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2011 UPDATE:
DEVELOPMENTS IN
NATURAL RESOURCES
LAW

Tom Daily

RECENT DEVELOPMENTS IN NATURAL RESOURCES LAW—2012 UPDATE
by Thomas A. Daily¹

Arkansas' increasing volume of new natural resources statutes and decisions continues at near-record pace. There may be more here than we can talk about, but we need to try. Here goes.

ACT 857 OF 2011 AMENDS ARKANSAS' STATUTORY PUGH CLAUSE BUT FAILS TO FIX IT

Regular attendees at this institute will recall our many discussions of Arkansas' "Statutory Pugh Clause." That statute, which was Act No. 330 of 1983, was enacted to read as follows:

Section 15-73-201 Lease extended by production - Scope

(a) The term of an oil and gas, or oil or gas, lease extended by production in quantities in lands in one (1) section or pooling unit in which there is production shall not be extended in lands in sections or pooling units under the lease where there has been no production or exploration.

(b) This section shall not apply when drilling operations have commenced on any part of lands in sections or pooling units under the lease within one (1) year after the expiration of the primary term, or within one (1) year after the completion of a well on any part of lands in sections or pooling units under the lease.

(c) The provisions of this section shall apply to all oil and gas, or oil or gas, leases entered into on and after July 4, 1983.

Somehow, this grammatical nightmare managed to escape judicial construction until 2010, when two separate Arkansas Supreme Court decisions dealt with one of its many problems. *Snowden v. JRE Investments, Inc.*² and *Southwestern Energy Production Company v. Elkins*³ dealt with a pretty simple argument. The lessors in

¹ Member, Daily & Woods., P.L.L.C., Fort Smith, Arkansas.

² 2010 Ark. 276, 2010 Ark. LEXIS 318.

³ 2010 Ark. 481, 2010 Ark. LEXIS 588.

those cases contended that their leases expired one year after the primary terms' expiration, regardless that additional wells were drilled on lease lands without longer than one year's interruption. Of the two cases, *Snowden*, which had pretty ugly facts, came to the court first. In *Snowden*, JRE's successor, Chesapeake Exploration, LLC, had dutifully drilled at least one well every year after the expiration of the primary term. However, every one of those wells was in the original section. Still, the court held that Section (b) of the statute prevented Section (a) from terminating the lease. In effect, the statute merely requires one well per year, somewhere on the lease.

Elkins was decided by the circuit court, adverse to the lessee, while *Snowden* was before the Supreme Court. Thus, Southwestern was obligated to appeal *Elkins*, to get that trial court ruling reversed, notwithstanding that its facts were even more favorable to the lessee than were the *Snowden* facts.⁴ The result in the Supreme Court was consistent.

Justice Danielson, who participated in only *Elkins*, dissented from that decision. His dissenting opinion encouraged the Legislature to rewrite the statute to say clearly what Justice Danielson knew the Legislature really meant to say, rather than what the majority of the Court held the Legislature had said, whether intended or not.

Well, guess what? The Legislature went right to work revising the statute. Here is the result of that effort:

Lease Extended by Production – Scope

(a)(1) The term of an oil and gas, or oil or gas, lease extended by production in quantities in lands in one (1) section or pooling unit in which

⁴ In *Elkins*, Southwestern's multiple wells were drilled in multiple sections covered by the lease.

there is production shall not be extended in lands in sections or pooling units under the lease where there has been no activity.

(2) Subsection (a) of this section does not prevent the parties to the lease from agreeing to a continuous drilling provision in order to extend the lease term to additional lands drilled or included in another section or unit if the lessor's waiver of the right to terminate the lease to the additional lands, sections or units where no activity has occurred before the expiration of the lease is fully set forth in the lease or another agreement in bold, enlarged, or other distinctive print.

(b) After the primary term of a lease in an uncontrolled oil field with no spacing requirements, a producing well shall contain a maximum of one (1) governmental quarter-quarter section as a production unit.⁵

Thus, in Subpart (a), "production or exploration" has been replaced with "activity."

I suppose we will get to learn what "activity" encompasses, in this context, case-by-scarey-case.

The former Subpart (b) is gone, altogether, eliminating the ability of a producer to hold its lease by continuous development, as occurred in *Snowden* and *Elkins*. It was replaced by (a)(2) which permits a lessor to opt out of the statute by language "set forth...in bold, enlarged, or other distinctive print." Presumably that sort of language might be incorporated into a multi-section lease executed by a professional mineral owner, but is unlikely to show up in many other lease forms.

I am at a loss to explain the new Subpart (b), dealing with the "uncontrolled oil field."⁶ Read literally, it makes absolutely no sense. Lands contain wells, not vice versa. Even if we make that correction, the statute does not clearly state which

⁵ Act No. 857 of 2011.

⁶ Uncontrolled oil fields are those producing from "...those pools that, prior to February 20, 1939, have been developed to an extent and where conditions are such that it would be impracticable or unreasonable to use a drilling unit at the present stage of development." A.C.A. §15-72-302(b)(1). (Repl. 2009)

“quarter-quarter section” might be the “production unit.” Worse, the word “maximum” implies that there will be instances where the “production unit” may be smaller than even that.

