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ARKANSAS

John Peiserich[†]

I. INTRODUCTION

Does the government have the authority to alter the terms of an agreement between private parties that it deems unfair? At first pass, most Americans would agree that it does not. Of course, exceptions apply. American courts exercise the right to break up monopolies,¹ enforce a minimum wage,² and invalidate contracts that they deem unconscionable.³

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1. *See* Sherman Antitrust Act, 15 U.S.C. § 2 (2018).

2. *See* 29 U.S.C. § 201 *et. seq.* (2018).

3. *See* GGNSC Holdings, LLC v. Lamb, 487 S.W.3d 348, 356 (Ark. 2016) (citing LegalZoom.com, Inc. v. McIlwain, 429 S.W.3d 261, 264 (Ark. 2013)), discussing procedural unconscionability, in which there is an absence of meaningful choice on the part of one of the parties together with terms that are unreasonable favorable to the other party, and substantive unconscionability, which generally

The Arkansas Supreme Court recently extended these exceptions to include agreements that involve the complex realm of oil and gas law. The forced integration of interest owners in a drilling unit compels administrative agencies to consider who among the unit owners, lessees, and operators owes what to whom. Additionally, the doctrine of sovereign immunity governs whether an aggrieved party may even challenge such a determination by a government agency. Through a two-part decision, the Supreme Court of Arkansas clarified that the Arkansas Oil and Gas Commission (the “Commission”) has the authority to evaluate the fairness of compensation owed by a unit operator to a party who does not consent to integration. Within this industry-specific holding, which this Article will show was a natural development of state oil and gas law, the Arkansas Supreme Court notably also reinforced that sovereign immunity does not bar a party’s right to judicial review of administrative decisions, but it signaled a significant pivot away from traditional agency deference.

Part II of this Article discusses the statutory and regulatory framework of Arkansas oil and gas law as it relates to the Court’s decision. Part III tracks the journey of the case through the Arkansas courts. Part IV analyzes the courts’ decisions on the doctrine of sovereign immunity, judicial deference to agency decisions, and the Commission’s general authority, concluding that the Court properly applied Arkansas law and did not expand the Commission’s authority.

II. BACKGROUND

A. *Arkansas Oil and Gas Commission*

In 1939, the Arkansas Oil and Gas Production and Conservation Act created the Commission and gave it the authority to regulate the production of oil and gas.⁴ Pursuant to this authority, the Commission adopted spacing regulations that limit the number of wells that can be drilled in a drilling unit.⁵ Because a drilling unit is often comprised of many property owners, the Commission further has authority to, and in fact must, order all tracts and interests to integrate on the application

involves excessive price or restriction of remedies.

4. ARK. CODE ANN. § 15-71-101 (2019) (legislative creation); ARK. CODE ANN. § 15-71-110 (2019) (legislative charge); 1938 Ark. Acts 105, 219 (codified as amended at Ark. Code Ann. §§ 15-72-101-407); Thomas A. Daily, *Rules Done Right: How Arkansas Brought its Oil and Gas Law into a Horizontal World*, 68 ARK. L. REV. 259, 265 (2015).

5. 178-00-001 ARK. CODE R. § B-3 (2020).

of any mineral owner or operator if all parties do not voluntarily pool their interests.⁶ Pooling is the integration of separately-owned tracts of land in a drilling unit, where drilling and production costs are shared among lessees (also known as the working-interest owners), and revenue is shared by all owners of mineral rights in the unit.⁷ These owners may agree on a plan of development for the unit and voluntarily pool their interests, or the Commission may order forced pooling through the integration process.⁸

If the Commission orders integration, an unleased mineral owner generally has three choices, which will be specified in an integration order: (1) participate in the well by paying a proportionate share of production costs (and assuming a share of the initial financial risk) and taking a share of production revenues;⁹ (2) lease his or her interest to the unit operators and receive a negotiated royalty, not less than one-eighth, plus a bonus that the Commission determines;¹⁰ or (3) “go non-consent” and allow the participating owners to cover the non-consenting owner’s share of upfront production costs.¹¹ An owner who elects the third option will only receive his or her proportionate share of production revenue (less an additional “risk factor” penalty set by the Commission) after the participating interest owners recoup the initial production costs.¹²

B. Judicial Review

The Commission’s integration order is a final agency action, which sets forth the integration options for affected mineral interest owners.¹³ Therefore, the Arkansas Administrative Procedures Act (“APA”) governs all appeals of integration orders.¹⁴ Under the APA, any interested party who has exhausted their administrative remedies

6. Phillip E. Norvell, *Prelude to the Future of Shale Gas Development: Well Spacing and Integration for the Fayetteville Shale in Arkansas*, 49 WASHBURN L.J. 457, 463 (2010) (citing ARK. CODE ANN. § 15-72-303(b) (2019); see also Patrick H. Martin, *What the Frack? Judicial, Legislative, and Administrative Responses to a New Drilling Paradigm*, 68 ARK. L. REV. 321, 326 (2014).

7. Patrick H. Martin, *What the Frack? Judicial, Legislative, and Administrative Responses to a New Drilling Paradigm*, 68 ARK. L. REV. 321, 327 (2014).

