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I. INTRODUCTION

2019 provided no shortage of excitement, as there were more oil and gas opinions issued by the Kansas Supreme Court than in a usual year.[1] These cases will be the main focus of this Survey, as there

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1. *See* N. Nat. Gas Co. v. Oneok Field Servs. Co., 448 P.3d 383 (Kan. 2019); Jason Oil Co. v. Littler, 446 P.3d 1058 (Kan. 2019); Oxy USA Inc. v. Red Wing Oil, L.L.C., 442 P.3d 504 (Kan. 2019).

are no major legislative developments to report for this year. The first case decided whether the common-law rule against perpetuities should be applied to exceptions of defeasible term mineral interests.[2] The second case is "yet another round in [a] high-dollar subsurface prize fight" about who has the right to gas that has escaped from an underground natural gas storage facility.[3] The third case analyzes whether the misappropriation of royalty payments gives rise to a claim of adverse possession.[4] Additionally, the Kansas Court of Appeals released an oil and gas opinion, which will be briefly discussed.[5]

II. JASON OIL CO. V. LITTLER

In *Jason Oil Co. v. Littler*, the court had to determine whether an exception of a defeasible term mineral interest violates the common-law rule against perpetuities.[6] Generally, an exception of a defeasible term mineral interest includes the grantor conveying the surface estate to the grantee but reserving the mineral interest for a term of years "and so long thereafter as oil and gas is produced."[7] These types of exceptions create a springing executory future interest in the grantee.[8] The springing executory interest could theoretically vest whenever, consequently, it violates the famous Rule Against Perpetuities.[9] Applying the Rule to this type of interest produces a counter-

2. *Jason Oil Co.*, 446 P. 3d at 1059.

3. *N. Nat. Gas Co.*, 448 P.3d at 386. This series of litigation has spanned over a decade and involved multiple cases in various courts. *See* David E. Pierce, *Kansas*, 2 TEX. A&M L. REV. 81, 82–87 (Spring 2015).

4. *Oxy USA Inc.*, 442 P.3d at 508.

5. Lario Oil & Gas Co. v. Kan. Corp. Comm'n, No. 120,121, 2019 WL 3977825 (Kan. Ct. App. Aug 23, 2019).

6. *Jason Oil Co.*, 446 P.3d at 1059.

7. THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 49.13(f) (David A. Thomas, ed., 2003). For example, the exception of the defeasible term mineral interest at issue in *Jason Oil Co.* read "EXCEPT AND SUBJECT TO: Grantor saves and excepts all oil, gas and other minerals in and under or that may be produced from said land for a period of 20 years or as long thereafter as oil and/or gas and/or other minerals may be produced therefrom and thereunder." *Jason Oil Co.*, 446 P.3d at 1060.

8. David E. Pierce, *Kansas – Oil & Gas*, MIN. L. NEWSL. (Rocky Mountain Min. L. Found., Westminister, CO), Number 3, 2019, at 11.

9. THOMPSON ON REAL PROPERTY, *supra* note 7, at § 49.13(f). A different outcome would exist, however, if a *grant* of a defeasible term mineral interest was

intuitive result, as the grantor would then own the mineral interest outright.[10]

The first step for the court was to classify exactly what type of future interest was at issue in the case.[11] A handful of other states have looked at this issue, and the court noted some of these jurisdictions have twisted common-law property rules and classifications to avoid applying the Rule to these exceptions. [12] Instead of doing this, the court decided to call a spade a spade and recognized the future interest at issue in the case is a springing executory interest.[13] Thus, the next question for the court was whether it wanted to carve out a narrow exception to the common-law rule against perpetuities for exceptions of defeasible term mineral interests.[14] If not, the Rule would invalidate the future interest.[15]

To determine if it should carve out a narrow exception to the common-law Rule, the court focused on the public policy behind the Rule.[16] The court articulated that in Kansas, the clear policy behind the Rule is ensuring the alienability of property and next examined whether applying the Rule to reservations of defeasible term mineral interests would promote the alienability of property.[17] The court held that defeasible term mineral interests actually *promote* the alienability of property, not hinder it.[18] This is because applying the Rule in this instance would keep the surface and mineral estates split, which would increase the difficulty for a potential buyer who wants to buy the entire property.[19] The potential buyer would be able to not only negotiate with the surface estate owner, but they would also have to locate and negotiate with every heir who had received a portion of the mineral

involved instead of an exception. *Id.* In this situation, the grantor would maintain a possibility of reverter which is not subject to the Rule Against Perpetuities. *Id.*

10. Pierce, *supra* note 8, at 11.

11. *Jason Oil Co.*, 446 P.3d at 1063.

