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NORTH DAKOTA



*William J. Black**

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I. Introduction

This Article summarizes and discusses important developments in North Dakota oil and gas law between August 1, 2020, and July 1, 2021. 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

A. Supreme Court of North Dakota

Blasi v. Bruin E&P Partners, LLC

In *Blasi v. Bruin E&P, LLC*,¹ the North Dakota Supreme Court answered a certified question from the United States District Court for the District of North Dakota regarding royalty valuation points. The Court held that oil royalties are appropriately valued at the well when the royalty clause provides that the lessee is to deliver “to the credit of the Lessor, free of cost, in the pipeline to which Lessee may connect wells on said land, the equal [fractional] part of all oil produced and saved from the leased premises.”²

The Plaintiffs sued the Defendants in the United States District Court for the District of North Dakota alleging that the Defendants underpaid royalties due under the terms of various oil and gas leases. The Plaintiffs allege that oil and gas operators improperly took deductions from the oil royalties accruing under the oil and gas leases at issue by valuing production at the well.³ The Plaintiffs argue the valuation location is independent of the well's location and “the pipeline” means a downstream pipe used to transport oil to a refinery.⁴

The United States District Court for the District of North Dakota certified a question of law to the North Dakota Supreme Court concerning whether the oil royalty should be calculated at the well.⁵ The Court held that the oil royalty clause “unambiguously established the valuation point at the well.”⁶ It reasoned that “the words describing the contemplated

1. 959 N.W.2d 872 (N.D. 2021).

2. *Id.* at 874.

3. *Id.*

4. *Id.* at 877.

5. *Id.* at 875 (“The certified question require[d] a determination as to whether the lease establishes a royalty valuation point at the well or whether the valuation point is at some other place downstream.”).

6. *Id.* at 879.

location—i.e., the place where the lessee ‘may connect’ a pipeline . . . is at the ‘wells on said land.’”⁷

Tesoro Great Plains Gathering & Mktg., LLC v. Mt. Peak Builders, LLC

Tesoro Great Plains Gathering & Marketing, LLC, formerly known as Great Northern Gathering & Marketing, LLC (“Great Northern”), contracted Mountain Peak to build a 30-mile oil pipeline and gathering system.⁸ Mountain Peak recorded an oil pipeline lien under North Dakota Century Code.⁹ Great Northern appealed an amended judgment entered after the district court ordered a pipeline lien held by Mountain Peak Builders, LLC foreclosed, and awarded Mountain Peak attorney fees and costs.¹⁰

An award of attorney fees and costs requires a favorable judgment in an action brought to enforce a lien.¹¹ Great Northern argues the district court erred when it granted summary judgment ordering the pipeline lien foreclosed because it paid the full amount of the obligation the lien secured prior to the foreclosure order.¹² If the obligation a lien secures is satisfied, the lien is extinguished and no longer valid. In this case, the parties' arbitration agreement stated that if Mountain Peak "obtains a confirmed award in its favor, the amount of such confirmed award shall be the amount of Mountain Peak's lien"¹³ Mountain Peak did obtain an arbitration award, the award was confirmed by a Minnesota court, Great Northern paid the confirmed amount, and Mountain Peak filed a satisfaction of judgment.¹⁴

When Mountain Peak accepted Great Northern's tendered payment, the lien was extinguished.¹⁵ The district court erred as a matter of law when it ordered the extinguished lien foreclosed because the lien was no longer valid.¹⁶ The district court's judgment also does not comply with North

7. *Id.* at 878.

8. *Tesoro Great Plains Gathering & Mktg., LLC v. Mt. Peak Builders, LLC*, 960 N.W.2d 770 (N.D. 2021).

9. *Id.* (N.D. Cent. Code § 35-24).

10. *Mountain Peak Builders LLC v. Tesoro Great Plains Gathering & Mktg., LLC*, 0:19-cv-01473 (2019).

11. *Id.* at *7 (see N.D. Cent. Code § 35-24-19).

12. *Id.* at *4.

13. *Id.* at *2.

14. *Id.* at *5.

15. *Id.* at *5–6.

16. *Id.* at *6.

Dakota Century Code,¹⁷ which provides the exclusive remedy of a sale when a pipeline foreclosure judgment is entered.¹⁸ No order for sale exists in this case, nor could one have been issued because the obligation the lien secured was satisfied.¹⁹

Environmental Law & Policy Center, et al.
v. N.D. Public Svc. Commission, et al.

