Recent Developments: An Overview of New Cases, Legislation & Regulations Affecting The Oil & Gas Industry-Natural Resources Industries

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RECENT DEVELOPMENTS -
AN OVERVIEW OF NEW CASES, LEGISLATION & REGULATIONS AFFECTING THE OIL & GAS INDUSTRY

Thomas A. Daily
The case of *Deltic Timber Corp. v. Great Lakes Chemical Corp.*\(^2\) represents another round in the continuing legal fight between South Arkansas chemical companies and their royalty owners. This battle has already lasted long enough to have been discussed in papers presented at the two previous Natural Resources Law Institutes.\(^3\) Great Lakes and its competitor, Albemarle Corporation\(^4\), extract elemental bromine from brine which they produce from high volume wells drilled into the Reynolds Aquifer of the Smackover Limestone Formation underlying Columbia and Union Counties, Arkansas. One of the biggest land and royalty owners in Union County is Deltic Timber Corporation, a successor to a subsidiary of Murphy Oil Corporation.

Deltic sued Great Lakes alleging that Great Lakes' brine production and injection operations had wrongfully displaced bromine-rich brine from beneath Deltic's lands, leaving in its place debrominated "tail brine" (produced brine that Great Lakes reinjects into the geologic formation after its elemental bromine is removed by chemical reaction). Great Lakes had failed to

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\(^1\)With considerable assistance from others including, without limitation, Tim Dowd and John Dexter of Oklahoma City and Frank Patton, W. S. Walker and Leigh Chiles of Fort Smith.


\(^4\)Albemarle is the successor to Ethyl Corporation.
secure brine leases covering all of Deltic’s lands within the vicinity of Great Lakes’ operation but, with a few exceptions, did hold leases on Deltic’s lands lying directly between injection and production wells. Deltic claimed compensatory and punitive damages of more than $100,000,000. The United States district judge
5 ruled in favor of Deltic, in part, awarding compensatory damages of about $415,000.

The case is the fourth in which a plaintiff has claimed subterranean injury resulting from a brine producer’s recycling operations. The first such case was Budd v. Ethyl Corp.6 In that case the Arkansas Supreme Court upheld dismissal of Budd’s complaint which involved two tracts of land. As to the first tract, which lay near, but outside, Ethyl’s cluster of injection and production wells (“recycling area”), the court refused to find liability, ruling that the law of capture applied. Budd’s second tract lay within Ethyl’s recycling area, but he owned only a mineral leasehold interest in that tract, as opposed to a fee interest. The court denied recovery for damage to that tract because this limited interest did not provide standing to sue.

In Young v. Ethyl Corp.7, the Eighth Circuit held that Ethyl was liable to Young, whose unleased lands lay within Ethyl’s recycling area. That court noted the different rationale applied by the Arkansas court to Budd’s two tracts which, it reasoned, would have been unnecessary had the law of capture applied within the recycling area. In Jameson v. Ethyl Corp.8, the Arkansas Supreme Court adopted the Eighth Circuit’s ruling in Young. In that decision the Arkansas court

5Hon. Harry Barnes.

6251 Ark. 639, 474 S.W.2d 414 (1971).

7521 F.2d 771 (8th Cir. 1975).

8271 Ark 621, 609 S.W.2d 346 (1980).
held that Ethyl was liable for injury to Jameson's lands lying within its recycling area.

In *Deltic* Great Lakes had argued that *Budd* precluded liability for injury to Deltic’s lands lying outside Great Lakes’ recycling area (defined by Great Lakes as the area directly between its lines of injection and production wells). The district court held otherwise, ruling that since Great Lakes’ production wells would produce significant amounts of brine which originated outside its recycling area, and since that production would be enhanced by the increase in differential pressure caused by injection of tail brine, Great Lakes was liable for injury to those lands, as well as to Deltic’s few tracts which lay between injection and production wells.

The court then held that Great Lakes’ injury to the Deltic lands lying outside the recycling area was not committed in bad faith since Great Lakes had relied in good faith upon its interpretation of *Budd*. The court awarded Deltic three years’ royalty for those lands. The Eighth Circuit had previously affirmed the district court’s summary judgment ruling barring Deltic from recovering any damages sustained outside the three-year period of limitations.

