Institute for **ENERGY LAW**

Oil & Gas E-Report

ARTICLES

ISSUE 3 OCTOBER 2020

Editorial Board

The IEL Oil & Gas E-Report is a publication the Institute for Energy Law of The Center for American and International Law. Please forward any comments, submissions, or suggestions to any of the editors or IEL's Deputy Director, Vickie Adams.

In Climate Case, U.S. Tenth Circuit Holds that Federal Officer Removal Does Not Apply

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In *Board of County Commissioners v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020), the City of Boulder and the County Commissioners of Boulder and San Miguel Counties sued Suncor Energy (U.S.A.) Inc. and Exxon Mobil Corporation in state court in Colorado in 2018, blaming those defendants for global warming and seeking money damages. The plaintiffs' complaint declared that the plaintiffs were asserting state law claims for public nuisance, private nuisance, trespass, unjust enrichment, civil conspiracy, and violation of the Colorado Consumer Protection Act.

The defendants removed the case to federal court, asserting that there were seven bases for removal, with the first five relying on the general removal statute, 28 U.S.C. § 1441(a), namely that the plaintiffs' claims (1) arise under federal common law, (2) are completely preempted by federal law, (3) implicate disputed and substantial federal issues, (4) arise in part from activities on federal enclaves, and (5) are based on the Outer Continental Shelf Lands Act, with the other bases for removal being (6) bankruptcy removal under 28 U.S.C. § 1452,[1] and (7) federal officer removal under 28 U.S.C. § 1442(a)(1). The plaintiffs moved to remand the case to state court, pursuant to 28 U.S.C. § 1447(c), and the United States District Court for the District of Colorado granted the motion, concluding that none of the seven asserted bases for removal were applicable and that the federal court therefore lacked subject matter jurisdiction.

The defendants filed an appeal to the United States Court of Appeals for the Tenth Circuit with respect to six of the seven bases for removal that they had asserted in removing the case (all but bankruptcy removal). Generally, under 28 U.S.C. § 1447(d), a federal district court's order remanding a removed case to state court is not appealable. But § 1447(d) makes an exception for cases in which a defendant removed a case based on the federal officer removal statute. Therefore, the defendants had a right to appeal the remand order, at least with respect to the district court's rejection of federal officer removal.

But the parties disputed whether the Tenth Circuit had authority to review the district court's decision to reject the other bases for removal. The Tenth Circuit noted that there is a split in the circuits. Most of the federal circuits that have faced the issue have concluded that, if a federal district court remands a case that was removed by a defendant who relied on federal officer removal *and* one or more other bases for removal, and the defendant appeals, the federal appellate court can only consider the correctness of the district court's rejection of federal officer removal. However, at least one circuit has held that, in such an appeal, the federal appellate court also can consider the correctness of the district court's rejection of other bases of removal. In this case, after extensive discussion, the Tenth Circuit sided with the majority view, concluding that it could only review the correctness of the district court's rejection of federal officer removal.

The appellate court then turned to the issue of federal officer removal. The defendants argued that federal officer removal applied because the plaintiffs based their claims in part on the defendants' production of oil and gas, and some of that production came from the federal Outer Continental Shelf. The defendants asserted that the federal government asserts sufficient control over offshore production that federal officer removal applies. The Tenth Circuit disagreed. The appellate court noted that private individuals or corporations who are defendants can sometimes

[1] The defendants argued that other fossil fuel companies, including other oil and gas companies and coal companies, were necessary parties and that some of these were in bankruptcy. *Board of County Commissioners v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 980 (D. Colo. 2019).

remove a case based on federal officer removal. For a private corporation to be entitled to do so, it must show that: (1) it acted under the direction of a federal officer; (2) there is a causal nexus between the plaintiffs' claims and the acts that the private corporation performed under direction of a federal officer, and (3) that there is a colorable federal defense to the plaintiffs' claims.

The Tenth Circuit rejected the defendants' argument that federal officer removal applied, concluding that the defendants had not shown that they acted under the direction of a federal officer. The Tenth Circuit stated that the mere compliance with federal regulation—even an extensive and pervasive set of regulations—is not sufficient. Here, the Tenth Circuit concluded that the defendants merely showed that ExxonMobil had conducted offshore operations that were extensively regulated by the federal government, not that ExxonMobil had actually worked under the direction of a federal officer. Accordingly, the Tenth Circuit affirmed the district court's order remanding the case to state court.