Sadly, the legislative drafters did not bother to fix some of the most glaring problems of the statute. They continue to confuse “sections” and “pooling units,”⁷ apparently assuming that they were, in all cases, one and the same.⁸ That is true a lot, but not always. The statute defies meaning when applied to South Arkansas situations where the unit is 1/4, 1/8 or 1/16, or less, of the governmental section, but the lease covers lands both inside and outside the unit, but inside the section.⁹ A similar problem is presented by those North Arkansas units which are composed of parts of more than a single section. While the bill was under consideration in the legislature, some of us oil and gas lawyers actually offered to fix this problem for the drafters.¹⁰ We were spurned.

Unlike the previous statute, the statute, as amended, is without an effective date. Here is the legislative history on that. As originally introduced, the changed law would have had the same effective date as the original, making it purport to apply to leases entered into on or after July 4, 1983. When it was explained to the bill’s primary

⁷“Pooling” is unnecessary. It is not otherwise used in the oil and gas statutes in connection with “unit.”

⁸ i.e. “Six of one, half dozen of the other.”

⁹ “Sections” is totally superfluous, in context, and this particular confusion would be eliminated were it removed from the statute, wherever it appears. Then, while we are at it, let’s overcome our need to say that “(1)” equals “one.”

¹⁰ A simple fix removes all occurrences of “section(s) or” and, for good measure “pooling” and the new term “production” as modifiers of “unit” or “units.”

sponsor that the U. S. Constitution prohibits impairing the obligation of contracts, the bill was amended to strike Subpart (c) from the statute altogether.

I am going out on a limb with a prediction: Someone out there is going to get into court with a case filed upon the premise that the statute now retroactively applies to existing leases, because it does not specifically say that it does not so apply. Such an argument should not succeed. In addition to the constitutional problem,¹¹ the Arkansas Supreme Court has held that statutes have prospective application only, unless a contrary legislative intent is clear.¹²

Arkansas is not the only jurisdiction with a statutory Pugh Clause. There are several others. Arguably, however, theirs are better written. Here is Oklahoma's:

In case of a spacing unit of one hundred sixty (160) acres or more, no oil and/or gas leasehold interest outside the spacing unit involved may be held by production from the spacing unit more than ninety (90) days beyond expiration of the primary term of the lease.¹³

The Oklahoma Supreme Court has held that statute, enacted in 1977, had application only to leases executed after its effective date.¹⁴ That decision was based, primarily, upon the presumption that retroactive application was not intended by Oklahoma's legislature. The constitutional argument was discussed by the Court, but the case was decided without need to go there.

¹¹ See *Adams v. Spillyards*, 187 Ark. 641, 61 S.W. 2d 686 (1933).

¹² *The Arkansas Rural Medical Practice Student Loan and Scholarship Board v. Luter*, 292 Ark. 259, 729 S.W.2d 402 (1987).

¹³ 52 O.S.1971 § 87.1(b).

¹⁴ *Wickham v. Gulf Oil Corporation*, 1981 OK 8, 623 P.2d 613 (1981).

ARKANSAS COURT OF APPEALS REJECTS BID TO EXTEND *KILLAM* RULING

One of the first lessons in title examination class involves learning the consequences of non-compliance with recording statutes. Those vary widely from state to state. In a “pure race” jurisdiction, you are not charged with notice of an unrecorded instrument, even if you know all about it. In a “notice” jurisdiction anyone with actual knowledge of an unrecorded instrument is estopped from being a BFP, innocent of the instrument. Arkansas has long been among the notice states. Then, in its 1990 decision, *Killam v. Texas Oil & Gas Corp.*¹⁵ the Arkansas Supreme Court took notice to a whole new dimension.

We title examiners know the *Killam* story by heart. There was a deed conveying a mineral interest to Killam and McMillan, who were partners at the time. For reasons unexplained, that deed was not recorded. Then, when the partnership dissolved, there was a second deed from McMillan to Killam, which was recorded. Additionally, Killam was assessed for taxes as the owner of a one-half mineral interest beneath the tract.

Texas Oil and Gas’ title examiner relied upon record title when he opined that the tract’s surface owner owned 100% of the minerals. He did notice the McMillan-to-Killam deed, speculating that it contained an error in its legal description. Texas Oil and Gas leased the surface owner, drilled wells, produced gas and got sued, by the heirs of Killam.

Both the Chancellor and Supreme Court ruled for the Killams, expanding the meaning of “notice.” Essentially, after if you are given a clue, or two, you then have an

¹⁵ 303 Ark. 547, 798 S.W.2d 419 (1990).

affirmative duty to go search for a the missing deed, which the grantee failed to record, in defiance of the recording statute. We have since observed that Arkansas is neither a pure race state, nor is it really a notice state. Rather, Arkansas is an oughtanoed¹⁶ state.

In the years since, title examiners have wondered where this *Killam* ruling would lead. Well, thanks to the Arkansas Court of Appeals, it did not lead where Walls, et al. wanted to take it in *Walls v. Humphries*.¹⁷ Humphries sold 100 acres in Van Buren County to Hernandez, who sold to Walls. Both sales were made pursuant to unrecorded contracts. Indeed, there was absolutely nothing recorded which would lead one to suspect the land was owned by anyone but Humphries.

In spite of having sold to Hernandez, Humphries executed an oil and gas lease, which became owned by SEECO. Humphries later deeded the minerals to Paraclifta and Claughton.

Walls and Hernandez then sued Humphries for fraud. They also sued SEECO, Paraclifta and Claughton. The theory against those defendants was based upon the *Killam* principle. According to Walls and Hernandez, their mere possession of the 100 acres was notice to all. Moreover, according to Walls' pleadings, SEECO, Paraclifta and Claughton should have noticed signs written in Spanish around the place and figured it out. Makes sense, right?