In applying the “royalty” measure of damages for good faith trespass the court followed *Killam v. Texas Oil & Gas Corp.*, which makes Arkansas the only modern jurisdiction which has

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9. The chemical industry has customarily paid “in lieu” royalties, on a per acre basis, rather than a fraction of production of the value of actual production. This is, in large part, because of the difficulty of valuing brine, a mineral which is worthless unless it contains minerals which can and will be extracted. A.C.A. §1 codified this in lieu royalty, establishing a minimum which, because it exceeds the true market value of the brine, has served as the standard in lieu royalty paid throughout South Arkansas. Judge Barnes based good faith damages upon this statutory in lieu royalty.

10. *Deltic Farm and Timber Co. v. Great Lakes Chemical Corp.*, 120 F.3d 854 (8th Cir. 1997).

11. 303 Ark. 547, 798 S.W.2d 419.
sanctioned the award of royalty, rather than the in-ground value of the mineral taken, under circumstances where the plaintiff would not have produced the mineral on its own.

Judge Barnes found that Great Lakes had acted in bad faith with respect to the few unleased Deltic tracts lying within its recycling area. He computed bad faith damages based upon the value of brine at the wellhead without allowance for lifting costs. Deltic had unsuccessfully argued that bad faith damages should be based upon the value of bromine extracted from the brine without allowance for either lifting costs or for the cost of extracting the brine.

In an earlier summary judgment ruling, which is not discussed in his opinion, Judge Barnes had ruled that since the bad faith measure of damages is inherently punitive in nature, Deltic was precluded from receiving additional punitive damages.

Finally, Judge Barnes refused to award pre-judgment interest to Deltic. Under Arkansas law pre-judgment interest may be recovered on claims which are liquidated or which are ascertainable by fixed standards. The court noted that the parties presented conflicting competent evidence of which Deltic tracts had been adversely impacted by Great Lakes’ operations, the extent of that adverse impact, and the value of the brine displaced. Thus, it found that an award of pre-judgment interest would be improper.

This was big time, big cost litigation.\(^\text{12}\) It featured high-tech movie presentations of computer reservoir simulators estimating the effect of the displacement. Highly credentialed economists grappled with the problem of valuing the brine while earning hourly rates which rival the weekly take-home pay of many Arkansans.

\(^\text{12}\)Deltic actually requested an award of costs in an amount exceeding its award of damages, most of which was denied.
Also noteworthy was Great Lakes’ proof of the underlying facts of *Budd, Young* and *Jameson*. Those cases all involved Ethyl Corporation’s Kerlin brine field. The lands owned by Budd, Young and Jameson are not far apart. Their precise relationship to Ethyl’s recycling area was established by Great Lakes’ testimony and exhibits in the *Deltic* trial. The appellate opinions in those cases become much clearer when augmented by such proof. That proof is now a part of the record in *Deltic*.

Both parties have appealed. Great Lakes urges error in the finding of liability outside its recycling area based upon its interpretation of *Budd, Young* and *Jameson*. It relies largely upon the underlying facts of those cases which it proved at the trial. Deltic urges that Judge Barnes’ findings of fact relating to good faith rather than bad faith liability, and the amount of both good faith and bad faith damages are clearly erroneous. Deltic did not appeal from Judge Barnes ruling that punitive damages could not be recovered in combination with bad faith damages. The appeal has been briefed and awaits oral argument. This is the third chapter of this author’s report on the brine wars. At minimum there will be a fourth.

**OKLAHOMA COURT OF APPEALS RULES THAT LESSEE’S CONDUCT MAY EXCUSE DEMAND TO MARKET GAS**

Hill Resources drilled two gas wells, the Drummond 31-1 and Drummond 32-1 in 1979 and 1980, respectively. Neither well is capable of open flow exceeding 100 MCF per day. Hill never connected either well but claimed that, notwithstanding its failure to do so for 14 to 15 years, its leases were validly held by production. In 1994 Noel Nally took top leases and, along with his lessors, sued to terminate Hill’s leases. Nally argued, in the alternative, that neither Drummond Well was capable of commercial production and that Hill had egregiously breached
the implied covenant to market gas. Most of Nally’s lessors had made demand upon Hill to connect the wells and market the gas, but only immediately prior to filing suit.