PHMSA Issues Proposed Rules for Gas Pipeline Regulatory Reform[1]

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On June 9, 2020, the Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a Notice of Proposed Rulemaking ("NOPR") to revise the Federal Pipeline Safety Regulations ("Regulations") to reduce regulatory burdens associated with construction, operation, and maintenance of the gas pipeline systems. Key reformations include reducing the burden on distribution pipelines associated with the Distribution Integrity Management Program ("DIMP"), streamlining reporting obligations, and easing certain monitoring requirements.

Through the NOPR, the PHMSA proposed two revisions to DIMP requirements to ease the regulatory burden on gas distribution operators: (i) the exemption of farm taps originating from unregulated gathering and production pipelines from both DIMP and incident and annual reporting requirements; and (ii) the exemption of master meter operators from DIMP requirements.

The PHMSA also proposed two revisions to the reporting requirements for distribution operators: (i) eliminating the requirement for operators to submit mechanical fitting failure ("MFF") reports through DOT Form PHMSA F-7100.1-2, and instead, collecting all necessary information by adding a MFF count to the gas distribution annual report form; and (ii) raising the threshold for reporting incidents that result in property damage from $50,000 to $122,000.

Regarding monitoring requirements, the PHMSA proposed amendments related to corrosion control. Specifically, the PHMSA proposed to revise the requirement of regular inspection of rectifiers on gas pipelines under Section 192.485(b) of the Regulations. Currently, all onshore gas pipelines exposed to the atmosphere must be inspected once every three (3) years. However, the PHMSA proposed to extend the maximum inspection interval for distribution service lines to five (5) years (unless atmospheric corrosion was identified on the last inspection).

In response to the NOPR, the West Virginia Independent Oil & Gas Association, the Pennsylvania Independent Oil & Gas Association, the Independent Petroleum Association of America, and many oil and gas producers have filed comments discussing the positive and negative attributes of the NOPR.

[1] These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case is fact-specific, and that the appropriate solution in any case will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the authors and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.

Federal Court in Arkansas Applies AAPL Form 610 JOA's "Subsequently Created Interest" Provision

Keith B. Hall
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In *Shale Royalty, LLC v. MMGJ Arkansas, LLC*, 2020 WL 4228580 (E.D. Arks.), the parties included:

- **Flywheel Energy Production, LLC** ("Flywheel"), a defendant in this litigation and also designated operator under several joint operating agreements ("JOAs") that covered leases in Arkansas,
- **MMGJ Arkansas, LLC** ("MMGJ"), a defendant and non-operator working interest owner under the JOAs, and
- **Shale Royalty, LLC** ("Shale"), the plaintiff and owner of overriding royalty interests ("ORRIs") burdening MMGJ's working interest.

Shale brought suit against Flywheel and MMGJ, claiming that they both were liable for certain ORRI payments that were owed to Shale, but which had not been paid. Shale asserted that MMGJ was liable based on breach of the ORRI agreements and under certain Arkansas statutes, Ark. Code §§ 15-74-601 and 15-74-604. Shale asserted that Flywheel was liable based on the same statutes, as well as based on breach of the JOAs, which utilized the 1982 version of the American Association of Professional Landmen Form 610 Model Form Joint Operating Agreement (the "1982 Form").

The JOAs contained several provisions dealing with liability for royalty payments. First, Article III.B provided that the parties generally would be liable for costs and the payment of royalties up to one-eighth for leases subject to the JOAs. Article III.C provided a general rule that, to the extent that a lease subject to a JOA was burdened by lease interests (whether lease royalties or overriding royalties) exceeded a cumulative amount of the amount specified in Article III.B (that is, one eighth), the party which contributed that lease to the JOA would alone bear the liability for royalties in excess of one-eighth.

However, two relevant exceptions to these rules existed. The first exception relates to operations by fewer than all the parties. Under the JOAs, as under many JOAs, a party can choose not to contribute to the cost of drilling a well. A party that makes such a choice is called a "Non-Consenting Party," while the JOA parties that agree to pay a share of the costs of drilling are "Consenting Parties." If a well produces oil or gas, a Non-Consenting Party is not entitled to a share of revenue during the period that the well is producing enough oil or gas to pay for the costs of drilling and for an additional period that the well is producing enough oil or gas to provide the Consenting Parties with a specified amount of compensation for having taken a greater risk than the Non-Consenting Party. Article VI.B.2.b of the JOAs provided that, during the period when the Non-Consenting Party to the JOA is not entitled to a share of production from the well, the Consenting Parties are generally liable for all royalties, including both lessors' royalties and overriding royalties.