SEECO, Paraclifta and Claughton were granted summary judgment based upon

¹⁶ Oughtanoed, spelled here phonetically, means "ought to have discovered, and, therefore would have obtained the requisite knowledge."

¹⁷ 2012 Ark. App. 4, 2012 Ark. App. LEXIS 10.

the recording statute. The Court of Appeals affirmed. Apparently, in this case, the clues to the unrecorded instruments were too weak. The court's opinion is lacking in detail. However, here is a suggested distinction between *Walls* and *Killam*. In *Killam*, the clues to the unrecorded deed lay within a subsequent recorded deed and the tax records, both public records. To discover the unrecorded Hernandez and Walls contracts would have required on-the-ground inspection of the land, which the Court of Appeals held was an idea repugnant to the recording statute.

**U. S. DISTRICT COURT HOLDS THAT WALLS' FAILURES TO CONSENT TO LEASE
ASSIGNMENTS WERE WAIVED AND/OR UNREASONABLE**

It has been a somewhat litigious year for the Walls family. In *Walls v. Petrohawk Properties, LP, et al.*,¹⁸ they sought cancellation of assignments of an oil and gas lease which they had executed in favor of Griffith Land Services in 2005. The lease contained a provision requiring its owner to obtain the Walls' consent for any assignment. It has been assigned three times, from Griffith to Alta Resources, then to Petrohawk and, ultimately to Exxon Mobil. Requests for consent, sent to the Walls, were ignored. Production resulted and the Walls were paid royalties exceeding \$200,000. Finally, when they were requested to consent to the last assignment they claimed that all assignments were void and that they were entitled to damages for the breach. The United States District Court ruled, summarily, against them. When they accepted the benefits of the lease they waived their right to complain of the assignments made without their consent. Their refusal to consent to the assignment to Exxon Mobil was just plain unreasonable. Arkansas law requires a duty of

¹⁸ 2012 U.S. Dist. LEXIS 4644 (E.D. Ark. Jan. 13, 2012).

reasonableness in the exercise of a power to refuse to consent to assignment¹⁹

**ARKANSAS COURT OF APPEALS REJECTS WALLS' CHALLENGE
TO AOGC INTEGRATION ORDER**

This year's third Walls case was *Walls, et al. v. Arkansas Oil and Gas Commission, et al.*²⁰ There, Zelda Walls and her son, Richard Gawenis, challenged an integration order of the Arkansas Oil and Gas Commission which awarded them options for their unleased land in Van Buren County, including leases for a bonus of \$800 per net mineral acre and a 1/6 royalty or, alternatively, \$225 per net mineral acre and a 3/16 royalty. The Walls insisted that the Commission was bound to order payment to them of \$1,601.51 per net mineral acre and a 20% royalty, because those were lease terms upon which Chesapeake Exploration, LLC had secured a lease covering lands in the unit in question, and other lands, from the Arkansas Game and Fish Commission.

By statute, the Commission is not bound to blindly award bonus and royalty equal to the highest paid, without considering all the circumstances. Rather, it is required to offer a transfer of the unleased party's interest "for a reasonable consideration and on a reasonable basis."²¹ Here, witnesses testified that the lease from the Arkansas Game and Fish Commission to Chesapeake was not market-representative, justifying the Commission disregarding it.

¹⁹ *Warmack v. Merchants National Bank of Fort Smith*, 272 Ark. 166, 612 S.W.2d 733 (1981).

²⁰ 2012 Ark. App. 110, 2012 Ark. App. LEXIS 197.

²¹ A.C.A. § 15-72-304(b)(4) (Repl. 2009).

MINERAL AD VALOREM TAX LAW EASES INTO THE POST-*JONES V. FLOWERS* ERA

Lawyers and landmen are tasked with determining ownership of minerals and royalty, in order that leases are taken from the right people and, ultimately, royalties are paid only to persons entitled thereto. In Arkansas, some of the more confusing title issues involve the validity of limited warranty deeds issued by Arkansas' Commissioner of State Lands following the state's attempt to forfeit those lands for non-payment of ad valorem taxes levied upon the severed mineral estate. As we have seen over the years, most such forfeitures were void, in the first place, because of one or more defects in the assessment and/or forfeiture process. For example, every attempted forfeiture of a severed mineral interest, for a tax year earlier than 1986²² suffers from the fatal defect that the assessor failed to subjoin the assessment of the severed interest to the assessment of the surface of the same lands.²³ Other defects include the assessor and Land Commissioner's use of an abbreviated "part of" legal description, instead of an assessed tract's full metes and bounds description.²⁴

²² The Supreme Court's subjoinder requirement was repealed by Act No. 961 of 1985. Given Arkansas' pay-in-arrears taxing system, the next assessment after that act's effective date was made in January, 1986, for the tax year, 1986, though the tax did not become delinquent, if unpaid, until October, 1987. Whew!

²³ See, e.g., *Selrahc Limited Partnership v. SEECO, Inc., et al*, 2009 Ark. App. 865 and authorities cited therein.

