

The court addressed other issues too. For example, the Rule applies to property interests, but not contract rights. The court rejected an argument that the Yowells' interest in the 2007 lease was a contractual right only. The court concluded that the Yowells had both a property interest and a contract right. To the extent the Yowells might have had a breach of contract claim, the Rule would not have barred it, but the Yowells had not asserted a breach of contract claim.

The court noted that Texas Property Code section 5.043 generally requires reformation of commercial interests that violate the Rule. The court rejected Granite's arguments: that section 5.043 does not apply to instruments other than trusts and wills; that it does not apply to conveyances by corporations; and that a reformation under 5.043 is subject to a four-year statute of limitations. The court remanded for further proceedings regarding whether the Yowells' ORRI interest in new leases could be reformed.

Yowell also dealt with certain contractual indemnity issues and attorney fee issues contested in the case.

Louisiana Mineral and Energy Board Adopts Temporary Moratorium on Leasehold Maintenance and Grants Other Relief

Cynthia A. Nicholson and C. Peck Hayne Jr.

Gordon, Arata, Montgomery, Barnett, McCollam, Duplantis & Eagan, LLC

On April 29, 2020, the Louisiana Mineral and Energy Board held a special meeting via Zoom to consider resolutions to grant certain relief to lessees of oil and gas lease and operating agreements granted by the State of Louisiana.

The Board adopted resolutions that grant a temporary moratorium on lease maintenance obligations for the time period of March 11 until July 13, 2020 and then allow an additional thirty-day period for the lessee to recommence lease maintenance operations or production. But if a lessee obtains production during this time period, royalty payments to the state must be timely paid on such production. The resolutions also suspend all demands for reasonable development for the time period of March 11th until August 13th. The resolutions also provide for the postponement, waiver, delay and suspense of all penalties accrued during the time period of March 11th until August 12th for the settlement of royalty disputes and other lease or statutory obligations.

At their meeting on April 29, the Board recognized that lessees may still be adversely affected by the COVID-19 pandemic and/or low prices when these time periods expire and agreed to meet again to consider additional measures to assist the industry.

Sage-Grouse Advocates Secure Cancellation of Federal Oil and Gas Leases

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Sage-grouse protection advocates secured summary judgement voiding numerous federal leases in *Montana Wildlife Federation v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 WL 2615631 (D. Montana May 22, 2020) (“*Montana Wildlife*”).¹ It is this year’s second decision voiding federal leases because of actions by the Bureau of Land Management (“BLM”) in sage-grouse habitat areas.²

Facts

In 2015, the BLM amended provisions in 98 land-management plans across 10 Western states (“2015 Plans”) to protect sage-grouse in a successful effort to prevent an endangered species designation of the bird.³ The plans required that “[p]riority will be given to leasing and development ... outside of [sage-grouse habitat].”⁴ The Court said “[t]he central question ... is what it means to give something priority.”⁵ Plaintiffs sought Administrative Procedure Act (“APA”) review of claims that the BLM had violated the Federal Land Policy and Management Act (“FLPMA”).⁶

A. Statutory and Regulatory Backdrop

The Court noted that the APA’s “highly deferential” review standard directs overturning agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” while prohibiting substitution of a court’s judgment for the agency’s.⁷ It explained that federal leasing is subject to the FLPMA whose dictates the BLM accomplishes “by developing, maintaining and revising Resource Management Plans (“RMPs”) that “establish ‘[l]and areas for limited, restricted or exclusive use’ and determine ‘[a]llowable resource uses... and related levels of production or use to be maintained.’”⁸ The federal leasing process was described as including a party’s expression of interest (“EOI”) nominating a tract for inclusion in a competitive lease sale, the BLM’s posting of a notice of sale, and submission of any protests.⁹

The 2015 Plans provided sage-grouse habitat varying protection levels with “priority habitat management areas (“PHMAs”)” as the highest level¹⁰ and “general habitat management areas (“GHMAs”)” as the next level of priority.¹¹ Identical language in the Wyoming and Montana RMPs “directed BLM field offices to prioritize leasing outside of PHMAs and GHMAs.”¹² The BLM’s Record of Decision explained that the prioritization was “to further limit future surface disturbance and encourage new development in areas that would not conflict with [sage-grouse]” and “to guide development to lower conflict areas and ... protect important habitat.”¹³ The 2015 Plans promised “additional guidance” which was provided by “Instruction Memorandum 2016-143 (‘2016 IM’).”¹⁴ As “the 2015 Plans require ‘prioritization at both the “leasing and development” stages’”, the 2016 IM has sections for both stages;

¹ Reportedly, leases on over 470 square miles of public land were cancelled. Assoc. Press, *Judge Strikes Down US Energy Leasing Rules in Bird Habitat*, N.Y. Times, May 26, 2020, available at <https://www.nytimes.com/aponline/2020/05/26/business/ap-us-energy-leases-sage-grouse.html>.

² See *Western Watersheds Project v. Zinke*, 2020 WL 959242 (D. Idaho Feb. 27, 2020) (voiding June and September 2018 lease sales in Nevada, Utah, and Wyoming within sage-grouse habitat areas and voiding a BLM Instruction Manual (“IM”), *appeals docketed*, Nos. 20-35291 & 35342 (9th Cir. April 1 & April 17, 2020) (hereafter “*WWP*”).

³ *Montana Wildlife* at *1 & 8.

⁴ *Id.* at *1. Unless otherwise noted, brackets are by the Court.

⁵ *Id.*

⁶ *Id.* National Environmental Policy Act (“NEPA”) violation claims were denied as moot. *Id.* at *12.

⁷ *Id.* at *1.

⁸ *Id.* at *2.

⁹ *Id.*

¹⁰ *Id.* These have “essential habitat for maintaining [sage-grouse].” *Id.*

¹¹ *Id.* These contain areas “where some special management will apply to sustain [sage-grouse]” and “include... ‘occupied seasonal or year-round habitat outside of PHMAs.’” *Id.*

¹² *Id.*

¹³ *Id.* at *3.

