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North Dakota Oil and Gas Update

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NORTH DAKOTA OIL AND GAS UPDATE

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I. JUDICIAL DEVELOPMENTS

The following is an update on North Dakota case law related to the oil and gas industry from August 1, 2011, through July 31, 2012. The cases address a variety of oil and gas law related issues.

A. *Reformation of Deeds*

Several North Dakota Supreme Court cases this year address various arguments for reformation of deeds to include mineral reservations not originally included within the deeds. Each of the cases involves contracts for deed and subsequent warranty deeds.

1. *Van Berkom v. Cordonnier*

Arlo Van Berkom and Garoldine Van Berkom owned the entire surface and all of the oil and gas underlying the subject tract of land.[2] In 1979, Arlo Van Berkom and Garoldine Van Berkom entered into a contract for deed with James Van Berkom and Betty Van Berkom (the "Van Berkoms") for the sale and purchase of the subject tract.[3] The contract for deed contained a mineral reservation.[4]

Following execution of the contract for deed, Arlo Van Berkom died.[5] During probate proceedings for his estate, half of the oil and gas interest underlying the subject property was distributed to a trust

1. The North Dakota portion of this Annual Oil and Gas Law Update was prepared by Christopher D. Friez, attorney with Crowley Fleck PLLP in Bismarck, North Dakota.

2. Van Berkom v. Cordonnier, 807 N.W.2d 802, 803–04 (N.D. 2011).

3. *Id.* at 803.

4. *Id.*

5. *Id.*

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created by Arlo Van Berkom's will, and the other half was distributed to Garoldine Van Berkom.[6] Following fulfillment of the obligations under the contract for deed, in 1995, Garoldine Van Berkom executed a warranty deed conveying the subject tract to the Van Berkoms.[7] The warranty deed did not contain a mineral reservation.[8] Garoldine Van Berkom died in 2002, and according to her will, the Cordonniers would be entitled to the one-half oil and gas interest in the subject land if Garoldine Van Berkom owned the one-half interest at her death.[9] In 2008, the Van Berkoms and the Cordonniers claimed title to the one-half oil and gas interest which was owned by Garoldine Van Berkom following the death of Arlo Van Berkom.[10] The Van Berkoms commenced this action to quiet title to one-half of the oil and gas underlying the subject tract.[11] The Cordonniers alleged mutual mistake in the drafting of the warranty deed and sought to reform the warranty deed to conform to the contract for deed.[12] The district court ruled that the Cordonniers failed to produce the proof required to reform a deed and held the Van Berkoms were entitled to the one-half oil and gas interest.[13]

The Cordonniers relied upon the mineral reservation included within the contract for deed to establish that the warranty deed was mistakenly executed without a mineral reservation but did not provide additional evidence of a mutual mistake.[14] The district court found the Cordonniers' evidence was insufficient to overcome the presumption that the warranty deed properly set forth Garoldine Van Berkom's intent.[15] The North Dakota Supreme Court affirmed the district court's decision after finding that it was not clearly erroneous.[16] The Court noted that Van Berkom testified at trial that it was the intent of Arlo Van Berkom and Garoldine Van Berkom to transfer the mineral interests along with the subject tract upon fulfillment of the contract for deed.[17] The Court further noted that this testimony was not refuted by other evidence during the trial and further supported the district court's decision.[18]

6. *Id.*
7. *Id.*
8. *Id.* at 803–04.
9. *Id.* at 804.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 805.
14. *Id.* at 806.
15. *Id.*
16. *Id.*
17. *Id.* at 804.
18. *Id.* at 806.

2. *Arndt v. Maki*

Carl Arndt owned the entire surface and all of the minerals underlying a tract of land.[19] Carl Arndt died in 1973 without a will.[20] Under the laws of intestate succession in effect on Carl Arndt's death, his wife Marie Arndt would receive one-half of the tract of land with their ten children receiving the other one-half interest.[21] However, the ten children agreed to disclaim their interest in the tract of land to give full title to Marie Arndt.[22]

Thereafter, in 1973, Marie Arndt agreed to sell the tract of land to Richard Arndt.[23] The two entered into a handwritten agreement which provided "[t]he mineral rights that are on the place go with the place."[24] Marie Arndt and Richard Arndt entered into a contract for deed on October 24, 1973, which agreed to convey the tract to Richard Arndt upon fulfillment of the contract.[25] The contract for deed did not contain a mineral reservation.[26]