8. Norvell, *supra* note 6, at 463 (citing ARK. CODE ANN. § 15-72-303(a)).

9. *Id.* at 464 (citing ARK. CODE ANN. § 15-72-304(b)(3)).

10. *Id.* (citing ARK. CODE ANN. § 15-72-304(b)(4), (d)).

11. *Id.* (citing ARK. CODE ANN. § 15-72-304(b)(4)).

12. *Id.*

13. 178-00-001-A-(2)(1) ARK. CODE R. § B-3 (2020).

14. *Id.*

through the Commission may appeal the integration order in circuit court with the Commission as the defendant.¹⁵

C. Agency Deference

Reviewing courts must determine the deference that should be given to agency decisions, such as Commission integration orders. The challenging party has the burden of proving an absence of substantial evidence to support an agency's factual findings.¹⁶ The Arkansas Supreme Court has not applied a consistent standard of deference regarding agencies' interpretations of statutes.¹⁷ In some cases, the Court conducted a de novo review, explaining that it is the court's power to interpret statutes.¹⁸ In other cases, the Arkansas Supreme Court adopted a de novo but deferential "clearly wrong" review for an agency's statutory interpretation¹⁹ or has omitted the de novo standard and announced only the deferential "clearly wrong" review.²⁰

D. Arkansas Sovereign Immunity

Because any judicial challenge to a Commission integration order requires a suit against the state of Arkansas, sovereign immunity must also be considered. Sovereign immunity is currently a hot topic in Arkansas that has been revisited in multiple recent Arkansas Supreme Court decisions.

Article 5, section 20 of the Arkansas Constitution provides that "[t]he [s]tate of Arkansas shall never be made defendant in any of her courts."²¹ Prior to 2018, the Arkansas Supreme Court routinely held that sovereign immunity may be overcome when an agency is acting illegally, or, since 1996, when the legislature specifically waives sovereign immunity, which it has done in numerous state statutes.²²

15. ARK. CODE ANN. § 15-72-106(a) (2019).

16. Ark. Racing Comm'n v. Wayne Ward, Inc., 57 S.W.3d 198, 203 (Ark. 2001).

17. Myers v. Yamato Kogyo Co., 597 S.W.3d 613, 616–17 (Ark. 2020) ("We acknowledge confusion in prior cases regarding the standard of review for agency interpretations of a statute . . .").

18. Miller v. Enders, 425 S.W.3d 723, 726 (Ark. 2013); Ark. Game & Fish Comm'n v. Gerard, 541 S.W.3d 422, 425–26 (Ark. 2018).

19. Ark. Dep't of Human Servs. v. Pierce, 435 S.W.3d 469, 473 (Ark. 2014); McLane S., Inc. v. Ark. Tobacco Control Bd., 375 S.W.3d 628, 640 (Ark. 2010).

20. See, e.g., Brookshire v. Adcock, 307 S.W.3d 22, 29 (Ark. 2009).

21. ARK. CONST. art. V, § 20.

22. Ark. Dep't of Cmty. Corr. v. City of Pine Bluff, 425 S.W.3d 731 (Ark. 2013); Ark. Dep't of Fin. & Admin. v. Staton, 942 S.W.2d 804 (Ark. 1996) (citing ARK.

This changed with the issuance of *Board of Trustees of University of Arkansas v. Andrews*, in which the Arkansas Supreme Court departed from earlier precedent and held that the Arkansas General Assembly cannot waive the state's sovereign immunity.²³ In that case, a terminated employee of a state community college brought an action against the college under the Arkansas Minimum Wage Act ("AMWA") for failing to compensate him for overtime.²⁴ The Court acknowledged previous holdings that the legislature could waive sovereign immunity but ultimately concluded that AMWA's provision allowing suits against the state for unpaid overtime wages was incompatible with article 5, section 20 of the Arkansas Constitution.²⁵

In reaching its decision, the *Andrews* Court explained, "[a] suit against the [s]tate is barred by the sovereign immunity doctrine if a judgment for the plaintiff will operate to control the action of the [s]tate or subject it to liability." Based on this description of sovereign immunity, the Court held that "suits subjecting the state to financial liability are barred by sovereign immunity and that plaintiffs like *Andrews* with these causes of actions have a proper avenue for redress against [s]tate action, which is to file a claim with the Arkansas Claims Commission."²⁶ The only exception to this broadened view of sovereign immunity explicitly recognized in *Andrews* applies when the government is operating "illegally."²⁷

Though the Court cautioned in a footnote in a subsequent case upholding *Andrews* that it "should not be interpreted too broadly,"²⁸ the implications of the *Andrews* decision are extensive. Under a literal reading of the *Andrews* opinion, Arkansas state courts would no longer have jurisdiction to conduct appellate review of any final agency action (including Commission integration orders) despite the many statutes guaranteeing an appeal.²⁹

CODE ANN. § 26-18-507(e)(2)(A)); See discussion *infra* Section III.B.1, IV.A.

23. Bd. of Trs. of Univ. of Ark. v. *Andrews*, 535 S.W.3d 616, 623 (Ark. 2018).

24. *Id.* at 617 (citing ARK. CODE ANN. §§ 11-4-201 to -222).

25. *Id.* at 622.

