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ONE J

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I. Introduction

The following is an update on Alaska legislative activity and case law relating to oil, gas and mineral law from August 1, 2018 to July 31, 2019.

II. Legislative and Regulatory Developments

The following is a discussion of notable legislation:

A. Senate Bill 158

Senate Bill 158 (“SB 158”) — Relating to oil and hazardous substances and waiver of cost recovery for containment and cleanup of certain releases; and providing for an effective date.

Section 3 of SB 158 amends Alaska Stat. § 46.08.070 by adding a new section, Alaska Stat. § 46.08.070(e), relating to the costs incurred by the Department of Environmental Conservation (the “Department”) in the cleanup or containment of oil or hazardous substances pursuant to the Department’s enforcement of Alaska Stat. § 46.03.822 – Liability for the release of hazardous substances.¹ Previously, the commissioner of environmental conservation (the “Commissioner”) was obligated to seek reimbursement for such cost, but after passage of Alaska Stat. § 46.08.070(e), the Department is granted the discretion to waive all or a portion thereof upon making a written finding that:

(1) the release was from piping, tankage, or other equipment used solely to provide heat or electrical power generation for a building used primarily for residential purposes and that does not consist of more than four dwelling units; (2) the person did not wilfully or negligently fail to comply with spill prevention, reporting, and response requirements of the department applicable to the release or the property where the release occurred; (3) the person took immediate measures upon discovery of the release to contain the release where possible; and (4) the person provided reasonable assistance to the department and other governmental entities that responded to the release, including providing reasonable access to the property where the release occurred and providing information requested by the department about the release and property.²

1. ALASKA STAT. § 46.08.070 (Lexis Advance through 2019 SLA, chapter 12).

2. S.B. 158, 30th Leg., 2d Sess. § 3 (Ala. 2018).

Section 4 of SB 158 amends the uncodified law of the State of Alaska by adding a new section giving the Department authority to “adopt regulations necessary to implement Alaska Stat. § 46.08.070(e) under Alaska Stat. § 44.62 (Administrative Procedure Act), but not before the effective date of the law implemented by the regulation.”³

Section 5 of SB 158 amends the uncodified law of the State of Alaska by adding a new section directing that Sections 1 through 3 of SB 158 shall take effect retroactive to January 1, 2018.⁴

SB 158 was signed into law on October 17, 2018.

III. Judicial Developments

A. Supreme Court Cases

1. *Kenai Landing, Inc., v. Cook Inlet Natural Gas Storage Alaska, LLC*⁵

In *Kenai Landing, Inc., v. Cook Inlet Natural Gas Storage Alaska, LLC*, the Supreme Court of Alaska addressed, in part, (1) whether a landowner who has assigned all of his royalty rights under a gas lease covering his property to the lessee/condemnor is entitled to just compensation for the native gas that remains within a storage reservoir established by condemnation of easement⁶; and (2) whether a landowner is entitled to just compensation for new gas discovered on his property after the date of the taking, when the new gas was not present on his property at the time of the taking, but was instead located on an adjacent isolated reservoir, and only came into pressure communication with the gas on the lessor’s property after the isolated reservoir was accidentally tapped into while work was being conducted on the storage reservoir project.⁷

a) Facts

Cook Inlet Natural Gas Storage Alaska, LLC (“CINGSA”) is building a natural gas storage facility on the Kenai Peninsula overlying and utilizing a mostly depleted rock formation known as the Sterling C Reservoir.⁸ To efficiently extract gas from the facility, a certain minimum amount of gas and/or pressure (“Base Gas”) must be maintained within the Sterling C

3. *Id.* § 4.

4. *Id.* § 5.

5. *Kenai Landing, Inc., v. Cook Inlet Natural Gas Storage Alaska, LLC*, 441 P.3d 954 (Alaska 2019).

6. *Id.* at 960-61.

7. *Id.* at 960-62.

8. *Id.* at 957.