The second exception relates to the JOAs' Article III.D provision relating to "Subsequently Created Interests." Under this provision, a party is responsible for all royalties owed for Subsequently Related Interests that burden the parties' leases, whether or not the party is a Consenting or Non-Consenting Party. An overriding royalty, production payment, or similar burden constitutes a Subsequently Created Interest if: it was created after execution of the JOA. Further, an overriding royalty, production payment, or similar burden is classified as a Subsequently Created Interest even if it was created before execution of the JOA, unless the interest was either identified on Exhibit A to the JOA (an exhibit which identifies the interests that are subject to the JOA) or "disclosed in writing to all other parties prior to the execution of" the JOA or the burden was one that was jointly acknowledged and accepted as an obligation by all the parties.

The undisputed facts showed that Flywheel was a Consenting Party and that MMGJ was a Non-Consenting Party. Thus, under Article VI.B.2.b of the JOAs, Flywheel would have liability for payment of Shale's ORRIs, unless the ORRIs constituted a Subsequently Created Interest. The undisputed facts showed, however, that the ORRIs were not identified on Exhibit A and that the parties to the JOAs had not jointly acknowledged and accepted the ORRIs as an obligation of all parties. Further, neither MMGJ nor its predecessor-in-interest had delivered written notice to the other parties of the ORRIs. The ORRIs were identified in instruments recorded in the public record, and Shale and MMGJ argued that such recordation qualified as written notice to the other parties. The court disagreed, concluding that constructive notice by filing an instrument in the public record did not qualify as written notice for purpose of the JOAs. The court reasoned that the written notice contemplated by the JOAs was written notice actually delivered to the parties.

The court based this conclusion on its interpretation of the JOAs' reference to written notice as meaning actual notice, not constructive notice, but the court also concluded that it believed this interpretation was consistent with provisions in the JOA. For example, the other ways that an interest created prior to execution of a JOA could avoid classification as a Subsequently Created Interest was if the lease burden was identified on Exhibit A to the JOA or the parties had jointly acknowledged and accepted the burden as an obligation of the parties. Either of these would provide actual notice to the parties, not mere constructive notice. Further, the court concluded that certain provisions of the JOA suggested that the parties were not necessarily expecting to do title examinations of each other's leases prior to executing a JOA, but that MMGJ's and Shale's argument regarding constructive notice implied that parties should be doing title examinations.

MMGJ also argued that, without regard to whether Flywheel had received written notice, Flywheel should be liable for the ORRIs because it had actual knowledge of the ORRIs before it entered most of the JOAs. Flywheel denied knowing about the ORRIs before entering the JOAs, but the court concluded that it did not matter whether Flywheel had such knowledge. The court reasoned that, pursuant to the JOAs, advance knowledge of the ORRIs would not be sufficient to make Flywheel liable. In order for Flywheel to be liable, it would have to have received actual written notice before entering the JOAs. Accordingly, the court granted partial summary judgment in favor of Flywheel, holding that it was not liable under the JOAs for payment of Shale's ORRIs.

The court then turned to Shale's statutory claims, which were based on two statutory provisions. The first, Arkansas Code § 15-74-601(a), provides:

> The proceeds from the sale of oil or gas production … shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of the first sale and thereafter no later than sixty (60) days at the end of the calendar month within which subsequent production is sold…."

The second, Arkansas Code § 15-74-604(b), provides:

> In the event the operator under an oil or gas lease fails to pay oil or gas royalties to the mineral owner or his or her assignee within one hundred eighty (180) days after oil or gas produced under the lease is marketed, the unpaid royalties shall bear interest thereafter at the rate of twelve percent (12%) per annum until paid.

Flywheel argued that it had no liability under the statute because Shale's ORRIs were Subsequently Created Interests. The court disagreed, holding that the provisions of the JOA did not shield Flywheel from statutory liability to Shale, which was not a party to the JOAs. Nevertheless, the court concluded that certain factual issues existed regarding the extent of

Flywheel's liability. Accordingly, the court denied Shale's motion for summary judgment against Flywheel on the statutory claims.

In Coastal Land Loss Litigation, Fifth Circuit Holds that Removal Based on Federal Officer Statute was not Timely

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On August 10, 2020, another decision was rendered in the Louisiana Coastal Zone litigation regarding whether federal district courts had subject-matter jurisdiction to hear the two cases filed in 2013, one by Plaquemines Parish and one by Cameron Parish. The U.S. Court of Appeals for the Fifth Circuit held on August 10 that the cases should be remanded to state court because the federal courts lacked federal question jurisdiction, affirming decisions from the Eastern and Western District Courts of Louisiana on the same issue. *Parish of Plaquemines v. Chevron U.S.A., Inc.*, 2020 WL 4582196, _______ F.3d ________ (5th Cir. Aug. 10, 2020).