The district judge\(^\text{13}\) voided Hill’s leases for violation of the implied covenant to market. He held that Nally’s lessors were excused from making additional demands to market when Hill’s response to those lessors who did make demand was “meager at best and only for appearances”. The Oklahoma Court of Appeals affirmed.\(^\text{14}\) This result is similar to that in the Arkansas case of Byrd \textit{v.} Bradham.\(^\text{15}\) In both states, demand to comply with an implied covenant is generally a prerequisite to a lease cancellation. However, there are exceptions to that general rule. It is possible for a lessee to conduct itself so badly that demand will not be necessary.\(^\text{16}\)

The result is correct. However, it is submitted that the district judge should also have held that Hill’s leases had expired, since neither Drummond well is capable of producing gas in paying quantities. In calculating paying quantities he excluded pipeline hookup costs, even though undisputed testimony established that neither well was likely to ever recover the cost of connecting it to market. Of course, there are lots of cases holding that drilling, completion and hookup costs are not to be included in the arithmetic of determining a well’s commerciality.\(^\text{17}\)

\(^{13}\)Hon. Ted Knight.


\(^{15}\text{280 Ark. 11, 655 S.W.2d 366 (1983).}\)

\(^{16}\text{Id.}\)

\(^{17}\text{See Daily, And For So Long Thereafter. . . “Paying Quantities”, “Shutting-in”, and other Legal Problems of the Secondary Term, 1991 ARKANSAS NATURAL RESOURCES LAW INSTITUTE, for a general discussion of the perpetuation of oil and gas leases by operation of the habendum clause.}\)
However, in each of those cases the costs in question had already been incurred. The correct test should include all reasonably expected future costs but should exclude past (sunk) costs. That result was reached in at least one Federal diversity case from Western Oklahoma.\(^{18}\) The hypothetical prudent operator certainly considers all future costs in determining whether to keep or plug his well. Indeed, the likely inability of the Drummond Wells to recover their hookup cost was the very reason that Hill failed to market gas from the wells.

**ROYALTY OWNER CLASS CERTIFICATION CASES YIELD INCONSISTENT RESULTS**

The author expects that the paper presented at this institute by Mr. Tom Marrs will thoroughly discuss *Hales v. SEECO*, a case in which Mr. Marrs was lead counsel for the defendants. That discussion will be left to Mr. Marrs. However, *Hales* wasn't the only royalty owner class action in the ArkLaTex region in 1998. There were at least one Texas and two Oklahoma interlocutory appeals of decisions involving class certification. The Texas case was *Tana Oil and Gas Corporation v. Bates*.\(^ {19}\) It involved allegations that the defendant had failed to market gas for the best available terms and had improperly deducted certain post-production costs. Class certification was affirmed over the arguments of the defendant that there were many individualized fact distinctions between class members. Indeed, the various class members had executed different leases with different royalty clauses, but the court ruled that these differences were irrelevant.

The Oklahoma cases reached opposite results. In *Greghol Limited Partnership v. Oryx*


\(^{19}\) 978 S.W. 2d. 735 (Tex. App. 1998).
Energy Company\textsuperscript{20}, the Oklahoma Court of Appeals upheld certification of a class of certain allegedly improper post production costs to royalty and overriding royalty owners. The district judge certified a class of plaintiffs over claims by the defendant that individual questions predominated. The Court of Appeals affirmed the certification.

However, in Mayo v. Kaiser-Francis Oil Co.\textsuperscript{21}, another division of the Oklahoma Court of Appeals affirmed denial of class certification by the same district judge\textsuperscript{22} in a very similar case. In Mayo the plaintiffs alleged that Kaiser-Francis had marketed gas to an affiliate company and then resold it at a higher price as part of a scheme to cheat royalty owners. The complaint is apparently confusing. It sought to obtain class certification for "all mineral owners". The court held that since Kaiser-Francis was not in privity with owners who were not its own lessors, there was not sufficient commonality to certify the class. The dissenting opinion correctly points out that in Oklahoma, like in Arkansas, all royalty owners draw from a pool based upon all gas sales. Therefore, lack of contractual privity was irrelevant. It is likely that the Mayo plaintiffs' failure to articulate this argument contributed more than anything to this incorrect decision.

Mayo highlights another trend -- one that is somewhat disturbing. Appellate courts are tiring of interlocutory appeals of class certification decisions. They are beginning to summarily affirm those rulings without giving adequate thought to the issues.

\textsuperscript{20}959 P. 2d 596 (Okla. App. 1998).

\textsuperscript{21}962 P.2d 657 (Okla. App. 1998).

