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ONE J

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*John R. Chadd**

Table of Contents

I. Introduction	332
II. Legislation	332
A. Priority of Tax Lien on Mineral Production	332
III. State Regulation	333
A. New Guidance on Well Location Moves	333
B. New Policy on Protests of Applications for Permit to Drill	333

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C. Jurisdiction over Intrastate Refined Petroleum Products	
Pipelines	334
IV. Judicial Developments.....	335
A. Supreme Court of Wyoming.....	335
1. Application of Forum-Selection Clause	335
2. Whether the BLM is an Indispensable Party in a State Court	
Action regarding a Private-Federal Lease Dispute.....	337

I. Introduction

This article summarizes and discusses important developments in Wyoming’s oil and gas law between August 1, 2018 and July 31, 2019. During this time period, the Wyoming legislature passed a bill into law concerning the priority of county ad valorem tax liens on mineral production.¹ The Wyoming Oil and Gas Conservation Commission (“WOGCC”) issued new policies concerning the movement of a horizontal well location after the related well drilling permit has been approved and the protests of applications for permits to drill.

Also during this applicable time period, there were cases of note which dealt with the application of forum-selection clauses in oil and gas lease purchase and sale agreements, and whether the Bureau of Land Management (the “BLM”) was an indispensable party in litigation over the conflict between private oil and gas leases and coal development under federal government leases.

II. Legislation

A. Priority of Tax Lien on Mineral Production

Senate File 0118, signed into law on March 8, 2019, amended various subparts of Wyoming Statute 39-13-108(d) to provide that, on or after January 1, 2021, a county ad valorem tax lien on mineral production is perpetual against all persons except the United States and the State of Wyoming, is perfected immediately upon production of the minerals subject to all prior existing liens (presumably liens of the same type, although the provision does not specify), is superior and paramount to all other liens, claims, mortgages, or other encumbrances (other than the claims specified in the previous exception), and shall survive any foreclosure actions until the taxes owed are paid in full or the tax lien is waived by the tax lien holder.²

1. S. File 0118, 65th Gen. Sess. (Wyo. 2019).

2. *Id.*

During the transitional eighteen month period July 1, 2019 through December 31, 2020, the tax lien is superior to all other liens unless the county fails by certain deadlines both to provide notice of the delinquent taxes to any bona fide creditor who holds a properly perfected, filed or recorded lien that the creditor also provided to the county treasurer, and to file its lien with the county clerk and recorder of real estate records and with the Wyoming Secretary of State.³

The law further provides that a notice of tax lien is not required to be filed with the Wyoming Secretary of State in order to perfect, enforce, or foreclose a county tax lien on mineral production.⁴

III. State Regulation

A. New Guidance on Well Location Moves

On February 9, 2019, the Supervisor of the Wyoming Oil and Gas Conservation Commission (“WOGCC”) issued new guidance concerning the movement of a horizontal well’s location after the well’s Application for Permit to Drill (“APD”) has been approved.⁵ As long as the planned location of the well’s horizontal lateral is moved within the same drilling and spacing unit, and the new location still complies with setbacks and authorizing orders of the WOGCC, no new APD submission and related notice is required.⁶ In those circumstances, only a sundry notice of the location change is required.⁷ However, certain other changes, such as a change in the well’s target formation, require a new APD submission.⁸ Application of this new guidance is within the discretion of the WOGCC engineers reviewing APDs.⁹

B. New Policy on Protests of Applications for Permit to Drill

Building upon a policy issued July 11, 2017, a second WOGCC policy regarding protests of APDs was issued on May 13, 2019.¹⁰ Due to the large

3. *Id.*

4. *Id.*

5. *Well Location Move Requires Post APD Approval*, WYO. OIL & GAS CONSERVATION COMM’N, (Feb. 8, 2019), <https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d31vLmdvdxvaWwtYW5kLWdhe3xneDoyZmU3MTI0ZTY4ZmY1ZDky>.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *2nd Protest Policy for Applications for Permit to Drill (APD)*, WYO. OIL & GAS CONSERVATION COMM’N, (May 13, 2019), <https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d31vLmdvdxvaWwtYW5kLWdhe3xneDo2YWJlZTgwZTI2YzVmNzM5>.