Environmental Law & Policy Center, et al. (“Appellants”) appealed from a district court judgment affirming the Public Service Commission’s order dismissing Appellants’ formal complaint.²⁰ The appeal arose from Meridian Energy Group, Inc.’s construction of a new oil refinery (“Davis Refinery”) in Billings County, North Dakota.²¹ The Appellants alleged Meridian was required to obtain a certificate of site compatibility from the Commission under the North Dakota Century Code,²² and Meridian’s planned facility would have a capacity of refining 50,000 or more barrels per day (bpd).²³

Appellants filed their complaint after the North Dakota Department of Health, now Department of Environmental Quality, granted Meridian a construction permit for a “55,000 bpd” oil refinery.²⁴ The complaint sought a declaration that Meridian’s refinery was subject to Section 49-22.1²⁵ and to the statutory siting process.²⁶ The Commission determined the complaint stated a “prima facie case” under its pleading rule, and the Commission formally served the complaint on Meridian.²⁷

Meridian asserted it was constructing a refinery with a capacity of 49,500 bpd, falling outside the Commission’s statutory jurisdictional threshold of 50,000 bpd.²⁸ Meridian argued, as a result, the Commission did not have jurisdiction over this matter and the complaint must be dismissed.²⁹ After review, the North Dakota Supreme Court concluded the

17. § 35-24-18.

18. *Id.*

19. *Id.*

20. *Environmental Law & Policy Center, et al. v. N.D. Public Svc. Commission, et al.*, U.S. 08-2018-CV-02937 (2019).

21. *Env’t L. & Pol’y Ctr. v. N. Dakota Pub. Serv. Comm’n*, 948 N.W.2d 838, 839.

22. N.D. Cent. Code § 49-22.1-01.

23. *Env’t L. & Pol’y Ctr.*, 948 N.W.2d at 839.

24. *Id.* at 840.

25. N.D. Cent. Code § 49-22.1-01.

26. *Env’t L. & Pol’y Ctr.*, 948 N.W.2d at 840.

27. *Id.* at 840.

28. *Id.*

29. *Id.*

Commission did not err when it dismissed Appellants' complaint.³⁰ The Court affirmed the district court's judgment and the Commission's order of dismissal.³¹

*Wilkinson, et al. v. Board of University
and School Lands of the State of N.D.*

The Board of University and School Lands of the State of North Dakota, the State Engineer, and Statoil Oil & Gas LP appealed from a judgment determining William Wilkinson and their successors in interest owned mineral interests in certain North Dakota land. J.T. Wilkinson and Evelyn M. Wilkinson acquired title to property located in Williams County.³² In 1958, the Wilkinsons conveyed the property to the United States for construction and operation of the Garrison Dam and Reservoir, but they reserved the oil, gas, and other minerals in and under the property.³³

In 2012, the Plaintiffs sued the Land Board to determine ownership of the minerals in and under the property, alleging they own the mineral interests.³⁴ The Plaintiffs also sued Brigham Oil & Gas, LLP and EOG Resources, Inc., to determine their rights, alleging Brigham received an oil and gas lease from the State and EOG received an oil and gas lease from the Plaintiffs.³⁵ The district court determined ownership of the property below the ordinary high-water mark ("OHWM") in favor of the Land Board.³⁶ The Plaintiffs argued the North Dakota Century Code³⁷ applies, the Industrial Commission determined under section 61-33.1 that the Wilkinson property is above the OHWM of the historical Missouri riverbed channel, that the State is bound by its admission in a separate action that the North Dakota Century Code applies, and that the State does not own the minerals.³⁸

30. *Id.* at 846.

31. *Id.* at 847.

32. *Wilkinson v. Bd. of Univ. & Sch. Lands of N.D.*, 947 N.W.2d 910, 913 (N.D. 2020).

33. *Wilkinson*, 947 N.W.2d at 913.

34. *Id.*

35. *Id.*

36. *Wilkinson*, 947 N.W.2d at 913.

37. N.D.C.C. § 61-33.1; *Id.* at *34 ("provides a process for determining what property is part of the historical Missouri riverbed channel, which the State owns as sovereign lands, and for determining whether money paid to the State in error should be returned to the property owner").

38. *Id.* at 913–14.

The district court granted the Plaintiffs' motion, determining that the North Dakota Century Code applies and the Plaintiffs own the disputed minerals.³⁹ The court concluded the State's interest is statutorily limited to the historical Missouri riverbed channel as determined by section 61-33.1, the Industrial Commission determined under section 61-33.1-03 that the Wilkinson property is above the OHWM of the historical Missouri riverbed channel, and therefore the State's claim to the property failed as a matter of law.⁴⁰ The court held that the North Dakota Century Code applies and controls the ownership, the Wilkinson property is above the OHWM of the historic Missouri riverbed channel, and therefore the plaintiffs own the property.⁴¹

On appeal, the Court concluded the district court did not err in concluding section 61-33.1 applied and the disputed mineral interests were above the ordinary high-water mark of the historical Missouri riverbed channel.⁴²

B. Federal Courts

Northern Oil and Gas, Inc. v. EOG Resources, Inc.

