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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 9 NUMBER 2

OKLAHOMA

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I. Legislative and Regulatory Developments

This year's developments include the State of Oklahoma providing a framework to develop Class VI wells and obtain carbon credits for methane emissions, and the Oklahoma Corporation Commission adopting final versions of several rules, including new allowables for gas wells.

A. State Legislative Developments

1. Oklahoma Carbon Capture and Geologic Sequestration Act - Class VI Injection Wells – SB 200

The Oklahoma Senate signed Senate Bill 200 into law on June 7, 2023, amending 27 A O.S. 2021, Section 3-5-104. The amendment provides that the Oklahoma Carbon Capture and Geologic Sequestration Act requires interagency cooperation or interaction, including procedures for directing applicants through the application process. The Amendment requires the Corporation Commission and Department of Environmental Quality to evaluate their respective statutory and regulatory frameworks that govern their agencies and identify and report where modifications are needed in order to provide for the development of underground injection control Class VI wells. All recommendations were due on August 1, 2023.

2023 Okla. Sess. Law Serv. (S.B. 200) (WEST)

2. Orphaned Well Methane Emissions – SB 852

The Oklahoma Senate signed Senate Bill 852 into law on June 7, 2023, amending 17 O.S. 2021, Section 518 related to abandoned wells. In the event a well on the Corporation Commission's orphaned well list has measurable methane, the Act authorizes the Corporation Commission to test and record the methane emissions and obtain any carbon credits that may be available for the measured emissions. The Commission may use the proceeds from the sale of the credits, to be deposited into the Oil and Gas Division Revolving Fund, to offset the cost of administering the program and testing for methane. All funds remaining after testing, administration, and the cost to market and secure the value of the credits shall be placed in the Corporation Commission Plugging Fund. The Act is effective 90 days after session adjournment on May 26, 2023.

2022 Okla. Sess. Law Serv. (S.B. 852) (WEST)

B. State Regulatory Developments

1. Production Rates for Unallocated Gas Wells

On February 22, 2023, by Order No. 732333, in Cause CD No. 2022-005088, the Oklahoma Corporation Commission entered an order establishing the proration formula for the period of April 1, 2023, through March 31, 2024, at seventy-five percent (75%) of wellhead calculated absolute open flow potential or 3,000 mcf/d, whichever is greater.

Okla. Corp. Comm'n, Cause CD No. 2022-005088, Order No. 732333 (February 22, 2023)

II. Judicial Developments

This year, Oklahoma state courts examined how to determine pretermitted heirs, the mechanics of a cessation of production clause in a lease, and how to apply a preferential right to purchase provision. Federal district courts examined nuisance claims.

A. Oklahoma Supreme Court Cases

1. In the Matter of the Estate of Parker, 2023 OK 50, 529 P.3d 203

How do you determine the share of a pretermitted heir? Ronald Parker died April 3, 2020, survived by two daughters, Mandy Allford and Shila Pirpich ("Allford and Pirpich"), and a brother, Herman.[1] Ronald's holographic will devised his workers compensation settlement to his brother (worth approximately $850,000), but the will did not mention his daughters or a residuary estate, which includes a travel trailer and a truck (worth about $15,000). The trial court dealt with three issues: 1) whether Allford and Pirpich were pretermitted heirs; 2) if so, what they would receive from the estate; and 3) whether Allford and Pirpich would be entitled to any portion of the specific bequest to Herman.[2]

Allford and Pirpich claimed their father unintentionally omitted them from his will and that they were therefore pretermitted heirs ,entitled to an intestate share of his estates. Herman countered that the daughters were not pretermitted heirs, and regardless, were not entitled to any portion of the workers compensation settlement.[3] The trial court held the daughters were

1. In the Matter of the Estate of Parker, 2023 OK 50, ¶1, 529 P.3d 203, 204.
2. Id. ¶ 3.
3. Id.

pretermitted heirs and the devise of the settlement was ineffective.[4] The Court of Civil Appeals affirmed.[5]

The Oklahoma Supreme Court analyzed the relationship between two statutes: 84 O.S. 2011 §132 ("Section 132") and 84 O.S. 2011 §133 ("Section 133"). Section 132 identifies who qualifies as a pretermitted heir, and Section 133 determines what share of the estate passes to a pretermitted heir.[6]

Under Section 132, the court explained Allford and Pirpich were pretermitted heirs and would each be entitled to one-half of their father's estate. However, Section 133 modifies Section 132, stating that whatever share is awarded to a pretermitted heir must not defeat the obvious intention of the testator.[7] The Court of Civil Appeals held Section 133 was inapplicable because it only applies when there are lineal descendants (i.e., issue of the testator) that were not omitted from the will.[8] The Oklahoma Supreme Court disagreed, noting nothing in the statutory language supports such an interpretation.[9]