Defendant-oil companies previously removed the cases to federal court when they were filed in 2013, but the federal courts hearing the matters (the Eastern and Western Districts of Louisiana) found that they lacked federal question jurisdiction and remanded the cases. Following a 2018 expert report, defendants again removed the cases. In this most recent bid, defendants attempted to remove on the basis of an expert report by Plaquemines Parish (the "Rozel Report") suggesting that the Parish's claims were based in part on oil and gas operations during World War II, while the companies were acting under the authority of the federal wartime agency known as the "Petroleum Administration for War." Based upon that information, Defendants removed all 42 "coastal zone" lawsuits to federal court, relying on the federal officer removal statute found in 28 U.S.C § 1442.

In the first two cases to be appealed, the Fifth Circuit disagreed with the defendants. Typically, a federal district court's decision to remand a case is not reviewable. However, in this instance, the Fifth Circuit had authority to review the remand orders pursuant to 28 U.S.C. § 1447(d) because the notices of removal were based upon the federal officer removal statute. The appellate court found that defendants' second attempt to remove was untimely. The court explained that, under the federal removal statute (28 U.S.C. § 1446(b)(3)), defendants could remove the cases under two circumstances: (1) if the basis for federal jurisdiction is evident from the face of the initial pleading, then within 30 days of being served with the initial pleading, or (2) if the basis of federal jurisdiction is not evident from the face of the initial pleading, then 30 days after defendant receives "an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable." Here, the court found that removal was untimely because the Rozel Report repeated information from a 1980 environmental impact statement filed in the litigation in 2013. That statement, according to the Fifth Circuit, discusses certain wells at issue in the litigation that were drilled before or during World War II. Thus, the Rozel Report did not fall into the "other paper" category set forth in 28 U.S.C. § 1446(b)(3), and, therefore, defendants' removal was untimely. As of this writing, the deadlines for seeking rehearing and/or rehearing *en banc* have not elapsed.

Louisiana Legislation Amends Mineral Code Article 212.21

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Act No. 227 of the 2020 Regular Session of the Louisiana Legislature amends Louisiana Mineral Code article 212.21 (La. Rev. Stat. 31:212.21). In particular, Act No. 227 amends article 212.21 to expressly provide that it does not apply to claims brought by "unleased owners"—that is, landowners or servitude owners whose mineral interests are not under lease. To understand the significance of this amendment, it is helpful to know a little about Mineral Code articles 212.21 through 212.23 (La. Rev. Stats. 31:212.21 through 31:212.23).

These articles were enacted in a 1982 amendment to Louisiana to govern claims by "the owner of a mineral production payment or a royalty owner other than a mineral lessor …for the failure of a mineral lessee to make timely or proper payment of royalties or the production payment." Article 212.21 requires that such a person "must give his obligor written notice of such failure as a prerequisite to a judicial demand for damages." Article 212.22 provides that "[t]he obligor shall have thirty days after receipt of the required notice within which to pay the royalties or production payments due or to respond by stating in writing a reasonable cause for nonpayment." Article 212.23 then specifies the consequences that arise from the obligor making payment or failing to make payment of the amount due and either stating or failing to state a reasonable cause for nonpayment. In some circumstances, the consequences can include the requirement that the obligor pay (in addition to the amount owed) interest, attorney's fees, and "damages double the amount due."

Parties sometimes have disputed whether the owner of an unleased mineral interest in a compulsory drilling unit can utilize these statutes, which apply in favor of "the owner of a mineral production payment or a royalty owner other than a mineral lessor." An unleased owner would not seem to qualify as "a royalty owner other than a mineral lessor." Mineral Code article 213 defines "royalty" as that term used in connection with mineral leases, Mineral Code article 80 defines a "mineral royalty" that is carved out of a mineral servitude or a landowner's interest in minerals, and persons in the industry recognize the concept of an "overriding royalty" that is carved out of the lessee's interest. An unleased owner's interest is not one of those types of royalties and there is no other commonly used term "royalty" that would encompass the interest of an unleased owner.

The Mineral Code does not define "mineral production payment," but "production payment" is commonly used in the oil and gas industry to refer to a person's right to receive a fraction of the value of production, free of costs, with the interest having been carved out of the lessee's interest.[1] Used this way, the term "production payment" has a meaning similar to the meaning of "overriding royalty," except that once an overriding royalty is established it typically lasts for the life of the lease, but a "production payment" often terminates automatically once the owner of it has recovered a specified amount of money.[2]

A strong argument exists that this is the appropriate meaning of "production payment" for purposes of article 212.21.[3] If such a meaning is applied for purposes of Mineral Code article 212.1, the owner of an unleased interest would not be the owner of a mineral production payment. And

[1] *See, e.g.*, Patrick H. Martin and Bruce M. Kramer, WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS (definition of "production payment").
[2] *Id.* (definition of "overriding royalty").
[3] *See* La. Civ. Code art. 11 ("Words of art and technical terms must be given their technical meaning when the law involves a technical matter.").

two federal courts have interpreted the statute this way, holding that unleased owners were not entitled to use Mineral Code article 212.21.[4]

Act No. 227 revises Mineral Code article 212.21 by changing "owner of a mineral production payment" to "owner of a production payment created out of a mineral lessee's interest." This effectively codifies the results of *Adams* and *J&L Family*.