26. *Id.* at 619.

27. *Id.*

28. Ark. Dep't of Veterans Affairs v. *Mallett*, 549 S.W.3d 351, 352 n.2 (Ark. 2018).

29. Compare *Andrews*, 535 S.W.3d at 619, with ARK. CODE ANN. § 25-15-212 (right to judicial review under the APA).

III. HURD ET. AL. V. ARKANSAS OIL AND GAS COMMISSION

A. Factual Background

All of the legal issues described above came together in two Arkansas Supreme Court opinions arising from a dispute between members of the Hurd and Killam families (collectively, “the Hurds”) and a natural gas production company, SWN Production Arkansas, LLC, formerly known as SEECO, Inc. (“SWN”). SWN was the operator of numerous oil and gas wells in the Fayetteville Shale area. In 2010, the Hurds leased mineral interests in Cleburne County, Arkansas, which the Commission then integrated into two units naming SWN as the designated operator.³⁰ Importantly, these contained a “stratigraphic Pugh clause.”³¹

Oil and gas leases executed in the Fayetteville Shale generally include all oil and gas owned by the lessor beneath the leased premises. Accordingly, no further leasing or integration of most mineral owners is required to drill into a different formation within a producing unit. However, some sophisticated owners (like the Hurds) insert a stratigraphic Pugh clause into their leases that causes their oil and gas lease to terminate to depths below the deepest producing interval after a specified time. This type of clause can be attractive to lessors who want a “second bite at the apple” and want to gamble on getting a higher royalty later if there is additional development in their unit. Along with this potential benefit, a lessor with a stratigraphic Pugh clause also risks a possible decline in the market.³²

Because there had been no natural gas production below the Fayetteville Shale formation during the primary term, the Hurds became unleased as to any depths below the Fayetteville Shale formation.³³ Accordingly, when SWN sought to drill natural gas wells to the lower Moorefield Shale formation in 2017, the Hurds’ interests in this formation had to be re-leased or otherwise integrated.³⁴ Based on market conditions at the time, SWN began offering unleased mineral owners, including the Hurds, a new lease that included either a one-seventh royalty or a \$100 per acre bonus and a one-eighth royalty.³⁵

30. Hurd v. Ark. Oil & Gas Comm’n, 601 S.W.3d 100, 101 (Ark. 2020).

31. *Id.*

32. Appellant’s Br. at Addendum 325, Hurd, 601 S.W.3d 100 (No. 19-808).

33. Hurd, 601 S.W.3d at 101.

34. *Id.* at 101–02.

35. *Id.* at 102.

In February 2017, SWN requested that the Commission integrate two units for the purpose of drilling in the Moorefield Shale formation.³⁶ On March 6, 2017, the Commission granted SWN's application and issued two integration orders that included provisions allowing a period of time for unleased mineral interest owners to either participate in the costs of completing and operating the well or to "go non-consent."³⁷ As to interest owners who elected to go non-consent, both integration orders provided:

6.B. Uncommitted Leasehold Working Interest Owner(s)

Leasehold royalty shall be paid according to the provisions of the valid lease(s) existing for each separately owned tract, except where the Commission finds that such lease(s) provide for an excessive, unreasonably high rate of royalty, as compared with the royalty determined by the Commission to be reasonable and consistent with the royalty negotiated for lease(s) made at arm's length in the general area where the Unit is located³⁸

Upon hearing of the integration applications, SWN subsequently learned that the Hurds had executed self-dealing leases between their own family-owned oil and gas companies with a 25% royalty.³⁹ On March 8, 2017, SWN filed supplemental applications with the Commission, stating that it expected the Hurds to go non-consent, thereby exempting them from shouldering any production costs or financial risk.⁴⁰ SWN alleged that the 25% royalty attempted in the Hurds' leases was unreasonable and asked the Commission to set a reasonable royalty rate.⁴¹

At an evidentiary hearing held in June 2017, SWN presented evidence that gas prices had declined since 2010, SWN was the only company taking Moorefield-only leases, and the highest bonus and royalty paid for Moorefield-only interests in the relevant sections was

36. *Id.* at 101–02.

37. *Id.* at 102.

38. Appellant's Br. at Addendum 177, *Hurd*, 601 S.W.3d 100 (Ark. 2020) (No. 19-808).

39. *Hurd*, 601 S.W.3d at 102.

40. *Id.*

41. *Id.* at 102–03.

what SWN offered to the Hurds and other unleased mineral owners.⁴² The Hurds argued, conversely, that a 20–25% royalty was reasonable based on estimated production from the recoverable reserve.⁴³ The Commission held that any royalty rate over one-seventh was excessive and unreasonably high based on the circumstances and entered supplemental integration orders capping SWN’s royalty obligations to the Hurds at one-seventh.⁴⁴

1. The Circuit Court Dismissal

The Hurds petitioned for judicial review of the Commission’s supplemental integration, arguing that the supplemental integration orders were outside the Commission’s statutory authority and were arbitrary and capricious.⁴⁵ Less than one week before the court was set to hear the matter, the Arkansas Supreme Court issued its opinion in the landmark *Andrews* case, holding that the state legislature does not have the power to waive sovereign immunity and prompting the Commission to file a motion to dismiss in *Hurd*.⁴⁶ The court dismissed the Hurds’ petition, finding that sovereign immunity barred the Hurds from seeking judicial review. But the circuit court also took it a step further, finding the adjudicatory provisions of the APA unconstitutional in light of *Andrews* and that because there was no right of review of the Commission’s orders, any such orders were void from the start.⁴⁷ The Commission and SWN appealed, and the Hurds filed a cross-appeal.⁴⁸

B. *The First Arkansas Supreme Court Decision (2018)*

The first appeal focused solely on the threshold sovereign immunity issue. Interestingly, all parties challenged the circuit court’s order of dismissal. The Commission argued that the court lacked jurisdiction

42. *Id.* at 103.