¹⁴ *Id.*

and, its section on leasing stage prioritization has “six broad sections that each contain different actions” to accomplish its conservation goals.¹⁵

B. Regulatory Changes

After an Executive Order directed review of guidance documents potentially burdening usage or development of domestic energy, “then-Secretary Zinke issued a memorandum (“Zinke Memorandum”) that directed BLM to ‘collaborate’ with stakeholders on certain actions aimed at improving the 2015 Plans compatibility with state governments” and “to [m]odify or issue new policy on fluid mineral leasing and development, including the prioritization policy.”¹⁶ The BLM responded with “Instruction Memorandum 2018-026 (“2018 IM”), replacing “the 9.5 pages of the 2016 IM with five paragraphs.”¹⁷ “The 2018 IM states that “[i]n effect, the BLM does not need to lease and develop outside of [sage-grouse] habitat management areas before considering any leasing and development within” them and “should implement the new prioritization policy” where “the BLM has a backlog of Expressions of Interest for leasing.”¹⁸

C. The Sales

Lease sales were unsuccessfully protested and took place in December 2017 and March 2018 for lands in Montana and in June 2018 for lands in Wyoming.¹⁹ The percentages of tracts within the “General” or “Priority” sage-grouse habitat were 100% of the Wyoming sale, almost 90% of the 2017 Montana sale, 70% of the 2018 Montana sale.²⁰

Decision

Because only a “final agency action” can be challenged, the Court decided if the Zinke Memorandum and the 2018 IM were such actions.²¹ The 2018 IM was ruled to be a final agency action because it was: “the consummation of BLM’s decision of how to apply the prioritization requirement”, “definitely settled...how BLM will implement ...prioritization”, “effective immediately”, and “a decision ‘by which rights or obligations have been determined, or from which legal consequences will flow’” because it “in essence rescinds a number of mandates in the 2016 IM.”²² The Court nixed the claim that the 2018 IM “merely sets forth procedural guidelines, within the bounds of applicable regulations” because of its “practical effects” since the differences between 2018 IM and the 2016 IM were “significant.”²³ The Court concluded that 2018 IM was a final action under *WWP*’s analysis and under *Bennett v. Spear*, 520 U.S. 154 (1997), “as it represents BLM’s position and ... expectation of immediate compliance with its terms.”²⁴

The Court noted that the FLPMA requires management of public lands in accordance with land use plans, prohibits actions inconsistent with such plans, and requires “that an agency go through a formal amendment process” to change a plan.²⁵ According to the Court, the “2018 IM violates the FLPMA by contracting the 2015 Plans in two ways”: (1) “limiting the prioritization requirement only to

¹⁵ *Id.* at *3-4. Within the six sections were a prioritization sequence for considering leasing that assigned top priority in any sale to tracts without sage-grouse habitat (Section 1) and seven more factors to consider while leaving discretion not to consider certain parcels for a lease sale (Section 2). *Id.* at *3.

¹⁶ *Id.* *4.

¹⁷ *Id.*

¹⁸ *Id.* If such a backlog existed, the BLM would “prioritize its work first in non-habitat management areas, followed by” GHMA and, thereafter, “PHMA, then SFA.” *Id.* SFAs, undefined in *Montana Wildlife*, are Sagebrush Focal Areas, “areas that “represent “recognized strongholds for [sage-grouse]” and a subset of PHMA. See *Western Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225, 1236 (D.Or.2019).

¹⁹ 2020 WL 959242 at * 4-5.

²⁰ *Id.*

²¹ *Id.* at *5-7.

²² *Id.* at *5-6. Not being the “consummation” of the decision making, the Zinke Memorandum was not a final action. *Id.* at *7

²³ *Id.* at *6.

²⁴ *Id.* at *7. The Court said *WWP* involved “a new IM like the ones at issue here” and discussed that decision’s analysis in some detail. *Id.*

²⁵ *Id.* *8. Note that *WWP* held that notice-and-comment rulemaking was required to adopt the IM before it. See *WWP*, 2020 WL 959242 at *15.

situations when BLM faces a backlog of EOs,²⁶ and (2) “misconstrues the 2015 Plans and renders the prioritization requirement into a mere procedural hurdle.”²⁷ The argument that the 2016 IM implied that prioritization was only necessary for backlogs was rejected as contrary to the 2016 IM’s language showing that backlogs were an additional consideration, not a limitation on prioritization.²⁸ Additionally, the Court said the BLM violated the APA because there was no “satisfactory explanation”²⁹ for reinterpreting prioritization to apply only when there was a backlog and that “[f]aster and easier lease sales,” at the expense of imperiling the habitat potentially of a species on the brink” of endangered species listing was insufficient.³⁰ Finally, the 2018 IM viewed mere prioritization as the goal without mentioning the 2015 Plans’ goals of limiting surface disturbance and encouraging development in non-sage-grouse habitat areas; and, ignoring those goals “was fatal to the 2018 IM.”³¹ Deference to the BLM’s interpretation of the 2015 Plans was denied as the 2018 IM conflicted with the “plain language” of the plans.³²

The Court determined that the lease sales violated the FLPMA because they “explicitly, or in effect, follow the same rationale as the 2018 IM.”³³ Although the Montana leasing decisions preceded the 2018 IM, they “explicitly state that they did not apply the prioritization requirement...because there existed no EOI backlog” and the “failure to apply the prioritization requirement...violates the FLPMA regardless of whether the agency purported to follow the 2016 IM or the 2018 IM.”³⁴ Finally, the lease sales and the 2018 IM were voided because: “BLM’s errors undercut the very reason that the 2015 Plans created a priority requirement in the first place and prevent BLM from fulfilling that requirement’s goals [and] the errors here occurred at the beginning of the ... lease sale process, infecting everything that followed.”³⁵ Although lease cancellation would require return of millions of dollars to lease-winners, the Court said “that economic harm does not rise to the level of harm [the Ninth Circuit] considered significant enough to warrant remand without vacatur.”³⁶ The Court concluded that there was not “a serious possibility that the [agency would] be able to substantiate its decision on remand”³⁷ and vacated the 2018 IM and the lease sales (except the Butte Field Office’s leases without sage-grouse habitat).³⁸

Conclusion

An appeal seems likely as in *WWP*.³⁹ *Montana Wildlife*, even if reversed, sounds a warning that lessees may suffer adverse consequences if the BLM fails to follow proper procedures.

²⁶ *Montana Wildlife* at *8 (noting the Federal Wildlife Service relied on the mandatory nature of the prioritization in refusing to list the sage-grouse as an endangered species).

²⁷ *Id.*

²⁸ *Id.* at *10.

²⁹ *Id.* at *9.

³⁰ *Id.*

³¹ *Id.* (noting BLM’s previous signaling that non-sage-grouse EOs had a better chance of approval by explicit deferrals from lease sales).

³² *Id.* at *10-11.

³³ *Id.* at *10.

³⁴ *Id.*

³⁵ *Id.* (brackets by author).

³⁶ *Id.* at *11 (citing *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 993-4 (9th Cir. 2012) and indicating that decision had noted “that remand with vacatur would disrupt a “billion-dollar venture”).

³⁷ *Id.* at *12.

³⁸ *Id.*

³⁹ Pending appeal, the court in *WWP* stayed lease cancellation, but not lease operation or production. See *Western Watersheds Project v. Zinke*, 2020 WL 2462817 (D. Idaho May 12, 2020). Such a stay probably will be sought in *Montana Wildlife* before this Article is published.