[4] *Adams v. Chesapeake Operating Co.*, 561 Fed. Appx. 322 (5th Cir. 2014) (unpublished) and *J&L Family, L.L.C. v. BHP Billiton Petroleum Properties*, 293 F. Supp. 3d 615 (W.D. La. 2018).

North Dakota Supreme Court Holds "Actual Drilling Operations" is Ambiguous

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In *Hess Bakken Investments II, LLC v. Agribank, FCB*, 946 N.W.2d 746 (N.D. 2020), the parties disputed whether certain oil and gas leases held by Hess Bakken Investments II, LLC ("Hess") had terminated at the end of the primary terms of the leases on April 2, 2012. At that time, Hess had not established production and no one had spudded wells on the leased premises or land unitized therewith. However, the leased acreage had been pooled into a spacing unit for which Continental Resources, Inc. was the operator. Further, Hess asserts that, as of April 2, 2012, Continental Resources had begun surface operations in preparation for drilling and, by early May 2012 Continental had spudded wells that continue to produce oil and gas in paying quantities. Hess argued that this was sufficient to maintain the leases pursuant to a savings clause in the lease.

The savings clause on which Hess relied provides in part that, even absent production at the end of the primary term,

> [T]his lease shall not terminate if *actual drilling operations* on any portion of the leased premises, or on lands with which a portion of the leased premises may be unitized … are being conducted at the end of the primary term. Such operations shall continue to maintain this lease in force and effect beyond the primary term for so long as actual drilling operations are being conducted with no cessation of more than one hundred twenty (120) consecutive days from the date of the running of the final induction electrical survey of one well and the actual drilling operations of another well; any well commenced and drilled pursuant hereto after the primary term shall be drilled to a depth sufficient to test the producing horizon in the nearest producing well unless production in paying quantities is encountered at a lesser depth.

Hess contended that this savings clause was satisfied by Continental's surface work in preparation for drilling, but the lessor (and certain lessees to whom the lessor had granted new leases about nine days after the end of the primary term on Hess's leases) argued that the surface preparation work was not sufficient. The lessor argued that the term "actual drilling operations" could not be satisfied unless a well had been spudded. The district court granted judgment in favor of the lessor and Hess appealed.

On appeal, the North Dakota Supreme Court noted that it had suggested in *Abell v. GADECO, LLC*, 897 N.W.2d 914 (N.D. 2017) that the term "drilling operations" included work at the drill site in preparation for drilling the well. *Abell* also noted that other jurisdictions have interpreted "drilling operations" to include work performed to prepare the drill site for drilling.

But in this case the North Dakota Supreme Court went on to note that the savings clause in *Abell* did not contain the word "actual." Thus, the savings clause in *Abell* required "drilling operations," whereas the savings clause in Hess's leases required "actual drilling operations." The lessor argued that the word "actual" in front of "drilling operations" means that the savings clause is not satisfied unless a well is spudded. Hess argued that the word "actual" merely requires that there be a good-faith intent to complete a well and that activity must be conducted at the well site in order to satisfy the savings clause. The North Dakota Supreme Court has noted that some tribunals have interpreted "actual drilling operations" the way that the lessor suggests. However, the court concluded that the term "actual drilling operations" is ambiguous. Accordingly, the North Dakota Supreme Court reversed the judgment in favor of the lessor and remanded for further proceedings.

Eight Circuit Holds that "Promote" Obligation in an Exploration and Development Agreement is not a Covenant Running with the Land under North Dakota Law

Keith B. Hall
LSU Law Center

Slawson Exploration Company, Inc. acquired oil and gas leases in an area of North Dakota.[1] Slawson sought other companies to join it in exploring and developing the leased land. Slawson entered an exploration agreement with Triangle Petroleum Corporation. The agreement included an area-of-mutual-interest provision that required Slawson to offer Triangle the right to acquire a 30% interest in any lease Slawson held or later acquired in a defined area. The provision also required Triangle to offer Slawson the opportunity to acquire a 70% interest in any lease that Triangle acquired in the area. In addition, the exploration and development agreement provided that Triangle would pay a "promote" to Slawson in an amount equal to 10% of Triangle's share of the costs of drilling any well in which Triangle chose to participate within the AMI area.