In determining the daughters' share, the court focused on satisfying the obvious intention of the testator regarding any specific devises. Section 133 applies to any case where there are pretermitted heirs, regardless of how many lineal descendants may have been omitted from the will. The court noted the testator obviously intended to devise his workers compensation settlement to his brother, Herman.[10] However, since his residuary estate was *de minimis*, awarding 100% of the settlement to Herman would render Section 132 meaningless since Allford and Pirpich, the pretermitted heirs, would inherit almost nothing from their father. Section 133 allows a court to adopt a different apportionment consistent with the testator's intent; therefore, the court remanded the case to the trial court to determine such a division.[11]

2. Tres C, LLC v. Raker Resources, LLC, 2023 OK 13, 532 P.3d 1

When does a cessation of production clause take effect? Plaintiff (lessor) brought a quiet title action against Defendants (lessees) based on a

4. Id. ¶ 4.
5. Id.
6. Id. ¶ 8-9.
7. Id. ¶ 9.
8. Id.
9. Id. ¶ 10.
10. Id. ¶ 12.
11. Id. ¶ 13.

cessation-of-production clause in the oil and gas lease on the property ("Lease"). The trial court quieted title in favor of Plaintiff finding that the Lease expired by its own terms after the well failed to produce in paying quantities over a three-month period. On appeal, the Supreme Court of Oklahoma considered how to determine if production that maintains a gas lease under the habendum clause has ceased, and whether the "cessation-of-production" clause can narrow the window of time that should be considered when making that determination.[12]

The court held that the trial court erred in concluding that a cessation of production had occurred simply because the well at issue was unprofitable for three months. The court explained that a three-month period is too short, as a matter of law, to determine if a cessation in production in paying quantities has occurred. The court further explained that a "cessation-of-production clause is only implicated where production *has already ceased*—i.e., the clause only comes into play *after* a cessation has occurred."[13] (emphasis in original). Cessation of production clauses work like a "savings clause" and define the grace period for reestablishing production in paying quantities in the manner set forth in the lease.[14] The court further explained that cessation of production clauses do not "establish an accounting period for purposes of determining if production is in paying quantities."[15] The court explained that such a finding would be unworkable for the oil and gas industry. A reasonable amount of time, as determined based on all the facts and circumstances of each case and usually much longer than three months, is needed to assess the profitability of a well and to determine if a cessation has occurred.[16] The court held the Defendants' conduct was sufficient to keep the Lease in effect and quieted title in favor of the Defendants.[17]

B. Oklahoma Appellate Activity

1. Latigo Oil & Gas Inc. v. BP America Production Company, Case No. 120,969 (OK CIV APP 2023) NOT FOR OFFICIAL PUBLICATION

Does a preferential right to purchase depend on a Buyer's asset valuation? Plaintiff and Defendant were successors to three JOAs.

12. Tres C, LLC v. Raker Resources, LLC, 2023 OK 13, ¶ 23, 532 P.3d 1, 14
13. Id. ¶ 28.
14. Id.
15. Id. ¶ 29.
16. Id. ¶ 30.
17. Id. ¶ 37.

Plaintiff had the right of first refusal concerning certain mineral interests, and Defendant was required to provide notice to Plaintiff if it intends to sell those interests.[18]

Defendant entered into a PSA with a third party ("Party") to sell all of its mineral interests in hundreds of counties across several states. Defendant provided notice to Plaintiff and included the PSA with Party which valued the three leases at issue at $60,000 each. Plaintiff disagreed with the valuation and requested good faith allocations be presented. Party argued their valuation was made in good faith.[19]

After the ten-day timeframe to exercise its right of first refusal had expired, Plaintiff told Defendant it wanted to exercise its rights under protest and argued the leases should be valued at $5 instead of $60,000.[20] Defendant claimed Plaintiff had not exercised its rights in a timely manner. Plaintiff sued for specific performance, breach of contract, and injunctive relief. The district court granted a temporary restraining order preventing Defendant from assigning the leases.[21] In the hearing on the temporary injunction, the district court found Plaintiff was likely to prevail on the merits and granted the injunction to prevent Plaintiff from suffering irreparable harm.[22]

The district court found the $60,000 amount was likely not a "good-faith allocation."[23] The Court of Civil Appeals noted the two preferential rights in the three JOAs are almost the same.[24] They both provided Plaintiff with ten days, upon receiving notice, "to acquire such interest under the same or substantially the same terms offered by such prospective transferee for such interest[.]"[25]

