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NORTH DAKOTA



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I. Introduction

This Article summarizes and discusses important developments in North Dakota oil and gas law between July 1, 2017, and June 30, 2018. Part II of this Article will discuss common law developments in both state and federal courts in North Dakota and Part III will discuss the state's recent legislative and regulatory developments.

II. Judicial Developments

This section will first discuss a variety of oil and gas cases decided by the Supreme Court of North Dakota. Second, this section will examine similar jurisdictional issues of tribal courts and federal courts regarding royalty payments.

A. Supreme Court of North Dakota

Cont'l Res., Inc. v. Counce Energy BC #1, LLC

Cont'l, filed January 22, 2018, concerns a drilling operator appealing a judgment from the district court over a breach of contract claim due to the lack of subject matter jurisdiction within a drilling unit.¹ Counce, a non-operating working interest owner, stopped paying its proportionate share of the drilling costs for a well.² Subsequently, Continental filed an oil and gas production lien against Counce for the expenses.³ After an audit of the well, some charges were modified and Continental amended its complaint against Counce, but it released its lien.⁴ After the District Court of Billings County, Southwest Judicial District determined that it had subject matter jurisdiction, a jury found that Counce breached its contract by failing to pay its share of drilling expenses and awarded Continental its costs.⁵

On appeal, the Supreme Court of North Dakota vacated the judgment entered by the district court for lack of subject matter jurisdiction.⁶ The Court held that the legislature granted the Industrial Commission with the broad authority to regulate oil and gas development—particularly once a pooling order is issued for a drilling unit.⁷ North Dakota Code states:

1. *Cont'l Res., Inc. v. Counce Energy BC #1, LLC*, 2018 ND 10, 905 N.W.2d 768 (N.D. 2018).

2. *Id.* at ¶ 2, 905 N.W.2d at 770.

3. *Id.* at ¶ 3, 905 N.W.2d at 770.

4. *Id.*

5. *Id.* at ¶ 4, 905 N.W.2d at 771.

6. *Id.* at ¶¶ 10-11, 905 N.W.2d 772.

7. *Id.* at 771.

Each such pooling order must make provision for the drilling and operation of a well on the spacing unit, and for the payment of the reasonable actual cost thereof by the owners of interests in the spacing unit, plus a reasonable charge for supervision. In the event of any dispute as to such costs, the commission shall determine the proper costs.⁸

In this case, the breach of contract dispute directly stems from the leases within the pooling order.⁹ Therefore, any dispute about the costs involved must be resolved exclusively by the Industrial Commission.¹⁰ Once Continental released its lien and focused on the breach of contract claim, the district court lost any subject matter jurisdiction.¹¹ As a result, the Court vacated the judgment of the district court.¹²

Hallin v. Inland Oil & Gas Corp.

Hallin, filed October 17, 2017, concerns a lease interpretation that was concluded to be unambiguous which transferred an additional twenty acres of mineral owners' interests into a leasehold.¹³ Mineral owners ("Hallins") leased their fractional interests of minerals in "all that certain tract of land situated in Mountrail County" to an operator.¹⁴ Due to an unclear chain of title, the exact amount of acreage—either sixty or eighty acres—was uncertain when the lease was executed.¹⁵ However, after a quiet title lawsuit between the Hallins and other mineral owners in the same tract, it was determined that the Hallins owned eighty acres.¹⁶ Subsequently, the acreage under lease was disputed between the Hallins and the operator and litigation ensued. The District Court of Mountrail County, North Central Judicial District of North Dakota held that the leases were unambiguous in that the Hallins leased "whatever interest they had in the subject property."¹⁷ Accordingly, the court granted summary judgment to the operator.¹⁸

8. N.D. CENT. CODE ANN. § 38-08-08(2) (West 2018).

9. *Cf. Cont'l Res., Inc.*, at ¶¶7-9, 905 N.W.2d at 771-72.

10. *See id.*

11. *Id.* at ¶ 9, 905 N.W.2d at 772.

12. *Id.* at ¶ 11, 905 N.W.2d at 772.

13. *Hallin v. Inland Oil & Gas Corp.*, 2017 ND 254, 903 N.W.2d 61 (N.D. 2018).