Triangle entered bankruptcy and the bankruptcy court approved a reorganization plan in which Nine Point Energy was the successor to Triangle. During the bankruptcy, Slawson filed a proof of claim in which it asserted that Triangle's obligation to pay the promote was either a covenant running with the land, an equitable servitude, or a real property interest, and that the obligation was not one that was dischargeable in bankruptcy. The bankruptcy court gave Slawson leave to pursue that claim and Slawson filed a declaratory judgment to do so. The federal district court held that Triangle's promote obligation did not fall within any of the categories claimed by Slawson and that the obligation therefore was dischargeable in the bankruptcy. Slawson appealed.

The United States Court of Appeals for the Eighth Circuit heard the appeal. The appellate court noted that North Dakota statutory law governs covenants that run with the land. Under this law, "[a]ll covenants contained in a grant of an estate in real property, which are made for the direct benefit of the property or some part of it then in existence, run with the land."[2] Such covenants are "contained in grants of estates in real property [and] are appurtenant to such estates and pass with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they personally had entered into them."[3] But "if a covenant contained in a deed does not directly benefit the land as required by N.D.C.C. § 47-04-26, it is personal and is enforceable only between the original parties to the deed."[4]

Slawson argued that the promote directly benefitted the land by encouraging development. The Eighth Circuit disagreed, noting that Triangle had been obligated to pay a promote as to any well in which it participated, even if Slawson chose not to participate in the well. The court concluded that the promote was merely a personal obligation.

Slawson also argued that the promote was an equitable servitude. The Eighth Circuit disagreed. It cited a secondary source for the proposition that the distinction between equitable servitudes and real covenants is outdated. Further, the court stated that it had found only three North Dakota cases involving equitable servitudes and that all of those were cases involving a statute recognizing that certain obligations relating to condominiums could be enforced as equitable

[1] *Slawson Exploration Company, Inc. v. Nine Point Energy, LLC*, 966 F.3d 775 (8th Cir. 2020).
[2] N.D. Cent. Code § 47-04-26.
[3] N.D. Cent. Code § 47-04-24.
[4] 966 F.3d at 778 (quoting *Beeter v. Sawyer Disposal LLC*, 771 N.W.2d 282, 286 (N.D. 2009)).

servitudes. Therefore, the appellate court held that the promote obligation was not an equitable servitude.

Finally, Slawson contended that the promote was a real property interest. The Eighth Circuit noted that a lessee's interest under an oil and gas lease is a real property interest under North Dakota law, as is the lessor's right to a royalty and an overriding royalty owner's right to a royalty. Slawson argued that the promote was analogous to an overriding royalty. Slawson asserted that the promote is carved out of the lessee's interest and the fact that it is paid when a well is drilled and is based on those costs, rather than being a fraction of the value of the oil or gas produced, does not prevent it from being a real property interest. The appellate court disagreed, concluding that although an overriding royalty is a form of profits issuing from land, an allocation of drilling costs in the form of a promote is not. Instead, it is merely a personal, contractual obligation and is dischargeable in bankruptcy.

Ohio's Dormant Mineral Act Found to Require More Than Search of Local County Records for Notice Purposes

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Ohio courts continue to wrestle with the diligence required to locate and notify heirs before abandoning a severed mineral interest under Ohio's Dormant Mineral Act, R.C. 5301.56. In *Fonzi v. Miller*, the Seventh Appellate District recently held that the surface owners' limited search of the local county records was insufficient when they failed to follow up on information found in the reservation deed, even though it would have involved a search of records in a neighboring state.[1]

The facts are straightforward: In 1952, Harry and Elizabeth Fonzi (the parents of the appellants), reserved a one-third interest in certain oil and gas royalties in property located in Monroe County, Ohio. The reservation deed stated specifically that the Fonzis resided in Washington County, Pennsylvania. Nearly 60 years later, the property's surface owners sought to have that interest abandoned under Ohio's Dormant Mineral Act ("DMA"). To locate potential heirs of the Fonzis, the surface owners searched the local county records and undertook an unspecified internet search. However, despite locating the reservation deed, they did not conduct any search of the public records of Washington County, Pennsylvania. Having then failed to locate the appellants, the surface owners published a notice of intent to declare the severed interest abandoned in the local paper and subsequently recorded an affidavit of abandonment, all purportedly under the auspices of the DMA.

