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Growing Pains: How the North Dakota Supreme Court's Decision in *Baha Petroleum Consulting Corp. v. Job Service North Dakota* Fails to Set Precedent in the Booming Oil and Gas Industry

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ONE J

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GROWING PAINS: HOW THE NORTH DAKOTA
SUPREME COURT'S DECISION IN *BAHA
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NORTH DAKOTA* FAILS TO SET PRECEDENT IN THE
BOOMING OIL AND GAS INDUSTRY

DAVID W. WILKEN^{a1}

I. Introduction

Most, if not all, companies within the oil, gas, or mineral business use landmen to acquire, negotiate, and manage oil and gas leases and leased properties.¹ With the use of landmen for mineral acquisitions or leasing, an issue of whether those landmen are considered “employees” or “independent contractors” is brought forth. The distinction between an employee and an independent contractor is one that carries many implications, both legal and non-legal, for all parties involved. For a landman, the distinction between being considered an employee as opposed to an independent contractor can impact both taxes and eligible benefits derived from the employer. Financially, independent contractors have to pay a higher self-employment tax, compared to their employee

a1. Student, University of Oklahoma College of Law. Thanks to Daniel Franklin, Jordan Volino, Jarrod Gamble, Patrick Hoog, and Taylor Venus for their insightful input throughout the entire process. Much appreciation to my faculty advisor, Erin Means, for her constant support and for pushing me to write the best note possible.

1. *Landman*, Black's Law Dictionary (10th ed. 2014).

counterparts.² Employees may also be entitled to obtain better benefits than would an independent contractor.³ These benefits can include subsidized health insurance, life insurance, disability insurance, and retirement, along with the steady paycheck.⁴ Yet, independent contractor status entitles an individual to benefits his employee counterpart does not get to enjoy. For example, an independent contractor may write off all reasonable and necessary business expenses, while an employee does not receive the same tax benefits or limited deductibility.⁵ Similarly, it is important for employers to clarify and fully understand the differences between an independent contractor and an employee while analyzing what classification the members of their company fall into. The differences between independent contractors and employees entail the following: hours available to work, salary or hourly wages, methods to file their taxes, and the responsibilities and liabilities associated with each. Employees likely have to assign any intellectual property such as patents to the employer if they are created while employed, while an independent contractor likely can retain those rights.⁶ For an oil and gas company, this distinction could have major implications. Such an issue is particularly relevant in North Dakota and Oklahoma, as these states rank as four and five, respectively, as the most oil rich states in the United States.⁷

With the emergence of the Bakken Shale in 2006, North Dakota's oil and gas industry skyrocketed.⁸ Because of this rapid new shale development, North Dakota became a top producer of oil and gas in the United States, along with states such as Alaska, California, and Texas.⁹ The sudden

2. Steve Parrish, *Should I Be An Employee Or An Independent Contractor?*, Forbes, December 16, 2013, <http://www.forbes.com/sites/steveparrish/2013/12/16/should-i-be-an-employee-or-an-independent-contractor/>.

3. *Id.*

4. Steve Parrish, *Should I Be An Employee Or An Independent Contractor?*, Forbes, December 16, 2013, <http://www.forbes.com/sites/steveparrish/2013/12/16/should-i-be-an-employee-or-an-independent-contractor/>.

5. *Id.*

6. *Id.*

7. Paul Ausick, Michael B. Sauter, *The 10 Most Oil-Rich States*, USA Today, August 3, 2013, <http://www.usatoday.com/story/money/business/2013/08/03/the-most-oil-rich-states/2613497/>

8. Jack Nicas, *Oil Fuels Populations Boom in North Dakota City*, Wall Street Journal, April 6, 2012, <http://www.wsj.com/articles/SB10001424052702304072004577328100938723454>

9. Jack Nicas, *Oil Fuels Populations Boom in North Dakota City*, Wall Street Journal, April 6, 2012, <http://www.wsj.com/articles/SB10001424052702304072004577328100938723454>

increase in natural resource extraction brought with it the need for oil and gas companies, as well as landmen, to quickly adapt to an evolving industry. Therefore, it is necessary to correctly define these landmen in order for the employers to be in compliance with the law, as well as to notify the landmen of their employment status so they too can be in compliance with applicable laws.