14. *Id.* at ¶ 2, 903 N.W.2d at 63.

15. *Id.* at ¶ 3, 903 N.W.2d at 63.

16. *Id.* at ¶ 5, 903 N.W.2d at 63.

17. *Id.*

18. *See id.* at ¶ 22, 903 N.W.2d at 68

On appeal, the Supreme Court of North Dakota affirmed the judgment of the district court because the court did not err in determining that the leases conveying “all” of the mineral interests of the Hallins were unambiguous.¹⁹ Although the exact acreage was in dispute at the time of the lease execution, the Court reasoned that the dispute did not factor into the intent of the parties at that time.²⁰ The district court correctly applied the rules of contract interpretation to the word “all,” determining that it had a clear meaning.²¹ Moreover, although not argued by the Hallins, the Court noted that the term “more or less” as used in land conveyances—appearing to be ambiguous—has also been determined by the Court to be construed to convey the entirety of a tract.²²

Abell v. GADECO, LLC

Abell, filed July 6, 2017, concerns the termination of an oil and gas lease while operations were being conducted within the unit of pooled leases.²³ On January 9, 2007, Abell signed a lease with GADECO which provided that the lease shall remain in force as long thereafter the primary term as “operations are conducted on the leased premises.”²⁴ “The Industrial Commission designated the subject property as part of a spacing unit in February 2011.”²⁵ GADECO then began planning wells and began negotiations with Abell on a surface use agreement intended for a well location; but by December of 2011, Abell wanted to relocate the well site.²⁶ Before the primary term of the lease ended, GADECO applied for a well permit and it was approved.²⁷ Because GADECO was unable to reach a surface use agreement with Abell, it relocated the well site off of Abell’s property but within the approved unit.²⁸ Shortly thereafter, a producing oil and gas well was completed.²⁹ Abell provided a notice of termination and sued to recover attorney’s fees.³⁰ The District Court of Williams County,

19. *Id.* at ¶ 21, 903 N.W.2d at 68.

20. *Id.* at ¶ 15, 903 N.W.2d at 66.

21. *Id.*

22. *Id.* at ¶ 16, 903 N.W.2d at 67.

23. *Abell v. GADECO, LLC*, 2017 ND 163, 897 N.W.2d 914 (N.D. 2018).

24. *Id.* at ¶ 2, 897 N.W.2d at 915-16.

25. *Id.* at ¶ 3, 897 N.W.2d at 916.

26. *Id.*

27. *Id.* at ¶ 4, N.W.2d at 916.

28. *Id.*

29. *Id.*

30. *Id.* at ¶ 5, 897 N.W.2d at 916.

Northwest Judicial District ruled that Abell's lease had terminated and awarded her attorney's fees.³¹ GADECO appealed.³²

On appeal, the Supreme Court of North Dakota reversed and remanded the district court's ruling holding that the court erred in granting summary judgment when it declared that Abell's lease terminated at the end of its primary term.³³ To support its decision, the Court relied on a substantial body of case law which has defined the meaning of drilling operations—including when work is done preparatory to drilling, the driller has the capability to do the actual drilling, and there is a good-faith intent to complete the well.³⁴ Moreover, the Court noted that drilling operations could be defined as broadly as the parties agreed to in their lease—most simply by the “preparation of the drill site.”³⁵ In this case, though GADECO's preparatory activities were minimal, they nonetheless constitute “operations” within the terms of the lease.³⁶ Additionally, the Court illustrated the point that Abell was part of the cause in delaying the completion of the well site because of her requests for relocation and for her inability to return telephone calls from GADECO.³⁷ For these reasons, the Supreme Court reversed the summary judgment terminating the lease and also reversed the award of attorney's fees to Abell.³⁸

B. Federal Courts

Enerplus Res. (USA) Corp. v. Wilkinson

Enerplus, filed August 2, 2017, concerns an operator that overpaid royalties to a mineral owner and demanded the return of the excess funds, as well as jurisdiction in federal court instead of in tribal court.³⁹ On October 4, 2010, Wilkinson was assigned certain overriding royalty interests as a result of a settlement agreement from a tribal court proceeding.⁴⁰ Pursuant to that agreement, Enerplus's predecessors-in-title and Wilkinson agreed that any disputes arising from the agreement “shall be resolved in the United States District Court for the District of North

31. *Id.*

32. *See id.*

33. *See id.* at ¶¶ 20-21, 897 N.W.2d at 920.

