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*William J. Black**

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* William J. Black is a member with Steptoe & Johnson PLLC in Morgantown, West Virginia.

I. Introduction

This Article summarizes and discusses important developments in North Dakota oil and gas law between August 1, 2021, and July 31, 2022. Part II of this Article will discuss the State's recent legislative and regulatory developments. Part III of this Article will discuss common law developments in both state and federal courts in North Dakota.

II. Legislative and Regulatory Developments

A. Legislative Enactments

There were no relevant legislative updates between August 1, 2021 and July 31, 2022. time.

B. Regulatory Changes

1. 43-02-03-55 Abandonment of Wells, Treating Plants, Underground Gathering Pipelines, or Saltwater Handling Facilities – Suspension of Drilling

The North Dakota Legislature updated abandonment rules to include a specific time wells and pipelines must remain inactive before being deemed abandoned.

(1) The removal of production equipment or the failure to produce oil or gas for one year constitutes abandonment of the well. If an underground gathering pipeline is inactive for seven years, the commission may, after notice and hearing, require the pipeline to be properly abandoned pursuant to 43-02-03-29 and 43-02-03-29.1.

III. Judicial Developments

A. North Dakota Supreme Court

1. Blue Appaloosa, Inc. v. North Dakota Industrial Commission

The Supreme Court of North Dakota affirmed the lower court's ruling that Blue Appaloosa, Inc. ("Blue") had started construction on a water treatment facility without receiving approval from the North Dakota Industrial Commission ("Commission").¹

Blue purchased land and shortly thereafter sent an email to the Commission signaling their intent to build a waste disposal plant on the

1. Blue Appaloosa, Inc. v. N.D. Indus. Comm'n, 2022 ND 119, 975 N.W.2d 578.

land.² Blue then completed earth work by leveling the site, constructing a perimeter dike, stockpiling topsoil, building an entrance road, and removing trees and shrubs.³ Blue also hired individuals experienced in constructing and operating treatment plants to assist with developing a treating plant.⁴ Six months after the ground preparation was completed, Blue sent an application to the Commission to construct a waste treatment plant, who then brought an administrative action against Blue. The administrative action stated that when Blue had begun construction of a treating plant before obtaining a permit and posting a bond, it violated N.D. Admin. Code 43-02-03.⁵ In the administrative hearing, an administrative law judge (ALJ) ruled in favor of the Commission. Blue then appealed to the district court of North Dakota, who affirmed the ALJ's order.⁶

Blue appealed the judgment, arguing that the Commission did not have jurisdiction over the property before filing the application to build the treatment plant.⁷ The Court held that the Commission's jurisdiction rests on the fact of intent, not the filing of an application.⁸ An expert with the Commission testified that dirt work has always been consistent with operations for constructing a treatment plant.⁹ The Court agreed with the expert testimony holding that Blue's intentions to build a plant were clear since the initial email. The judgement was ultimately affirmed.¹⁰

2. *Armstrong v. Helms*

The Supreme Court of North Dakota affirmed the district court's ruling, holding that Plaintiff, Phillip Armstrong ("Armstrong"), did not exhaust all available administrative remedies before bringing the suit to state court.¹¹

In 1996, Armstrong filed a surety bond with the State of North Dakota when he began operating wells on private land.¹² In 2001, Armstrong began operating oil wells on federal lands.¹³ When Armstrong began working with the federal government on a reclamation plan for the non-producing oil

2. *Id.* ¶ 2.

3. *Id.*

4. *Id.*

5. *Id.* ¶ 3.

6. *Id.* ¶ 4.

7. *Id.* ¶ 5.

8. *Id.* ¶ 7.

9. *Id.* ¶ 10.

10. *Id.* ¶ 13.

11. *Armstrong v. Helms*, 2022 ND 12, 969 N.W.2d 180

12. *Id.* ¶ 2.

13. *Id.*

wells on federal property he requested his bond be released from the state.¹⁴ The state agreed to release the bond on the condition that he conduct a geoprobe of the wells, which Armstrong refused.¹⁵

Armstrong then filed a complaint with the district court attempting to release his bond.¹⁶ The state filed for summary judgment, claiming he did not exhaust all available administrative options.¹⁷ Armstrong filed a competing motion for summary judgment, claiming that federal regulations pre-empted N.D.C.C 38-08.¹⁸ The district court ruled that Armstrong had not exhausted his administrative remedies and rejected his claims of federal pre-emption.¹⁹

Armstrong appealed the district court's judgment to the Supreme Court of North Dakota, claiming that the Commission's powers related to his bond are limited to the production phase of oil and do not extend to the reclamation phase.²⁰ As such, he is not required to use administrative procedures to obtain his bond.²¹

The court held that the reclamation of oil wells is within the jurisdiction of the Commission. See N.D.C.C. §§ 38-08-04(1)(a)(12) and 38-08-04(1)(b)(1).²² The court additionally held that under N.D. Admin. Code § 38-08-11, Armstrong had an administrative remedy available to request release of the bond.²³ The court also rejected Armstrong's claim that he did not have to comply with both federal and state law regarding the reclamation of the oil wells on federal land. Finally, the court rejected Armstrong's argument that he should only have to comply with the Federal reclamation rules, quoting federal regulations which state that if the state regulations are more stringent, the operator can comply with both the federal and state requirements by meeting the more stringent state requirements.²⁴

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* ¶ 3.

18. *Id.*

19. *Id.* ¶ 4.

20. *Id.* ¶ 6.

21. *Id.*

22. *Id.* ¶ 11.

23. *Id.* ¶ 10.