43. *Id.*

44. Appellant’s Abstract, Br., and Addendum at Ab. 98–99, *Hurd*, 601 S.W.3d 100 (Ark. 2020) (No. CV-19-808).

45. Pet. for Review ¶ 18, *Hurd v. Ark. Oil & Gas Comm’n*, 2018 WL 7133052 (Ark. Cir. Feb. 12, 2018) (No. 60CV-17-3961) (citing ARK. CODE ANN. § 25-15-212(h)).

46. Bd. of Trs. of Univ. of Ark. v. *Andrews*, 535 S.W.3d 616, 623 (Ark. 2018); See Resp’ts Mot. to Dismiss, *Hurd v. Ark. Oil & Gas Comm’n*, 2018 WL 7133052 (Ark. Cir. Feb. 12, 2018) (No. 60CV-17-3961).

47. Order ¶ 8, *Hurd v. Ark. Oil & Gas Comm’n*, 2018 WL 7133052 (Ark. Cir. Feb. 12, 2018) (No. 60CV-17-3961).

48. *Ark. Oil & Gas Comm’n v. Hurd*, 564 S.W.3d 248, 249 (Ark. 2018).

to invalidate the APA and the Commission's orders after it found that the petition was barred by sovereign immunity.⁴⁹ SWN contended that original actions seeking monetary damages from the state are distinguishable from petitions for review of an administrative decision and that applying sovereign immunity to bar judicial review of agency actions would violate the separation-of-powers doctrine by delegating final adjudication of rights to the executive branch.⁵⁰ The Hurds argued that judicial review of an agency action is constitutional because sovereign immunity is waivable and that judicial review was proper because the Commission exceeded its authority by reducing the royalty rates in their leases.⁵¹

The Arkansas Supreme Court agreed with SWN's first argument, reiterating its *Andrews* holding that sovereign immunity applies when a judgment for the plaintiff would control the action of the state or subject the state to liability.⁵² The Court agreed with SWN that the role of the Commission, though named as defendant in the matter, was like a trial court in an appellate proceeding: it had no vested interest in the outcome of the appeal.⁵³ The Court found sovereign immunity was therefore inapplicable even under *Andrews* and also reversed the circuit court's ruling, declaring the adjudicatory provisions of the APA unconstitutional and the Commission's orders void from the start.⁵⁴ The Court remanded the Hurds' cross-appeal.⁵⁵ On remand, the circuit court affirmed the Commission's decision, and the Hurds appealed.⁵⁶

C. The Second Arkansas Supreme Court Decision (2020)

1. Agency Deference and Separation of Powers

The lawsuit was appealed a second time in 2020—this time on the merits. The Arkansas Supreme Court ultimately upheld the integration orders entered by the Commission. In doing so, the Court reinforced

49. *Id.* at 253.

50. Appellant SWN Prod. (Ark.), LLC's Brief at Arg. 6-9, Ark. Oil & Gas Comm'n v. Hurd, 564 S.W.3d 248 (Ark. 2018) (No. 18-233) (citing *Singleton v. City of Pine Bluff*, 285 S.W.3d 253, 256 (Ark. App. 2008)).

51. Appellees/Cross Appellant's Supplemental Abstract, Brief, and Supplemental Addendum at Arg. 3-23, Ark. Oil. & Gas Comm'n v. Hurd, 564 S.W.3d 248 (Ark. 2018) (No. 18-233).

52. *Hurd*, 564 S.W.3d at 253.

53. *Id.* at 255 (citing *Duit Constr. Co. v. Ark. State Claims Comm'n*, 476 S.W.3d 791, 795 (Ark. 2015)).

54. *Id.*

55. *Id.*

56. *Hurd v. Ark. Oil & Gas Comm'n*, 601 S.W.3d 100 at 101 (Ark. 2020).

its indication of a pivot on agency deference first announced earlier this year in *Myers v. Yamato Kogyo Co., Ltd.*, which held that courts must review agency interpretations of statutes de novo because it is solely within the judiciary's power to interpret statutes. In the 2020 *Hurd* decision, the Court reiterated that while it gives unambiguous statutes their plain meaning, "where ambiguity exists, the agency's interpretation will be one of [the court's] many tools used to provide guidance."⁵⁷

As to the scope of the Commission's authority to set a reasonable royalty rate, the Court's decision focused on both Arkansas Code Annotated section 15-71-110(a)(1), which authorizes the Commission to enforce its statutory powers⁵⁸ and Arkansas Code Annotated section 15-72-304(a), which provides:

[a]ll orders requiring integration shall be . . . upon terms and conditions that are just and reasonable and that will afford the owner of each tract or interest in the drilling unit the opportunity to recover or receive his or her just and equitable share of the oil and gas in the pool without unnecessary expense⁵⁹

The Court found that this clear and unambiguous language gave the Commission explicit authority to ensure that all integration orders are entered upon "just and reasonable" terms.⁶⁰ While there is no statute specifically stating that the Commission may reduce the royalty rate in a lease to a reasonable market rate, the Court reasoned that there is also no statute requiring consenting parties, such as SWN, to pay royalties to an uncommitted leasehold working-interest owner who elects to go non-consent.⁶¹ The Court agreed with SWN's argument that it would be impracticable for statutes to cover every possible situation that an agency may encounter in carrying out its statutory duties and that state agencies, including the Commission, have both powers that are explicitly conferred by statute and that are necessarily implied from a statute.⁶² Because the Commission's reduction of the

57. *Id.* at 104 (citing *Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 617 (Ark. 2020)).

58. *Id.*

59. *Id.* at 104–05.

60. *Id.* at 105.

61. *Id.*

62. *Id.* (citing *Walker v. Ark. State Bd. of Educ.*, 365 S.W.3d 899, 911 (Ark. 2010)).

royalty to a reasonable rate was authorized by statute, the Court held that the supplemental integration orders were neither ultra vires nor arbitrary and capricious and affirmed the Commission's supplemental integration orders.⁶³

IV. ANALYSIS

A. *What the Hurd Decisions Mean for Sovereign Immunity*

1. Analysis of Arkansas Supreme Court's Reasoning (2018)

The Arkansas Supreme Court's 2018 *Hurd* decision turned on whether sovereign immunity barred judicial review of the Commission's actions.⁶⁴ While *Andrews* was premised on damages being sought from the state, the Court failed to distinguish between a claim for damages and appellate review of final agency action.⁶⁵ As SWN argued, the destruction of traditional judicial review of agency actions would violate the separation-of-powers doctrine and improperly delegate absolute authority to the executive branch; an agency's actions are through the executive branch, so the agency has no power to usurp the function of the judiciary and enter a final adjudication of property or contractual rights.⁶⁶

Barring judicial review would trigger other legal complications as well. Many federal regulatory statutes allow states to administer the provisions of various acts but require that the delegated state authorities have adequate implementation and enforcement powers.⁶⁷ For example, Clean Water Act regulations require state programs to

63. *Id.* at 106.

64. *See* Ark. Oil & Gas Comm'n v. Hurd, 564 S.W.3d 248, 254 (Ark. 2020).

65. The Court did emphasize the availability of the Arkansas Claims Commission, *see* Bd. of Trs. of Univ. of Ark. v. Andrews, 535 S.W.3d 616, 623 (Ark. 2018), which does not provide appellate review of agency action.

66. Appellant SWN's Brief at Arg. 9, Ark. Oil & Gas Comm'n v. Hurd, 1564 S.W.3d 248 (citing Singleton v. City of Pine Bluff, 285 S.W.3d 253, 256 (Ark. Ct. App. 2008)).

67. *See, e.g.*, 33 U.S.C. §§ 1342(b), (c)(3) (the Clean Water Act requires states to possess "adequate authority" to carry out and "abate violations" of the program, including through penalties); 42 U.S.C. §§ 7411(c)(1), 7412(l)(5–6) (the Clean Air Act requires that state procedure must be adequate to implement and enforce New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants); 42 U.S.C. § 6926(b) (the Resource Conservation and Recovery Act requires states to provide adequate enforcement of compliance with program requirements).

guarantee judicial review for agency decisions to retain their delegated authority.⁶⁸

The first circuit court decision in *Hurd* held that the *Andrews* decision did in fact bar judicial review of agency actions.⁶⁹ The court reasoned that the adjudicatory provisions of the APA left citizens without a mechanism to challenge agency actions, thereby violating the guarantees of due process found in the Arkansas Constitution and the United States Constitution.⁷⁰

The Arkansas Supreme Court took this opportunity to narrow the *Andrews* holding: judicial review of an agency decision is not barred by sovereign immunity because the agency is not a real party-in-interest. The subject of the adjudication—the amount of royalty SWN owed to the Hurds—did not affect the state’s funds or control its actions.⁷¹

The Court backtracked from *Andrews*’s extreme result of a circuit court striking the substantial statutory and regulatory framework as well as thousands of judicial opinions that allow for judicial review of agency decisions.⁷² However, the justices could not agree that the *Hurd* decision cleared up Arkansas’s sovereign immunity law.⁷³

Justice Baker dissented and urged that the *Andrews* court held that “never means never” as stated in the Arkansas Constitution’s sovereign immunity provision.⁷⁴ The fact that *Hurd* involved a review of an agency decision did not make it distinguishable from *Andrews* because the Court did not identify any exceptions to sovereign immunity in *Andrews*.⁷⁵ Justice Baker further insisted, as she did in her dissent in *Andrews*, that the Arkansas Constitution does not limit sovereign immunity to money judgments. Therefore, the majority’s holding that sovereign immunity did not apply because the suit did not affect the state’s funds or action was inaccurate.⁷⁶ Justice Baker

68. 40 C.F.R. § 123.30 (2012).

