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Table of Contents

I. Introduction	226
II. Legislative and Regulatory Developments.....	226
A. Legislative Enactments.....	226
B. Regulatory Changes	227
III. Judicial Developments	227
A. North Dakota Supreme Court	227
B. Federal Courts.....	230

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I. Introduction

This Article summarizes and discusses important developments in North Dakota oil and gas law between August 1, 2022, and July 31, 2023. Part II of this Article will discuss the State's recent legislative and regulatory developments, and Part III will discuss common law developments in both state and federal courts in North Dakota.

II. Legislative and Regulatory Developments

A. Legislative Enactments

The North Dakota 68th Legislative Assembly had notable updates to their oil and gas tax legislation and created an incentive program for clean natural gas capture and emissions reduction. The North Dakota legislature convenes on a biennial legislative cycle, and it will convene again in January 2025.¹

1. Chapter 57-51 (Oil and Gas Production Tax)

The amendments to North Dakota Century Code (N.D.C.C.) § 57-51-02.2, titled "Gross Production Tax – Gas,"² support tax administration by the Office of State Tax Commissioner, and allows the annual base rate adjustment and tax rate notice to be provided by posting it on the Tax Commissioner's website.³ The amendments also remove the oil extraction tax rate change trigger for all North Dakota oil wells, except designated tribal oil wells and designated straddle wells. Further, the bill⁴ eliminates the oil extraction tax rate increase from five percent to six percent after three months of average prices for a barrel of crude oil exceeding the annual trigger price adjustment.

2. Chapter 57-51 (Oil and Gas Extraction Tax)

The amendment to North Dakota Century Code (N.D.C.C.) § 57-51.1-03, titled "Exemptions from Oil Extraction Tax,"⁵ created a new tax incentive rate for restimulated wells. A restimulated well is a previously

1. North Dakota, *Learn More About the Biennium Cycle*, <https://www.legis.nd.gov/learn-more-about-biennium-cycle> (last visited Jul. 13, 2023).

2. N.D. CENT. CODE § 57-51-02.2.

3. See H.B. 1057, 68 Leg., Reg. Sess. (N.D. 2023). See also *N.D. Wholesale & Oil Taxes Newsl.*, 2023 LEGIS. RECAP (Office of State Tax Commissioner), June 2023, at 7.

4. See H.B. 1286, 68 Leg., Reg. Sess. (N.D. 2023). See also *N.D. Wholesale & Oil Taxes Newsl.*, 2023 LEGIS. RECAP (Office of State Tax Commissioner), June 2023, at 7.

5. N.D. CENT. CODE § 57-51.1-03.

completed well that produced oil and has subsequently been treated with an application of fluid under pressure for the purpose of creating additional fractures in a targeted geological formation. The restimulated well incentive: (1) creates a reduced oil extraction tax rate of 2% for restimulated wells; (2) requires the North Dakota Industrial Commission to certify that the project qualifies as a restimulation well; (3) allows the reduced oil extraction tax rate to be effective for the first 75,000 barrels or 18 months, whichever occurs first, after restimulation is complete; and (4) allows a tribe to elect to opt-in to the restimulation well oil extraction tax incentive rate.⁶

3. Chapter 54-17.6 (Oil and Gas Research Council)

The creation and enactment of North Dakota Century Code (N.D.C.C.) § 54-17.6-06.1, titled The Clean Natural Gas Capture and Emissions Reduction Program,⁷ provides an incentive for natural gas capture and utilization systems on an oil or gas well site or gathering pipeline facility which collects or utilizes over fifty percent of propane and heavier hydrocarbons from an oil and gas well site for defined beneficial uses.⁸

B. Regulatory Changes

There were no relevant oil and gas regulatory changes from August 1, 2022, through July 31, 2023.