number of protests of APDs that continue to be filed, all protests of APDs are to be immediately placed on the WOGCC's inactive, "B" docket for an indefinite period.¹¹ Later actions in the matter are either the withdrawal of the protest, the withdrawal or expiration of the APD, or a request by either party that the matter come off the "B" docket and be set for contested hearing before the WOGCC commissioners.

C. Jurisdiction over Intrastate Refined Petroleum Products Pipelines

On August 16, 2018, the Wyoming Public Service Commission (the "WPSC") issued an order in a consolidated proceeding in which the WPSC decided whether it had the jurisdiction to regulate intrastate pipelines carrying refined petroleum products.¹² Specifically, whether the term "oil" in the Wyoming Public Utilities Act at Wyo. Stat. § 37-1-101(a)(vi)(G) includes refined petroleum products such as gasoline, giving the WPSC jurisdiction over the intrastate transportation of these products by pipeline.¹³

The WPSC had previously issued a clarification letter to Phillips 66 Pipeline LLC ("Phillips 66") (one of the applicants in the consolidated proceeding), in which the WPSC advised Phillips 66 that the WPSC did not have the jurisdiction to regulate intrastate pipelines carrying refined petroleum products, such as gasoline, and that Phillips 66 should petition the WPSC for cancellation of tariffs relating to such pipelines.¹⁴ That letter prompted Phillips 66 to apply to the WPSC for cancellation of two existing WPSC-approved tariffs on intrastate refined petroleum products pipelines, and the WPSC canceled the tariffs.¹⁵ Subsequently Sinclair Oil Corporation ("Sinclair"), a refiner who has the physical capability to ship refined petroleum products between its refineries using one of Phillips 66's intrastate pipelines, filed to intervene and requested a rehearing on the matter.¹⁶ Separately, Pioneer Pipe Line Company ("Pioneer") also applied for cancellation of its tariff on its intrastate refined petroleum products pipeline, and Sinclair filed to intervene and object in that matter as well.¹⁷ The WPSC consolidated the two matters.¹⁸

11. *Id.*

12. *In re* Application of Phillips 66 Pipeline LLC; *In re* Application of Pioneer Pipe Line Company, 2018 WL 4052419 (Wyo. P.S.C. August 16, 2018).

13. *Id.* at *1.

14. *Id.* at *2.

15. *Id.*

16. *Id.*

17. *Id.* at *2-3.

18. *Id.* at *3.

The WPSC first examined whether the term “oil” was ambiguous, as used in the Public Utilities Act, and found that it was.¹⁹ Next, the WPSC conducted statutory interpretation, by examining the legislative intent in enacting the statute in question in 1915, and then checking for any intervening legislative action between 1915 and the present day which would have changed the original legislative intent.²⁰ The WPSC found that there was an intent to consider the transportation of “crude oil” and “refined products” similarly.²¹ Therefore the term “oil” in the Public Utilities Act included refined petroleum products, and the WPSC found it had the jurisdiction over the intrastate transportation by pipeline of refined petroleum products, including gasoline.²² The prior order granting cancellation of Phillips 66’s tariffs was reversed, and Pioneer’s application to cancel its tariff was denied.²³

IV. Judicial Developments

A. Supreme Court of Wyoming

1. Application of Forum-Selection Clause

The dispute in *Finley Resources, Inc. v. EP Energy E&P Company, L.P.* arose from a Purchase and Sale Agreement (the “PSA”) executed between the parties for the sale of oil and gas leases located in Converse and Niobrara Counties, Wyoming.²⁴ Finley Resources, Inc. (“Finley”) filed suit against EP Energy E&P Company, L.P. (“EP Energy”), seeking to quiet title into Finley of certain leases, declaratory judgment, claiming adverse possession, and also claiming breach of the PSA and breach of the covenant of good faith and fair dealing.²⁵ At issue upon EP Energy’s motion to dismiss was whether the non-contract claims arose from or implicated the PSA, such that the forum-selection clause in the PSA would operate and require the suit to be filed in Texas.²⁶ After the state district court found that the forum-selection clause in the PSA did operate to require Finley to file its case in Texas, the court

19. *Id.* at *8.