69. Order ¶ 7, *Hurd v. Ark. Oil & Gas Comm’n*, 2018 WL 7133052 (Ark. Cir. Feb. 12, 2018) (No. 60CV-17-3961).

70. *Id.* ¶ 4–8; ARK. CONST. art. II, § 13 (promises citizens the right to a remedy for all wrongs suffered in person, property, or character); *See* BE&K Const. Co. v. Nat’l Labor Relations Bd., 536 U.S. 516, 524–25 (2002) (the First Amendment to the U.S. Constitution protects citizens’ rights to petition the government and access the courts).

71. *Ark. Oil & Gas Comm’n v. Hurd*, 564 S.W.3d 248, 255 (Ark. 2018)..

72. *Id.*

73. *Id.* at 258 (Baker, J., dissenting); *Id.* at 256 (Hart, J., concurring).

74. *Id.* at 258 (Baker, J., dissenting). .

75. *Id.*

76. *Id.* (citing *Bd. of Trs. of Univ. of Ark. v. Andrews*, 535 S.W.3d 616, 623 (Ark. 2018) (Baker, J., dissenting)).

concluded that the Commission's decision constituted state conduct, so the *Andrews* holding barred suit.⁷⁷

Justice Hart concurred, citing Justice Baker's concerns regarding the scope of *Andrews*.⁷⁸ She posited that continuing to awkwardly develop sovereign immunity jurisprudence in light of *Andrews* is unsustainable; the court should instead "wipe the slate" on sovereign immunity.⁷⁹ She pointed to the lack of constitutional analysis in *Andrews* and the majority's failure to define the opinion's limitations, which led to extensive litigation by public and private parties trying to either weaponize or escape from *Andrews*.⁸⁰

2. Subsequent Application of *Andrews*

The Court had occasion to apply *Andrews* again in 2019. In *Monsanto Company v. Arkansas State Plant Board*, Monsanto objected to the Plant Board's promulgation of certain rules that would prohibit the use of a particular pesticide. Monsanto framed each of its claims to seek injunctive or declaratory relief for alleged illegal or unconstitutional activity by the Plant Board or its members.⁸¹ The parties agreed that sovereign immunity should not bar actions to enjoin *ultra vires* government conduct, even after *Andrews*, but disagreed as to whether the Plant Board's conduct was *ultra vires*.⁸² The circuit court dismissed all claims, explaining that *Andrews* precluded judicial review of all agency actions, even *ultra vires* actions.⁸³

The Arkansas Supreme Court reversed the *Monsanto* decision, finding that the *ultra vires* exception to sovereign immunity was intact and applicable to the case.⁸⁴ Specifically, where a claim is based on alleged *ultra vires* conduct on the part of the state and the claimant seeks only declaratory and injunctive relief, sovereign immunity is inapplicable.⁸⁵

77. *Id.* at 259 (Baker, J., dissenting).

78. *Id.* at 256 (Hart, J., concurring).

79. *Id.*

80. *Id.*

81. *Monsanto Co. v. Ark. State Plant Bd.*, 576 S.W.3d 8, 10 (Ark. 2019).

82. *Id.* at 11.

83. *Id.* at 11–12.

84. *Id.* at 13.

85. *Id.* (citing *Martin v. Haas*, 556 S.W.3d 509, 509 (Ark. 2018) in which a voter brought an action against the Arkansas Secretary of State, seeking to declare a legislative act unconstitutional and enjoin its enforcement).

Justice Baker again dissented and opined that *Andrews* in fact did not provide for an *ultra vires* exception to sovereign immunity.⁸⁶ She further stated that “until *Andrews* is overruled, suit against the [s]tate is barred, and the majority cannot pick and choose when an exception or exemption may apply.”⁸⁷

Because the Arkansas Supreme Court decision in *Andrews* sparked confusion in Arkansas courts, the Court’s decision in *Hurd* signals movement toward a clearer and more practical understanding of sovereign immunity. Whether the Court will explicitly overturn *Andrews* remains to be seen.

B. Hurd, the Myers Standard, and the Future of Agency Deference in Arkansas

In *Hurd*, the appellants challenged the lower court’s ruling by contending that agency deference impermissibly conflicted with the separation-of-powers doctrine.⁸⁸ The Court used *Hurd* to emphasize its recently announced adoption of the *Myers* standard of review for agency deference and held that there was “no need to further discuss [the] appellants’ argument in this regard.”⁸⁹ The Court reiterated this new view of agency deference in *Hurd*, holding:

[W]e clarify today that agency interpretations of statutes will be reviewed *de novo*. After all, it is the province and duty of this Court to determine what a statute means. In considering the meaning and effect of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. An unambiguous statute will be interpreted based solely on the clear meaning of the text. But where ambiguity exists, the agency’s interpretation will be one of our many tools used to provide guidance.⁹⁰

In *Myers*, Mary Myers, the wife of a steel plant ladleman who died from injuries suffered while working in his plant’s melt shop, came

86. *Id.* at 14–15 (Baker, J., concurring in part and dissenting in part).