12. *Id.* at 1064–65. The court also mentions that this same analysis would be employed for the reservation of a defeasible term mineral interest in addition to an exception. *Id.* at 1065.

13. *Id.* at 1065.

14. *Id.*

15. *Id.*

16. *Id.* at 1065–66.

17. *Id.* at 1066–67; Pierce, *supra* note 8, at 11.

18. *Jason Oil Co.*, 446 P.3d at 1066–67.

19. *Id.*

estate, even where there was no longer production of oil and gas on the property.[20]

The court also relied on the reasoning of the Williams & Myers treatise, quoting:

> [D]efeasible term interests serve a useful social purpose, whether reserved or granted. The term interest, as compared with a perpetual interest, tends to remove title complications when the land is no longer productive of oil or gas. This simplification of title promotes alienability of land, which is one purpose served by the Rule against Perpetuities. We believe, therefore, that the courts should simply exempt interests following granted or reserved defeasible term interests from the Rule, on the straightforward basis that they serve social and commercial convenience and do not offend the policy of the Rule Against Perpetuities.[21]

The court ultimately held exceptions of defeasible term mineral interests are "ingrained in the oil and gas industry" and furthers the Rule's purpose as opposed to inhibiting it.[22] Thus, the court decided not to apply the Rule in this situation because "[a]pplying the Rule here would be counterproductive to the purpose behind the Rule and create chaos."[23]

This case has the potential to impact areas of law beyond oil and gas.[24] As Professor David E. Pierce notes, "litigants should be able to use the court's analysis to avoid the Rule in other oil and gas and non-oil and gas contexts."[25] Thus, it remains to be seen just how far Kansas courts are willing to temper the once-rigid Rule.

III. NORTHERN NATURAL GAS CO. V. ONEOK (ONEOK II)

20. *Id.*

21. *Id.* at 1067 (citing 2 Williams & Meyers, Oil and Gas Law, § 335 (2018)).

22. *Id*. at 1068.

23. *Id.*

24. Pierce, *supra* note 8, at 11–12.

25. *Id.*

Those familiar with Kansas oil and gas law have most likely heard of the *Northern Natural Gas Co. v. ONEOK* underground storage litigation, which has already lasted over a decade.[26] 2019 provided yet another chapter in this long-lasting saga.[27] A full recap of this series of cases could last pages, so this Survey will attempt to remain focused on the takeaways from the most recent case.[28]

In this case, the precise issue was whether a public utility receiving a certificate from the Federal Energy Regulatory Commission or the Kansas Corporation Commission impairs the right of operators in a reservoir to produce non-native natural gas injected by the public utility into an underground storage field.[29] To answer this question, the court had to walk through the history of Kansas underground natural gas storage law.[30] The court first revisited its holding in *Anderson v. Beech Aircraft Corp.*,[31] which was when non-native gas is injected into a common pool by an entity that is not a public utility, the gas is subject to the rule of capture.[32] Thus, other operators in the pool can produce non-native gas without legal consequences.[33]

Whereas *Anderson* didn't involve a public utility, *Union Gas System, Inc. v. Carnahan* did.[34] The court in *Union Gas* had to determine who has ownership of migratory non-native gas injected into an underground storage facility by a public utility both before and after the public utility receives a certificate of authority for that area.[35] The court held that the migrated non-native gas that was produced before the public utility received certification for underground storage was subject to the *Anderson* rule.[36] Consequently, operators were able to

26. N. Nat. Gas Co. v. Oneok Field Servs. Co., 448 P.3d 383, 386 (Kan. 2019).

27. *Id.*

28. *See* Pierce, *supra* note 3, at 82–87 for a more robust discussion of the cases involved in this litigation.

29. *N. Nat. Gas. Co*., 448 P.3d at 385–87.

30. *See id.* at 388.

31. *Id.* at 389. *See* Anderson v. Beech Aircraft Corp. 699 P.2d 1023 (Kan. 1985).

32. *N. Nat. Gas Co.*, 448 P.3d at 391.