Defendant extended the offer on April 11, 2022, and Party used an engineer to allocate the value, so the allocation came from the buyer.[26] Defendant did not receive Plaintiff's response until April 26, 2022, wherein Plaintiff challenged Party's valuation.[27] Plaintiff argued Defendant's

18. *Latigo Oil & Gas Inc. v. BP America Production Company,* Case No. 120,969 (OK CIV APP 2023)
19. Id. ¶ 4.
20. Id. ¶ 5.
21. Id.
22. Id. ¶ 6.
23. Id. ¶ 10.
24. Id. ¶ 12.
25. Id.
26. Id. ¶ 14.
27. Id. ¶ 15.

notice was invalid because it disagreed with Party's valuation.[28] The appellate court held whether Party's allocation was made in good faith is irrelevant under the JOAs. As long as Defendant gave proper notice to Plaintiff, then the terms of Party's offer control. Therefore, since Plaintiff did not timely respond or meet the terms of the offer, the appellate court reversed the district court's order.[29]

C. Federal Cases

1. Lazy S Ranch Properties, LLC v. Valero Terminaling and Distrib. Co., 19-CV-425-JWB, 2023 WL 2382725 (E.D. Okla. Mar. 2, 2023)

This case is currently on appeal. Is the mere presence of hydrocarbons enough to constitute a nuisance? Plaintiff alleged a pipeline owned by Defendants leaked and contaminated the soil, water, and air on Plaintiff's property.[30] Both Plaintiff and Defendants hired experts to take samples and test for the presence of refined petroleum product hydrocarbons. The results of the samples were undisputed: samples contained either no hydrocarbons over the minimum level at which a laboratory would report a quantitative value or miniscule amounts falling far below the levels necessary for adverse health effects according to applicable regulatory guidance. Plaintiff argued that there was no minimum threshold for pollution to be actionable in Oklahoma. The District Court disagreed.[31]

The court held that "under Oklahoma law, the mere presence of hydrocarbons is insufficient to establish a legal injury. . . . Rather, a plaintiff must establish that the alleged contaminants exist in sufficient quantities to constitute a nuisance or to render the environment harmful, detrimental, or injurious."[32] The court held that Plaintiff had not met this standard to establish an injury, nor had Plaintiff established that any alleged injury was proximately caused by Defendants.[33]

Plaintiff then moved the court to alter or amend its Judgment, which the court declined.. The court held that its Judgment was consistent with the Oklahoma Constitution, statutory law, and precedent. The court explained that, although Plaintiff was not required to prove that the pollution

28. Id. ¶ 16.
29. Id. ¶ 18.
30. Lazy S Ranch Properties, LLC v. Valero Terminaling and Distribution Company, 19-CV-425-JWB, 2023 WL 2382725 at *1 (E.D. Okla. Mar. 2, 2023)
31. Id..
32. Id.
33. Id.

exceeded any specific threshold or level set by a government agency or regulatory body, the applicable regulatory thresholds were instructive to the extent that they provided a benchmark for hydrocarbon levels that were known to be harmful.[34] However, in this case, Plaintiff did not prove that the hydrocarbon levels exceeded the regulatory thresholds *or present any alternative* "benchmark or any other evidence by which a reasonable jury could find that the hydrocarbon levels detected on the property were harmful."[35] Therefore, Plaintiff had failed to establish "[s]cientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities" as required in toxic tort cases.[36]

2. Donehue v. Apache Corp., CIV-21-00710-D, 2023 WL 28437 (W.D. Okla. Jan. 3, 2023)

When is a party liable for a nuisance created by its predecessor? In 2017, the Donehues (Plaintiffs) purchased a tract of land in Edmond, Oklahoma. Upon drilling two water wells for residential use, they learned the water was contaminated. The Plaintiffs sued Apache Corporation (Defendant) who briefly conducted oil and gas operations on the property nearly 40 years before Plaintiffs' purchase of the land.[37] Defendant filed a motion for summary judgment on all claims and argued that it did not use unlined pits (the alleged source of the contamination) and that it could not be liable for the actions of its predecessors. The District Court granted portions of the Motion and held other claims presented material issues of fact for trial.[38]

On the public nuisance claim, the court ruled that "a successor may be held liable for a nuisance, even without an abatement request, if the successor had, or should have had, knowledge of the nuisance and its ability to cause harm."[39] The court held that Plaintiffs set forth sufficient evidence that a reasonable juror could find Defendant knew or should have known about the unlined pits and their ability to cause contamination, and denied summary judgment on this claim. As to the private nuisance claim, the court held that a private nuisance action is intended to resolve disputes

34. Id. at *4.
35. Id.
36. Id.
37. Donehue v. Apache Corporation, CIV-21-00710-D, 2023 WL 28437 at *1 (W.D. Okla. Jan. 3, 2023)
38. Id.
39. Id. at *4.