Federal District Court in Montana Enjoins Dredge or Fill Activities Under Nationwide Permit and Halts New Pipeline Projects

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The U.S. District Court for the District of Montana, in *Northern Plains Resource Council, et al. v. U.S. Army Corps of Engineers*, Civ. Action No. 19-0044 (D. Mont.), issued rulings on April 15, 2020, and May 11, 2020, that halted the Keystone XL Pipeline project and potentially halted other new pipeline construction projects for the foreseeable future. In particular, the court enjoined any dredge or fill activities for new pipeline construction projects under the U.S. Army Corps of Engineers (the “Corps”) Nationwide Permit 12 (“NWP 12”) until the Corps engages in the “consultation process” required by Section 7 of the Endangered Species Act (“ESA”) and other environmental statutes and regulations.

Section 404 of the Clean Water Act provides the Corps with the authority to regulate discharges into the navigable waterways of the United States. Pursuant to Section 404, the Corps first issued NWP 12 in 1977 to regulate activities associated with utility lines and related facilities and discharges resulting from such activities. Utility lines include oil and gas pipelines and the activities include construction, maintenance, and removal of such pipelines like the Keystone XL Pipeline. NWP 12, in part, allows discharges of dredged or fill material into U.S. waters subject to not losing more than one-half acre of jurisdictional waters for each project.

Environmental groups filed this suit challenging the re-issuance in 2017 of NWP. When the Corps re-issued NWP 12, it contended that the environmental impact of NWP 12 had been considered as required by the ESA and the National Environmental Policy Act (“NEPA”). The Corps’ final Decision Document indicated that General Condition 18 of NWP 12, which prohibits activities likely to jeopardize endangered species or adversely modify critical habitats, results in activities authorized under NWP 12 being of minimal impact. As a result, the Corps determined it did not need to engage in a programmatic consultation with the U.S. Fish and Wildlife Service (“FWS”) and/or the National Marine Fisheries Service prior to re-issuance of the permit.

The federal district court, however, disagreed and enjoined the Corps from authorizing “any dredge or fill activities under NWP 12 pending completion of the consultation process and compliance with all environmental statutes and regulations.” More specifically, the court stated that the Corp may not “circumvent” Section 7 of the ESA by allowing project-level reviews or relying on General Condition 18. The court indicated, in part, that allowing reliance on General Condition 18 essentially delegated the Corps’ responsibilities to “non-federal permittees” for an initial determination of the impact on endangered species or critical habitat. Moreover, the federal district judge relied on submissions by the environmental groups and held that “[s]ubstantial evidence exists that the Corps’ reissuance of NWP 12 ‘may affect’ listed species and critical habitat.” The court found that this evidence required the Corps to undertake a consultation under Section 7 of the ESA to ensure that the discharge activities complied with the ESA.

After finding the Corps’ decision to be “arbitrary and capricious” in his April 15th ruling, the district judge vacated NWP 12, remanded the matter to the Corps for the consultation process to occur and enjoined the Corps from authorizing dredge and fill activities pursuant to NWP 12 until completion of the consultation process. On May 11, 2020, the court amended its prior order to narrow the scope of its prior injunction. The amended order limited the application of the injunction to new pipeline construction projects but not non-pipeline projects and routine maintenance, inspection, and repair activities on existing NWP 12 projects.

This decision obviously will have significant impacts on new linear projects by pipeline companies as general reliance on NWP 12 will not be allowed until the Corps completes the consultation process or an appellate court reverses this decision. As of May 28, 2020, the decision has been appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit, however, denied a stay of

the federal district court's order finding that a "sufficient likelihood of success on the merits and probability of irreparable harm to warrant a stay pending appeal." Thus, for the time being, pipeline companies will be required to apply for individual permits under Section 404 of the Clean Water Act for new construction projects.

Montana Supreme Court Holds that Dinosaur Fossils are not “Minerals” for Purposes of Mineral Reservation in a Deed

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The United States Court of Appeals for the Ninth Circuit certified the following question to the Montana Supreme Court: “Whether, under Montana law, dinosaur fossils constitute ‘minerals’ for the purpose of a mineral reservation?” The Montana Supreme Court answered the question in *Murray v. BEJ Minerals, Inc.*, ___ P.3d ___ (Mont. 2020), 2020 WL 2553091.

The record supplied by the Ninth Circuit showed that Mary Ann Murray and Lige M. Murray (the Murrays) owned the surface estate of a large tract in Garfield County, Montana, as well as a minority interest in the mineral estate. The majority interest in the mineral estate was owned by two brothers and their companies (collectively, the “Seversons”). The Seversons had previously owned an interest in the surface estate, but in 2005 they sold their interest in the surface to the Murrays. In the sale, the Severson brothers each reserved a one-third in the mineral estate. The deed stated that the Seversons and Murrays would be tenants in common as to:

all right title and interest in and to all of the oil, gas, hydrocarbons, and minerals in, on and under, and that may be produced from the [property] ... together with the right, if any, to ingress and egress at all times for the purpose of mining, drilling, exploring, operating, and developing said lands for oil, gas, hydrocarbons, and minerals, and storing, handling, transporting, and marketing the same therefrom with the rights to remove from said lands all of Grantors’ property and improvements.

In 2005, after the deed was executed, the Murrays found a “spike cluster” of fossils on the property. They initially thought the finding was insignificant, but upon further investigation they learned that their land contained some extremely rare and valuable fossils. For example, their land contained one of only a dozen intact *Tyrannosaurus rex* fossils that have ever been discovered, and they sold this fossil to a Dutch museum for several million dollars. Their land also included fossilized remains of two dinosaurs “locked in combat,” the so-called “Dueling Dinosaurs,” which the parties stipulated are worth several million dollars, and other fossils—one of which the Murrays sold for \$20,000 and another which they have offered to sell for more than \$200,000.

In 2013, the Seversons asserted an ownership interest in the fossils, based on their reservation of an interest in “minerals.” The Murrays responded by filing an action in state court, seeking a declaratory judgment that the Seversons’ interest in “minerals” does not include an interest in fossils. The Seversons removed the case to federal court and filed a counterclaim, seeking a judgment that they own an interest in the fossils. The district court examined the prior cases in which the Montana Supreme Court has addressed the question of what constitutes a “mineral” for purposes of a property conveyance. The district court then granted summary judgment for the Murrays, reasoning that fossils “are not included in the natural and ordinary meaning of ‘mineral.’” On appeal, a panel of the Ninth Circuit reversed. The Murrays sought rehearing *en banc*, and the Ninth Circuit, proceeding *en banc*, certified the question noted above to the Montana Supreme Court, which accepted the certified question.