²⁴ See *Am. Portland Cement Co. v. Certain Lands*, 179 Ark. 553, 554, 17 S.W.2d 281, 281 (1929); *Buchanan v. Pemberton*, 143 Ark. 92, 95–96, 220 S.W. 660, 661 (1920); *Guy v. Stanfield*, 122 Ark. 376, 376, 183 S.W. 966, 967 (1916); *Boswell v. Jordan*, 112 Ark. 159, 164, 165 S.W. 295, 296–97 (1914); *Dickinson v. Ark. City Improv. Co.*, 77 Ark. 570, 576, 92 S.W. 21, 24 (1906); *Covington v. Berry*, 76 Ark. 460, 464, 88 S.W. 1005, 1006 (1905); *Rhodes v. Covington*, 69 Ark. 357, 359, 63 S.W. 799, 799–800 (1901); *Boles v. McNeil*, 66 Ark. 422, 425, 51 S.W. 71, 71 (1899); *Little Rock & Ft. S.R. Co. v. Huggins*, 64 Ark. 432, 434–35, 43 S.W. 145, 146 (1897); *Cooper v. Lee*, 59 Ark. 460, 463–64, 27 S.W. 970, 971 (1894); *Patrick v. Davis*, 15 Ark. 363, 371 (1854). Adding tax

Then, in 2006, the United States Supreme Court, in *Jones v. Flowers*,²⁵ a case which involved a surface interest, held that the Arkansas tax sale statute, which required only that notice be sent to the delinquent taxpayer, by certified mail, was constitutionally deficient, at least as applied to the facts of that case.²⁶ Because *Jones v. Flowers*' ruling was somewhat dependant upon its particular facts, and because the Supreme Court declined to prescribe a constitutional-in-every-case notice method, we are left to determine, case-by-case, whether notice of a pending tax sale was constitutionally copasetic. Here are a couple of cases to help us along with that process.

In *Morris v. LandNPulaski, LLC, et al*,²⁷ two separate pre-sale notices to the taxpayer, Morris, were returned, marked "unclaimed." The tax sale then ensued, without further notice to Morris. However, after the sale, but still during the statutory redemption period, the Commissioner sent a third notice to Morris, via regular mail, which "advised that his property had been sold and that 'in order to cancel the sale and retain the ownership of the parcel, all taxes, penalties, interest, and fees must be paid in full before 8/6/2005.'"

The Arkansas Court of Appeals upheld the *Morris* tax sale, holding that the parcel numbers to the description does not help, for obvious reasons. See, *Patton v. Blake*, 362 Ark. 538, 210 S.W.3d 74(2005).

²⁵ 126 S.Ct. 1708 (2006).

²⁶ The certified notice was returned, "unclaimed" and the Commissioner took no other steps to notify the taxpayer, though the return of the notice informed him that the notice had not been received.

²⁷ 2009 Ark. App. 356, 309 S.W.3d 212.

regular mail notice satisfied the due process objection based upon *Jones v. Flowers*. This result can be justified by a highly mechanical reading of *Jones v. Flowers*, where the Supreme Court did suggest that a regular mail notice might be sent after the Commissioner learns that his certified notice failed. However, there are other facts which justify the result in *Morris*, while not establishing the premise that regular mail notice would suffice in every case. In *Morris*, there was no dispute that the address to which all notices were sent was Morris' correct address. There was also some disputed testimony that Morris once admitted to receiving the third notice.

A somewhat contrasting case is *Linn Farms and Timber Limited Partnership v. Union Pacific Railroad Company, et al*,²⁸ involving mineral rights owned, of record, by Missouri Pacific Railroad Company. Missouri Pacific, formerly headquartered in Fort Worth, Texas had merged into Union Pacific, with headquarters in Omaha. Oblivious to that, both the Van Buren County tax collector and the Commissioner of State Lands sent certified notices addressed to Missouri Pacific at its former Fort Worth post office box. These notices, sent two years apart, were each returned with the notation "NOT DELIVERABLE AS ADDRESSED—UNABLE TO FORWARD." No further notice to Missouri Pacific was attempted.

The record before the 8th Circuit Court of Appeals established that the Commissioner actually had used the railroad's correct Omaha address in connection with tax matters in other counties, but, through lack of internal communication, continued to use the old Fort Worth address for lands in Van Buren County.

²⁸ 661 F.3rd 354 (8th Cir. 2011).

The Federal Court of Appeals voided the sale to Linn Farms, holding that the notice was constitutionally deficient. The court faulted the Commissioner for not discovering the correct address within his own records and also noted that a simple internet search for a business as prominent as the railroad would have enabled it to be located.

In an unrelated matter, the Arkansas Supreme Court upheld the dismissal of a challenge to Arkansas' method of valuing producing mineral interests for tax purposes in *May, et. al v. White County, Arkansas, et. al.*²⁹ The taxpayers sought to challenge, as an illegal exaction, an ad valorem tax based upon a valuation which was established by a formula requiring multiplication of the previous year's production by an "average contract price."³⁰ That number, assumed income, is then further massaged to calculate an assessed value and reduced to the fraction of the royalty owner's interest. The calculation serves administrative convenience, but, in the real world, it is pretty bogus.

The complaint raised a plethora of other constitutional claims, all of which were dismissed by the trial court. The Arkansas Supreme Court affirmed the dismissal. Its denial of most of the claims was based upon its ruling that they lacked substance. However, it dismissed the valuation claim for procedural reasons, saying that the taxpayers are first required to pursue administrative remedies before the counties' equalization boards.

²⁹ 2012 Ark 7, 2012 Ark. LEXIS 12.

³⁰ A mostly "made-up" number, produced by the Arkansas Assessment Coordination division, which is unrelated to the actual price received for the taxpayer's royalty gas.