87. *Id.* at 15 (Baker, J., concurring in part and dissenting in part).

88. *See Hurd v. Ark. Oil & Gas Comm’n*, 601 S.W.3d 100, 104 (Ark. 2020).

89. *Id.*

90. *Id.* (quoting *Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 618 (Ark. 2020) (internal citations omitted)).

before the court to dispute an order from the Arkansas Workers' Compensation Commission ("AWCC") that held the parent companies of her late husband's direct employer were immune from liability for her husband's death.⁹¹ In making its decision, the AWCC interpreted Arkansas Code Annotated section 11-9-105(a) and held that the parent companies of Mrs. Myers's late husband were entitled to statutory immunity from suit.⁹² The court of appeals affirmed the decision; Mrs. Meyers then appealed to the Arkansas Supreme Court.⁹³

In deciding *Myers*, the Arkansas Supreme Court novelly held that "it is for this Court to determine what a constitutional or statutory provision means" and that the Court does not afford deference to agency interpretation.⁹⁴ The Court discussed what it perceived as a sometimes inconsistent history of standards used for agency deference.⁹⁵ The Court identified the application of "de novo but deferential 'clearly wrong' review" where issues of statutory interpretation are reviewed de novo, but the interpretation made by an agency charged with administration is entitled to deference and should not be overturned unless clearly wrong.⁹⁶ The Court identified another standard that was strictly based on the deferential "clearly wrong" review with no mention or use of the de novo standard.⁹⁷

Relying on the separation-of-powers doctrine, the Court in *Meyers* was the first to specifically disapprove of giving deference to agency interpretations of statutes, stating that doing so "effectively transfers the job of interpreting the law from the judiciary to the executive."⁹⁸ The Court held that the proper standard of review is de novo and that an agency's interpretation is merely a tool to use for guidance and not entitled to any deference.⁹⁹

In applying the *Myers* standard in *Hurd*, the Court effectively ended traditional agency deference in statutory interpretation. In *Myers*, the Court acknowledged the history of inconsistent applications of agency deference.¹⁰⁰ While only applied so far in *Myers* and *Hurd*, the Court

91. *See Myers v. Yamato Kogyo Co.*, 597 S.W.3d 613, 615 (Ark. 2020).

92. *See id.* at 616.

93. *Id.*

94. *Id.* at 616.

95. *See id.* at 617.

96. *See id.*

97. *Id.*

98. *Id.*

99. *See id.*

100. *Id.*

can be expected to now review all agency decisions de novo with no deference to any underlying agency interpretation. Neither dissent in *Hurd* addressed agency deference.¹⁰¹ Similarly, Justice Hart's lone dissent in *Myers* did not discuss the majority's new agency deference standard.¹⁰² Accordingly, the justices appear to be in agreement with the *Myers* standard of review. Only time will tell if the Court will continue to apply this new standard or if it will apply another variation to analyze agency decisions in the future.

C. Hurd's Implications on AOGC Powers

Justice Hart, in her 2020 *Hurd* dissent, opined that allowing the Commission to reduce privately negotiated lease royalty rates to a reasonable market-based rate was an improper broadening of Commission powers.¹⁰³ She further stated that forcing the Hurds to give up their property for less than the contract price amounted to a government taking of property.¹⁰⁴ However, this statement is incorrect as the majority's decision does not, in fact, expand the Commission's powers.¹⁰⁵

1. The Commission Did Not Alter the Hurds' Lease Terms

Justice Hart mischaracterized the Commission's actions in entering supplemental integration orders in this dispute. The Commission did not alter the terms of the leases that were negotiated between the Hurds and their family business. The Hurd family members, as lessors, were still entitled to a 25% royalty from their lessee, the family business.¹⁰⁶ The Court instead capped the obligation of the participating owners in the unit (SWN) who were not parties to the Hurd leases and who the Hurds sought to force to pay a higher-than-market royalty rate through a self-dealing lease.¹⁰⁷ SWN's obligation to pay the Hurds a reasonable royalty did not arise out of any leases; it was wholly contained in the integration orders, which the Commission had the statutory right to control.¹⁰⁸

101. See *Hurd v. Ark. Oil & Gas Comm'n*, 601 S.W.3d 100, 106–11 (Ark. 2020) (Baker, J., dissenting).

102. *Myers*, 597 S.W.3d at 620–22 (Hart, J., dissenting).

103. *Hurd*, 601 S.W.3d at 108 (Hart, J., dissenting).

104. *Id.* at 109 (Hart, J., dissenting).

105. *Id.* at 105 (the Commission's authority is necessarily implied from statute).

106. *Id.* at 102–03.

107. *Id.* at 105.