33. *Id.*

34. Union Gas Sys., Inc. v. Carnahan, 774 P.2d 962, 964 (Kan. 1989).

35. *N. Nat. Gas Co.*, 448 P.3d at 391–92.

36. *Union Gas Sys., Inc.*, 774 P.2d at 967.

produce this gas and sell it legally until the public utility got a certificate of authority to store gas in the area.[37]

The *Union Gas* court reached a different result, however, for the migrated gas after the public utility received a certificate of authority to condemn the property for storage of natural gas.[38] The court held once a certificate of authority to condemn more of the reservoir is issued, the migrated gas is no longer subject to the rule of capture inside the certificated area.[39] Thus, title to the migrated non-native gas taken from the storage field's certificated boundaries remains in the public utility as long as it is identifiable.[40]

The *Northern Natural Gas Co.* court recognized that due to the similarities between its case and *Union Gas*, if *Union Gas* is still good law, it controls the outcome.[41] The court outlined three potential arguments for why *Union Gas* may no longer be good law which were: (1) it was superseded by K.S.A.55-1210; (2) it was overruled by *Northern Natural Gas Co. v. Martin, Pringle*;[42] and (3) it results in an unconstitutional taking of property.[43] The court, however, dismissed all three of these arguments and held *Union Gas* is still good law in this particular circumstance.[44]

In 1993, K.S.A. 55-1210 was passed as a result of the underground gas storage battles being waged in Kansas.[45] The section of the statute relevant to this case reads:

> With regard to natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased: The injector, such injector's heirs, successors and assigns shall not lose title to or possession of such gas if such injector, such injector's heirs,

37. *Id.*
38. *Id.* at 968.
39. *Id.*
40. *Id.*
41. N. Nat. Gas Co. v. Oneok Field Servs. Co., 448 P.3d 383, 394 (Kan. 2019)
42. *See* N. Nat. Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, LLP, 217 P.3d 966 (Kan. 2009)..
43. *N. Nat. Gas Co.*, 448 P.3d at 395.
44. *Id.*
45. *See* Pierce, *supra* note 3, at 83.

> successors or assigns can prove by a preponderance of the evidence that such gas was originally injected into the underground storage.[46]

In *Northern Natural Gas Co. v. ONEOK Field Services Co. (ONEOK I)*, the court held the statute did not completely preempt the field, meaning prior case law in the area is still good law in situations the statute does not directly address.[47] Relying on this, the court in the current case held that *Union Gas* is still good law in circumstances K.S.A. 55-1210 does not specifically address.[48] Such situations include, "how the common-law rule of capture operates during the time *between* certificate issuance and storage rights acquisition," which was what was at issue in this case.[49]

The next argument for *Union Gas* no longer being good law is that it was overruled by *Northern Natural Gas Co. v. Martin, Pringle*.[50] This argument is based on language from *Martin, Pringle*, which stated landowners adjoining natural gas storage areas can continue to capture non-native gas that has migrated onto their property until the public utility "obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action."[51] This standard created an extra requirement for *Union Gas* in that the public utility has to *pay* landowners for the right to store the gas beneath their property before the rule of capture is turned off.[52] The court here disposed of the extra requirement by saying it was just dicta, as the court in *Martin, Pringle* neither explicitly stated it was overruling *Union Gas* or gave any analysis of why it added the extra requirement.[53] Thus, *Union Gas* remains good law.[54]

46. KAN. STAT. ANN. § 55-1210(c)(1) (2005).

47. N. Nat. Gas Co. v. Oneok Field Servs. Co. (ONEOK I), 296 P.3d 1106, 1125 (Kan. 2013).

48. *N. Nat. Gas Co.*, 448 P.3d at 395.

49. *Id.* at 396.

50. *Id.*

51. N. Nat. Gas Co. v. Martin, Pringle, Wallace, & Bauer, L.L.P, 217 P.3d 966, 976. Essentially, this standard would allow gas to be taken from the certificated area until actual condemnation occurs. *N. Nat. Gas Co.*, 448 P.3d at 396.

52. *Id.*

53. *Id.* at 396-97.

54. *Id.* at 397.

