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Nebraska Oil and Gas Update

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NEBRASKA OIL AND GAS UPDATE



By: James R. Nicas & Dominique Ranieri

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I. INTRODUCTION

The following is an update on Nebraska's legislative activity and case law relating to oil and gas and mineral law from August 1, 2011, to July 31, 2012.

II. LEGISLATIVE ACTIVITY

A. *Major Oil Pipeline Siting Act*

Legislative Bill 1,¹ better known as the act that adopts the Major Oil Pipeline Siting Act, was introduced to the legislature November 1, 2011, during the 102nd Legislature, First Special Session.² In addition to adopting the Major Oil Pipeline Siting Act, the act reissues revised statutes of Nebraska, changes provisions relating to eminent domain

1. Legis. B. 1, 102d Leg., 1st Spec. Sess. (Neb. 2011) (amending NEB. REV. STAT. §§ 57-1101, 75-109.01, 75-110.01, 75-112, 75-118, 75-128, 75-129, 75-502).

2. See Legis. B. 1044, 102d Leg., 2d Reg. Sess. (Neb. 2012). Legislative Bill 1 renders Legislative Bill 1044 (indefinitely postponed) moot, by specifically excluding any attempt to regulate safety, as preempted by Federal Law.

for pipelines, changes and provides powers and duties for the Public Service Commission, harmonizes certain provisions, provides severability, repeals original sections, and declares an emergency.³ The act was passed with an emergency clause,⁴ and the governor signed the act on November 22, 2011.⁵

In the act, the legislature declared the following:

Nebraska has the authority as a sovereign state to protect its land and natural resources for economic and aesthetic purposes for the benefit of its residents and future generations by regulation through approval or disapproval of major oil pipeline siting and the location of routes, so long as it does not regulate in the area of safety as to the design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, replacement, and maintenance of major oil pipelines and pipeline facilities.⁶

Along with certain application requirements, fee explanations, and various definitions, the act explains the purposes of the Major Oil Pipeline Siting Act:

- a. [To] [e]nsure the welfare of Nebraskans, including protection of property rights, aesthetic values, and economic interests;
- b. Consider the lawful protection of Nebraska's natural resources in determining the location of routes of major oil pipelines within Nebraska;
- c. Ensure that the location of routes for major oil pipelines is in compliance with Nebraska law; and
- d. Ensure that a coordinated and efficient method for the authorization of such construction is provided.⁷

Any person that engages in owning, operating, or managing a pipeline that is larger than six inches in inside diameter for the transportation of petroleum or petroleum components, products, or wastes must file an application with the Public Service Commission (the "Commission").⁸ Interestingly, the applicant is required to publish notice of the application in at least one newspaper of general circulation in each county in which the major oil pipeline is to be construed and to serve notice of the application upon the governing bodies of the counties and municipalities.⁹ Within sixty days of the receipt of the applica-

3. Legis. B. 1, 102d Leg., 1st Spec. Sess. (Neb. 2011).

4. *LBI – Adopt the Major Oil Pipeline Siting Act and Change Eminent Domain Provisions*, NEB. LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=15149 (last visited Sept. 21, 2012); *Lawmaking in Nebraska*, NEB. LEGISLATURE, <http://nebraskalegislature.gov/about/lawmaking.php> (last visited Aug. 24, 2012) (A bill with an emergency clause requires a vote of two-thirds (33 members) of the legislature).

5. Legis. B. 1, 102d Leg., 1st Spec. Sess. (Neb. 2011).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

tion, the Commission will schedule a public hearing. The Commission may hold additional public meetings and request reports from various agencies, including the Department of Environmental Quality, the Department of Natural Resources, the Department of Revenue, the Department of Roads, the Games and Parks Commission, the Nebraska Oil and Gas Conservation Commission, the Nebraska State Historical Society, the State Fire Marshal, and the Board of Educational Lands and Funds.¹⁰

The pipeline carrier has the burden to establish that the proposed route will serve the public interest.¹¹ To determine whether the pipeline carrier has met this burden, the Commission will consider:

- a. Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances;
- b. Evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources;
- c. Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources;
- d. Evidence regarding the economic and social impacts of the major oil pipeline;
- e. Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline;
- f. The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline;
- g. The reports of the agencies filed pursuant to subsection (3) of this section; and
- h. The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.¹²

The commission may contract for professional services and expert assistance—including the services of engineers, hydrogeologists, accountants, attorneys, and economists—to assist with reviewing applications.¹³

Applications that have been denied can be amended in accordance with the Commission's findings or may be appealed in accordance

10. *Id.* (the agencies may submit a request for reimbursement of reasonable and necessary expenses incurred for any consultants hired pursuant to this subsection).

11. *Id.*

12. *Id.*

13. *Id.*

with the Administrative Procedure Act.¹⁴ If the application is approved, the pipeline carrier shall file status reports with the Commission every six months until completion.¹⁵

B. *Hydraulic Fracturing*

On January 6, 2012, Legislative Bill 877 was introduced, requiring the disclosure of hydraulic fracturing treatment information.¹⁶ The Bill would amend section 57-905 and repeal the original section. The requirements proposed by the bill include providing the composition of the hydraulic fracturing fluids used to the Nebraska Oil and Gas Conservation Commission, including the total volume of water used and each chemical ingredient. The information would then be posted on the Commission's web site.¹⁷ The Legislative Committee on Natural Resources has indefinitely postponed Legislative Bill 877.¹⁸