Northern filed a quiet-title action in federal court against EOG over a dispute regarding the parties' competing interests in mineral rights in North Dakota.⁴³ *Northern* and EOG both leased oil and gas rights, and their lessors litigated a similar matter in state court.⁴⁴ The district court found that *Northern* was in privity with its lessor, holding that the lessors' case barred *Northern's* claims.⁴⁵

In the 1950s and 1960s, Axel Anderson and Henry Johnson engaged in a series of transactions involving land and mineral interests.⁴⁶ These culminated in a 1962 warranty deed in which Anderson conveyed certain mineral interests to Johnson but reserved 1/4 for himself.⁴⁷ By 2008, Anderson's interest had passed to Nancy Finkle, and Johnson's interest had passed to his descendants ("the Johnsons").⁴⁸ That year, Finkle entered an

39. *Id.* 914.

40. *Id.*

41. *Id.*

42. *Id.* at 916.

43. *N. Oil & Gas, Inc. v. EOG Res., Inc.*, 970 F.3d 889 (8th Cir. 2020).

44. *Id.* at 890.

45. *Id.*

46. *Id.* at 891.

47. *Id.*

48. *Id.*

oil and gas lease with Northern's predecessor, which assigned most of its interest to Northern a few months later. The Johnsons entered oil and gas leases with EOG.⁴⁹

In 2011, the Johnsons filed a quiet-title action against Finkle in North Dakota state court.⁵⁰ The state court found in the Johnsons' favor, terminating Finkle's interest in the land at issue.⁵¹ Northern moved for reconsideration, but the district court denied the motion. The Eighth Circuit reversed the district court's grant of EOG's motion to dismiss under principles of res judicata, holding that no privity exists between Northern and its lessor because Northern acquired its lease before the lessors' case.⁵² The court applied *Gerrity Bakken, LLC v. Oasis Petroleum N. Am., LLC*,⁵³ and held that the privity doctrine cannot be applied if the rights to property were acquired by the person sought to be bound before the adjudication.⁵⁴

III. Legislative and Regulatory Developments

A. Legislative Enactments

No relevant oil and gas legislative enactments were passed between August 1, 2020, through July 1, 2021. The North Dakota legislature convenes on a biennial legislative cycle, and it will convene again in January 2022.⁵⁵

B. Regulatory Changes

Chapter 85-06-01 (Minerals Management)

The amendment to North Dakota Administrative Code (“NDAC”) § 85-06-01-15, titled Offset obligations for vertical oil and gas wells⁵⁶ provides options for a lessee in the event that a vertical oil and gas well has been drilled and is producing in commercial quantities from mineral acreage

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 893.

53. 915 N.W.2d 677 (N.D. 2018) (*Gerrity Bakken* sets forth current North Dakota law on the subject of privity and the application of res judicata).

54. N. Oil & Gas, Inc., 970 F.3d at 893.

55. North Dakota, *Learn More About the Biennium Cycle*, <https://www.legis.nd.gov/learn-more-about-biennium-cycle> (last visited Jul. 22, 2021).

56. N.D. Admin. Code § 85-06-01-15.

owned by another or from adjacent trust lands leased at a lesser royalty, within one thousand feet of the trust lands.⁵⁷

Chapter 85-01-01 (Definitions and General Provisions)

The amendment to North Dakota Administrative Code titled Definitions,⁵⁸ provides additional definitions to the North Dakota Century Code that apply. According to the North Dakota Century Code:

30. “Offset drainage” means the drainage of oil or gas to an adjoining tract of land on which a well is being drilled or is already in production.

31. “Offset well” means any well drilled opposite another well on adjoining property with the specific purpose of preventing drainage to the adjoining property.

36. “Original grant lands” means all those lands granted to the state of North Dakota by virtue of the Enabling Act of 1889[.]

45. “Vertical oil and gas well” means a well, the wellbore of which is drilled on a vertical or directional plane into a non-shale formation and is not turned or curved horizontally to allow the wellbore additional access to the oil and gas reserves in the formation.

N.D. Admin. Code § 85-01-01-01.

57. *Id.*

58. N.D. Admin. Code § 85-01-01-01.