24. *Id.* ¶ 15.

B. Federal Courts

1. *EEE Mins., LLC v. North Dakota*

The United States District Court for District of North Dakota granted Defendant North Dakota Board of University and School Lands' Motion to Dismiss against EEE Minerals ("EEE") and other defendants, holding that a fifth amendment taking had not occurred and the Flood Control Act of 1944 did not pre-empt state ownership of riverbeds and minerals.²⁵ EEE sued North Dakota regarding the methods in which the Missouri River's ordinary high-water mark ("OHWM") was determined, which ultimately determined Plaintiff and Defendant's ownership of minerals.²⁶

North Dakota was granted statehood in 1889. Pursuant to the equal footing doctrine, the grant included the Missouri River, from the riverbed to the OHWM, and included the minerals.²⁷ Congress passed the Flood Control Act of 1944 to control flooding, and as a result constructed dams.²⁸ Privately owned land that was flooded by construction of the dam was obtained either by purchase or through the use of eminent domain by the Army Corps of Engineers.²⁹ Landowners who sold the surface to the Corps of Engineers were able to reserve their mineral rights while those whose land was taken by eminent domain were unable to keep the mineral rights.³⁰ The dam flooded the land behind the river and made it difficult to identify the boundaries of the river. The State and the Corps of Engineers each hired engineering firms to survey the river.³¹

EEE and others sued the state, claiming that the state's method of determining ownership of minerals through placement of the OHWM were unconstitutional because it was pre-empted by the Flood Control act of 1944.³² In additional allegations, EEE claimed an unconstitutional taking, and that the Commissioner of the Land Board violated their interests in the property.³³ The state moved to dismiss the claim under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), claiming that the law at issue does not conflict with

25. *EEE Mins., LLC v. North Dakota*, No. 1:20-CV-219, 2022 WL 1814213 (D.N.D. May 31, 2022).

26. *Id.* at *4.

27. *Id.* at *1 (citing *Continental Res., Inc. v. North Dakota Bd. of Univ. and School Land*, 505 F. Supp. 3d 908, 910-13 (D.N.D 2020)).

28. *See EEE Mins., LLC v. North Dakota*, 2022 WL 1814213.

29. *Id.* at *2.

30. *Id.*

31. *Id.* at *3.

32. *Id.* at *4.

33. *Id.*

flood management of the dam under the Flood Control Act of 1944 and that the Eleventh Amendment of the U.S. Constitution prevents defendants from suing the state.³⁴

The Court ultimately dismissed all of the plaintiffs' claims. The court ruled that the Flood Control Act did preempt the state to the extent that the state passed laws regarding the bed of Lake Sakakawea. The court also dismissed the other three complaints, holding that a taking had never occurred under the Fifth Amendment, because the plaintiffs never owned the minerals under the OHWM.³⁵

2. *Highline Exploration Inc. v. QEP Energy*

The United States District Court for the District of North Dakota ruled that Defendant QEP Energy Company ("QEP") did not err in deducting post-production costs from Plaintiff Highline Exploration Inc.'s Overriding Royalty Interest (ORRI).³⁶

Highline Exploration, Inc. ("Highline") entered into an agreement with other plaintiffs to acquire mineral leaseholds within an area of mutual interest in McKenzie County, North Dakota.³⁷ Later, the mineral interests obtained by Highline and other plaintiffs were assigned to the Helis Oil and Gas Company, L.L.C. ("Helis").³⁸ Highline then assigned thirty-two leases in the working area to Helis, where Highline reserved an ORRI "equal to the difference between existing burdens and twenty percent (20%) in and to the Leases described in [the exhibit]."³⁹ In the lease assignment, the leases did not mention the ORRI being free from post-production costs, and when QEP acquired the prospect from Helis, QEP began deducting post-production costs from Highline's ORRI.⁴⁰

Highline sued QEP in United States District Court for breach of contract, unjust enrichment, and conversion along with a request for an accounting, interest and attorney's fees.⁴¹ The court referenced a previous case's definition of ORRI as an interest that is free of the costs of production.⁴²

34. *Id.*

35. *Id.* at *10.

36. *Highline Expl., Inc. v. QEP Energy Co.*, No. 1:19-CV-134, 2021 WL 4847999 (D.N.D. Oct. 18, 2021).

37. *Id.*

38. *Id.* at *2.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at *4 (quoting *Cont'l Res., Inc. v. Armstrong*, 2021 ND 171, ¶ 20).

Additionally, the court held that it is well established understanding that ORRI must pay a proportionate share of the post-production costs.⁴³

The clause at issue read that the ORRI “shall be ‘free and clear of all costs and expenses whatsoever of exploring, developing, and operating said property’ and ‘free and clear of all costs and expenses of development and operation.’”⁴⁴ The plaintiffs argued that because the production costs are normally excluded, the assignment and ORRI must have referenced production costs in order to express intent to exclude post-production costs.⁴⁵ The court held that while it is standard practice to exclude production costs from ORRI, it is not uncommon to explicitly state that in the ORRI.⁴⁶ The plaintiffs argued secondly that the ORRI is based on gross proceeds from which post-production costs cannot be deducted.⁴⁷ The court held that an ORRI is derived from a net revenue interest, and therefore cannot be calculated from gross proceeds.⁴⁸ The court ultimately granted Defendant’s motion for summary judgment, holding that it was not improper for QEP to deduct post-production expenses.⁴⁹

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* (quoting *Hyder*, 483 S.W.3d at 873).

47. *Id.* at *5.

48. *Id.*

49. *Id.*