The Montana Supreme Court noted that it has addressed the meaning of “mineral” in a property conveyance on two prior occasions. In the first, *Farley v. Booth Bros. Land & Livestock Co.*, 890 P.2d 377 (Mont. 1995), the court had to determine whether scoria, a material used in road construction, should be characterized as a “mineral” for purposes of land conveyances. *Farley* concluded that scoria was not a mineral. In reaching that decision, the court “was informed by the reasoning of the Texas Supreme Court in *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (Tex. 1949),” though *Farley* “declined to expressly adopt the *Heinatz* test.” In 2009, in *Hart v. Craig*, 216 P.3d 197 (Mont. 2009), the Montana Supreme Court addressed whether sandstone, which could be used in landscaping, was a mineral for purposes a property deed. *Hart* concluded that it was not.

The Seversons argued that, under Montana law, and based on *Heinatz*, there is a two-part inquiry for determining whether a substance constitutes a “mineral” for purposes of a property deed. The first question is whether the substance “is technically a mineral.” The second question is whether the substance is “exceptionally rare and variable.” If the answer to both questions is “Yes,” the substance qualifies as a “mineral” for purposes of a property deed, absent some contrary indication in the deed. The Seversons asserted that, under this test, the dinosaur fossils constitute “minerals” because the fossils technically are minerals and they are extremely rare and valuable. The Montana Supreme Court disagreed with the Seversons’ characterization of Montana law. The court stated that, under both the Texas decision in *Heinatz* and the courts’ own prior jurisprudence, the ultimate goal is to determine whether the substance in question is a “mineral” under the “ordinary and natural meaning” of the word.

The court identified three important principles. First, although the relative rarity and value of a substance might be a factor in determining whether it is a “mineral,” the test for what constitutes a mineral does not turn on that factor. Second, the question of whether a substance is “technically” a mineral is not determinative, unless it is shown that the parties intended to use a scientific definition of “mineral.” Third, “the relation of the material in question to the surface of the land, and the method and effect of the material’s removal” is also a factor to consider. (The court’s subsequent analysis suggests that, under this third principle, factors weighing against a substance being a mineral are: a location on or very near the surface, a method of removal other than drilling or mining, and the removal method being a method that would seriously disrupt surface use.) Finally, the court stated that the “best method for determining whether a substance fits within the ordinary and natural meaning of ‘mineral’ is to use contextual clues” from the way the term “mineral” is used in the conveyance instrument.

Turning to that inquiry, the court noted that the common understanding of “mineral” includes both hard compounds that can be mined, as well as oil and gas. Further, the deed referred to “oil, gas, hydrocarbons, and other minerals,” and to the right of “mining, drilling, exploring, operating, and developing said lands.” The court also noted that Montana statutes use “mineral” in several provisions, none of which mention fossils or clearly contemplate fossils. The court concluded that fossils do not fall within the ordinary and natural meaning of “mineral.” Accordingly, stated the court, “in the context of a general mineral reservation deed, where the parties have not manifested a different intention in the transacting document, the language identifying ‘mineral’ would not ordinarily and naturally include fossils.”

The court acknowledged that the dinosaur fossils found by the Murrays were rare and extremely valuable, but the court noted that rarity and substantial value are not inherent characteristics of fossils. Some are neither rare nor particularly valuable. The fact that the particular fossils found by the Murrays happened to be rare and valuable does not mean that fossils are minerals.

The court noted that fossils are often found near the surface, rather than at significant depth. Further, fossils are not obtained by drilling or by mining, but by “excavation.” Moreover, a large excavation would interfere with use of the surface. These factors weigh against fossils being considered minerals.

Accordingly, stated the court, “We conclude that, under Montana law, dinosaur fossils do not constitute ‘minerals’ for the purpose of a mineral reservation.”

One justice dissented, effectively agreeing with the Seversons that, if a substance fits within the technical definition of “mineral,” and it is rare and valuable, it should be considered a “mineral” for purposes of a property deed. Under that test, the dissent concluded, the disputed fossils were a “mineral.”

U.S. Ninth Circuit Holds that Federal Court Did Not Have Federal Question Jurisdiction to Hear Oakland’s Climate Lawsuit Against Oil Majors

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The October 2018 issue of IEL’s *Oil & Gas E-Report* contained an article discussing a climate change lawsuit filed by San Francisco and the City of Oakland against five oil majors in state court, asserting a claim for public nuisance. The defendants removed to federal court. The federal district court concluded that federal question jurisdiction existed under 28 U.S.C. § 1331. Therefore, the district court denied the plaintiffs’ motion to remand. The federal court then granted the defendants’ Rule 12(b)(6), motion to dismiss, agreeing with the defendants that the plaintiffs had failed to state a viable cause of action.

The plaintiffs appealed. Recently, the United States Court of Appeals for the Ninth Circuit vacated the district court’s judgment and remanded, focusing on the jurisdiction issue.¹ The Ninth Circuit began its jurisdictional analysis by noting that the plaintiffs’ state court pleadings had asserted that they were bringing only a state-law claim for public nuisance. Under the well-pleaded complaint rule, a defendant may not remove a case to federal court based on federal question jurisdiction if the plaintiff or plaintiffs bring only state law claims, even if a defense based on federal law exists.

A couple of narrow exceptions to this rule exist. First, the Ninth Circuit explained that, under one of the exceptions, federal jurisdiction exists over a state law claim if a federal issue is “(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”² An issue is not considered “substantial” if, in a particular case, the issue turns on a fact-specific analysis. The Ninth Circuit concluded that resolution of claims in the plaintiffs’ climate change suit did not require resolution of a substantial federal law issue. The claim did not require interpretation of a federal statute and, according to the court, it was not clear that any other federal law issues would need to be resolved. The Ninth Circuit stated that the defendants had not identified any federal-law issues that would need to be resolved, but instead had pointed to “federal interests” in energy security, national security, and foreign policy. Therefore, this exception to the well-pleaded complaint rule did not apply.

A second exception to the well-pleaded complaint rule is the “artful-pleading doctrine,” which applies if federal law “completely preempts” a plaintiff’s state law claims. To satisfy this doctrine, it is not sufficient that federal law provides a defense. The Ninth Circuit noted that, under its own jurisprudence, the artful-pleading doctrine is not satisfied unless “Congress: (1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action.”³ The defendants pointed to the Clean Air Act as a basis for complete preemption, arguing that it triggered the artful-pleading doctrine. The court rejected their argument. The court stated that the Clean Air Act did not totally displace state law. In fact, stated the court, the Clean Air Act has a savings clause that preserves at least some state law.⁴ The court also stated that the Clean Air Act did not supply a substitute cause of action for the plaintiffs’ public-nuisance claim.