III. Judicial Developments

A. North Dakota Supreme Court

1. *Dominek v. Equinor Energy L.P.*

In *Dominek v. Equinor Energy L.P.*,⁹ the North Dakota Supreme Court answered a certified question from the United States District Court for the District of North Dakota regarding the allocation of mineral royalties in the case of overlapping oil and gas spacing units under N.D. Cent. Code § 38-08-08(1). The Court held allocation of production from the overlapping spacing unit to the underlying spacing unit is not required.¹⁰

6. See HB 1427, 68 Leg., Reg. Sess. (N.D. 2023). See also *N.D. Wholesale & Oil Taxes Newsl.*, 2023 LEGIS. RECAP (Office of State Tax Commissioner), June 2023, at 8.

7. N.D. CENT. CODE § 54-17.6-06.1.

8. *Id.*

9. *Dominek v. Equinor Energy L.P.*, 982 N.W.2d 303 (N.D. 2022).

10. *Id.* at 310.

The Plaintiffs sued the Defendants in the United States District Court for the District of North Dakota to recover revenue proceeds from the only well authorized for the overlapping spacing unit. The Plaintiffs allege that the twenty-five percent attributable to the Section 13 overlapping spacing unit should not be shared with the interest owners in Section 24 given those sections are pooled in the underlying spacing units.¹¹ The Plaintiffs argued that operation of the section line well is exclusive to the overlapping spacing unit and therefore the underlying unit should not share in the production.¹²

The United States District Court for the District of North Dakota certified five questions of law to the North Dakota Supreme Court concerning the interpretation of section 38-08-80(1) and the language in the pooling order. However, the Court only answered the first question of law regarding whether the language from section 38-08-80(1) required production to be allocated to the underlying spacing unit.¹³ The Court held that there was nothing in the statute to require this type of allocation or any language in the statute that created an ambiguity as to the legislature's intention of such allocation.¹⁴ The court reasoned that the question was specific and limited to the relevant language of the statute and that the statute simply did not contemplate the issue.¹⁵

2. Northern Oil & Gas, Inc. v. EOG Resources, Inc.

*N. Oil & Gas, Inc. v. EOG Res., Inc.*¹⁶ involved a dispute concerning two competing oil and gas leases. This appeal arose from a judgment entered by the district court in favor of Northern Oil & Gas, Inc. (Northern) to quiet title a mineral leasehold and the award of damages and attorney fees.¹⁷

In 2006, Eugene and Carol Hanson executed an oil and gas lease (EOG Lease) and a "Side Letter Agreement" with Ritter, Laber and Associates, Inc. which contained terms allowing Ritter to "exercise its option" to lease the minerals.¹⁸ The EOG Lease was not immediately recorded. In April 2007, Eugene and Carol Hanson executed a warranty deed to their son and

11. *Id.* at 306.

12. *Id.* at 309.

13. *Id.* ("The question before us is: 'Does the relevant portion of Section 38-08-08(1) of the North Dakota Century Code require the allocation of production from Section 13 of the Overlapping Spacing Unit to Section 24 of the Underlying Spacing Unit?'").

14. *Id.* at 310.

15. *Id.*

16. *N. Oil & Gas, Inc. v. EOC Res., Inc.*, 981 N.W.2d 314 (N.D. 2022).

17. *Id.* at 318.

18. *Id.* at 317.

daughter-in-law, Kelly and Denise Hanson, which reserved a fifty percent life estate in the minerals and was recorded.¹⁹ In September 2007, Ritter assigned the EOG Lease to EOG and the assignment was recorded.²⁰ In December 2007, Ritter obtained an oil and gas lease (Northern Lease) from Kelly and Denise Hanson listing the tracts in question, it was recorded in January 2008 and assigned to Northern in June 2008.²¹

In 2016, Northern brought this lawsuit in district court requesting a declaration that it owns the Disputed Interests, an accounting of production, and damages.²² The district court entered partial summary judgment in favor of Northern determining “The EOG Lease is not valid and subsisting insofar as it conflicts with the Northern Lease.” The court held a bench trial as to the remaining claims and awarded Northern damages and attorney fees.²³