Discovering the abandonment, appellants filed suit, claiming that the surface owners failed to exercise reasonable diligence in attempting to locate potential heirs of the Fonzis (*i.e.*, the current holders of the severed interest) before commencing the abandonment process. Losing at the trial court, appellants argued on appeal (i) that the surface owners limited their search to the local county records despite having actual knowledge that the Fonzis had moved to Pennsylvania, and (ii) that had they conducted a search in Pennsylvania, the estate documents would have been easily found and would have revealed that the appellants were the Fonzis' heirs. The surface owners responded that the DMA does not require a search beyond the public records in the county where the property is located; and that because this was a matter involving *in rem* jurisdiction, it was reasonable to expect that the name of any person with an interest in the property would be revealed through a search of the local records.

Reversing the trial court below, the court of appeals began with the proposition: "Any given search must be conducted in a manner that demonstrates the searcher exercised due diligence in conducting the search and the search itself was reasonable. **The entire goal of the search is to uncover potential interest-holders so that they can receive appropriate notice of the request to declare those interests abandoned**. The search must, then, be geared towards this goal in a reasonable, diligent fashion." Moreover, the court emphasized that the language of the DMA itself "makes it clear that since notice by publication is a last resort, a sincere, diligent effort by the researcher is required before service by publication is appropriate." Here, the surface owners searched only the county in which the property was located, despite having knowledge that the Fonzis had resided in a neighboring state. "This fact alone would have led any reasonable researcher to extend the search into Washington County, Pennsylvania since it should be apparent at that point a search of the Monroe County records, exclusively, may not lead to discovery of any Fonzi heirs." That, according to the court, was *per se* unreasonable.

Stay tuned: The Ohio Supreme Court has several similar cases before it that could have decisions out soon.

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[1] 2020-Ohio-3739.

Oklahoma Court of Appeals Reverses Ruling of the District Court Invalidating a City Ordinance on the Ground That the Ordinance was Found to be in Conflict with a State Statute

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The case of *Magnum Energy, Inc. v. Board of Adjustment for the City of Norman*,[1] presented the review of a "quasi-judicial administrative decision of the City of Norman's Board of Adjustment." Magnum Energy sought a variance from a City ordinance requiring umbrella liability insurance as a condition to issuing a drilling permit within the city limits of the City of Norman. The Board denied the request. Magnum appealed that decision to the Cleveland County District Court. The District Court found that the City Ordinance conflicted with a state statute regulating oil and gas production and was, therefore, invalid as applied to Magnum. The District Court granted summary judgment in favor of Magnum. The Board of Adjustment appealed. The Court of Appeals found that a *de novo* standard of review applied in this appeal.

The Court of Appeals observed at the outset of its decision that "[t]he dispositive question on appeal is whether there is a conflict between the [City of Norman's] ordinance and the state statute." Citing the prior decision in *Vinson v. Medley,*[2] the Court of Appeals found that, "[f]or matters of general statewide concern, a municipal ordinance will be invalid if it conflicts with a state enactment." The Court of Appeals further stated that "[a] city charter supersedes state law *only* when it affects a subject that is deemed to lie exclusively within municipal concern."

The court further found:

> A conflict between a state statute and municipal ordinance exists when "both contain either express or implied conditions that are inconsistent and irreconcilable with one another. If one is silent on the issue and the other speaks to it, there can be no conflict."[3]

In the present appeal, the Court stated that the ordinance at issue "is an insurance requirement that must be met for the City to issue a permit; it is a business practice safeguarding the health, safety and welfare of the City and its citizens."[4] In contrast, the Oklahoma Statute under discussion[5] "regulate[d] oilfield operations and allowed for municipal control over indirectly-regulated oil and gas operation concerns of a wellsite such as public nuisances, property setbacks, and flood prevention." The Court additionally recognized that 17 Okla. Stat. §52 specifies the scope of the Corporation Commission's authority. That statute provides that "[t]he Corporation Commission and incorporated cities and towns shall have exclusive jurisdiction over permit fees for the drilling and operation of oil and gas wells."

The Court of Appeals held that the City's ordinance was not precluded by the Oklahoma Corporation Commission's exclusive jurisdiction over certain areas of oil and gas regulation. The Court found that the ordinance was enforceable and that the District Court's conclusion to the contrary was error and was reversed in this appeal.

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[1] 91 Okla. Bar J. 642 (Okla. App 2020 - #117,912) (Not for Publication).
[2] 1987 OK 41, ¶ 5, 737 P.2d 932.
[3] Id. at ¶ 5.
[4] Citing *Gant v. Oklahoma City*, 1931 OK 241, ¶11, 6 P.2d 1065.
[5] 52 Okla. Stat. §137.1.