In the case *BAHA Petroleum v. Job Service*, the North Dakota Supreme Court conducted an extensive analysis in determining the differences between independent contractors and employees.¹⁰ In doing so, the court analyzed the applicable North Dakota statute—a codified 20-factor common law test that provides the criterion to establish and determine an employer’s sufficient control—and weighed the circumstances and facts of the case against each relevant factor in the statute.¹¹ BAHA likely desired their landmen to be classified as independent contractors for taxation purposes, considering independent contractors are not protected by labor standards, workers compensation, or unemployment insurance.¹² Further, failure to properly define a landman’s employment status could have potentially resulted in BAHA being liable for the payment of “benefits, back taxes, and penalties that were never contemplated at the time the [landman] was hired.”¹³ It is clear why the distinction between independent contractor and employee is so crucial when analyzed through this recent scenario. The fact that BAHA was completely controlling their landmen’s work led the court to determine that the dealers were employees.

This note evaluates the North Dakota law regarding employment classification and what future possibilities of oil and gas companies might lend themselves to such analysis, and predicts how an Oklahoma court would review a similar circumstance. This note will first discuss the relevant law preceding and influencing the court’s decision in *BAHA Petroleum*. Next, this note will summarize and explain the *BAHA Petroleum* decision itself, noting important implications stemming from the court’s decision. Finally, this note will conclude with an analysis of the

10. *BAHA Petroleum Consulting Corp. v. Job Service North Dakota*, 2015 ND 199, ¶1, 868 N.W.2d 356, 362 (N.D. 2015).

11. *Id.* at 360-63.

12. *Independent Contractor Verification*, North Dakota Dept. of Labor and Human Rights, <http://www.nd.gov/labor/contractor/>.

13. *North Dakota Independent Contractors: What you need to know*, BLR, <http://www.blr.com/Compensation/Compensation/Independent-Contractors-in-North-Dakota>.

holding of *BAHA Petroleum*, both in North Dakota and other similarly situated states, like Oklahoma.

II. Law Before the Case

A. North Dakota Case Law

Historically, when the courts in North Dakota have been faced with issues similar to the issue in *BAHA Petroleum v. Job Service*, one predominant question has emerged to lead the analysis while serving as a starting point for the court.¹⁴ In determining whether a landman is an employee or an independent contractor, the court must ask the question, “Who is in control?”¹⁵ The common law test used to analyze this issue originated in *BKU Enterprises, Inc. v. Job Service North Dakota*.¹⁶ In this seminal case, BKU Enterprises was a distributor of Kirby vacuum cleaners in the town of Fargo, North Dakota.¹⁷ BKU entered into written contracts with local dealers who would sell the vacuums to customers through in-home presentations.¹⁸ The contracts used to enforce the agreement between BKU and the dealers designated the dealers as independent contractors, with the dealers setting their own schedules and having no obligation to report work hours to BKU.¹⁹ Job Service North Dakota began investigating BKU’s failure to pay job insurance taxes on its dealers, and after an extensive investigation, the Director of the Job Insurance Division concluded that BKU’s dealers were employees and not independent contractors.²⁰ Certain factors were evaluated in making this determination, such as (1) the absence of employer-provided phones, cars or office space, (2) the lack of investment from the dealers in the company, and (3) the fact that BKU supplied the business cards and brochures while retaining the ability to terminate dealer contracts.²¹ The sole issue presented to the court in this case was whether BKU’s dealers were independent contractors, or if the dealers were employees subject to job insurance taxes.²² In evaluating the issue, the court interpreted N.D.A.C. § 27-02-14-01(5)(a), which

14. See generally; *Myers-Weigel Funeral Home v. Job Ins. Div. of Job Service of North Dakota*, 1998 ND 87, 578 N.W.2d 125 (N.D. 1998).

15. *BKU Enterprises v. Job Service North Dakota*, 513 N.W.2d 382, 385 (N.D. 1984).

16. *Id.*

17. *Id.* at 383.

18. *Id.*

19. *Id.* at 384.

20. *BKU Enterprises v. Job Service North Dakota*, 513 N.W.2d 382, 384 (N.D. 1984).

21. *Id.* at 383.