34. *Id.* at ¶ 10, 897 N.W.2d at 917.

35. *Id.*

36. *Cf. id.* at ¶ 15, 897 N.W.2d at 920.

37. *Cf. id.* at ¶ 14, 897 N.W.2d at 919.

38. *See id.* at ¶¶ 20-21, 897 N.W.2d at 920.

39. *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094 (8th Cir. 2017).

40. *Id.* at 1095.

Dakota Northwest Division and such court shall have exclusive jurisdiction hereunder and no party shall have the right to contest such jurisdiction or venue.”⁴¹ Due to an alleged clerical error, Enerplus overpaid Wilkinson nearly three million dollars in overriding royalty payments and subsequently sought the return of the money.⁴² Then, Wilkinson sued Enerplus for underpayment in the Fort Berthold Tribal Court and Enerplus sued Wilkinson in federal court seeking, among other things, a preliminary injunction prohibiting jurisdiction in tribal court.⁴³

After evaluating the *Dataphase*⁴⁴ factors, the district court ordered the return of the excess payments to Enerplus and granted the preliminary injunction because of the irreparable harm that Enerplus would otherwise suffer.⁴⁵ Wilkinson appealed, arguing that the district court erred by giving greater weight to the forum selection clauses.⁴⁶ Additionally, Wilkinson argued that the tribal court should have been afforded the opportunity to determine its own jurisdiction—particularly because some of the leases involved tribal lands.⁴⁷ On appeal, the Court reiterated the point that the parties already agreed on jurisdiction in the forum selection clauses.⁴⁸ Therefore, the Court of Appeals for the Eighth Circuit determined that the district court’s grant of the preliminary injunction did not constitute clear error and affirmed it.⁴⁹

Kodiak Oil & Gas (USA) Inc. v. Burr

Kodiak concerns an operator that sought declaratory and injunctive relief that a tribal court lacked jurisdiction over a suit regarding, among other things, breach of contract for royalty payments on lands with exterior boundaries on an Indian reservation.⁵⁰ In the underlying tribal court action at the Fort Berthold Tribal Court, plaintiffs sought to recover royalties pursuant to an oil and gas lease in the exterior boundaries of the Fort Berthold Indian Reservation.⁵¹ The operator, now EOG Resources Inc. (“EOG”), sought a preliminary injunction over the tribal court’s lack of

41. *Id.*

42. *Id.* at 1096.

43. *Id.*

44. *Dataphase Systems, Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc).

45. *Id.*

46. *Id.*

47. *See id.* at 1096.

48. *Id.* at 1097.

49. *Id.* at 1098.

50. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 303 F. Supp. 3d 964 (D.N.D. 2018).

51. *Id.* at 968.

jurisdiction.⁵² Before granting an injunction, the district court weighed the factors set forth in *Dataphase*.⁵³ The *Dataphase* factors include: “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.”⁵⁴

Regarded by the Eighth Circuit as the most significant factor, the court reasoned that the probability of success on the merits in this case was present because EOG had a strong likelihood of success on at least one of its claims against the defendants.⁵⁵ Furthermore, the court found no provision in federal law that provided for tribal court jurisdiction over a breach of contract claim for a mineral lease or the underpayment of royalties.⁵⁶ Due to the lack of jurisdiction over the claims, EOG would undoubtedly suffer irreparable harm by being forced to expend time, effort, and money in a forum where there is no way to realistically recoup fees.⁵⁷ After weighing the remaining factors and viewing the totality of the arguments, the court noted that EOG clearly met the burden of necessity for a preliminary injunction.⁵⁸ Consequently, the district court granted the motion for a preliminary injunction and enjoined the defendants from further action in the tribal court.⁵⁹ The Defendants have appealed to the Eighth Circuit.

III. Legislative and Regulatory Developments

A. Legislative Enactments

No legislative enactments were passed between July 1, 2017, and June 30, 2018, that significantly shape or alter existing North Dakota oil and gas law.