Next, the court addressed the fact that, after the district court denied the plaintiffs’ motion to remand, the plaintiffs had amended their pleadings to assert a public-nuisance claim under federal common law. The defendants argued that, by doing so, the plaintiffs waived their objection to federal court jurisdiction. The Ninth Circuit disagreed. The court explained that the propriety of removal generally is based on the state of the plaintiffs’ pleadings at the time of removal, and at the time of removal, the plaintiffs in this case had asserted only a state-law claim for public nuisance. As for the defendants’ waiver argument, the plaintiffs had stated, at the time of their amendment, that they were

¹ *City of Oakland v. BP PLC*, ___ F.3d ___ (9th Cir. 2020), 2020 WL 2702680.

² *Id.* at *5.

³ *Id.*

⁴ *Id.* at *6 (citing 42 U.S.C. § 7416).

adding the federal claim only to conform with the district court's holding that their claim arose out of federal law only, not state law, and that the plaintiffs had stated at the time of the amendment that they were reserving their right to challenge the existence of federal court jurisdiction.

The Ninth Circuit also noted that there is an exception to the rule that the propriety of removal is judged based on the pleadings at the time of removal. Under this exception, if, subsequent to removal, a plaintiff amends its pleadings in a way that would cure the lack of federal court jurisdiction, the case can remain in federal court if keeping the case in federal court would serve interest of finality and judicial economy. The Ninth Circuit stated, however, that the finality-and-judicial-economy standard is not satisfied, for purposes of this exception, unless a case has gone to final judgment after trial or been resolved on a motion for summary judgment. In this case, the defendants had prevailed on a Rule 12(b)(6) motion, not on summary judgment or after trial. The Ninth Circuit held that the standard for this exception is not satisfied when a party prevails, as the defendants did here, on a Rule 12(b)(6) motion.

The Ninth Circuit noted that the defendants had asserted several bases for federal court jurisdiction other than just federal question jurisdiction under 28 U.S.C. § 1331.⁵ Because the district court had not addressed those other potential bases for jurisdiction, the Ninth Circuit remanded to the federal district court for consideration of those potential bases. The Ninth Circuit did not address the district court's conclusion that it lacked personal jurisdiction over certain defendants.

⁵ The Ninth Circuit stated:

The notice of removal also asserted that the complaints are removable because the Cities' claim: (1) raises disputed and substantial federal issues, see *Grable & Sons Metal Prods., Inc v. Darue Eng'g & Mfg.*, 545 U.S. 308, 125 S. Ct. 2363, 162 L.Ed.2d 257 (2005); (2) is "completely preempted" by federal law; (3) arises out of operations on the outer Continental Shelf, see 43 U.S.C. § 1349(b); (4) implicates actions that the Energy Companies took "pursuant to a federal officer's directions," see 28 U.S.C. § 1442(a)(1); (5) arose on "federal enclaves"; and (6) is related to bankruptcy cases, see 28 U.S.C. §§ 1334(b), 1452(a).

Id. at *2 n.2.

Deans of Oil and Gas Practice Lecture

The Wide Range of Issues and Experiences Encountered in Oil and Gas Industry Litigation

Mark D. Christiansen

Edinger Leonard & Blakley PLLC

Presented February 21, 2020 at the 71st Annual Institute on Oil and Gas Law

I. Introduction

I want to first thank my longtime and valued friend and colleague, Larry Simon, for the thoughtful and kind comments he made in his introduction. I first became aware of Larry's recognition as one of the nation's top oil and gas industry trial lawyers when I graduated from law school back in the 1980s. Larry and his highly regarded Louisiana-based law firm, Liskow & Lewis, were achieving great outcomes for their clients in many of the same types of lawsuits that were also being pursued against oil and gas clients of our firm in Oklahoma. In the 1990s, I had the good fortune to be able to work with Larry, from our respective states and law firms, in what became known as the "crude oil posted price litigation." That wave of litigation consisted of a series of proposed class action royalty owner lawsuits and antitrust suits filed by a number of national plaintiff law firms in Texas, Louisiana, Oklahoma, New Mexico and other oil-producing states. From there, Larry and I have remained in contact through occasional subsequent legal matters and, most significantly, through our mutual involvement with the programs, publications, and other activities of the Institute for Energy Law (IEL).

As those who have been actively involved with IEL are already aware, one of the greatest benefits this organization provides to its participants is the opportunity to come to know, and to remain in contact with, the most active and accomplished participants in the oil and gas industry's legal world—whether in-house counsel, attorneys with outside law firms, top members of the academic community, veteran consultants and expert witnesses or others who make important contributions in responding to the legal challenges faced by the energy industry each year.

When I was contacted about presenting the Deans of Oil and Gas Practice Lecture this year, I reviewed the written history of this honor and was quickly reminded that Joseph W. Morris, the distinguished arbitrator, practitioner, scholar and true friend to so many of us, and highly-accomplished member of the Oklahoma and national energy bar, was the very first person selected by the IEL leadership to present the Deans Lecture some twenty years ago. They wanted to begin this annual distinction with an honoree whose achievements could not be matched, and they certainly accomplished that goal. As only a brief excerpt from his distinguished career, Judge Morris served as Chief Judge of the United States District Court for the Eastern District of Oklahoma, as General Counsel of Shell Oil Company and of Amerada Petroleum Corporation, and as Dean of the College of Law at the University of Tulsa. He then returned to the highly regarded Tulsa-based law firm of Gable & Gotwals where he is probably best-known for his extensive work and achievements as an arbitrator in major commercial arbitrations, both domestic and international.

I have to assume that the reason it has taken the leadership of the IEL some twenty years before inviting another Oklahoma-based lawyer to present the Deans Lecture at this legendary Annual Oil and Gas Law Conference is because the IEL leadership was hoping to find another oil and gas industry participant from Oklahoma with the same level of amazing accomplishments and standing as Judge Morris and, understandably, failed in those efforts each of the past twenty years. Thankfully, the leadership decided this year to lower their aspirations and end that pursuit, and so I stand before you today.

II. Experiences in the Practice of Oil and Gas Law and Litigation

When the IEL leadership invites an individual to speak during the core morning and afternoon sessions of this Annual Oil and Gas Law Conference, the invitee is given a specific topic to be addressed; one that is expected to be of great interest to most of the attendees in the audience. However, in

speaking with some of the individuals who have previously presented the Deans Lecture at past annual conferences, I confirmed that it has been customary to give latitude to the invited speaker to select the subject of his or her talk. Most of the past presentations tend to either recount some of the experiences the presenter has had in his or her legal career in the energy industry or, alternatively, present a brief review of a select area of law or study that has been noteworthy in that individual's legal practice.

Lead by the experiences and approaches of prior presenters of the Deans Lecture, the primary focus of this discussion will be to review three subjects of oil and gas litigation that illustrate the types of interesting issues and experiences offered to those who choose to primarily engage in a litigation practice focused on the oil and gas industry. This writer was not involved with the first case discussed below; however, he did have the opportunity to participate in the second and third areas of litigation.