22. *Id.*

focuses upon the employer's right to direct and control the means and manner of performing the work:

Generally, an employment relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what must be done but how it must be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. However, the right to terminate a contract before completion to prevent and minimize damages for a potential breach or actual breach of contract does not, by itself, suggest an employment relationship. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. The fact that the contract must be performed at a specific location, such as a building site, does not, by itself, constitute furnishing a place to work if the nature of the work to be done precludes a separate site or is the customary practice in the industry. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the individual is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." Subsection (b) of N.D.A.C. § 27-02-14-01(5) lists twenty factors to be used as guidelines to determine if sufficient

control is present to establish an employer-employee relationship.²³

The court explained that the fact finding used in these sorts of cases is not “the blind factoring of numerical quotients.”²⁴ Instead, the court weighed the evidence proffered, ultimately giving greater importance to some factors over others.²⁵ The court concluded that while the administrative ruling listed twenty factors to differentiate employment status, “the degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed.”²⁶

The common law test’s purpose is to determine the “employer’s right to direct and control the means and manner of performing the work,” and said “right” to control is dispositive regardless of whether or not it has actually been exercised.²⁷ If the court finds that an employer has the ability and legal right to exercise control over those who perform services, the court will then consider those performing the work to be employees of their employer, even if the employer’s control has yet to be displayed.²⁸ Further, *BKU Enterprises* solidified the use of N.D.A.C. § 27-02-14-01(5)(a) when determining an independent contractor versus employee status in North Dakota, by applying the statute to determine the amount of control an employer has in situations where the line between the two statuses is unclear.

B. North Dakota Statutes

The pertinent statutes for this discussion reside in the North Dakota Administrative Code and the West’s North Dakota Century Code Annotated, each discussing employment categories and how they are defined in certain situations. Due to there being more than one potentially applicable statute, the court in North Dakota has been tasked with implementing the *most* relevant and appropriate statute while analyzing the facts of the case compared to the respective statutes. One who performs a service for another for “recompensation” is determined an employee of another for which the services are performed under N.D. Cent. Code Ann. §

23. *Id.* at 385 (quoting N.D.A.C. § 27-02-14-01(5)(a) (1991)).

24. *BKU Enterprises v. Job Service North Dakota*, 513 N.W.2d 382, 387 (N.D. 1984).

25. *Id.*

26. *Id.* at 388.

27. *Myers-Weigel Funeral Home v. Job Ins. Div. of Job Service of North Dakota*, 1998 ND 87 ¶ 9, 578 N.W.2d 125, 126 (N.D. 1998) (citing *Turnbow v. Job Service North Dakota*, 479 N.W.2d 827, 830 (N.D. 1992)).

28. *Myers-Weigel Funeral Home*, 578 N.W.2d at 126.

65-01-03(1).²⁹ This classification will stand unless the employer can prove the individual is in fact an independent contractor, due to the fact that the party asserting the classification change has the burden of proving the stated fact and claim.³⁰ Another applicable statute, N.D. Cent. Code Ann. § 52-01-01(18)(k), states that employment does not include “services . . . performed under a written contract between the individual and the person for whom the services are performed.”³¹ Further, he who is performing the services is to be “treated as an independent contractor and not as an employee” when it comes to the services contracted for.³² Inversely, employment in North Dakota is defined as services performed for another under *contract* of hire unless proven otherwise by the common law test.³³

At first glance, these statutes appear to run contradictory to each other in that if landmen contract for services, they are not considered employees, unless of course the landmen perform those services . . . *under contract*. This appears to take away discretion from the judge and sets forth certain requirements that will define a landman a certain way. Under N.D. Admin. Code 27-02-14-01(5), the pertinent statute interpreted:

Generally, an employment relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what must be done but how it must be done...in general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, the individual is an independent contractor.³⁴

Acting as a guide as to what constitutes control, the now-codified common law test contains twenty factors to identify whether sufficient control is present.³⁵ In *BAHA Petroleum Consulting Corp.*, it is undisputed that the North Dakota Supreme Court analyzed the circumstances with

29. N.D. Cent. Code Ann. § 65-01-03(1) (West 1957).

30. *Id.*

31. N.D. Cent. Code Ann. § 52-01-01(18)(k) (West 1957).

32. *Id.*

33. N.D. Admin. Code 27-02-14-01(5) (1991).

34. *Id.* at 5(a).