Reservoir.⁹ CINGSA will maintain the necessary pressure through a combination of inserting gas from other locations, and by utilizing gas left in the reservoir at the time CINGSA acquired it ("Native Gas").¹⁰

In 2011, the Regulatory Commission of Alaska ("RCA") granted CINGSA a certificate of public convenience and necessity and CINGSA "proceeded to use the power of eminent domain to acquire the property rights necessary for the storage facility's operations."¹¹

Kenai Landing, Inc. ("Kenai") "owns a parcel of land overlying the Sterling C Reservoir."¹² Kenai acquired said parcel "subject to an existing oil and gas lease (the "Ward Cove Lease")" that was committed to the Cannery Loop Unit.¹³ The term of said lease will continue so long as gas is being produced anywhere in the unit.¹⁴ At the time of the condemnation action, under the Wards Cove Lease, the Wards Cove held the royalty rights and Marathon Alaska Production Company held the production rights.¹⁵ After CINGSA negotiated and successfully acquired the rights of both Wards Cove (lessor) and of Marathon Alaska Production Company (lessee) under said lease, "the Department of Natural Resources ("DNR") agreed to sever the Sterling C Reservoir from the Cannery Loop Unit so that it could be used for storage purposes."¹⁶

Sometime after the commencement of the condemnation action, CINGSA discovered a new pocket of gas ("New Gas") and through its drilling accidentally brought the New Gas "into contact with the gas already known to be in the reservoir," thus, increasing the overall volume of Native Gas, including that underlying Kenai's property.¹⁷

b) Proceedings

CINGSO filed a complaint against Kenai and others in March 2011 seeking to condemn:

- (1) an easement for gas storage, to include the underground formations in the Sterling C Reservoir plus an adjoining geological zone for use as a "buffer"; and (2) an easement in the

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 957-58.

14. *Id.* at 958.

15. *Id.*

16. *Id.*

17. *Id.*

mineral interests, which would allow CINGSA the use of all gas, oil, or other minerals . . . located within the Sterling C Pool and the correlative buffer geological formation, including the use of native gas as "base gas for the storage facility."¹⁸

Thereafter, CINGSA moved for a partial summary judgment arguing that Kenai "had no right to compensation for any of the Native Gas in the Sterling C Reservoir because CINGSA owned this gas as assignee of the Wards Cove Lease."¹⁹ Kenai responded that "the lease had been terminated, either by the condemnation itself or by DNR's severance of the Sterling C Reservoir from the Cannery Loop Unit, and that ownership of the minerals had therefore reverted to Kenai."²⁰ The superior court granted summary judgment in favor of CINGSA, finding that "the Wards Cove Lease was still in effect."²¹

While the parties agreed that Kenai had "a right to compensation for the use of its property for underground gas storage," there was disagreement over whether Kenai was entitled to compensation for the Native Gas and/or New Gas underlying its property.²² The superior court determined that Kenai "was entitled to \$65,000 for the gas storage rights" and added an additional "\$23,677 for the stipulated value of the non-producible minerals under Kenai's Landing's land."²³

Kenai appealed.

c) Standard of Review

A superior court's decision on summary judgment is reviewed de novo and will be affirmed "if there are no genuine issues of material fact and if the movant is entitled to judgment as a matter of law."²⁴

The proper amount of compensation for a taking is a question of fact, and the determination of the superior court will be affirmed unless there is a finding a clear error.²⁵

18. *Id.* (internal quotation omitted).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* 958-59 (quoting *Alakayak v. B.C. Packers, Ltd.*, 48 P.3d 432, 447 (Alaska 2002)).