Legislative Resolution 504, introduced on March 20, 2012, designates the Natural Resources Committee of the Legislature to study Nebraska's statutes and regulations on hydraulic fracturing.¹⁹ The Resolution states, "a comprehensive examination of Nebraska's laws, rules, and regulations should be undertaken . . . [to] assure that adequate protections are in place and that Nebraska's laws are in accordance with best practices[.]"²⁰

III. CASE LAW

A. *Peterson v. Sanders*²¹

Record owners of surface property brought an equitable action pursuant to Nebraska's dormant mineral statutes. The surface owners claimed the property's severed mineral interests had been abandoned and sought an order vesting title in the severed mineral interests in them. The district court vested title to the mineral interests in the surface owners after determining the mineral interests had been abandoned.²² On appeal, the owners of severed mineral interests assigned that the district court erred in failing to find that application of Nebraska's dormant mineral statutes against their severed mineral interests was an unconstitutional retroactive application of the statutes.²³

14. *Id.*

15. *Id.*

16. Legis. B. 877, 102d Leg., 2d Reg. Sess. (Neb. 2012).

17. *Id.*

18. *LB877 – Require Disclosure of Hydraulic Fracturing Treatment Information*, NEB. LEGISLATURE, http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=15637 (last visited Oct. 11, 2012).

19. Legis. Res. 504, 102d Leg., 2d Reg. Sess. (Neb. 2012).

20. *Id.*

21. *Peterson v. Sanders*, 806 N.W.2d 566 (Neb. 2011).

22. *Id.* at 567.

23. *Id.* at 568.

Several Nebraska statutes affect dormant mineral rights. These statutes were intended to address title problems that developed after mineral estates were fractured.²⁴ The primary statute at issue in *Peterson* was section 57-229.²⁵ The Nebraska Supreme Court held that the critical date in determining whether severed mineral interests had been abandoned under the dormant mineral statutes was when the interests were transferred to the holders by their mother, which was years after the enactment of the statutes, not when the interests were originally severed from the surface property and reserved by the mother. Thus, regardless of whether retrospective application of the statutes to persons who owned severed mineral interests prior to their enactment deprived those persons of due process, the statutes were not applied retrospectively to holders.²⁶

B. *Bedore v. Ranch Oil Co.*²⁷

In *Bedore v. Ranch Oil Co.*, after a lessee attempted to preserve an oil and gas lease beyond the primary term by restoring an old well to production by drilling out the plug and inserting pumping equipment, the lessors brought action against the lessee seeking a declaratory judgment that the lease was null, void, and of no further force and effect and alleging damages from trespass and conversion.²⁸ The district court granted partial summary judgment to the lessors, concluding they were entitled to a judgment declaring that the lease was no longer in effect, and, following a bench trial, the court ruled that the lessors had failed to prove any damages from trespass and conversion

24. *Id.* at 569 (citing *Ricks v. Vap*, 784 N.W.2d 432 (Neb. 2010)).

25. *Id.* at 567–69; NEB. REV. STAT. §57-229 (2012). “A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same. The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts; *Provided*, that the provisions of this section shall not apply to mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner.” *Id.* (emphasis added).

26. *Peterson*, 806 N.W.2d at 571.

27. *Bedore v. Ranch Oil Co.*, 805 N.W.2d 68 (Neb. 2011).

28. *Id.* at 73.

and awarded only nominal damages to the lessors.²⁹ The lessee appealed, and the lessors cross-appealed asserting that the district court erred in failing to award the cost of plugging their wells and in failing to award damages resulting from trespass and conversion, costs and attorney fees, and deposition expenses.³⁰

The Supreme Court of Nebraska affirmed the district court's ruling. The Court held that as a matter of first impression, the oil and gas lessee did not commence operations for drilling a well, within the meaning of the savings clause of the lease, when it used a drill to remove cast iron and sand plugs from an old well. In addressing this matter of first impression, the Court looked to the terms of the individual leases as well as the Oil and Gas Lien Act,³¹ which defines "drilling" as "drilling, digging, torpedoing, acidizing, cementing, completing, or repairing," but it does not define "drilling a well." Neither does the Nebraska Oil and Gas Conservation Commission's rules and regulations define "drilling a well."³² The Court concluded that in spite of case law regarding the specifics of drilling, the weight of authority agreed that general reworking operations, which do not involve making a new hole, are not "operations for drilling a well." One commentator stated, "reworking operations will not satisfy a clause that requires the resumption of 'operations for drilling a well.'"³³

The Court further held that acceptance of royalties by the lessors after the expiration of the primary term did not waive expiration of the lease or estop the lessors from claiming the lease was no longer valid; the lessors were under no obligation to give notice of termination to the lessee; the lessors failed to prove surface damages caused as a result of the lessee's trespass and conversion; the lessors' claim for cost of plugging the lessee's wells was premature; evidence of lost interest income was too speculative to support the award of damages; the lessee with whom the lessors entered into a new lease could not recover as damages the cost of its election to renew a lease in order to make up for time lost on the land due to the prior lessee's occupation and protracted litigation over the validity of the occupation; the district court did not abuse its discretion in failing to award attorney fees and costs to the lessors; and the district court did not abuse its discretion in denying the lessors' motion to compel payment of witness fees and expenses.³⁴

29. *Id.* at 78, 80.

30. *Id.* at 86.

31. *Id.* at 84; *see also* Oil and Gas Lien Act, NEB. REV. STAT. §§ 57-801 to 57-820 (2010); *Id.* § 57-801(8).

32. *Bedore*, 805 N.W.2d at 84.

33. *Id.*

34. *Id.* at 85-90.