35. N.D. Admin. Code 27-02-14-01(5)(b)(1-20) (1991).

regards to each factor.³⁶ However, to save both time and resources, the court gave only a preview of the factors that displayed employee status.³⁷ Those selections and their ramifications will be analyzed within this Note.

The conclusions reached were findings of fact, as is the right to the control of services performed.³⁸ The fact-findings led to a determination of law, thus making the employee/independent contractor struggle a mixed question of fact and law.³⁹ With such an extensive and subjective test used to determine the employment status of landmen, there is potential for a court to manipulate or view the twenty categorical factors in such a way as to reach their desired outcome, which is the determination of “employee.”

III. Statement of the Case

A. Background

BAHA provides various services to oil and gas companies, including referrals of individuals to perform landman services.⁴⁰ The general responsibilities of the landmen subject to the litigation includes acquiring mineral and surface rights from certain landowners, negotiating leases for the oil and gas company to which they were referred, researching public and private records to determine ownership of said mineral rights and reviewing the status of titles in question.⁴¹ The issue presented in *BAHA Petroleum v. Job Service North Dakota* was whether BAHA’s control of their landmen was enough to define those landmen as employees.⁴² Job Service conducted an audit of BAHA and determined that BAHA’s landmen were employees rather than independent contractors.⁴³ BAHA appealed the determination made by Job Service, and a hearing occurred before a Job Service appeals referee.⁴⁴ After testimony by several parties

36. *BAHA Petroleum Consulting Corp. v. Job Service North Dakota*, 2015 ND 199, ¶1, 868 N.W.2d 356, 360-63 (N.D. 2015).

37. *BAHA Petroleum Consulting Corp. v. Job Service North Dakota*, 2015 ND 199, ¶1, 868 N.W.2d 356, 361-62 (N.D. 2015).

38. *BAHA Petroleum Consulting Corp. v. Job Service North Dakota*, 2015 ND 199, ¶1, 868 N.W.2d 356, 360 (N.D. 2015) (citing *BKU Enterprises v. Job Service North Dakota*, 513 N.W.2d 382, 387 (N.D. 1984)).

39. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 360.

40. *Id.* at 358.

41. *Id.*

42. *Id.*

43. *Id.*

44. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 358.

associated with BAHA, the referee affirmed the initial determination that BAHA's landmen were employees rather than independent contractors and denied an appeal, which was confirmed by the district court.⁴⁵ BAHA appealed the referee's decision, arguing that Job Service was incorrect in applying the twenty-factor common law test under N.D. Admin. Code 27-02-14-01(5)(b) and instead should have applied N.D. Cent. Code Ann. § 52-01-01(18)(k).⁴⁶

B. Arguments and Decisions

In making their determination, Job Service's referee used the common law twenty-factor test codified into the North Dakota administrative code.⁴⁷ BAHA appealed such finding, which assigned liability to them to pay the landmen for unemployment insurance and taxes.⁴⁸ BAHA argued that the referee erred in applying the twenty-factor common law test and claimed that a different statute should have been applied. The alternative statute proffered by BAHA states that employment does not include "payment on the basis of a daily rate . . . for the performance of the service . . . directly related to the completion of the specific tasks contracted for."⁴⁹ The statute further states that a landman should be treated as an independent contractor if "the services are performed under a written contract between the individual and the person for whom the services are performed[.]"⁵⁰ BAHA admitted the fact that there were no written contracts between with their landmen but regardless claimed that there was conclusive evidence of a connection between the daily pay rate of the BAHA-referred landmen and the tasks which the landmen performed.⁵¹

The court found it impossible to ignore the plain language of N.D. Cent. Code Ann. § 52-01-01(18)(k) and deemed it incorrect to apply the statute that BAHA asserted.⁵² The court affirmed the referee's finding to apply the twenty-factor common law test, as the requirements of N.D. Cent. Code Ann. § 52-01-01(18)(k) were not met.⁵³

45. *Id.*

46. *Id.* at 359.

47. N.D. Admin. Code 27-02-14-01(5)(b) (1991).

48. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 358.

49. N.D. Cent. Code Ann. § 52-01-01(18)(k) (West 1957).

50. *Id.*

51. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 359.

52. *Id.* at 360.