III. Reversal of Fortunes (and Legal Positions)

In *Harding & Shelton, Inc. v. The Prospective Investment and Trading Company, Ltd.*,¹ we were once again reminded that the speculative nature of the oil and gas business can impact the pursuit of transactions, litigation, and other activities in the energy industry. The *Harding & Shelton* case provides an illustration of the way in which changes in the valuation of the underlying asset can lead to dramatic changes in the positions of the litigants—at times, at an awkward stage of the proceedings.

The mineral owners (with the backing of Harding & Shelton) initiated a lawsuit (Lawsuit #1) against The Prospective Investment and Trading Company, Ltd. (PITCO) and other holders of the original oil and gas leases and sought a judicial declaration that the leases had terminated for lack of production. While that lawsuit remained pending, Consolidated American Resources, L.L.C. acquired “top leases” on the same mineral interests that would become effective if and when the existing leases expired or were terminated as a result of the lawsuit.

While both Lawsuit #1 and compulsory pooling proceedings before the Oklahoma Corporation Commission were pending, PITCO filed a separate lawsuit seeking a judicial ruling compelling Harding & Shelton and Consolidated to offer PITCO an interest in the top leases on the grounds that they were *renewals* of the original or base leases (Lawsuit #2).

During the pendency of the litigation, the Oklahoma Corporation Commission issued a compulsory pooling order for a proposed workover and named Harding & Shelton as the operator for the proposed deepening and recompletion of the Metzler well. The pooling order required the working interest owners to either elect to participate in the workover by paying their proportionate shares of the estimated operational costs or, in the alternative, accept a royalty interest and relinquish their working interest rights in the workover to the other owners who elected to participate in the associated expenses. The Commission's pooling order did not address the pending challenge to the continuing validity of PITCO's original oil and gas leases.

In order to make its election under the pooling order, PITCO tendered to the operators (Harding & Shelton and Consolidated) its share of the estimated recompletion costs. That tender was accompanied by a letter from PITCO that attempted to impose certain conditions on its election to participate, with specific reference to the pending claims of Harding & Shelton and the mineral owners seeking a district court ruling that PITCO's original oil and gas leases had terminated. The operators responded and advised that they rejected PITCO's attempt to impose conditions on its election. They additionally stated that “there should be no inference in our acceptance of your funds that we in any way recognize any ownership you [PITCO] may claim.”² PITCO did not request the return of its prepayment after receiving that response.

¹ 2005 OK CIV APP 88, 123 P.3d 56.

² *Id.* at ¶7.

In the months that followed, the workover yielded disappointing results, and the costs of the workover exceeded the original estimate. The conduct of the parties suggests that they promptly reassessed their prior pursuit of greater working interest participation rights in the workover in light of those results, and the parties essentially reversed course. The operators capitulated to PITCO's earlier demand and offered it a working interest in leases related to the Metzler well upon PITCO's payment of \$75 per acre and its share of the excess costs of the unsuccessful workover. At approximately the same time, and without responding to the operators' offer, PITCO dismissed Lawsuit #2 with prejudice (in which it had sought a working interest in the top leases on the grounds that they were *renewals* of the base leases) and demanded that the operators return PITCO's conditional prepayment for participation in the operation. The operators refused the requested refund.

Harding & Shelton filed the present lawsuit (Lawsuit #3) seeking a judgment against PITCO for its share of the excess expenses owed as a cost-bearing participant in the workover, and also seeking to foreclose its statutory lien against PITCO's interest in the Metzler leases. PITCO denied liability and filed a counterclaim for a refund of its prepayment. The district court, after a bench trial, ruled in favor of Harding & Shelton on all claims. It granted Harding & Shelton a monetary judgment and foreclosed its statutory lien on PITCO's interest in the Metzler leases. In an earlier hearing, the district court found that "PITCO elected to participate and as such obligated themselves for certain expenses."³

In appealing the district court's decision, PITCO asserted that (a) there was no legal basis for the district court to find that PITCO had an obligation to pay a share of the workover expenses; (b) the Corporation Commission lacked jurisdiction to compel PITCO to pay a portion of those costs because PITCO never held record title; and (c) there was no contract under which PITCO was obligated to pay a portion of the workover costs, and its prepayment of those costs was conditional.

The Oklahoma Court of Civil Appeals commenced its discussion of the issues presented in this case with what it described as this "preliminary statement:"

We begin our analysis with the observation that all parties to this litigation are sophisticated and canny players in Oklahoma's oil and gas economy. In this lawsuit, they have assumed positions diametrical to those they held through two lawsuits and a Corporation Commission proceeding. Although the material evidence is largely uncontested, the inferences to be drawn from that evidence have been hotly contested and support widely divergent results. We accept the reasonable inference that all parties reevaluated their positions once the [disappointing] workover results were known.⁴

The appellate court noted that the Corporation Commission's order did not *compel* PITCO to pay a portion of the workover costs. Rather, the Commission allowed interest holders, like PITCO, to elect to participate in the workover by paying a share of the costs. PITCO appeared before the Commission to oppose the application but abandoned that effort after entering into a voluntary agreement with the operators. "By voluntarily appearing and seeking affirmative relief and by electing to participate, PITCO waived its objection to the Commission's jurisdiction."⁵ The court further noted that PITCO had standing to appeal or seek modification of the Commission's order but did not do so. With regard to PITCO's contention that it placed a condition on its election to participate in the operations, the court noted that the operators refused to accept the condition and offered to return the prepayment that accompanied PITCO's conditional election to participate. However, PITCO did not ask for the return of its prepayment. "When PITCO did not ask for the return of the prepayment, Operators were entitled to assume PITCO was participating without the conditions."⁶

The Court of Civil Appeals concluded:

³ *Id.* at ¶10.

⁴ *Id.* at ¶15.

⁵ *Id.* at ¶19, citing *Greyhound Lines, Inc. v. Corp. Comm'n*, 1967 OK 80 ¶10, 430 P.2d 1 (Syllabus 1).

⁶ *Id.* at ¶26.