Marie Arndt died intestate in 1975.[27] In 1984, a final decree of distribution for the estate of Carl Arndt distributed the entire tract of land, including the minerals, to Marie Arndt's estate.[28] Also in 1984, a personal representative's deed for the estate of Marie Arndt distributed the entire tract of land to Richard Arndt.[29] The personal representative's deed did not contain a mineral reservation.[30]

In 2007, the personal representatives of the estates of Carl Arndt and Marie Arndt recorded a second personal representative's deed, conveying the minerals underlying the tract of land to all of the living heirs of Carl Arndt and Marie Arndt (hereinafter "Maki" defendants).[31] In November 2008, Richard Arndt brought this quiet title action against the Maki defendants.[32] The Maki defendants counterclaimed for reformation of the deeds to Richard Arndt to include a mineral reservation.[33] The district court concluded that the Maki defendants presented insufficient evidence to support their reformation action and quieted title in Richard Arndt.[34] The North Dakota Supreme Court affirmed, holding that the contract for deed and

19. Arndt v. Maki, 813 N.W.2d 564, 567 (N.D. 2012).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 568.
32. *Id.*
33. *Id.*
34. *Id.*

personal representative's deed were consistent with each other and with Richard Arndt's version of the facts.[35] Because there was no ambiguity or inconsistency between the contract for deed and the personal representative's deed, the Court concluded the evidence was not sufficient to support reformation.[36] Interestingly, the Court went further, concluding the evidence presented permitted an inference that the Maki defendants intentionally filed statements of claim and recorded instruments for the purpose of slandering title to the real estate or to harass the owners of the real estate.[37] The Court remanded to the district court for further proceedings regarding a claim by Richard Arndt for slander of title.[38]

B. *Lease Termination for Failure to Comply with "Unless" Clause*: Beaudoin v. JB Mineral Services

In July 2009, JB Mineral Services, LLC ("JB"), sent an oil and gas lease, a supplemental agreement, and a document JB alleged was a 120-day sight draft for $165,600 to the Beaudoins.[39] The supplemental agreement provided, in part, that the lease would terminate 120 business days from the date of "notarized signature" unless JB paid or tendered $45 per net mineral acre as a "supplemental bonus payment" before the termination date.[40] The Beaudoins executed the lease and supplemental agreement by notarized signatures on July 20, 2009, and presented the sight draft to their bank for payment on July 30, 2009.[41] Payment of the sight draft required further authorization by JB.[42] JB did not authorize payment of the sight draft but recorded the lease.[43]

The Beaudoins sued to have the lease declared invalid.[44] The district court granted summary judgment to the Beaudoins, concluding that the parties' agreement unambiguously provided that the lease terminated on January 12, 2010, 120 business days after the notarized signatures by the Beaudoins, when JB failed to make the required bonus payment by that date.[45]

JB appealed, contending the lease was valid because a royalty clause in an oil and gas lease, by itself, is sufficient consideration for an oil and gas lease under the North Dakota Supreme Court's recent holding in *Irish Oil & Gas, Inc. v. Reimer*.[46] The Court explained that

35. *Id.* at 572.
36. *Id.*
37. *Id.* at 573.
38. *Id.* at 574.
39. Beaudoin v. JB Mineral Servs., LLC, 808 N.W.2d 671, 672 (N.D. 2011).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 673.
45. *Id.*
46. *Id.*; Irish Oil & Gas, Inc. v. Reimer, 794 N.W.2d 715 (N.D. 2011).

https://scholarship.law.tamu.edu/txwes-lr/vol19/iss2/20
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the leases in *Irish Oil* did not contain "unless" clauses, and the holding in the case was based solely upon the lessors' contention that there was a total failure of consideration, which invalidated the leases.[47] The Court further explained the holding in *Irish Oil* did not apply to the case.[48] Rather, the Court held that the agreement clearly provides that the lease shall terminate 120 business days from the date of notarized signature unless JB "shall pay or tender" to the Beaudoins $45 per net mineral acre on or before the termination date.[49] The Court reasoned that JB was clearly required to pay or tender the agreed sum to the Beaudoins before the termination date that was specified in the agreement and that paying or tendering required funding a draft or making payment, not providing a draft which may never be funded.[50] Finally, the Court held that the "burden of preventing a lease with an 'unless' clause from terminating lies upon the lessee, and if the payments required by the lease are deficient in either the time or the amount of payment, the lease terminates automatically."[51]