53. *Id.*

C. Rationale

The referee's decision, which was affirmed by the court, found that the following factors supported the notion that landmen were independent contractors: instructions; services rendered personally; hiring, supervising, and paying assistants; continuing relationship; set hours of work; full time required; and significant investment. Such factors, if satisfied, swayed the determination to that of an independent contractor.⁵⁴ The referee also determined the factors regarding performing work on the premises, and the order or sequence set was considered neutral in nature.⁵⁵ The remaining eleven factors favored the status of employee.⁵⁶

The Supreme Court of North Dakota affirmed the referee's determination by finding that "reasonable minds could have determined by a reasonable means that the factual findings were proven by the weight of the evidence,"⁵⁷ which supported the legal conclusion that BAHA's landmen were employees and not independent contractors.⁵⁸ Based on this finding, the court affirmed Job Service and the district court and concluded that BAHA was liable for "unemployment insurance taxes on compensation paid to its landmen."⁵⁹

IV. Analysis

There can be no dispute that the court—and the referee—applied the correct statute in their analysis. BAHA asserted and focused its argument on a statute that clearly required written contracts to exist between the landmen referred and the company for whom the services were being performed. First, based on the plain language of this statute, it is obvious that the daily pay rate for services performed AND written contracts between the landman and company for whom the services are performed are both necessary. The existence of the word "and" instead of "or" in the statute indicates that both elements are needed to be considered an exception to employment. BAHA acknowledged the fact that there were no contracts created, thus rendering its proffered statute inapplicable to the circumstances.⁶⁰ Due to the plain language, the referee and the court

54. *Id.* at 361-62.

55. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 361.

56. *Id.* at 361-62.

57. *Id.* at 363.

58. *Id.* at 363.

59. *Id.*

60. *Id.* at 361.

correctly refused to apply N.D. Cent. Code Ann. § 52-01-01(18)(k). As a result, the court analyzed the case and circumstances under a different statute that codified a common law twenty-factor test of employer control.⁶¹

A. Future Impact on Similar Cases

While the court's decision to analyze the circumstances under N.D. Admin. Code 27-02-14-01(5)(b) was undoubtedly the correct one, the final result does not appear to resolve the issue of how to conclusively distinguish an employee from an independent contractor, and vice versa, once and for all. For example, if there is not an existing contract between the employer and the employee/independent contractor, then N.D. Cent. Code Ann. § 52-01-01(18)(k) is rendered useless. As a result, courts will be forced to turn to the twenty-factor test contained within N.D.A.C. § 27-02-14(5)(b). The issue then lies in the fact that there are twenty factors, which, subjectively analyzed by a referee and then a judiciary, could turn on the most minor of factual instances.

Clearly N.D. Cent. Code Ann. § 52-01-01(18)(k) calls for a written contract between the parties in order to establish an independent contractor classification.⁶² The law coming out of this case does little to change the existing law in terms of precedent. However, the impact of this case is an advisory one. The court is essentially telling similar parties and employers that in order to classify their landmen as independent contractors, it would be both wise and necessary to contract with them. By doing so, the analysis would be governed by N.D. Cent. Code Ann. § 52-01-01(18)(k). Aside from this "recommendation" by the court, its analysis and holding in the present case will likely have little to no impact on future cases that present similar issues.

B. So-Called "Employment Factors"

The first factor that the referee and the court found that favored employment was the factor that focused on the "training" of the landmen.⁶³ The relevant section of N.D. Admin. Code 27-02-14-01(5)(b) states that "the client requires the landmen to 'job shadow' another BAHA landman" if that landman is unfamiliar with the work, and "[w]ithout job shadowing, it is *unlikely* the client will allow landmen to perform services for them."⁶⁴

61. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 361 (citing N.D.A.C. § 27-02-14-01(5)(b) (1991)).

62. N.D. Cent. Code Ann. § 52-01-01(18)(k) (West 1957).

63. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 361.

64. N.D. Admin. Code 27-02-14-01(5)(b)(2) (1991) (emphasis added).

The referee found this factor favored employment, which was further affirmed by the court. The use of the word “unlikely” is unsettling in the sense that it portrays some ambiguity within the statute. If the employer did allow the landmen to perform their services without job shadowing, would that fact favor a finding that the landmen were independent contractors? The court does not answer how crucial each factor of the statute is, or what particular factor carried the most weight in the court’s analysis and subsequent decision. Instead, they use the word “unlikely” and do not use definitive verbiage. The common law twenty-factor test is supposed to analyze the control of the employer of the referred landmen from BAHA. The use of the word “unlikely” within the training factor indicates that control is not always present. Has every BAHA landman job shadowed another landman prior to their performance? It is hard to believe that this element clearly proves the necessary control element that comes with employment when the referee and the court only have testimony from two BAHA landmen and a statute that uses a weak word such as “unlikely.”