[T]he trial court did not err in determining that PITCO created an interest in the Metzler well through its contractual dealings with Operators and through its participation in the pooling process and its course of conduct. Further, while there is evidence to support the opposite conclusion, the Trial Court's decision is not against the clear weight of the evidence.⁷

Reported oil and gas court decisions do not often present cases in which the adverse parties in a well-established dispute over ownership and title abruptly reverse positions after the presumed value of the underlying asset is disproved. In many instances, estoppel and related doctrines could be equally invoked by parties on both sides of the dispute. In the *Harding & Shelton* case, the proceedings before the Oklahoma Corporation Commission and related interactions between the parties resulted in a course of conduct and resulting consequences that were found by the court to prevent PITCO from reversing its prior claims in the aftermath of the disappointing results of the workover operation.⁸

IV. Constitutional Challenges to New Oil and Gas Statutes

Under Oklahoma's state regulatory scheme for oil and gas development, the Oklahoma Corporation Commission has long held the authority to enter orders creating drilling and spacing units.⁹ Drilling and spacing units are created in order to define the specific size of unit whose owners will have the right to share in the proceeds of oil and gas production from a well producing from the spaced common source(s) of supply. For reasons relating to the longstanding wording of Oklahoma's oil and gas statutes that provide for the creation of drilling and spacing units, the statutory language provided that a *one-eighth* royalty would be communitized along with the working interest rights within a drilling and spacing unit so that the owners of those rights would participate in production from any well located within that unit, without regard for whether the well was located on the specific tracts within the unit owned by, or leased to, each such mineral or working interest owner.

Since the provisions of the drilling and spacing unit statute assumed and referred only to the communitization of a *one-eighth* royalty interest, the practice within the industry developed to be as follows: All participating working interest owners would distribute the first one-eighth royalty share, proportionately, to *all* royalty owners within the drilling and spacing unit (*i.e.*, even the royalty owners not leased to the particular lessee distributing the one-eighth royalty share from its leases). To the extent that any royalty owners were covered by an oil and gas lease that provided for a higher royalty fraction, such as a three-sixteenth royalty, those owners would be paid the additional one-sixteenth royalty share *solely* by their own contracted oil and gas lessees. If their contracted lessees were not selling production during a given month (particularly natural gas, which is more-commonly subject to separate contracts and disposition by the working interest owners), those lessors would receive only their proportionate part of the one-eighth share of production attributable to the sales of all lessees within the drilling and spacing unit. The royalty owners would later receive the additional one-sixteenth share of royalty when their contracted lessees made-up any past months of imbalances in the monthly gas sales through either interim gas or cash balancing, or cash balancing upon the depletion of the well.

Much could be written about the complex legal, regulatory, legislative, and contractual backdrop of the circumstances summarized above. However, that discussion would exceed the intended scope of this relatively short paper. For the purposes of this discussion, it should be noted that the Oklahoma royalty owner community in 1985 supported amendments to the Oklahoma Statutes (widely referred to as Senate Bill No. 160) that appeared to provide, when read in conjunction with existing statutes, that

⁷ *Id.* at ¶31. In footnote 6 of the opinion, the court further explained its reasoning: "In essence, by failing to successfully condition its acceptance of the terms of the pooling order, PITCO has managed to achieve what it sought for so long – an interest of some sort in the reworked Metzler well – even if that interest is only contractual and despite the fact that PITCO no longer wants the interest."

⁸ It bears noting that the Court of Civil Appeals observed, in its concluding statements, that "while there is evidence to support the opposite conclusion, the Trial Court's decision is not against the clear weight of the evidence." 2005 OK CIV APP 88, ¶31, 123 P.3d 56.

⁹ 52 O.S. 2001§87.1.

every royalty owner within a drilling and spacing unit should receive from every working interest owner within that unit a royalty share from that working interest owner's gas sales computed on the basis of the *full* fractional royalty provided for in each royalty owner's oil and gas lease. One of the stated goals of this amendment was that a royalty owner with a three-sixteenth royalty, who has leased its minerals to a working interest owner who is unable to find a consistent buyer for its share of the gas from the well, should no longer be forced to wait for implementation of the remedy of gas balancing in order to receive the extra one-sixteenth royalty share. Senate Bill No. 160 was approved, enacted on June 7, 1985, and became effective on October 18, 1985.¹⁰

On the face of the amended statutory language, the new law appeared to require that a working interest owner who was successful in negotiating its lease to provide for a normal one-eighth royalty burden would, effective with this enactment, be required to pay other royalty owners in the unit a proportionate share of their higher (e.g., 3/16th or 1/4th) fractional royalty burdens negotiated with other lessees in the unit. Correspondingly, the working interest owner whose leases were burdened by the highest fractional royalty burdens within the unit would benefit from the communitization of the *full* royalty burdens within the unit. Under the new law, part of its royalty share would be computed based on the smaller royalty fractions negotiated by other working interest owners and royalty owners. The statute provided no mechanism for the working interest owners who unfairly bore the higher royalty burdens negotiated by others in the unit to be reimbursed by those other working interest owners whose burdens were reduced as a result of the reallocation of burdens; rather, the working interest owners with the higher contractual royalty burdens received something of a windfall under the new law because they, in turn, paid a proportionate part of the lower royalty burdens negotiated by select others within the unit.

Perhaps the most interesting aspect of the history of the above amended statute is that, because of the above inequitable and harsh results that could occur depending upon variations in the size of the individual royalty burdens within the unit for a particular well, there appeared to be little compliance with the new law within the industry¹¹ as a result of the belief that the new law would not withstand constitutional challenge. Indeed, a group of energy companies concerned with the potential impact of the new law on oil and gas purchasers, transporters and producers pursued an action in the United States District Court for the Western District of Oklahoma asking that the Senate Bill No. 160 amendments be declared unconstitutional. One of the primary arguments of the oil and gas producers was that the Senate Bill No. 160 amendments, which had the effect of reallocating royalty burdens within a drilling and spacing unit, took a portion of the property of one or more working interest owners (*i.e.*, those whose leases provided for the *lowest* royalty burdens) and gave that property to other working interest owners (*i.e.*, those whose leases provided for the *highest* royalty burdens) without just compensation and in violation of constitutional standards.¹²

In the early proceedings at the federal district court level, the court entered an order that essentially stayed the case until the Oklahoma state courts had an opportunity to interpret the new amendments. The federal district court found that it should not rule on the constitutional challenges until the state courts had been given an opportunity to interpret the new state statutory amendments and, potentially, to do so in a way that would avoid the alleged violation of constitutional principles complained of by the plaintiffs. The federal district court directed the parties to submit periodic reports to the court advising of any state court lawsuits seeking to enforce the new amendments, and of any interpretations of the amendments arrived at by other courts through those proceedings.

¹⁰ *Panhandle Eastern Pipeline Co. v. State ex rel. Commissioners of the Land Office*, 1994 WL 401601 (W.D. Okla. July 28, 1994), at *6.

¹¹ *Panhandle Eastern Pipeline Co. v. State ex rel. Commissioners of the Land Office*, 83 F.3d 1219, 1224 (10th Cir. 1996). The Oklahoma Legislature enacted the Production Revenue Standards Act in April 1992. That act repealed and replaced the Senate Bill No. 160 amendments that were at issue in the above litigation. *Id.* However, that left a period of some six years during which the amendments at issue in the *Panhandle* case remained in effect.

