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Recent Developments in Natural Resources Law-2011 Update

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When I was first allowed to produce this update, now, many years ago I was challenged to find interesting cases from Texas, Oklahoma, Louisiana and elsewhere to help fill the allotted hour, along with the one or two cases that actually came from Arkansas. Back then, our local oil and gas simply was not worth suing over. No more. Arkansas’ Appellate Courts, together with our U. S. District Courts and the 8th Circuit Court of Appeals are turning out important natural resources decisions at record pace. The cases which follow are all Arkansas. Time’s a-wastin. Lets get with the program.

**SELRAHC CASE FINALLY HEARS THE FAT LADY’S SONG**

Those of us who read this report annually will be familiar, by now, with *Selrahc* Limited Partnership v. SEECO, Inc., et. al. That case was discussed in this space at both the 2009 and 2010 Natural Resources Law Institutes. Let us review.

Selrahc’s predecessor bought a tax deed from the Arkansas Commissioner of State Lands of severed mineral interests in Van Buren County, which had purportedly been forfeited for failure of their owners to pay separately assessed ad valorem taxes on the interests. When Selrahc could not find a responsible oil and gas producer

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

2 Apparently the original old southern proverb was “The carnival is not over until the fat lady sings.” The phrase became popular in sportscasting to describe the home team’s rallying from behind and, ultimately, was Yogi-ized by Yogi Berra, himself, becoming “It ain’t over till it’s over.”

3 Charles spelled backwards, of course.


5 Virtually everyone with over a day’s experience working in Arkansas knows that those sales convey worthless title in virtually every case.
gullible enough to pay it for a lease, it brought suit against the real owners and their mineral lessees to quiet title.6

The Van Buren County Circuit Court and the Arkansas Court of Appeals both rejected Selrahc’s claim, adhering to the long line of Arkansas cases invalidating purported tax forfeitures of severed mineral interests because of the failure to subjoin those minerals to the surface of the same lands upon the assessment books. In a per curiam order issued April 15, 2010, the Arkansas Supreme Court denied the unsuccessful appellant’s petition for review. Finally, the United States Supreme Court has denied the appellants’ petition for writ of certiorari.7 Barring some sort of ecclesiastical review, this one is finally over.8

ARKANSAS SUPREME COURT CONFIRMS EMINENT DOMAIN RIGHTS OF GAS GATHERING PIPELINES--EXPLAINS COMMON CARRIER RESPONSIBILITIES OF PIPELINES WHICH CONDEMN

Arkansas’ statutes concerning the Eminent Domain Rights of non-utility pipelines leave a bit to be desired, but here they are:

Section 23-15-101 Common carriers - Eminent domain

(a) All pipeline companies operating in this state are given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service.

(b) The procedure to be followed in the exercise of the right shall be the same as prescribed in Sec. 18-15-1201 et seq. relating to railroad companies, telegraph companies, and telephone companies.

6 Not only that, but Selrahc also executed a lease in favor of a similarly owned company, named Galaxy. Galaxy then obtained drilling permits, drilled and completed a well which, of course, it has no interest in whatsoever.

7 131 S.Ct. 280, 178 L.Ed.2d 140 (2010).

8 Though we still need to figure out what to do with that illegal well.
Section 18-15-1301 Pipelines and logging and tram roads

(a) Any corporation organized by virtue of the laws of this state for the purpose of developing and producing mineral oil, petroleum, or natural gas in this state, and marketing it, or transporting or conveying it by means of pipes from the point of production to any other point, either to refine or to market the oil or to conduct the gas to any point to be used for heat or lights and any corporation organized under the laws of this state for the purpose of manufacturing lumber, and which may find it necessary or expedient to lay out and build a logging railroad or tram road at least five (5) miles in length in order to reach its timber may:

(1) Construct, operate, and maintain a line of pipe for that purpose along and under the public highways and streets of cities and towns with the consent of the authorities thereof; and

(2) Construct logging roads or tramways over and across the lands of any individual or corporation, or across and under the waters and over any lands of the state and on the lands of individuals, and along, under, or parallel with the rights-of-way of railroads and the turnpikes of this state.

(b) The ordinary use of the highways, turnpikes, and railroad rights-of-way shall not be obstructed thereby, nor the navigation of any waters impeded. Just compensation shall be paid to the owners of the land, railroad rights-of-way, or turnpikes, by reason of the occupation of the lands, railroads rights-of-ways, or turnpikes by the pipeline or by the log roads.

(c) The right-of-way for any logging railroad or tram road shall not exceed in width fifty feet (50').

Section 18-15-1303 Procedure for condemnation

In the event any company fails, upon application to individuals, railroads, or turnpike companies, to secure the right-of-way by consent, contract, or agreement, then the corporation shall have the right to proceed to procure the condemnation of the property, lands, rights, privileges, and easements in the manner provided by law for taking private property for right-of-way for railroads as provided by Sec. 18-15-1201 18-15-1207, including the procedure for providing notice by publication and by certified mail in Sec. 18-15-1202.