The court next addressed “integration,” which indicated employment if the “business interests” of BAHA “are interwoven into the very fabric of the services provided by the landman” on BAHA’s client’s behalf.⁶⁵ This factor finds employment when the success of a business depends on the performance of services by certain people such as BAHA’s landmen.⁶⁶ The issue with this factor is that, under such analysis, anybody would be considered an employee. Everyday life does not pose a practical scenario in which an employer such as BAHA would not rely on their landmen. Clearly, the landman’s work is crucial to the success of BAHA, as are any other staff members to their respective employers. This factor appears to be unfairly weighted so that it will always result in favor of an employee determination. Third, the court addresses the factor of “oral or written reports”, which looks at whether there was a requirement for the landmen to submit regular reports, either oral or written, to the person the landman is performing the services for.⁶⁷ As per the record, the BAHA landmen submitted invoices to their respective clients and were not required to submit anything further.⁶⁸ It seems illogical for the court to consider an invoice a regular report of the work conducted. The literal meaning of the

65. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 361 (citing N.D.A.C. §27-02-14-01(5)(b)(3)).

66. N.D. Admin. Code 27-02-14-01(5)(b)(3) (1991).

67. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 361 (citing N.D.A.C. §27-02-14-01(5)(b)(11)).

68. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 361.

word invoice is an “itemized list of goods or services furnished by a seller” and the “prices and terms” of the transaction.⁶⁹ An invoice is usually delivered after the work is completed and when payment is due. A statement delivered at the final step of a project can hardly be considered a *regular* report on the status of the work being completed. Therefore, it would appear as if there is little control present with this factor, which indicates more of an independent contractor relationship than that of employer/employee.

The court next analyzed “the furnishing of tools and materials.”⁷⁰ This factor considers someone who is furnished tools by their employer as an employee.⁷¹ BAHA’s landmen were required to possess the equipment or gear necessary so that they were able to perform their services. BAHA did not provide their landmen with any tools or gear. However, the court defined this as leaning towards the determination of the employee.⁷² It is illogical for the court to abandon its prevalent method of analyzing the statute’s plain language for this sole factor. The court makes a justification that, due to the specific equipment and the specificity thereof, this factor is actually indicative of control.⁷³ Regardless, the plain language of “the furnishing of tools and materials” factor requires the equipment to be provided to the landmen in order for them to be employees, or else they are independent contractors. The court nonetheless disregarded this requirement and actively found this as favoring employee status.

C. *Could it be Activism?*

It appears as if the court acted with nothing short of judicial activism in reaching the conclusion that landmen were employees and not independent contractors, as it seemed to be the outcome the court desired and not the conclusion the facts dictated. For example, in the analysis of the factor of “working for more than one firm at a time,”⁷⁴ the court found that although the landmen had the ability to work for other firms, the absence of an indication or proof of doing so does not classify them as independent contractors and instead makes them appear as employees.⁷⁵ However, if

69. *Invoice*, Black’s Law Dictionary (10th ed. 2014).

70. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 362 (citing N.D.A.C. § 27-02-14-05(b)(14)).

71. N.D. Admin. Code 27-02-14-05(b)(14) (1991).

72. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 362.

73. *Id.*

74. N.D. Admin. Code 27-02-14-05(b)(17) (1991).

75. *BAHA Petroleum Consulting Corp.*, 868 N.W.2d at 362.

these landmen had worked for other firms simultaneously then they would have achieved independent contractor status. The fact that the court considered these landmen employees solely because they had yet to exercise their right to work for more than one firm at a time is contradictory to the employee/independent contractor debate. As previously mentioned, the determination of whether a landman is an independent contractor or an employee depends on the existence of control. Even if the control element has not been exercised, the fact that it exists is the strongest element in classifying the landmen's status.⁷⁶ If that same line of reasoning were to apply here, as it should, then the very fact that the landmen had the ability to work for more than one firm contemporaneously should weigh in favor of an independent contractor as this factor calls for, despite the fact that they have not exercised that right or ability to date. This sort of inconsistency is something that is unexpected and unacceptable in the United States judicial system. Consistency is a major theme and purpose of the legal system, based on the idea of precedent. When one court holds a certain way and makes binding law, that holding should be binding on the entire court system. As a result, the court in *BAHA Petroleum* should have held that the "ability to work for more than one firm" weighed in favor of an independent contractor status.