The Supreme Court of North Dakota reversed the district court’s judgment and vacated the award of attorney fees.²⁴ The Court held that under N.D. Cent. Code § 47-09-07, conditional delivery “is necessarily absolute and the instrument take effect thereupon, discharged of any condition on which the delivery was made.”²⁵ The Court reasoned that because Northern has not identified anything in the EOG Lease to indicate its grant was conditional, the EOG Lease was effective on delivery.²⁶

3. *Blue Steel Oil & Gas, LLC v. North Dakota Industrial Commission*

Blue Steel Oil & Gas, LLC (Blue Steel) appealed from a district court judgment affirming a North Dakota Industrial Commission order subjecting it to a risk penalty.²⁷ The appeal arose from the Commission’s determination that Slawson Exploration Company, Inc. met the good-faith attempt to lease requirement.²⁸ Blue Steel claimed the Commission erred by finding Slawson made a good-faith attempt to obtain Blue Steel’s interest

19. *Id.*

20. *Id.* at 318.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 324.

25. *Id.* at 321 (*See* N.D. CENT. CODE § 47-09-07).

26. *Id.* at 322.

27. *Blue Steel Oil & Gas, LLC v. N. Dakota Indus. Comm’n*, 991 N.W.2d 42 (N.D. 2023)

28. *Blue Steele Oil & Gas, LLC*, 991 N.W.2d at 44.

without first providing a proposed lease “containing the primary term, a per-acre bonus, a royalty rate, and other clauses.”²⁹

The Commission held that a proposed lease was not required as part of an offer to participate and declined to define a good-faith attempt to have a lease executed.³⁰ The Commission did however express a preference that the operator should provide the owner with a written lease proposal.³¹ The Commission reasoned that history showed the co-founder and member-manager of Blue Steel and Blue Steel’s parent company had been involved in earlier offers to participate. Therefore, Blue Steel “knew, or should have known, what the alternative option to receive a lease offer language in Slawson’s invitation meant, what he had to do in order to participate, what he had to do in order to receive a lease offer, and what it meant if he did not respond.”³²

Blue Steel further argued the Commission erred because Slawson failed to give Blue Steel a full thirty days to review Slawson’s proposed lease and to decide whether to accept or decline the invitations to participate or lease.³³ The Court concluded that because the provision does not require that the invitation include a proposed lease or lease terms, the Commission did not err in finding Blue Steel was not entitled to have a full thirty days to review a lease proposal together with the invitations to participate.³⁴

B. Federal Courts

1. Highline Exploration, Inc v. QEP Energy Co.

In *Highline Expl., Inc. v. QEP Energy Co.*,³⁵ the overriding royalty interest assignees appealed a judgment in favor of the operator of oil, gas, and mineral leases determining QEP was entitled to deduct post-production costs from royalty payments it paid to Plaintiffs under the “plain, clear, and unambiguous” language in the assignments that created the overriding royalty interests (ORRIs).³⁶ The Court held that the granting language in the assignment of ORRIs created a more specific interest than a typical ORRI.³⁷ The Court reasoned that the assignments provided for nonstandard ORRIs,

29. *Id.* at ¶ 6.

30. *Id.* at ¶ 11.

31. *Id.*

32. *Id.* at ¶ 13.

33. *Id.* at ¶ 16. (See N.D. ADMIN. CODE § 43-02-03-16.3(1)(b)).

34. *Id.* at ¶ 16.

35. *Highline Exploration, Inc. v. QEP Energy Co.*, 43 F.4th 813 (8th Cir. 2022).

36. *Id.* at 816.

37. *Id.* at 817.

and the free and clear clause clarified that the standard costs (production costs) were excluded from royalty payment calculations.³⁸ The Court affirmed the district court's grant of summary judgment to QEP and denial of summary judgment to Plaintiffs.³⁹

38. *Id.*

39. *Id.* at 819.