\textsuperscript{22}Hon. James Winchester.
OKLAHOMA COURT RESOLVES DEDUCTIBILITY OF POST-PRODUCTION COSTS

*Mittelstaedt v. Santa Fe Minerals, Inc.*\(^{23}\) was a case on certification from the Tenth Circuit Court of Appeals to the Oklahoma Supreme Court which involved the deductibility of post-production costs from royalties. The court’s well-reasoned opinion held that the implied duty to market gas implied a duty to make the gas into a marketable product free of cost. Therefore, such costs as well-head compression and dehydration are not deductible. However, once the gas becomes a marketable product, reasonable additional costs which actually enhance its value may be charged proportionately against the royalty interest. Thus, reasonable off-site gathering and transportation charges may be deducted.

The Arkansas Supreme Court could adopt the *Mittelstaedt* standard for Arkansas without overruling *Hanna Oil and Gas Company v. Taylor*\(^{24}\), because that case disallowed only deduction of well-head compression costs. It should be urged to do so at the first opportunity.

In a companion case, *XAE Corporation v. SMR Property Management*\(^{25}\) the Oklahoma Supreme Court held that since no implied covenants were owed to an in-kind overriding royalty interest owner, all reasonable post-production costs were properly chargeable against the override owner who elected to let the operator sell its in-kind production. That ruling makes sense since *Mittlestaedt*’s rationale is rooted in the implied covenant to market gas.

\(^{23}\)954 P.2d 1203 (Okla. 1998).

\(^{24}\)297 Ark. 80, 759 S.W.2d 563 (1988).

OKLAHOMA COURT APPROVES CASH BALANCING ORDER
WHEN PROOF ESTABLISHES THAT REMAINING RESERVES
ARE INSUFFICIENT TO PERMIT BALANCING IN KIND

*Harrell v. Samson Resources Company*[^26] involved a claim for cash balancing prior to depletion of a well in the absence of a gas balancing agreement. The plaintiff proved that the remaining reserves in the well were insufficient to permit balancing in kind. Samson argued that the statute of limitations began to accrue with the overproduction and that, since that was over ten years before suit was filed, Harrell's cause of action was barred by limitations. It also argued that no cash balancing should be ordered until depletion of the well.

The district court ordered cash balancing and awarded prejudgment interest from the date of the first overproduction. It also awarded an attorneys fee to Harrell. The Oklahoma Court of Appeals reversed based upon Sampson's statute of limitation argument. The Oklahoma Supreme court granted certiorari and then reinstated that part of the trial court's ruling that had ordered cash balancing. The Supreme Court permitted prejudgment interest only from the date that demand for cash balancing was made and disallowed the attorney's fee altogether.

The critical fact in this case is that the preferred remedy of balancing in-kind could not be accomplished. It would thus be pointless to require Harrell to wait until depletion of the well to be reimbursed for the gas which Samson had overproduced.

Since the unit JOA creates a co-tenant like relationship, limitations does not begin to run until violation by one co-tenant of the other's right. That had occurred when Samson recently tried to sell its interest in the well without offering to pay for its overproduction.

In Texas, unlike Oklahoma, actual marketing of oil or gas is required to perpetuate a lease under its habendum clause. In the case of Sun Operating Limited Partnership v. Holt\(^ {27}\) the Texas Court of Appeals dealt with a situation where sales were prevented for a period longer than permitted by the cessation of production clause in an oil and gas lease by pipeline repairs. The court refused to affirm a decree voiding the lease. It held that a *force majeure* clause which excused production during certain events including “failure of carrier to transport” prevented the forfeiture. The opinion doesn’t say why the operator didn’t just pay shut-in royalty. It seems that would have been much simpler.

**FIFTH CIRCUIT UN-SCREWS UP MISSISSIPPI LAW REGARDING ROYALTIES ON NONRECOUPABLE TAKE-OR-PAY SETTLEMENT**

Most jurisdictions, including Oklahoma\(^ {28}\) and Texas\(^ {29}\), have ruled that royalty owners are not entitled to share in nonrecoupable take-or-pay settlements. Unfortunately, the *Finkelstein* case which led to the Texas ruling originally reached an opposite result but was reversed on rehearing. That led to the comedy of errors in Mississippi known as *Williamson v. Elf Aquitaine, Inc.* *Williamson* was first decided by a federal district court predicting Mississippi law. Noting that Mississippi had no case in point and that Mississippi state courts often adopted Texas rulings in mineral law cases, the district court held, based upon the original *Finkelstein* opinion, that

\(^{27}\) ___ S.W.2d ___ (Tex. App. 1998).