25. *Id.* at 959 (citing *Triangle, Inc. v. State*, 632 P.2d 965, 968 (Alaska 1981); and quoting *Beeson v. City of Palmer*, 370 P.3d 1084, 1088 (Alaska 2016)).

d) Discussion

Kenai argued that (1) the superior “failed to to compensate it for CINGSA’s use of the [N]ative [G]as remaining in the Sterling C Reservoir as [B]ase [G]as; and (2) it is entitled to compensation for its proportionate share of the New Gas CINGSA discovered after the taking.”²⁶

The Supreme Court of Alaska held that neither of those issues involve legal error or a clearly erroneous finding of fact and affirmed the superior court’s judgment on each.²⁷

(1) The superior court did not err in deciding that Kenai was not entitled to compensation for CINGSA’s easement in the Native Gas

On appeal Kenai argued that “the superior court erred when it concluded that Kenai [] owned at most a reversionary interest in the Native Gas in place,” and that Kenai should be compensated for the Native Gas that remained in the storage reservoir because “the only interest in [N]ative [G]as that its predecessor-in-interest had transferred to Marathon under the Wards Cove Lease was the right to extract [the gas],” and did not include the right to use Native Gas as a Base Gas for a storage facility.²⁸

CINGSA contended that it had acquired the Native Gas under Kenai’s property upon acquiring the Wards Cove Lease, and that said acquisition was for any and all purposes.²⁹ Kenai countered that “absent specific language in the lease conveying the minerals in place to the lessee, the lessor retains title to the same, so long as they remain under the land.”³⁰

The Supreme Court of Alaska focused their evaluation on the issue of just compensation, recognizing that “the fundamental goal of ‘just compensation’ is to make the property owner whole.”³¹ Alaska courts determine just compensation “by what the owner has lost and not by what the condemnor has gained.”³² Therefore, the court examined what Kenai had lost by virtue of the condemnation of an easement in the gas for the duration of the lease, and concluded that Kenai had lost nothing because “the Wards Cove Lease gave the lessee production rights” and “gave the lessor a royalty interest,” both of which CINGSA had by assignment.³³

26. *Id.*

27. *Id.*

28. *Id.* at 959-60.

29. *Id.* at 960

30. *Id.*

31. *Id.* (quoting *Ketchikan Cold Storage Co. v. State*, 491 P.2d 143, 150 (Alaska 1971)).

32. *Id.* (quoting *Gackstetter v. State*, 618 P.2d 564, 566 (Alaska 1980)).

33. *Id.*

The court held that so long as the Kenai property remains subject to the Wards Cove Lease, Kenai has “no current right to produce or receive royalties on any portion of the [N]ative [G]as in place,” and only when “the Cannery Loop Unit as a whole ceases production” will the Wards Cove Lease also terminate, reverting full property rights to Kenai.³⁴ The court further reasoned that because CINGSA was only using the Native Gas for a non-consumptive use – as a Base Gas to help insure sufficient pressure to efficiently operate the storage facility – no damage would be done to Kenai’s property rights.³⁵

(2) The superior court did not err by deciding that Kenai was not entitled to compensation for the New Gas

Kenai’s second claim pertains to whether it is entitled to just compensation for new gas that entered the storage reservoir after the taking when CINGSA accidentally tapped into an geologic strata/formation that is not directly under the Kenai property, but which “came into pressure communication with the gas underlying Kenai Landing’s property only after CINGSA accidentally tapped into the isolated reservoir while working on the [gas storage] project.”³⁶

Generally, a landowner is only entitled to compensation for the value of the property as it exists at the time of the taking.³⁷ However, Kenai points to an exception to the general rule, that “a landowner should be compensated for features on the property (such a minerals) that were unknown on the date of taking but discovered before valuation proceedings.”³⁸ The Supreme Court of Alaska found the exception to be inapplicable in this case because the “[g]as from the isolated reservoir was not just undiscovered as of the date of the taking, it was not present under the Kenai Landing’s property [] at all,” and only “came into pressure communication with the gas underlying Kenai’s property after CINGSA accidentally tapped into the isolated reservoir while working on the project.”³⁹

e) Conclusion

Affirmed judgment of the superior court.

34. *Id.* at 961.

35. *Id.*

36. *Id.*

37. *Id.* at 962.

38. *Id.* (citing *City of Little Rock v. Moreland*, 231 Ark. 996, 334 S.W.2d 229, 230 (1960)).

39. *Id.*

B. Appellate Activity

None reported.

C. Trial Activity

None reported.