CIRCUIT COURT STROHACKER DECISIONS DRAW INTEREST

Just for background, what immediately follows is the portion of this paper from 2011 devoted to the Arkansas *Strohacker* Rule:

Everyone understand the Arkansas *Strohacker* Rule?³¹ Let's say it now, in unison:

A generic mineral grant or reservation³² includes specific substances if, and only if, those substances were generally recognized, in legal and commercial usage at the time and place of the grant or reservation, to be minerals.

Most of the *Strohacker* litigation, for obvious reasons, has been about when oil and gas were first recognized as minerals in each of the several Arkansas counties where those minerals have now become rather valuable.³³

Recently our *Strohacker* decisions have come out of Federal Court and have involved deeds with dates in the 1930's rather than dates between the 1890's and 1910, as was the case with the earlier decisions. The most important of those was *Griffis v. Anadarko E. & P. Co.*³⁴ Anadarko is the successor to the railroad, which made the mineral reservation in a 1936 deed. U. S. District Judge Bill Wilson granted Anadarko's requested summary judgment, and the Court of Appeals affirmed.

In an opinion by Judge Arnold, the Court of Appeals avoided the location-specific *Strohacker* analysis, observing that in *Strohacker*, itself, decided in 1941, the court stated "it can no longer be doubted that a reservation of minerals, or of mineral rights, is sufficient to identify oil and

³¹ Named for *Missouri Pacific Railroad Company v. Strohacker*, 202 Ark. 654, 152 S.W.2d 557 (1941).

³² i.e. "all coal and mineral deposits."

³³ The best compilation and explanation of these cases ever written is in Gerald DeLung's article, **The Strohacker Doctrine—An Arkansas Rule of Property**, which was presented at the 1975 version of this institute and was then published in the July 1975 issue of **Arkansas Lawyer** magazine.

³⁴ 606 F.3d 973 (8th Cir. 2010).

gas.”

The court then discussed *Sheppard v. Zeppa*³⁵ where, according to the initial *Griffis* opinion, the Arkansas Supreme Court, construing a [1935] deed held that oil and gas were, by then, well recognized as minerals, throughout the state.

The Appellants petitioned for rehearing. It turns out that the deed which the Arkansas Supreme Court construed in *Shepard v. Zappa* was actually executed in 1937, rather than 1935, as mistakenly stated in the initial *Griffis* opinion. Therefore, since the *Griffis* deed was a 1936 deed, the rehearing petition contended the court should change its mind.

Judge Arnold appeared unamused. In his opinion denying rehearing, he explained that his previous analysis was intended to note the difference between deeds executed in the 1930's and those 1890-1910 deeds which raised legitimate *Strohacker* issues. Moreover, Judge Arnold flatly predicted that the Arkansas Supreme Court would agree. I concur in that prediction.

No discussion of the *Strohacker* doctrine would be complete without a discussion of the late great Justice McFadden's view on the matter. In his dissenting opinions in *Stegal v. Bugh*³⁶ and *Ahne v. Reinhart & Donovan Co.*,³⁷ Justice McFadden accused the remainder of his court of “drifting like a ship without a rudder” in its county-by-county, fact-based analysis. Justice McFadden suggested a day-certain for all of Arkansas. The date he advocated, January 1, 1900, is certainly reasonable and, if adopted, even now, would bring some certainty to an area where that needed certainty is lacking.

We are not through with *Strohacker* in the Fayetteville Shale counties. I am told that there are pending state court suits involving 1903 to 1910 deeds in White County. It is not too late to follow Justice McFadden's suggestion.

Now for the update, but first a correction. One of the pending cases, *Nicholson*

³⁵ 199 Ark. 1, 133 S.W.2d 860 (1939).

³⁶ 228 Ark. 632, 310 S.W.2d 251 (1958).

³⁷ 240 Ark. 691, 401 S.W.2d 565 (1966).

v. *SEECO, et al* (including Upland Industrial Development Company³⁸ was, indeed, a White County case, and involved a 1903 reservation. However, the other two, *Dowell Farms, LLC v. Union Pacific Land Resources Corp.*³⁹ and *Sponer v. Union Pacific Land Resources Corp. ("UPRC")*⁴⁰ were Conway County cases, involving reservations dated in 1893 and 1897, respectively.

Each of those has now been decided by its respective Circuit Court, which, in each case, did Justice McFadden proud. *Dowell Farms* and *Sponer*, involving pre 1900 reservations, went for the surface owners (against UPRC.) The UPRC's alter ego, Upland, won a circuit court victory in *Nicholson*, not surprising to Justice McFadden, considering the 1903 date of the reservation.

UPRC did not appeal its adverse results in *Dowell Farms and Sponer*. However, the surface owners have appealed from the decision in *Nicholson*. Briefs are being filed as we write this.

The most remarkable thing about these cases is the manner in which Upland/UPRC tried them. In each case, Upland/UPRC's principal witness was Dr. Michael Dugan, a distinguished professor, emeritus, of history, especially Arkansas history, at Arkansas State University. Dr. Dugan is generally acknowledged as the leading expert in the history of Arkansas' newspapers, among other things. The thrust of his testimony was that, by the 1890's and, certainly, by 1900, literate people

³⁸ White County Circuit Court Case No. CV-2010-280.

³⁹ Conway County Circuit Court Case No. CV-2011-047.

⁴⁰ Conway County Circuit Court Case No. CV-2009-265.

throughout North Arkansas regularly read newspapers, particularly the *Arkansas Gazette*, and were aware of oil and gas development, not only locally, but all over the state. Thus, he concluded that, by the dates of the reservations at issue, legal and commercial usage of the term “mineral” included oil and gas.