20. *Id.* at *8–12.

21. *Id.* at *10.

22. *Id.* at *13.

23. *Id.*

24. *Finley Res., Inc. v. EP Energy E&P Co., L.P.*, 2019 WY 65, 443 P.3d 838 (Wyo. 2019).

25. *Id.* ¶ 4, 443 P.3d at 841.

26. *Id.* ¶ 2, 443 P.3d at 841.

dismissed the case, and Finley appealed.²⁷ The Supreme Court of Wyoming affirmed the district court's ruling.²⁸

The PSA contained a forum-selection clause that required any suit arising out of the PSA to be brought in either United States District Court for the Southern District of Texas or any Texas state court sitting in Houston, "so long as one of such courts shall have subject matter jurisdiction over such suit."²⁹

Finley asserted two main arguments upon appeal: that the declaratory judgment, quiet title, and adverse possession claims did not arise from the PSA, and if they did, Texas courts lack subject matter jurisdiction to consider the claims.³⁰ In its analysis, the court (applying Texas law per the governing law provision of the PSA) relied heavily on *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (Tex. 2017).³¹ The *Pinto* court stated a "forum-selection clause should be denied force only if the facts alleged in support of the claim stand alone, are completely independent of the contract, and the claim could be maintained without reference to the contract."³² The court further elaborated that *Pinto* used a "but-for test," examining whether but for the agreement in question, the plaintiff would have no basis to complain.³³ The court found that all three of Finley's non-contract claims stemmed from the PSA and the transaction thereunder, so that all three claims are subject to the forum-selection clause.³⁴

The court then examined the subject matter qualification in the forum-selection clause.³⁵ The court stated that it is undisputed Texas courts have no subject matter jurisdiction to adjudicate title to real property, including oil and gas leases, in another state or country, and also that a forum selection clause cannot "confer subject matter jurisdiction where it does not otherwise exist."³⁶ However, the court found that the strong legal precedent to uphold the terms of a private contract, combined with precedent that Texas courts need only have subject matter jurisdiction generally over the lawsuit rather than over every conceivable claim that may be brought relating to the

27. *Id.* ¶ 1, 443 P.3d at 841.

28. *Id.*

29. *Id.* ¶ 5, 443 P.3d at 841.

30. *Id.* ¶ 8, 443 P.3d at 842.

31. *Id.* ¶ 11, 443 P.3d at 842–43.

32. *Id.* (quoting *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W. 428 (Tex. 2017)).

33. *Id.* ¶ 14, 443 P.3d at 843.

34. *Id.* ¶ 15, 443 P.3d at 843.

35. *Id.* ¶ 17, 443 P.3d at 844–45.

36. *Id.*

contract, caused the court to find the forum-selection clause of the PSA did operate with regard to Finley's non-contract claims.³⁷

Finally, Finley attempted to argue that Wyoming has a strong public policy in determining title to the real property located within its boundaries; however, Finley offered no support for that statement.³⁸ The court then cited precedent that required courts not lightly to interfere with the freedom of contract, in order to deny Finley's public policy argument.³⁹