\(^{29}\) *TransAmerican Natural Gas Corp. v. Finkelstein*, 933 S.W. 2d. 591 (1996).
Mississippi royalty owners were entitled to share in nonrecoupable take-or-pay settlements just as were Texas royalty owners.\textsuperscript{30} Unfortunately, the Texas court then changed its mind, to the embarrassment of the Mississippi district court judge. Fortunately, there was still time to appeal to the Fifth Circuit which reversed the district court and applied real Texas law.\textsuperscript{31}

\textit{EN BANC TENTH CIRCUIT REFUSES TO VACATE OPINION HOLDING THAT INDIAN LANDS PATENT WHICH RESERVED COAL ALSO RESERVED COAL-BED METHANE}

This author’s contribution to the 1998 Natural Resources Law Institute noted that the Tenth Circuit Court of Appeals had ruled, contrary to a United States’ Solicitor General’s opinion, that an Indian patent which reserved coal also reserved coal-bed methane. An \textit{en banc} rehearing was granted but the full court upheld the panel decision.\textsuperscript{32} There are many identical Indian lands patents in Eastern Oklahoma. Since Oklahoma is in the Tenth Circuit, this decision is binding there.

\textit{1999 ARKANSAS GENERAL ASSEMBLY PROVES THAT TERM LIMITS DON’T MAKE ANY DIFFERENCE}

Lock up your valuables, the Legislature is in session again. This year is the first after mandatory retirement of many of the “old guard”. Fear not. The legislative foolishness is as bad as ever. While much of the fun centers around the usual topics,\textsuperscript{33} several bills are of interest to the Natural Resources Industries.


\textsuperscript{32}Southern Ute Indian Tribe \textit{v. Amoco Production Co.}, 151 F.3d 1251 (1998).

\textsuperscript{33}Such as prohibiting all forms of abortion, cutting taxes on property and groceries, achieving gridlock with the Governor over the State’s miserable highways.
In virtually every legislative session someone introduces a bill which would increase the severance tax on natural gas. Such a bill is almost certainly doomed to fail because tax increases (other than sales tax increases) require a super majority for enactment. It is thus important that Arkansas' voters soundly defeated proposed Initiated Act No. 2, which would have allowed the Legislature to increase any tax by majority vote, in the 1998 general election.

House Bill 1018, sponsored by Representative Lendall, proposes to increase the gas severance tax from 3/10 of one cent per MCF to 5% of market value. This bill drew instant opposition and was quickly pulled by its sponsor. However, polls show that the people of Arkansas want reduced property taxes. When that happens the lost revenue must be made up somewhere. Most of the state doesn't care what the severance tax is. Look for more efforts to increase it.

Senate Bill 30, sponsored by Senator Mahoney, is the proposed Revised Administrative Procedure Act. This bill, an outgrowth of the discontent of the Legislature for certain state agencies,34 would drastically and adversely impact the Oil and Gas Commission. Embedded in the bill are some good ideas, such as an express prohibition of ex parte communications with the agency and its hearing officer, and rules designed to prevent an agency’s staff from confusing the roles of advocate and judge.

Unfortunately, the negative aspects of this proposal outweigh any positive aspects. Both the rule-making and adjudicatory processes are made so complicated that the Oil and Gas Commission will likely be paralyzed. Also, it is inadvertently drafted in such a way that William Wynne, present Commission contract counsel and hearing officer, would be disqualified from the

34Reportedly the Fish and Game and Highway Commissions.
latter role. The Oil and Gas Commission officially opposes this bill, at least if that agency is not expressly exempted from its application. The industry should as well. As of February 10, 1999, it was still in the Senate Committee on State Agencies and Governmental Affairs.

For almost two years two state agencies—the Oil and Gas Commission and the Public Service Commission—have sought to exercise conflicting jurisdiction over natural gas production and gathering facilities located upstream from the custody transfer meter. The Natural Resources Industries should support the Oil and Gas Commission in this fuss. That agency has a far better understanding of realities of the gas business than does the other, a body whose expertise is mostly in the area of utility rates. A bill has been prepared to resolve the jurisdictional dispute in favor of the Oil and Gas Commission. As of February 10, 1999, it had not been filed and, therefore, it had no bill number to report. It will almost certainly be introduced into the Legislature before the presentation of this paper.