Perhaps the most unsettling result from this case is not the outcome but what the holding could and should have been. Contained herein is an *ex post* analysis of a difficult yet prevalent issue. The outcome could have and would have been substantially different had the court conducted their analysis in the manner proposed by this note. This analysis proves that later courts presented with this issue will in no means reach the same result proffered by the author, or reached by the court in *BAHA Petroleum*. As each factor changes in regards to the scenario presented, no two employers and their landmen (or other staff for that matter) will have the relationship *BAHA* had with its landmen. However, the court performed a public service of convenience by only applying the answer to this case and not a sweeping result claiming all landmen are considered employees.

V. Oklahoma Breakdown

As stated, Oklahoma and North Dakota share the fact that they are both very involved in the oil and gas industry. It is likely that cases such as the

76. *Myers-Weigel Funeral Home v. Job Ins. Div. of Job Service of North Dakota*, 1998 ND 87 ¶ 9, 578 N.W.2d 125, 126 (N.D. 1998) (citing *Turnbow v. Job Service North Dakota*, 479 N.W.2d 827, 830 (N.D. 1992)).

one analyzed herein are prevalent within the Oklahoma judiciary. The outcome of each case might differ from state to state, not only because of the different judges and how they receive and interpret the facts, but primarily because each state has its own statutes, relevant law, and industrial bias. Whether by statute or case law, Oklahoma has addressed the broader issue of independent contractor versus employee much like its North Dakota counterpart.

A. Oklahoma Statute Law

Typically, a landman is not considered an employee if that landman satisfies three elements.⁷⁷ A landman is not considered an employee if (1) the landman “is engaged primarily negotiating for the acquisition . . . of mineral rights or negotiating business agreements that provide for the exploration for or development of minerals;”⁷⁸ (2) if “substantially all remuneration paid in cash or otherwise for the performance of the services is directly related to the completion by the individual of the specific task contracted for rather than to the number of hours worked by the individual;”⁷⁹ and (3) “if the services performed by the [landman] are performed under a written contract between the [landman] and person for whom the services are performed, which provides that the individual is to be treated like an independent contractor and not an employee[.]”⁸⁰ Facially, it is obvious that the Oklahoma test for an employee is far simpler than that of North Dakota. It essentially boils down to this: landmen are independent contractors if they negotiate mineral rights under a contract and are paid in cash for those negotiations.⁸¹ There does not appear to be a codified factor test in Oklahoma, like there is in North Dakota.

B. Oklahoma Case Law

While there is a statute addressing what *is not* employment, “there is no definition for the term ‘independent contractor.’”⁸² At common law, the term has been historically used and has been applied to someone who “engages to perform a certain service for another according to *his or her own* method and manner, free from control and direction of the employer in

77. 40 Okla. St. Ann. § 1-210(15)(x).

78. 40 Okla. St. Ann. § 1-210(15)(x)(i).

79. 40 Okla. St. Ann. § 1-210(15)(x)(ii).

80. 40 Okla. St. Ann. § 1-210(15)(x)(iii).

81. 40 Okla. St. Ann. § 1-210(15)(x)(i).

82. *Hammock v. United States*, 2003 OK 77, 78 P.3d 93, 98 (Okla 2003).

all matters . . . except as to the result.”⁸³ Under Oklahoma case law, “an independent contractor is [someone] who engages to perform a certain service for another, according to his own method and manner, free from control and direction of his employer in all matters connected with the performance of the service, except as to the result of the service.”⁸⁴ Moreover, because independent contractor has yet to be defined by statute or other means, the common law meaning is still relevant and commonly used.⁸⁵ In total, the so called “decisive test” in Oklahoma as established by case law for determining whether a landman, or anyone for that matter, is an employee or an independent contractor is “the existence of the hirer’s right to exercise control over the physical details of the performance of the service.”⁸⁶

At first glance, there appears to be a vast distinction between Oklahoma and North Dakota in regards to how they classify and determine an independent contractor versus an employee. After all, North Dakota uses the twenty-factor common law test⁸⁷ while Oklahoma does not have a codified definition for independent contractor, instead using a statute consisting of three elements that only apply to landmen.⁸⁸ However, the two states are very similar when it comes to the essence of determining an independent contractor versus an employee. They both share the idea that the element of control dictates the relationship and status of the landman. Lack of control in each state indicates an independent contractor, while the presence of control is indicative of an employer/employee relationship in both North Dakota and Oklahoma.