between neighboring landowners, not claims between successor landowners from conditions on the land that they purchased. Because Plaintiffs' cause of action was not related to a contemporaneous use of land, but instead related to a condition existing on the land they purchased, Defendant was entitled to summary judgment.[40]

The court refused to limit Plaintiffs' recoverable damages at the summary judgment stage. The court granted summary judgment for Defendant on the negligence claim because there was no evidence that Defendant contaminated the ground and Defendants did not owe a duty to future landowners (like Plaintiffs) to remediate pits that it did not use or to warn of preexisting contamination. Similarly, the court granted summary judgment to Defendant on the negligence per se and trespass claims because Defendant did not put contaminants in the ground. The court also granted summary judgment for Defendant on the constructive fraud claim because, even if Defendant knew about the contamination, Plaintiffs did not prove that Defendant had a duty to report that information to Plaintiffs, who purchased the property many years after Defendant's operations ended. The court also held issues of fact precluded granting summary judgment on the unjust enrichment, successor liability, and punitive damages claims.[41]

3. Bristow First Assembly of God v. BP p.l.c., 15-CV-523-GKF-CDL, 2023 WL 2333890 (N.D. Okla. Mar. 2, 2023)

A church, its pastor and his family (Plaintiffs), sued several companies that allegedly operated oil refineries on property where the church and parsonage were located.[42] Defendant Kinder Morgan, Inc. ("Kinder Morgan") moved for summary judgment on all of Plaintiffs' claims against it. The property, which was once formerly the site of oil refinery operations, was gifted to the church in 1980. As early as 1984, church leaders recognized concerning contamination on the property from refinery operations. The pastor and his wife noticed alarming evidence of contamination in spring 2013. Plaintiffs did not file suit until June 2015.[43]

Although Kinder Morgan did not operate the refinery, Plaintiffs sought to hold Kinder Morgan liable under a theory of successor liability. Specifically, Plaintiffs argued that Kinder Morgan was liable because EPEC Oil was liable, and Kinder Morgan acquired EPEC Oil's parent company.

40. Id. at *6.

41. Id. at *6-11.

42. Bristow First Assembly of God v. BP p.l.c., 15-CV-523-GKF-CDL, 2023 WL 2333890 at *1 (N.D. Okla. Mar. 2, 2023)

43. Id.

Thus, the question before the District Court was whether EPEC Oil's liabilities passed to Kinder Morgan. The court explained that generally a parent corporation is not liable for the acts of its subsidiaries, and there was no evidence to support liability based on corporate successorship in this case.[44] The court also refused to hold Kinder Morgan liable under a veil-piercing theory.[45] The court applied Delaware law because Kinder Morgan is a Delaware corporation and explained that veil piercing is not warranted simply because a case involves harm to the public. Instead, for purposes of deciding whether to pierce the veil based on allegations of public wrong and violations of law, courts must determine if *the separate corporate existence* of the entity constituted fraud or public harm or contravened the law. Because there was no evidence that the alleged contamination was caused by an improper corporate structure, Kinder Morgan could not be liable for EPEC Oil's conduct and was entitled to summary judgment.[46]

The court continued to address Kinder Morgan's arguments on the statute of limitations and merits of Plaintiffs' claims. The court applied Oklahoma law and explained that a two-year statute of limitations applied to Plaintiffs' claims because the claims related to property damage and the exception for abatement claims did not apply since the property damage was permanent (i.e., it could not be abated).[47] Because Plaintiffs knew, or with the exercise of reasonable diligence should have known, about the contamination and the permanent nature of the damage more than two years before filing suit, the claims were time-barred and Kinder Morgan was also entitled to summary judgment on this basis.[48]

With regard to the merits of Plaintiffs' claims, the court held Kinder Morgan was entitled to summary judgment on Plaintiffs' public nuisance claim.[49] Although a successor landowner may be allowed to pursue a public nuisance claim against a predecessor responsible for contamination, here, Plaintiffs' claim failed because they could not show that Kinder Morgan's predecessor caused any pollution or damage to the property since the refinery had been torn down at the time Kinder Morgan's predecessor purchased the land. Plaintiffs' claims for negligence, strict liability, and unjust enrichment failed for the same reason. Kinder Morgan was entitled

44. Id. at *6.
45. Id. at *7.
46. Id.
47. Id. at 8.
48. Id. at 8-9.
49. Id. at 11.

to summary judgment on said claims.[50] Finally, the court held Kinder Morgan was entitled to summary judgment on Plaintiffs' damages claims for personal injury, property damage, and punitive damages because Plaintiffs failed to present sufficient evidence to prove such damages.[51]

50. Id. at 11-12.
51. Id. at 11-13.