It is not surprising that Dr. Dugan’s opinion’s were more convincing in *Nicholson*, than in the two Conway County cases. By 1903 a number of gas wells had been drilled in Arkansas River Valley counties, some successfully. One in particular, drilled in 1902 near the town of Mansfield in Sebastian County, was widely reported.

The surface owners trial methodology was more conventional. They showed that no oil and gas deeds or leases had been filed in White County by the time of the *Nicholson* reservation, and rested. Thus, we will have, on appeal, a test of whether Upland’s “historian” method of proof will carry the day over the conventional. Come back next year for the answer. I am confident that the spirit of Justice McFadden will be listening.

ARKANSAS COURT OF APPEALS DECIDES THREE APPEALS INVOLVING MINERAL OWNERSHIP

Barger v. Ferrucci,⁴¹ construed the following reservation language within a warranty deed: “[s]ubject to reservation of all oil, gas and other minerals,” which appears after the legal description, the deed’s granting clause. The Arkansas Court of Appeals affirmed the trial court’s ruling that the deed was unambiguous and that the quoted language was indeed a mineral reservation, as opposed to a mere limitation upon the grantor’s warranty, as the appellee, the successor in interest to the deed’s

⁴¹ 2011 Ark. App. 105, 2011 Ark. App. LEXIS 112.

grantee, had argued.

In *Robison v. Lee*,⁴² Plaintiffs, remaindermen to a mineral interest, sued their grantor and his life-tenant father, challenging the validity of the father's life estate, as well as the validity of their ratification of the life tenant's oil and gas lease. Their challenge to the ratification was based upon alleged failure of consideration. However, the ratification, which the remaindermen admittedly had signed, contained a recitation acknowledging that consideration had been received by them. The trial court granted summary judgment to the life tenant. The Arkansas Court of Appeals affirmed, holding that, in the absence of fraud, the Parol Evidence Rule barred any evidence contradicting the deed's express language.

*Burgess v. Lewis*⁴³ was a suit brought by the mineral owners, against the successors a former owner, who reserved a non-participating royalty interest in a 1921 deed with the following language:

...hereby retain One Half interest in any and all royalties that may at any time derive from this land, in any way, from oil, gas, or mineral. This land was leased on the First day of August, 1921 for Mineral, Oil & Gas.

The current mineral owners contended that the non-participating royalty interest, thus created, was limited to the enumerated 1921 lease, and thus had expired.

The Arkansas Court of Appeals held otherwise, affirming the trial court's determination that the reference to the 1921 lease was designed merely to protect the grantor from breach of the deed's general warranty of title.

⁴² 2010 Ark. App. 839, 2010 Ark. App. LEXIS 884.

⁴³ 2011 Ark. App. 362, 2011 Ark. App. LEXIS 386.

**ARKANSAS COURT OF APPEALS DECIDES TWO SIMILAR LEASE INTERPRETATION CASES,
DIFFERENT LEASE LANGUAGE YIELDS DIFFERENT RESULTS**

I am often asked to explain the Arkansas rule on this-or-that issue involving the meaning of a particular provision of an oil and gas lease. Over the years, I have developed a stock answer, which is really a question: What, exactly, does the lease say? You see, Arkansas law treats an oil and gas lease as a contract. All oil and gas leases are not identically written, so each will be interpreted, according to its own unique language.

2011 brought us poster-child proof of that. In *Garner v. XTO Energy Inc.*⁴⁴ the Appellants contended that an oil and gas lease expired when its primary term expired.

The lease provision at issue reads as follows:

If prior to the discovery of oil or gas on the leased premises, Lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof shall cease for any cause, this Lease shall not terminate if Lessee commences additional operations as provided herein within ninety (90) days thereafter, or, if it be within the primary term, then not until the expiration thereof. If at, or after, the expiration of the primary term oil or gas is not being produced on the leased premises, but Lessee is then engaged in operations thereon as provided herein, this Lease shall remain in force so long as operations are prosecuted (whether on the same or successive wells) with no cessation of more than ninety (90) days, and, if production results therefrom, then as long as production is maintained pursuant to the terms hereof.

Drilling began prior to the primary term's expiration, but the well was not completed until two months after the primary term expired. Appellants' suggested interpretation of the above-quoted lease language caused it to apply only in situations where a dry hole had been drilled or a productive well had ceased to produce.

⁴⁴ 2011 Ark. App. 606, 2011 WL 4824319.

The Court of Appeals was unconvinced by that novel argument, which it termed “a monolithic set of conditions, all of which must be satisfied, in order for the primary term to be extended.” Rather, the court found the language to clearly extend the lease when operations were ongoing at the primary term’s expiration.

Now, contrast that decision with that of the Court of Appeals in *Petrohawk Properties, LP v. Heigle*.⁴⁵ Here, the “equivalent” lease provision was differently, and somewhat clumsily written:

It is agreed that this lease shall remain in force for a term of Five (5) years from the date (herein called the primary term) and so long thereafter as oil and gas, or either of them, is produced from said land by the Lessee, **and** as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation for more than ninety (90) consecutive days.

When, as in *Garner*, the lessee sought to perpetuate the lease by commencing operations just before the end of the primary term the lessors sued. According to those lessors, the word “and” is not ambiguous. “And” implies both. Operations, alone, will not extend the lease term. Rather, both operations **and** production are required.

Every one of us geniuses who kibitzed about this case was in lock-step agreement. This lease form has an unfortunate, but obvious, scrivener’s error. “**And**” is supposed to be “**or**.” If you make that simple change, suddenly the lease makes sense, and order is restored to our universe. Unfortunately, not one genius among us is a member of an appellate court in this state, nor are we likely to ascend to that spot, any time soon. In the Arkansas Court of Appeals, what you say is what you get.