Oklahoma Supreme Court Affirms District Court's Denial of Exceptions to Report of Commissioners in Pipeline Condemnation Action

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In *Natural Gas Pipeline Co. of America LLC v. Foster OK Resources LP*,[1] NGPL initiated the present condemnation action seeking an order granting it four specific easements for access to operate and maintain two interstate natural gas pipelines and to clear title issues involving the pipelines. Foster disputed NGPL's attempted exercise of eminent domain and asserted that NGPL's taking did not meet the legal standard of necessity. However, Foster did not dispute that NGPL possessed the right of eminent domain where the prerequisites for eminent domain were present.

The district court appointed three Commissioners to determine the just compensation owed to Foster due to NGPL's taking of the several easements. After the Commissioners filed their report, Foster filed exceptions to the report. The district court, after conducting a hearing, overruled Foster's exceptions. Foster appealed. The Oklahoma Supreme Court retained the appeal, so there was no earlier ruling by an intermediate appellate court.

In its appeal, Foster first argued that the existing easement agreements between Foster and NGPL precluded NGPL from seeking the additional easements through condemnation. Foster argued that NGPL sought in this case to use eminent domain to by-pass the existing easement agreements and to obtain for NGPL permanent easements that conflicted with and abrogated the protections negotiated by the parties in the easement agreements. The court disagreed. It held that the right of condemnation is inalienable and cannot be waived, contracted away or surrendered, in whole or in part.[2] The temporary and permanent easements sought by NGPL through this condemnation proceeding were found to be outside the scope of the existing easement agreements. The court added that, even if the existing easement agreements contemplated similar rights, those agreements did not divest NGPL of its right to eminent domain.

Foster next argued that NGPL's taking did not meet the legal standard of necessity for a public use. The court found that the word "necessity" in connection with condemnation proceedings does not mean an absolute necessity but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner.[3] The court concluded that the taking of the easements through condemnation was necessary and was neither fraudulent nor in bad faith, and was not an abuse of discretion.

However, Foster asserted that another, optional means of access to the pipelines was available to NGPL so that the taking sought through this lawsuit was not necessary and amounted to fraud, bad faith, or an abuse of discretion. Yet, the Oklahoma Supreme Court found that it "is well settled in Oklahoma that where a condemnor has selected and designated a route for taking, the courts will not inquire into the matter to demand why some other route was not chosen."[4] The court cited the prior decision in *Graham v. Tulsa*[5] which in turn discussed the decision of the Idaho Supreme Court in *Grangeville Highway District v. Ailshie*.[6] The court in *Ailshie* held that defendants in condemnation actions cannot prevail merely by showing that there is other land in the immediate neighborhood available and equally useful.[7] The Oklahoma Supreme Court observed that other states had likewise held that the fact that some other available route might be sufficient or may

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[1] 2020 OK 29, 465 P. 3rd 1206.
[2] The court cited in support of this holding its prior decision in *Burke v. Oklahoma City*, 1960 OK 29, 350 P.2d 264.
[3] The court cited *White v. Pawhuska,* 1928 OK 136, 265 P. 1059, 1062.
[4] The court cited *Owens v. Okla. Tpk. Auth.*, 1954 OK 345, ¶ 5, 283 P.2d 827. 830, and *City of Tulsa v. Williams*, 1924 OK 136, ¶ 12, 227 P. at 879.
[5] 1953 OK 204, 261 P.2d 893.
[6] 290 P. 717 (Idaho 1930).
[7] *Id.* at 720.

even be more desirable was not adequate to show fraud, bad faith, or an abuse of discretion. In particular, the court held that NGPL's taking and resort to condemnation did not amount to fraud, bad faith or an abuse of discretion merely because other means of access to the pipelines were available to NGPL.[8]

In determining the necessity of NGPL's taking, the court found that NGPL's request for a permanent, nonexclusive easement over Foster's road was reasonably necessary, and that Foster produced no evidence indicating that NGPL's taking was fraudulent, in bad faith or an abuse of discretion.

In sum, the court held that (a) NGPL did not contract away its right of eminent domain by entering into earlier easement agreements with Foster; (b) the fact that NGPL had another means of access to its pipelines was insufficient to show that NGPL's taking was fraudulent, in bad faith or an abuse of discretion; (c) NGPL's condemnation of Foster's property was for a public use and met the legal standard of necessity; and (d) arguments relating to the necessity of surveying Foster's property in computing the just compensation due Foster were premature and could not be determined before the anticipated jury trial on that issue. The court affirmed the district court's ruling denying Foster's Exceptions to Report of Commissioners.

[8] 2020 OK 29 at ¶ 20.

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Issue 3 October 2020