52. *Id.* at 969.

53. *Id.* at 973 (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)).

54. *Kodiak*, 303 F. Supp. 3d at 973.

55. *See id.* at 984.

56. *Id.* at 983.

57. *Id.* at 984.

58. *Id.* at 985.

59. *Id.*

B. Regulatory Changes

On December 4, 2017, the Industrial Commission of the state of North Dakota approved additions and amendments to Chapters 43-02-03, 43-02-05, 43-02-06, and 43-02-11 of the North Dakota Administrative Code. These regulatory rule changes address new requirements for the oil and gas industry. Outlined below are some of the significant amendments.

Chapter 43-02-03 (Oil & Gas)

Chapter 43-02-03 incurred many minor alterations, however, only three are noteworthy that add notice requirements for operators. The first, is in the leak and spill cleanup section. Now, a sundry notice—including the date of the occurrence, date of cleanup, amount and type of each fluid involved, identification of the site affected, the root cause of the incident and explanation of how the volume was determined—must be submitted within ten days after the cleanup of any spill or leak in which fluids are not properly removed or appropriate resources are not utilized to contain and clean up the spill unless deemed unnecessary by the director.⁶⁰

The second is in the treating plant construction and operation section. There, a provision has been added to also require a sundry notice within thirty days following construction or modification of a treating plant.⁶¹ The notice shall be submitted detailing such work and the dates commenced and completed, along with a schematic drawing of the treating plant site drawn to scale, detailing a variety of things.⁶² The third is in the saltwater handling facility construction and operation section. Similar to the treating plant, notice is required within thirty days following the construction or modification of a saltwater handling facility.⁶³ And like the treating plant, the requirements for the saltwater handling facility include schematic drawings.⁶⁴

Chapter 43-02-05 (Underground Injection Controls)

Chapter 43-02-05 had a few changes that contain additional construction requirements. Specifically, added protections for wells to be converted to saltwater disposal wells must now have a surface casing set and cemented at a point not less than fifty feet below the base of the Fox Hills

60. N.D. ADMIN. CODE § 43-02-03-30.1 (West 2018).

61. *Id.* § 43-02-03-51.3(7).

62. *Id.*

63. *Id.* § 43-02-03-53.3(8).

64. *Id.*

formation.⁶⁵ Additionally, “[a]fter an injection well has been completed, approval must be obtained on a sundry notice (form 4) from the director prior to any subsequent perforating.”⁶⁶

Chapter 43-02-06 (Royalty Statements)

Chapter 43-02-06 has been amended to include, effective on July 1, 2019, more detailed information reporting to royalty owners.⁶⁷ The new reporting standards require the price to outline all deductions, as well as adding the prices for natural gas liquids.⁶⁸ Also, “[t]he amount and purpose of each deduction made, identified as transportation, processing, compression, or administrative costs.”⁶⁹ In addition, operators must provide mineral owners with a statement identifying the spacing unit for the well, “the net mineral acres owned by the mineral owner, the gross mineral acres in the spacing unit, and the mineral owner’s decimal interest that will be applied to the well” all “[w]ithin one hundred twenty days after the end of the month of the first sale of production from a well or change in the spacing unit of a well.”⁷⁰

Chapter 43-02-11 (Tax Exemptions and Reductions)

Chapter 43-02-11 may have been amended more than any other due to the repeal of many of the tax exemptions and reductions for operators. Specifically, the tax incentives within sections 02,⁷¹ 04,⁷² 05,⁷³ and 06⁷⁴ for horizontal, inactive, and reentry wells have all been repealed. The effective date of each repealed section is listed as July 1, 2017.

65. *Id.* § 43-02-05-06.

66. *Id.*

67. *Id.* § 43-02-06-01 (effective July 1, 2019).

68. *Id.* § 43-02-06-01(4) (effective July 1, 2019).

69. *Id.* § 43-02-06-01(6) (effective July 1, 2019).

70. *Id.* § 43-02-06-01.1.

71. *Id.* § 43-02-11-02.

72. *Id.* § 43-02-11-04.

73. *Id.* § 43-02-11-05.

74. *Id.* § 43-02-11-06.