C. WWOD: What Would Oklahoma Do?

If the individual landman is primarily involved in the negotiation for the acquisition of mineral rights, then the first element of the Oklahoma statute favors an independent contractor status. As stated, a primary duty of BAHA’s landmen was to acquire mineral rights and surface rights and to negotiate leases.⁸⁹ Second, the BAHA landmen were paid a daily rate by the company for their services and performance of certain tasks associated with

83. *Flick v. Crouch*, 1967 OK 131, 434 P.2d 256, 260 (Okla. 1967).

84. *Mistletoe Exp. Serv., Inc. v. Culp*, 1959 OK 250, 353 P.2d 9, 12 (Okla. 1959).

85. *Hammock v. United States*, 2003 OK 77, 78 P.3d 93, 98 (Okla 2003).

86. *Flick v. Crouch*, 1967 OK 131, 434 P.2d 256 (Okla. 1967).

87. N.D. Admin. Code 27-02-14-05(b) (1991).

88. 40 Okla. St. Ann. § 1-210(15)(x).

89. *BAHA Petroleum Consulting Corp. v. Job Service North Dakota*, 2015 ND 199, 868 N.W.2d 356, 358 (N.D. 2015).

their aforementioned duties.⁹⁰ However, there was not a contract between BAHA and their landmen dictating that the landmen were independent contractors instead of employees, which ultimately was a costly error on BAHA's part, thus not satisfying the third element of the test.⁹¹ Because 40 O.S. § 1-210(15)(x) is comprised of three elements instead of factors, unlike N.D. Admin. Code 27-02-14-05(b), each element must be satisfied in order for the landman to be an independent contractor. Were the *BAHA Petroleum* case to be analyzed under the relevant Oklahoma statute, there is no doubt that the landmen would be considered independent contractors. It is ultimately irrelevant that BAHA's landmen negotiated leases and acquired mineral rights, or that they were paid daily for services performed, because without the existence of a contract defining the relationship, the Oklahoma elemental test was failed.

With the absence of an alternate statute, such as North Dakota's N.D. Admin. Code 27-02-14-05(b), an Oklahoma court confronted with the same issue would have concluded that the landmen were independent contractors due to the lack of a contractual arrangement. This hypothetical Oklahoma court would not have been tasked with the burden of analyzing the scenario at hand over twenty factors, which not only would lead to a more efficient result but perhaps a more settling and acceptable result. By only using three elements, which are simple and easily defined, there is little to no room for error in order to obtain a certain desired result.

VI. Conclusion

If there is one lesson to learn by companies similarly situated to BAHA, it is that they should clearly define their relationships with their landmen. By inserting a simple clause stating that the landmen were independent contractors into their service contracts, BAHA could have and likely would have avoided the litigation and the unfavorable outcome. While there was some "extracurricular" activity by the judiciary in this case, it is ultimately their job to interpret the law in a way that best balances the interests of the law, parties, and industry impacted. A thorough contract that conforms to every element listed and required, it would be impossible for BAHA, or others, to not achieve the result they so desire. With a surging industry such as oil and gas, there will be innumerable problems arising that entail all aspects of the law. The decision reached by the *BAHA Petroleum* court may not have advanced the oil and gas industry; instead, it exposed a grey area

90. *Id.* at 361.

91. *Id.* at 360.

in the field and provided a means of reaching a decision favorable to the court. However, there is one prevailing theme that arises from the *BAHA Petroleum* case that is consistent with the American legal system, and that is the power of contract law. Contracts were and still are one of the cornerstones of the law that remains almighty. This case provides that despite the novel areas of industry and an ever-changing legal environment, a carefully drafted contract can prevail even over an activist judge.