Finally, the court shut down the argument that *Union Gas* constitutes an unconstitutional taking of property.[55] In short, the court articulated the rule of capture only gives an operator the right to produce gas, and it does not give the operator the right to the gas itself.[56] Therefore, no taking occurs when operators are no longer able to capture gas in a certificated area.[57]

All in all, the court held that *Union Gas* is still good law in certain contexts and its holding controlled in this case.[58] To reiterate, *Union Gas* established others cannot capture an injector's migrated gas "after a natural gas public utility obtains certificated authority to use a storage area and its gas within that area is identifiable"[59]

IV. OXY USA INC. V. RED WING OIL, LLC

Oxy USA Inc. v. Red Wing Oil, LLC involved the question of whether the improper receipt of royalties can give rise to a claim for adverse possession.[60] The facts in *Oxy* revolve around the reservation of a defeasible term mineral interest which expired in 1972.[61] From 1972 to 2009, royalties were paid to the wrong group of owners.[62] The operator continued to pay royalties to those who obtained the grantor's interest, even though it was extinguished in 1972 when the surface and mineral estates were reunited.[63] Thus, the question in the case was do these years of improper royalties prevent the owner of the grantee's interest from enforcing her rights now due to adverse possession?[64] The Kansas Supreme Court said no.[65]

55. *Id.* at 398–99.
56. *Id.* at 399.
57. *Id.*
58. *Id.* at 400.
59. *Id.*
60. Oxy USA Inc. v. Red Wing Oil, LLC, 442 P.3d 504, 505 (Kan. 2019).
61. *Id.* at 506.
62. *Id.* The reason royalties were still being paid after the defeasible term mineral interest ended in 1972 is because the oil and gas lease on the property was unitized with leases on surrounding property, however, a well was not actually drilled on the quarter section of at land at issue in this case until 2009. Oxy USA, Inc. v. Red Wing Oil, LLC, 360 P.3d 457, 459–60 (Kan. Ct. App. 2015).
63. *Oxy USA Inc.*, 442 P.3d at 506.
64. *Id.*
65. *Id.* at 505.

While the court started by recognizing it is possible to adversely possess minerals, it quickly disposed of the argument that was what happened here.[66] The court stated "[a] royalty represents a portion of the value of minerals *after* production."[67] "Thus, being in open, exclusive, and continuous possession of a royalty can never suffice to establish an adverse claim over minerals *in place*."[68] The court called the misappropriation of royalties a conversion "akin to tapping a pipeline and diverting its flow."[69] In order to actually adversely possess the minerals, the attempted adverse possessor would have had to do something to work the mineral estate.[70] Thus, the mineral estate was quieted in favor of the fee owner who had inherited the original grantee's interest.[71]

V. LARIO OIL & GAS CO. V. KANSAS CORPORATION COMM'N

Lario Oil & Gas Co. v. Kansas Corporation Comm'n is a Kansas Court of Appeals case that centers around a large fight to unitize a geological formation. However, it will only be discussed very briefly because it adds very little new to Kansas law.[72]

In short terms, unitization is the combining of oil and gas leases in a pool to operate them as a single unit.[73] In order for a reservoir to qualify as a pool under the Kansas unitization statutes, the reservoir must be a single pressure system.[74] In *Lario*, the party in favor of unitization argued that pools near the end of their economic life and pools not near the end of their economic life should have a "different standard for pressure communication."[75] The court shut this argument down, however, stating "[a]ll units, regardless of their economic

66. *Id.* at 508.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* (citing 1 KUNTZ, LAW OF OIL & GAS § 10.5 (1987)).
71. *Id.*
72. Lario Oil & Gas Co. v. Kan. Corp. Comm'n, No. 120,121, 2019 WL 3977825, at *1 (Kan. Ct. App. Aug 23, 2019).
73. *Id.* at *2.
74. KAN. STAT. ANN. § 55-1302(b) (2018).
75. *Lario Oil & Gas Co.*, 2019 WL 3977825, at *9.

conditions, must be single-pressure systems according to K.S.A. 55-1302(b)."[76]

VI. CONCLUSION

This reporting period provided plenty of excitement for those interested in Kansas oil and gas law. Once again, a few of the main takeaways are: (1) the common-law Rule Against Perpetuities does not apply to exceptions of defeasible term mineral interests; (2) *Union Gas* is still good law in certain contexts, and the rule of capture "does not apply after a natural gas public utility obtains certificated authority to use a storage area and its gas within that area is identifiable;"[77] and (3) the misappropriation of royalties does not give rise to a claim of adverse possession.

76. *Id.*

77. N. Nat. Gas Co. v. Oneok Field Servs. Co., 448 P.3d 383, 406 (Kan. 2019).