Efficient administration of the judicial branch of government is not uniquely a natural resources law issue. It is an issue affecting every citizen and certainly every taxpayer. The ancient and arcane Arkansas trial court system is severely in need of reform. This state simply doesn’t need separate equity and law courts. The successful operation of Circuit/Chancery courts around the state have proven that beyond a reasonable doubt.

Also, the current system of partisan election of trial judges is senseless and dangerous. Its primary effect has been to create a lot of overnight Republican judicial candidates who have figured out how to avoid crowded Democratic Party primaries.

35 See the discussion of this dispute in Daily, Recent Developments - A Review of Cases, Legislation and Regulations Affecting the Natural Resources Industries, 1998 ARKANSAS NATURAL RESOURCES LAW INSTITUTE.
Senate Joint Resolution 9, Sponsored by Senator Beebe, proposes a constitutional amendment which would replace the judicial article of the Arkansas Constitution with a new article drafted by a joint committee of the Arkansas Bar Association and the Arkansas Judicial Council. If enacted it would give every general trial judge jurisdiction over both common law and equity cases without abolishing the other procedural distinctions between the two. It would also provide for non-partisan election of all judges and prosecuting attorneys.

Every citizen of this state should support the proposed new judicial article, both in the legislature and in the 2000 general election. Unfortunately, there is little assurance that it will succeed in the Legislature. The place is obsessed with property tax reform. SJR 9 is only one of thirty-one proposed constitutional amendments filed in the legislature as of February 10, 1999. Arkansas' Constitution permits only three referred amendments per legislative session. The competition is stiff.

**LOCAL ORDINANCES COMPLICATE LIFE IN THE VALLEY, RAISE LEGAL QUESTIONS**

Millions of years ago organic material was deposited on earth to eventually chemically decompose into natural gas. Much more recently human population increases have urbanized much of the surface of Western Arkansas which is underlain by the natural resources produced by all those rotted dinosaurs. Most of the citizens own lots so small that they produce only token royalties. Even worse, many own no minerals at all as a result of severance by former owners. The mood of the land doesn't much favor gas drilling in the neighborhood. Cities, towns and tiny hamlets have started enacting local ordinances designed to regulate drilling within corporate limits. Fort Smith’s ordinance was first.36 It is not unreasonable, considering that Fort Smith is a

36 *See Appendix I.*
city of about 75,000, deserving of a certain amount of land use regulation. The many wells within that city prove that the gas industry can live with this ordinance.

Unfortunately other towns have enacted ordinances which are clearly designed to keep gas wells out of town altogether. The towns of Ozark, Branch and Ratcliff\textsuperscript{37} have produced virtually identical examples of these onerous laws.\textsuperscript{38} At today's prices, gas just isn't worth all that hassle.

Recently a resident of Van Buren proposed the mother of all such ordinances to the city counsel of that town.\textsuperscript{39} Several successful wells have been completed in Van Buren in the last few years. These trigger big royalty checks to substantial landowners including the town itself and its school district. Moreover, production facilities have been made almost invisible.\textsuperscript{40} That isn't enough to dissuade the proponent of the Van Buren ordinance who learned that one possible drill site was near a lot which he owned in the town. So far the Van Buren City Council has been cool to the proposal but the mayor, inexplicably, seems to favor it.

The Oil and Gas Commission opposes all such local regulation of drilling. The Commission believes that it has exclusive jurisdiction in this area. In mid-98 its director sought a supportive opinion from the State Attorney General. He didn't get one. The Attorney General opined that local bodies could enact such legislation if that legislation was related to protection of

\textsuperscript{37}The latter two are but spots along Arkansas Highway 22.

\textsuperscript{38}See Appendix II.

\textsuperscript{39}See Appendix III.

\textsuperscript{40}Wellheads are placed below ground and are covered with steel plates. The minimal above ground equipment is well concealed. Because these wells are connected to a low pressure gas distribution line, it is unlikely that noisy compression will ever be needed.
health and welfare and at was least as restrictive as state law. These local ordinances certainly meet the second criteria. Only litigation will determine whether they exceed the former.