⁴⁵ 2011 Ark. App. 709.

Heigle is not the full-blown disaster it could have been,⁴⁶ through divine grace, and another of the flawed lease form's provisions. "Operations" are defined to include production. Therefore, as confirmed in the Court of Appeals' opinion, production will extend the lease, because, by definition, "production" is both "production" and "operations." Here, because of the lease form's awkward language, we meet ourselves traveling both from and toward. "Production," a single condition, satisfies the conjunctive conditions of the lease, but "Operations," the other condition, is one condition short of the goal.

ARKANSAS COURT OF APPEALS EXPLAINS THAT FRAUDULENT CONCEALMENT OF A FRAUD CAUSE OF ACTION MUST BE DISTINGUISHED FROM FRAUD, ITSELF

In *Hipp v. Vernon L. Smith and Associates, et al.*⁴⁷ the Hipps contended that they were unaware of a lessee's extension option provision in their lease and that their signatures were procured by the broker's fraud in not explaining that provision, particularly since they had previously refused to execute leases providing for ten year primary terms. Fatally, their suit was brought outside Arkansas three-year Statute of Limitations on fraud.

The Hipps acknowledged the three-year statute, but claimed fraudulent concealment of their cause of action. The Court of Appeals affirmed dismissal of the suit. Even if the lease broker had fraudulently induced the execution of the leases, that fraud did not conceal the cause of action. The plaintiffs' delay in bringing suit was more

⁴⁶ There are hundreds of identical lease forms extant, covering many thousand productive acres.

⁴⁷ 2011 Ark App. 611, 2011 WL 4824296.

the result of their failure to read their own lease for more than the three-year limitations period.

**ARKANSAS COURT OF APPEALS USES REFORMATION TO AVOID APPLYING
ARKANSAS AFTER-ACQUIRED-TITLE STATUTE**

Mauldin v. Snowden, et al.⁴⁸ involved Arkansas' after-acquired title statute,⁴⁹ which provides:

If any person shall convey any real estate by deed purporting to convey it in fee simple absolute, or any less estate, and shall not at the time of the conveyance have the legal estate in the lands, but shall afterwards acquire it, then the legal or equitable estate afterwards acquired shall immediately pass to the grantee and the conveyance shall be as valid as if the legal or equitable estate had been in the grantor at the time of the conveyance.

Mr. and Mrs. Snowden owned the surface of two tracts. Cenark Oil and Gas Company, a corporation owned by the Snowdens, owned all of the minerals beneath one tract and one-half of the minerals beneath the other. The Snowdens conveyed both tracts to Mr. and Mrs. Flory by warranty deed and the Florys then conveyed them to the Appellants, again by warranty deed. Then the Snowdens caused Cenark to convey its mineral interests to the Snowdens.

The Appellants sued, seeking to quiet title to those mineral interests pursuant to the after-acquired title statute. Alternatively, the Appellants sought damages from the Florys for breach of the warranty of title.

At trial the Snowdens and Florys offered evidence that all parties, including the Appellants, understood that minerals were not being conveyed, notwithstanding the

⁴⁸ 2011 Ark. App. 630, 2011 WL 5080663.

⁴⁹ Ark. Code. Ann. § 18-12-601 (Repl. 2003).

general warranties in both deeds. Thus, the Snowdens and Florys sought equitable reformation of the deeds to except minerals therefrom.

The Arkansas Court of Appeals affirmed the trial court's decree reforming the deeds as requested. Thus, the after-acquired title statute did not apply.

**ON THE QUESTION: WHO-OWNS-COAL-BED-METHANE? SCORE ONE FOR THE GAS OWNER-
-THIS TIME IN A CASE ARISING IN ARKANSAS**

In the case of *Enervest Operating, LLC v. Anadarko Petroleum Corporation*⁵⁰ the single legal issue was whether coalbed methane gas is owned by the coal or the gas owner, when coal and gas are separately owned beneath a producing tract. The issue was one of first impression in Arkansas, but has been litigated a good bit, lately, in other jurisdictions. The United States District Court's opinion analyzed the considerable conflicting national authority on both sides of the issue before concluding that, under Arkansas law, coalbed methane gas is gas, rather than coal, and is the property of the separate gas owner.

**U. S. DISTRICT COURT REFUSES TO VOID LEASE TAKEN BY LANDMAN
ACCUSED BY LESSOR OF THE UNLICENSED PRACTICE OF LAW**

*Vanoven v. Chesapeake Energy Corp*⁵¹ is an ongoing putative class action lawsuit, primarily concerning claims that certain post-production costs have been improperly deducted from royalties paid to the putative class. One issue raised by the complaint was the contention that Chesapeake's lease broker was liable to the putative class because the oil and gas leases at issue were prepared by landmen who were not

⁵⁰ No. 2:09-CV-02135-PKH (W.D. Ark., Mar. 31, 2011).

⁵¹ No. 4:10-CV-0158 BSM, 2011 WL 1042251 (E.D Ark. Mar. 22, 2011).

licensed attorneys who thus, according to the complaint, violated Arkansas Supreme Court rules forbidding the unauthorized practice of law.

The United States district judge dismissed that count of the complaint. The court noted that there was uncertainty whether the landmen's actions constituted law practice. It then declined to decide that question, holding, instead, that the complaint advanced no theory how the putative class was damaged by the landmen's actions.