In *Linder v. Arkansas Midstream Gas Services Corp.*\(^9\), the Arkansas Supreme Court rejected a challenge to the constitutionality of Midstream’s eminent domain taking of a right-of-way for a gas gathering pipeline. The appellants contended that the taking was for

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a private, rather than public, use, and that the trial court’s construction of the enabling statute,10 which authorized the taking, rendered that statute unconstitutional. The court held otherwise, clarifying the distinction between public and private use. If members of the public have the right to use the right-of-way, it is subject to condemnation, regardless of whether the public actually makes use of it. The statute declares “pipeline companies” to be common carriers, thus satisfying the right-to-use test. However, the Court cautioned that subsequent failure to grant access to others into the pipeline, would be inconsistent with the common carrier requirement and thus void the taking.

The Court reached the same result in a slightly later case, Smith v. Arkansas Midstream Gas Services Corp.11 Again, the discussion focused upon A.C.A. § 23-13-101, to the exclusion of the other two statutes. The lesson to gathering companies is pretty clear: If you are willing to behave like a common carrier, when and if that time comes, you may condemn. Just do not forget the strings that are attached.

ARKANSAS SUPREME COURT PARTIALLY CLARIFIES STATUTORY PUGH CLAUSE

Here, in all its abundant glory, is Arkansas’ “Statutory Pugh Clause”:

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.

This is not our first opportunity to ask, rhetorically: “What on earth does that mean?” I predict that it will not be the last time, either. The legislative drafters confused “sections” and “pooling units”, apparently assuming that they were, in all cases, one and the same. That is true a lot, but not always. The statue 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. A similar problem is presented by those North Arkansas units which are composed of parts of more than a single section.

Perhaps worse, a literal reading of Section (b) suggests that the statute has no application when a well is drilled, commencing within one year after the lease’s expiration date. It suggests that a lessee could drill a well, in one section of a multi-section lease, during the primary term, then commence another well within one year after the primary term’s expiration, anywhere on the lease, including the original section, after which the statute would no longer apply—EVER.

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

13 “Sections” is totally superfluous, in context, and this particular confusion would be removed 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.”

14 I am not aware of any producer bold enough to argue for that grammatically correct result.
Snowden v. JRE Investments, Inc. and Southwestern Energy Production Company v. Elkins dealt with a much more basic argument. The lessors in 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 the worst 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. The court did make clear that the Common Law Implied Covenant to Develop is still alive in Arkansas, though the current cases involve leases which are not sufficiently old to present much of an argument on that basis.

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, notwithstanding that its facts were even more favorable to the lessee than were the Snowden facts.

One justice, Justice Wills, dissented in Snowden, while Justice Danielson did not participate. Justice Danielson, who participated in Elkins, also 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

17 In Elkins, Southwestern’s multiple wells were drilled in multiple sections covered by the lease.
what the majority of the Court held the Legislature had said, whether intended or not.

**Strohacker Marches On, Though the Best May Still Be Coming**

Everyone understand the Arkansas *Strohacker* Rule?¹⁸ Let’s say it now, in unison:

*A generic mineral grant or reservation¹⁹ 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.²⁰

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.*²¹ 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


¹⁹ i.e. “all coal and mineral deposits”.

²⁰ The best compilation and explanation of these cases ever written is in Gerald De Lung’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.

²¹ 606 F.3d 973 (8th Cir. 2010).
stated “it can no longer be doubted that a reservation of minerals, or of mineral rights, is sufficient to identify oil and gas.”

The court then discussed *Sheppard v. Zeppa*²² 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*²³ and *Ahne v. Reinhart & Donovan Co.*²⁴ 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

²² 199 Ark. 1, 133 S.W.2d 860 (1939).

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

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

**COURT OF APPEALS REACHES PREDICTABLE RESULT IN DUHIG RULE CASE**

In *Mason v. Buckman*, the Arkansas Court of Appeals applied the Duhig Rule to a 1944 warranty deed, executed by the then owner of the surface and a one-half mineral interest, containing the following language of reservation: “1/2 of mineral rights with power to mine reserved.” Since the deed contained a general warranty, the court held that the above language reserved nothing new to the grantors, applying *Peterson v. Simpson*. The appellants had argued that the 1985 *Peterson* decision should not be applied retroactively. The Court of Appeals was quick to notice that *Peterson*, itself, involved a 1948 deed, and summarily rejected the appellant’s argument.

**COURT OF APPEALS REJECTS ESTOPPEL BY ACCEPTANCE-OF-ROYALTY WHERE LEASE HAS EXPIRED FOR FAILURE TO PRODUCE**

In *L & L Energy Company v. Chesapeake Exploration, LLC*, the lease had terminated for non-production over a period exceeding an oil and gas lease’s 60 day cessation of production clause period. However, the owner of the well, L& L, claimed that the lessor was estopped from denying the validity of the lease since the plaintiffs had accepted royalty payments made by L & L after the lease had expired, when the

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26 286 Ark. 177, 690 S.W.2d 720 (1985).

well was put back into production.

The Arkansas Court of Appeals, in an opinion by Judge Glover, rejected the contention, citing 3 SUMMERS ON OIL AND GAS § 19:8,\textsuperscript{28} which states that acceptance of royalties after the end of a primary term does not estop the lessor from contending that the production in paying quantities condition of the lease’s habendum had failed.

Well, that’s all for now. Stay tuned, however. Arkansas’ oil and gas patches have clearly gone into a litigation phase. Expect more of the same next year.

\footnote{\textsuperscript{28} 3\textsuperscript{rd} ed. 2008.}