C. *Reviewing North Dakota Industrial Commission Decision Regarding Risk Penalty*: Gadeco, LLC v. Industrial Commission

Slawson Exploration Company was the operator of a well in Mountrail County, North Dakota.[52] Gadeco, LLC owned a leasehold interest in the well spacing unit.[53] On July 8, 2009, Slawson sent Gadeco and other working interest owners in the spacing unit invitations to participate in the well and share the costs of drilling and completion of the well.[54] The letter provided that should Gadeco choose to participate, it must send the authority for expenditure along with its share of costs within thirty days.[55]

On August 19, 2009, Gadeco returned the authority for expenditure, along with a check for its proportionate share of expenses.[56] On August 20, 2009, Slawson acknowledged receipt of the election to participate and the check but returned the check to Gadeco explaining that Gadeco failed to send the election and check within the thirty-day period, which ended on August 10, 2009.[57]

In November 2009, Slawson filed an application with the North Dakota Industrial Commission ("NDIC"), seeking to pool all interests in

47. *Beaudoin*, 808 N.W.2d at 674.
48. *Id.*
49. *Id.* at 675.
50. *Id.*
51. *Id.* at 676.
52. Gadeco, LLC v. Indus. Comm'n, 812 N.W.2d 405, 409 (N.D. 2012).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*

the well's spacing unit and authorizing recovery of the statutorily allowed 200% risk penalty against Gadeco as a non-participating owner under section 38-08-08(3)(a) of the North Dakota Century Code.[58] Gadeco objected to assessment of the risk penalty, but following a hearing, the NDIC pooled all interests in the spacing unit and authorized Slawson to impose the 200% risk penalty.[59] Gadeco appealed the NDIC decision, and the district court reversed the decision.[60] The North Dakota Supreme Court held that the NDIC decision does not explain how it reached the conclusion that the risk penalty could be assessed.[61] The Court held that because "the [NDIC's] findings are insufficient to enable us to understand the basis for its decision, we reverse the judgment and remand to the [NDIC] for the preparation of findings of fact that reveal the basis for its decision.[62]

D. *Information to be Shared with Participating Non-Operators*: Come Big or Stay Home, LLC v. EOG Resources, Inc.

EOG Resources, Inc. (hereinafter "EOG") operates numerous oil and gas wells in North Dakota under which Come Big or Stay Home, LLC (hereinafter "CBSH") owned working interests.[63] In late 2008, EOG sent CBSH an invitation to participate in a well.[64] The invitation asked CBSH to execute a joint operating agreement, which included provisions regarding what type of well information would be shared with CBSH and a non-disclosure agreement.[65] CBSH signed the joint operating agreement and returned it to EOG.[66] Over the next several months, EOG sent CBSH eighteen additional joint operating agreements and invitations to participate, which were substantially similar to the first one.[67] CBSH agreed to participate in all the wells but refused to sign any additional joint operating agreements.[68] After each refusal, EOG sent letters to CBSH explaining that it would not share well information with CBSH unless CBSH agreed to the nondisclosure agreement in the joint operating agreement.[69] CBSH refused to sign the nondisclosure agreement but instead sued EOG, seeking damages under various theories for EOG's failure to provide it with well information for the eighteen wells.[70]

58. *Id.*
59. *Id.*
60. *Id.* at 411.
61. *Id.* at 412.
62. *Id.* at 413.
63. Come Big or Stay Home, LLC v. EOG Res., Inc., 816 N.W.2d 80, 82 (N.D. 2012).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 82–83.
70. *Id.* at 83.

The North Dakota Supreme Court reasoned that CBSH had knowledge that EOG would not share well information unless CBSH agreed to hold the information confidential because CBSH had the opportunity to review the joint operating agreement and other documentation relating to any contractual relationship between the parties.[71] Additionally, the Court found that there were no provisions in the parties' contracts that granted CBSH access to well information, and thus, EOG's failure to provide well information to CBSH could not amount to a breach of contract.[72]

71. *Id.* at 85.
72. *Id.* at 86.