**EIGHTH CIRCUIT COURT OF APPEALS RULES AGAINST
ARRINGTON IN COLD-DRAFT CASE**

In three consolidated appeals⁵² the Eighth Circuit Court of Appeals affirmed summary judgments against Arrington Oil & Gas, Inc. in suits brought by mineral owners whose lease drafts had been dishonored, when Arrington thought better of exploring for Fayetteville Shale Formation Gas in Phillips County, Arkansas.

Arrington had raised a number of defenses to the action, all of which were rejected by both the district court and appeals court. The most interesting of those is that it was not obligated to honor the drafts because of lack of mutuality of obligation, since the lessors were not required to execute the leases and present the drafts. Arrington had cited a Texas Court of Appeals decision for that proposition,⁵³ but the appeals court distinguished that decision as being limited to liability based solely upon the bank draft, as opposed to the underlying contract, which became binding when the lessors accepted Arrington's offer to lease by executing the lease forms and returning

⁵² *Smith v. Arrington Oil & Gas, Inc.*; *Foster V. Arrington Oil & Gas, Inc.*; *Hall V. Arrington Oil and Gas, Inc.*, 2012 U.S. App. LEXIS 161 (8th Cir. 2012).

⁵³ *Spellman v. Lyons Petroleum, Inc.*, 709 S.W.2d 295 (Tex. Ct. App. 1986).

them with the drafts.

**UNITED STATES DISTRICT COURT AFFIRMS
FEDERAL LAND BANK'S RIGHT TO RESERVE MINERAL INTERESTS**

Plaintiffs were the successors in interest to the purchasers of lands from the Federal Land Bank of St. Louis, a farm loan bank chartered and operated under the former Federal Farm Loan Act of 1916.⁵⁴ That deed had reserved a one-half mineral interest to the Land Bank. In *Larry W. Nixon, et al v. Agribank, FCB*⁵⁵ they claimed that the Land Bank's retention of a perpetual mineral interest violated the Farm Loan Act, and was therefore invalid. The court granted a motion to dismiss the action, agreeing with AgriBank⁵⁶ that the practice of reserving perpetual mineral interests fell into an exception from the act's prohibition because the Farm Credit Administration's interpretation of prohibition to exclude mineral estates in 6 C.F.R. 10.64, was sufficient "special permission," as contemplated by that act. As an alternative reason for dismissing the action, the court noted that repealed statutes cannot be further enforced unless "competent authority" has kept the statute alive for that purpose. The court found that there was no such "competent authority" with respect to the repealed Federal Act.

**U. S. DISTRICT COURT EXPLAINS THE IMPLIED COVENANTS WHILE DENYING SPINDLETOP'S
ATTEMPT TO BEAT LEASE CANCELLATION SUIT WITH SUMMARY JUDGMENT**

Spindletop Oil & Gas Company has a "shut-in" gas well in Faulkner County. Once upon a time, the well produced, somewhat pitifully, from the Hale Sandstone

⁵⁴ 12 U.S.C. § 781 Fourth (b)(repealed 1971).

⁵⁵ 2011 U.S. Dist. LEXIS 113370 (E.D. Ark. Sept 30, 2011).

⁵⁶ AgriBank is the current corporate name of the Federal Land Bank of St. Louis.

Formation. It is now surrounded by Fayetteville Shale wells, the nearest being four-tenths of a mile away. Regardless, Spindletop's well has not produced in ten years, allegedly for lack of market.

In their lease cancellation suit Spindletop's royalty owners contended that its well was incapable of commercial production or, in the alternative, that Spindletop leasehold interest should be cancelled for breach of implied covenants to market and to develop. Somewhat remarkably, Spindletop moved for summary judgement. That motion was denied by the district judge,⁵⁷ whose opinion made it pretty clear that Spindletop was in deep trouble on the merits of the case, as well.

**UNITED STATES DISTRICT COURT UPHOLDS CHESAPEAKE'S
"ENTIRE SECTION" LEASE LEGAL DESCRIPTION**

Early during the Fayetteville Shale Play, Chesapeake Exploration, LLC's leasing program obviously got ahead of its title work. As a consequence, its lease brokers were leasing off the county tax records. The leases taken often described the entire section in which the lessor was thought to own something, and contained a statement that the lessor intended to lease all he owned, whether or not correctly described.

*Barber v. Chesapeake Exploration, LLC, et al.*⁵⁸ was brought by a lessor who was originally paid a bonus based upon acres which he was known to own. When Chesapeake later discovered that Barber owned additional mineral interests within the section, it tendered additional bonus, which Barber refused. Among other things,

⁵⁷ *Acre v. Spindletop Oil and Gas Company*, 2011 U.S. Dist. LEXIS 17911 (E.D. Ark. Feb. 22, 2011).

⁵⁸ 2012 U.S. Dist. LEXIS 4643 (E.D. Ark. Jan 13, 2012)..

Barber challenged the lease's legal description as invalid. Citing decisions of the Arkansas Supreme Court,⁵⁹ the United States District Judge agreed with Chesapeake that the lease's description was adequate.

Whew. That is enough for one year, already. I am wishing things would slow down a bit for next year.

⁵⁹ *Ketchum v. Cook*, 220 Ark. 320, 247 S.W.2d 585 (1936); *Turrentine v. Thompson*, 193 Ark. 253, 99 S.W.2d (1936); *Snyder v. Bridewell*, 167 Ark. 8, 267 S.W. 561 (1824).