2. Whether the BLM is an Indispensable Party in a State Court Action regarding a Private-Federal Lease Dispute

The 2018 volume of this journal summarized the proceedings in *Berenergy Corp. v. BTU W. Res., Inc.*, 2018 WY 2, 408 P.3d 396 (Wyo. 2018). Those proceedings are referred to as "*Berenergy I.*" The case concerned a dispute between mineral developers over a conflict between future oil and gas development versus future coal development on the same lands, each development to occur pursuant to federal leases issued by the BLM, and eventually led to the Wyoming Supreme Court addressing the key issue of whether the BLM was an indispensable party to the case, without which party the case must be dismissed.⁴⁰

In its *Berenergy I* decision, the court found the BLM to be an indispensable party in the case.⁴¹ Accordingly, the court remanded the case for an evaluation of whether the BLM (a federal agency) could be joined as a party, and if it could not, the case was to be dismissed.⁴²

In addition to the federal oil and gas leases held by Berenergy Corp. ("Berenergy") that overlapped with the federal coal leases held by affiliates of Peabody Energy Corporation (collectively "Peabody"), Berenergy was the lessee on a private oil and gas lease (the "Thornburg Lease") that also overlapped the lands of Peabody's coal leases.⁴³ After *Berenergy I* was decided in January 2018, Peabody petitioned for a rehearing on the basis that similar issues concerning the Thornburg Lease had not been included in the prior appeal; however the Wyoming Supreme Court declined to amend is

37. *Id.* ¶ 20, 443 P.3d at 845.

38. *Id.* ¶ 24, 443 P.3d at 846–47.

39. *Id.*

40. *BTU W. Res., Inc. v. Berenergy Corp.*, 2019 WY 57, ¶¶ 6–8, 442 P.3d 50, 53 (Wyo. 2019)

41. *Id.* ¶ 8, 442 P.3d at 53.

42. *Id.*

43. *Id.* at ¶ 1, 442 P.3d at 52.

decision in *Bereenergy I* because of the very fact that the Thornburg Lease issues had not been properly appealed.⁴⁴

Upon remand to the district court to hear matters concerning the Thornburg Lease (these proceedings being “*Bereenergy II*,” that court held it did not have subject matter jurisdiction as to the Thornburg Lease without the presence of the BLM in the case.⁴⁵ The court went on to say that if it had jurisdiction, it would have applied the “accommodation doctrine” to resolve the parties’ dispute on overlapping mineral development.⁴⁶ Both parties appealed.⁴⁷

The Wyoming Supreme Court stated that the issues before it in *Bereenergy II* were (1) whether “the BLM’s participation necessary to resolve the Thornburg lease dispute,” and (2) whether the “‘law of the case’ doctrine require[s] the district court to apply its original judgment of accommodation[.]”⁴⁸

The court started by correcting the district court as to subject matter jurisdiction and what precisely the decision in *Bereenergy I* was.⁴⁹ The *Bereenergy I* holding concerned the joinder of an indispensable party (a non-jurisdictional question), not whether the district court had subject matter jurisdiction over the federal lease disputes.⁵⁰ The court goes on to cite precedent that “makes clear that Wyoming courts have jurisdiction over mineral disputes between private parties, even where federal leases may be concerned.”⁵¹

As to the issue of joinder of the BLM as an indispensable party, the court found that since the Thornburg Lease was a private lease, and the lease did not expressly vest the BLM with any discretion over the lease operational rights vis-à-vis competing federal leases, the BLM’s participation in the lease dispute was not required.⁵² The facts of *Bereenergy II* were distinguishable from those in *Bereenergy I*, where there were no independent private rights involved in the competing lease analysis.⁵³

44. *Id.* at ¶ 2, 442 P.3d at 52.

45. *Id.* at ¶ 3, 442 P.3d at 52.

46. *Id.*

47. *Id.*

48. *Id.* at ¶ 4, 442 P.3d at 52.

49. *Id.* at ¶ 13, 442 P.3d at 54.

50. *Id.*

51. *Id.*

52. *Id.* ¶ 17, 442 P.3d at 56.

53. *Id.* ¶ 16, 442 P.3d at 55.