Perhaps the solution lies in the legislature. A new state statute simply providing for exclusive Oil and Gas Commission regulatory jurisdiction would work, but such a bill is unlikely to be very popular with legislators or their constituents. Reasonable exclusive state legislation regulating urban drilling in a manner similar to the Fort Smith Ordinance might have a better chance. Such a statute could still grant exclusive enforcement jurisdiction to the Oil and Gas Commission. If any such proposed legislation is currently in the works the author is unaware of it.

41 See Appendix IV.
APPENDIX IV
ARKANSAS’ ATTORNEY GENERAL OPINION RELATING TO
LOCAL ORDINANCE REGULATION OF GAS DRILLING

OPINION NO. 98-241

Opinion letter from Attorney General Winston Bryant
to Honorable Ned R. Price, Chairman of the
Arkansas Oil and Gas Commission

Dear Chairman Price:

You have requested an Attorney General opinion concerning certain municipal ordinances. You indicate that two cities of the second class in Arkansas have recently enacted ordinances that purport to restrict the mining and drilling of oil and gas wells within the city limits, and that require permits from the city to engage in such activities. The ordinances also impose penalties for violations. You note that these ordinances appear to conflict with the jurisdiction of the Oil and Gas Commission. Accordingly, you have asked:

Do cities of the second class have the authority to enact ordinances regulating the mining and drilling of oil and gas wells within the city limits?

It is my opinion that cities of the second class can enact ordinances regulating the mining and drilling of oil and gas wells within the city limits, but only if the ordinances do not conflict with state law or with any requirement of the Oil and Gas Commission, and only if the ordinances are not less significant than state law or any requirement of the Oil and Gas Commission.

Cities of the second class are empowered to regulate matters related to municipal affairs, including matters of public health, welfare and safety, and including matters related to the regulation of the use of property within the city limits. These various grants of power to municipalities to regulate matters related to municipal affairs are broad enough to encompass regulations concerning oil and gas drilling.

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1 Your opinion request was actually submitted by the Director of the Oil and Gas Commission pursuant to your direction. I have addressed my response to you rather than to the Director, in accordance with the requirements of A.C.A. § 25-16-706.

2 You have inquired about cities of the second class only. However, because the constitutional authority upon which my opinion is based is applicable to all municipalities, my conclusion would be the same with regard to cities of the first class and incorporated towns.
Nevertheless, these cities are prohibited by state law from enacting any ordinance that is inconsistent with or contrary to state law. Article 12, § 4 of the Arkansas Constitution states: "No municipal corporation shall be authorized to pass any law contrary to the general laws of the state . . ." Accord, A.C.A. §§ 14-42-307 (cities can exercise all powers conferred by state law that are "not contrary" to state law); 14-54-101 (cities can exercise powers that are "not inconsistent" with the general laws of the state); 14-55-101 (cities can enact ordinances that are "not inconsistent with the laws of the state").

State law grants the Oil and Gas Commission extensive and detailed authority to regulate matters relating to oil and gas drilling, including authority to grant permits for drilling and the authority to make rules and regulations governing the various aspects of such activities. For a detailed listing of the Commission's powers and duties with regard to these matters, see A.C.A §15-71-110. State law also establishes numerous requirements regarding these matters and sets forth penalties for violations. See 15-72-101 et seq.

Because of the breadth and detailed extent of the regulatory power given to the Oil and Gas Commission by state law, it is my opinion that the primary authority to regulate in the field of oil and gas matters belong to the Commission. Accordingly, if a municipality exercises its regulatory powers pursuant to the statutes cited previously, it must do so in a manner that is consistent with the Commission's authority. In my opinion, a local ordinance that is less stringent than the requirements of state law and the rules and regulations of the Commission would be inconsistent with and contrary to authority of the Commission. It would therefore be contrary to state law, and thus violative of the Arkansas Constitution.

However, a local ordinance that attempts to regulate oil and gas drilling through regulations and other requirements that are more stringent than state law would be constitutionally permissible (provided that the ordinance any and rules and regulations enacted thereunder are otherwise consistent with state law and the rules and regulations of the Commission.)

For the foregoing reasons, I conclude that cities of the second class can enact ordinances that regulate the mining and drilling of oil and gas wells within the city limits, but only if the ordinances are consistent with state law and the rules and regulations of the Oil and Gas Commission, and only if the ordinances are not less stringent than state law or any requirement of the Oil and Gas Commission.

Assistant Attorney General Suzanne Antley prepared the foregoing opinion, which I hereby approve.

Sincerely

/s/ Winston Bryant