¹² *Panhandle Eastern Pipeline Co. v. State ex rel. Commissioners of the Land Office*, 1994 WL 401601 (W.D. Okla. July 28, 1994), at *8.

While the parties waited for a period of years for potential lawsuits seeking to enforce the Senate Bill No. 160 amendments (and to thereby frame the constitutional arguments), no such cases could be found. Many in the industry perceived that those who might have otherwise been incentivized to sue to enforce the new law for their benefit were aware that the filing of such a suit would likely lead to significant added time and expense due to the pending Constitutional test case.

After a period of some six years had passed with no apparent impending prospect for a state court interpretation of the new law within the near term, the federal district court in the *Panhandle Eastern* case determined that it would proceed forward based on its interpretation of the new statutory language so that the proceedings would not be further delayed.

Without describing in detail the analysis of the court, the United States District Court found that the Senate Bill No. 160 amendments challenged in the litigation were unconstitutional under the United States Constitution. In particular, the amendments violated the contracts clause and the Fourteenth Amendment. The legislation was also preempted by federal law. The Tenth Circuit Court of Appeals affirmed.¹³ It held that portions of the amendments were preempted. Because the court found that it could not presume that the Oklahoma Legislature would have enacted the non-preempted language standing alone, the Tenth Circuit ruled that the enactment was invalid in its entirety. The court did not reach the remaining issues raised on appeal.¹⁴

The *Panhandle Eastern* lawsuit, and the underlying legislation challenged in that suit, provided the oil and gas industry with a situation in which the initial posture of the federal courts was that they preferred to provide the state courts with an opportunity to first interpret the key *state* statutory wording complained of by the plaintiffs. However, in an environment where the pending constitutional challenge was widely known in the industry, with related questions regarding the viability of the new statute, and in the absence of lawsuits seeking to enforce the Senate Bill No. 160 amendments which could be taken to indicate widespread doubts regarding the validity of the new law, the federal courts ultimately proceeded to address the constitutional issues based upon the wording of the amendments, without waiting further for state court interpretations.

V. Industry Joint Defense Efforts

As a final example of the types of experiences offered to those involved in litigation within the oil and gas industry since the 1990s, brief reference should be made to what was often described as the “crude oil posted price” litigation. Beginning in the summer of 1995, a series of lawsuits were filed in key oil-producing states that alleged in part, and in varying ways, that: Crude oil had been sold from producing oil wells based upon “posted prices”; that royalty owners had been paid (in whole or in part) based upon the posted prices; and that the posted prices did not represent the fair or proper value of the oil for royalty payment purposes under governing documents and legal doctrines. Many of the lawsuits were filed as proposed class actions. The claims and theories of relief, as well as the supporting factual allegations, differed between the cases in certain respects; however, a dominant assertion was to challenge the use of posted prices in the valuation of oil royalty payments.¹⁵

¹³ *Panhandle Eastern Pipeline Co. v. State ex rel. Commissioners of the Land Office*, 83 F.3d 1219 (10th Cir. 1996).

¹⁴ *Id.* at 1231.

¹⁵ See, e.g., *Texas General Land Office v. Amoco Production Co.*, No. 95-08680, District Court of Travis County, Texas, 345th Judicial District (case filed July 14, 1995); *Texas General Land Office v. Union Pacific Resources Co.*, No. 954-241, District Court of Fayette County, Texas, 155th Judicial District; *State of Texas, Lee County v. Amerada Hess Corp.*, No. 10,652, District Court of Lee County, Texas, 21st Judicial District (case filed August 31, 1995); *Engwall v. Amerada Hess Corp.*, No. CV-95-322, Fifth Judicial District of Chaves County, New Mexico (case filed September 1, 1995); *Kershaw v. Amoco Production Co.*, No. CJ-95-184, District Court of Seminole County, Oklahoma (case filed September 13, 1995); *The McMahon Foundation v. Amerada Hess Corp.*, No. H-96-1155, U.S. District Court for the Southern Dist. of Texas (Hou. Div.) (case filed April 10, 1996); *Cameron Parish School Board v. Texaco Inc.*, No. 10-14264, 38th Judicial District Court, Cameron Parish, Louisiana (case filed April 1996); *In re Lease Oil Antitrust Litigation*, 186 F.R.D. 403 (S.D. Tex. 1999). This footnote lists only a portion of the cases that were either directly or indirectly part of the crude oil posted price litigation that began in the mid-1990s with the filing of certain of the key cases cited above. See also, Professor Gary B. Conine, “Crude Oil Royalty Valuation: The Growing Controversy Over Posted Prices and Market Value,” 43 *Rocky Mtn. Min. L. Instit.* 18-1 (1997).

With various plaintiff's counsel making coordinated filings in multiple states of lawsuits pursuing a relatively new form of royalty litigation over the use and role of "posted prices" as a basis for royalty payments,¹⁶ a significant number of defendant companies in the oil and gas industry encountered certain legal issues and arguments that had not arisen with any great frequency in prior royalty litigation.

The scope and depth of the crude oil posted price litigation, and the ancillary lawsuits and controversies that were impacted by that litigation, cannot be adequately discussed from a substantive standpoint during this brief presentation. The reason this wave of litigation merits mention as one of three examples of the types of experiences that can be found in an energy litigation practice is because it provided the many lawyers, from many states, involved in the posted price litigation on the plaintiff side and on the defense side with the opportunity to work through tough industry legal issues in a way that few areas of energy litigation provide. At least in the type of oil and gas industry litigation we are discussing here, it was a valuable and rewarding experience to be able to work directly with out-of-state colleagues on multistate litigation that presented issues that could impact oil royalty payment practices within the industry.

Many of the law firms and oil and gas litigators that had been active in IEL legal conferences, and in the IEL organization, became actively involved in representing clients in this new wave of lawsuits challenging the use of posted prices in the computation of royalty payments. A number of the lawyers who were among the most active advocates in those cases are in this room today. We have all moved on to the more-recent areas of industry controversies and litigation that are often related to the evolution of, and resulting changes in, the oil and gas industry as we are well into an evolving industry environment in this 21st Century.

VI. Conclusion

It is fitting that the IEL leadership established this annual Deans of Oil and Gas Practice Lecture some twenty years ago. A review of the prior presentations shows a focus on experiences and topics in the oil and gas industry legal world in which members of IEL have inevitably been involved in significant ways. I cannot adequately express the depth of my appreciation for being invited to present the Deans Lecture this year. I know I join all of you in conveying our sincere gratitude to the IEL for all it has done to provide such a positive environment for the development of friendships within the industry and the opportunity, through the Institute's programs and publications, to learn more about the constant changes that impact the work of energy lawyers and those who contribute greatly in other capacities.

¹⁶ The decision in *In re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403 (S.D. Tex. 1999) (No. MDL 1206), describes certain aspects of the history of the crude oil posted price litigation.



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