The court also performed an analysis under Rule 19 of the Wyoming Rules of Civil Procedure, which governs the joinder of indispensable parties and the determination of cases when an indispensable party is not able to be joined.⁵⁴ Even though the court determined the BLM was not an indispensable party, it stated that even if the BLM was an indispensable party, pursuant to an analysis of the four factors in Rule 19(b) to determine if an action can proceed without an indispensable party the court determined that the Thornburg Lease dispute action could proceed.⁵⁵ The court cited the fourth factor as the most significant – that if the action was dismissed for nonjoinder of the BLM, no adequate remedy or forum existed to address the Thornburg Lease dispute.⁵⁶

The second question for the court was whether the district court’s use of “the law of the case” doctrine was correct, so that the district court’s prior accommodation ruling in *Berenergy I* would be applied to the Thornburg Lease dispute in *Berenergy II*.⁵⁷

Since the district court stated it would have utilized the law of the case doctrine (typically defined as “a court’s decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation”⁵⁸) to apply its decision in *Berenergy I* to *Berenergy II* if the BLM was joined as a party, review of that decision by the higher court is a two-part analysis.⁵⁹

First, the court reviewed the lower court’s holding for abuse of discretion.⁶⁰ A court has “discretion to ‘entertain relitigation of settled issues when the failure to do so would work ‘a manifest injustice.’”⁶¹ The court found that since the parties had ample opportunity to argue the Thornburg Lease dispute through extensive litigation, the district court’s decision not to relitigate certain issues (therefore apply the law of the case doctrine and utilize the district court’s *Berenergy I* accommodation holding) was not an abuse of discretion.⁶²

54. *Id.* ¶¶ 20–21, 442 P.3d at 57.

55. *Id.* ¶ 21, 442 P.3d at 57.

56. *Id.*

57. *Id.* ¶ 23, 442 P.3d at 57.

58. *Id.* ¶ 26, 442 P.3d at 58, citing *Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664, 667 (Wyo. 1993) (citing 1B JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 0.404[1] (2d ed. 1983)).

59. *Id.* ¶ 24, 442 P.3d at 57–58.

60. *Id.*

61. *Id.* (internal citations omitted).

62. *Id.* ¶ 25, 442 P.3d at 58.

Second, the court reviewed de novo “whether the prior decision controls the issue raised in the subsequent proceeding.”⁶³ The court found that normally a litigant’s failure to raise an issue on appeal gives preclusive effect to the lower court’s ruling, and in the case at hand the parties did not appeal the district court’s ruling as it pertained to the Thornburg Lease.⁶⁴

However, if an appealed judgment is not independent from the non-appealed portion of the case, then the whole judgment is treated as appealed – which in this case would mean the Thornburg Lease dispute would be treated as appealed in the same way the federal lease dispute in *Bereenergy I* was appealed.⁶⁵ The court then distilled the issue down to whether the Thornburg Lease issues were independent (severable) from the federal lease issues that were appealed in *Bereenergy I*, or on the other hand “the same as, or interdependent upon” the issues appealed in *Bereenergy I*.⁶⁶ After examining the record, the court found that the Thornburg Lease issues were different and therefore severable, so that the Supreme Court’s ruling in *Bereenergy I* (if the BLM could not be joined as a party, the case must be dismissed) only applied to the federal leases named in *Bereenergy I*.⁶⁷

Therefore, the court found that the district court’s use of the law of the case doctrine was correct, and so it follows that the lower court’s ruling that the accommodation doctrine applied to the Thornburg Lease is also correct.⁶⁸

63. *Id.* ¶ 24, 442 P.3d at 57–58 (internal citation omitted).

64. *Id.* ¶ 27, 442 P.3d at 58.

65. *Id.* ¶ 28, 442 P.3d at 58.

66. *Id.* ¶ 31, 442 P.3d at 59.

67. *Id.* ¶ 32–35, 442 P.3d at 59–60.

68. *Id.* ¶ 35, 442 P.3d at 60.