108. *Id.*

2. The Commission's Statutory Authority Gives It Implied Power to Limit an Operator's Royalty Obligation to a Non-Consenting Owner

The Court agreed with SWN's argument that the Commission's power to limit SWN's royalty obligations to the Hurds was necessarily implied from its statutory authority to ensure integration orders are just and reasonable.¹⁰⁹

Prior to *Hurd*, the statutory and regulatory framework of forced integration contained a glaring gap: participating owners are compensated with their proportionate share of production revenue;¹¹⁰ owners who lease their interests to the unit operator will receive a "competitive" royalty and bonus to be determined by the Commission, but never less than a one-eighth share;¹¹¹ but how will a non-consenting owner be compensated during the recoupment period? For twenty-five years, this gap has been filled by language common to integration orders: the operator, on behalf of the participating parties, will pay to a non-consenting party the royalty rate contained in its existing lease, unless the Commission finds that rate to be excessive or unreasonably high.¹¹² The *Hurd* decision finally confirmed this practice as a proper exercise of the Commission's statutory authority.¹¹³

3. The Commission is Not Likely to Apply *Hurd* Too Broadly

Justice Hart asserts that the 2020 *Hurd* decision could lead to the Commission disregarding royalty rates in any other mineral lease and, in any case, will lead to subjective and disparate treatment of interest owners throughout Arkansas.¹¹⁴ This fear stems from a misunderstanding of the Commission's action at the center of this case.

The Commission has the implied power to determine reasonable compensation between participating parties and non-consenting

109. ARK. CODE ANN. § 15-72-304(a) (2020); *see also* *Hurd*, 601 S.W.3d at 105 (citing *Walker v. Ark. State Bd. of Educ.*, 365 S.W.3d 899, 911 (Ark. 2010) (quoting that State agencies possess such powers as are conferred by statute or are necessarily implied from a statute)).

110. ARK. CODE ANN. § 15-72-304(b)(3) (2020).

111. Norvell, *supra* note 6, at 464 (citing ARK. CODE ANN. § 15-72-304(b)(4), (d)).

112. Brief for Appellant at 17, *Ark. Oil & Gas Comm'n v. Hurd*, CV-18-223 (Ark. June 26, 2018); State Appellants' Reply Brief at 10, *Ark. Oil & Gas Comm'n v. Hurd*, CV-18-223 (Ark. Aug. 23, 2018).

113. *Hurd*, 601 S.W.3d at 105.

114. *Id.* at 109 (Hart, J., dissenting).

owners, but this is less power than the Commission has when a mineral owner leases its interest to the unit operator.¹¹⁵ The Commission will determine a competitive royalty rate for an owner who decides to lease its interest to the operator through the integration process, but the Commission can only cap the participating parties' royalty obligations to the non-consenting owners if it first finds the rate excessive or unreasonably high.¹¹⁶ The majority's holding in the *Hurd* decision did not broaden the Commission's power; it merely clarified it.

In addition, the Court acknowledged that the record contained evidence to support the Commission's finding that the 25% royalty rate was excessive and unreasonable. The Hurds argued that the rate could not be unreasonable because it was the same rate contained in previous leases they held with SWN.¹¹⁷ However, the Hurds took a chance in including a stratigraphic Pugh clause in their lease in the hopes of a higher return.¹¹⁸ Due to a downturn in the market, when it came time to re-lease new formations below the Fayetteville Shale formation, natural gas prices significantly dropped, resulting in reduced lease royalty rates particularly for the unproven Moorefield Shale formation.¹¹⁹ In addition, because the Hurds executed the leases with their own family-owned businesses in anticipation of integration, the Commission had reason to believe that the royalty rate attempted by the Hurds was inflated and not comparable to market-based royalty rates being utilized in arms-length leases.¹²⁰

In contrast, most oil and gas leases are executed under much less suspicious circumstances. When the Commission considers whether ordinary lease royalty rates are excessive or unreasonable, they will be easily distinguishable from the Hurds' case.¹²¹

Justice Hart warned that the Court's ruling gives operators no reason to negotiate royalty rates with landowners in good faith.¹²² However, an applicant for forced integration of a unit must describe its due diligence and show that it made a bona fide effort to reach an agreement with each owner.¹²³ The applicant must also provide an

115. Norvell, *supra* note 6, at 464 (citing ARK. CODE ANN. § 15-72-304(b)(4), (d)).

116. *Id.*; *Hurd*, 601 S.W.3d at 105.

117. *Hurd*, 601 S.W.3d at 110 (Hart, J., dissenting).

118. *Id.* at 109 (Hart, J., dissenting).

119. *Id.* at 103.

120. *Id.*

121. *Id.* at 103, 105.

122. *Id.* at 109 (Hart, J., dissenting).

123. 178-00 ARK. CODE R. § 001-A-3(G)(i) (LexisNexis 2020).

affidavit showing the highest cash bonus and royalty terms that the lessors and lessees contracted for in the unit.¹²⁴

These requirements provide the Commission with evidence of what is a just and reasonable rate under an integration order. Unit operators will still have every reason to negotiate agreeable terms with each property owner in a unit.

V. CONCLUSION

The *Hurd* case was a natural culmination of Arkansas law that clarified the authority of the Commission and its relationship with the Arkansas courts. Judicial review of a Commission decision allows affected parties to challenge the actions of executive agencies, ensuring that the Commission regulates oil and gas production within the scope of its authority.

Further, the Commission did not alter a contract in *Hurd*. The compensation owed by the unit operator to the Hurds was not contained in a contract or dictated by a statute. Instead, the integration order provided that a lease created between the Hurds and their own business would set the payment rate. The Commission found this term in the integration order to be unfair and amended it accordingly.

124. § 001-A-3(G)(ii).