TABLE OF CONTENTS

Baytide Petroleum and the Termination of an Oklahoma Oil and Gas Lease .............................................. 2
SELECTED OIL AND GAS DECISIONS .............................................................................................................. 13
SELECTED WATER DECISIONS .................................................................................................................. 18
SELECTED WIND DECISIONS ..................................................................................................................... 20
SELECTED AGRICULTURE DECISIONS ....................................................................................................... 21
ARTICLES OF INTEREST .................................................................................................................................. 22

From the Editor:

This issue of the Newsletter marks the end of my term as Editor-in-Chief. I would like to take this opportunity to thank the members of the Energy & Natural Resources Law Section for allowing me to serve in this capacity, and especially Chris Tytanic and the rest of the Executive Committee for their support in our efforts to expand the scope of our legal updates. I also would like to thank Professors Owen Anderson and Drew Kershon for their invaluable guidance and supervision over these past two years. I leave the Newsletter in the capable hands of Editor-in-Chief, Doug Nix, and Associate Editors, Grant Eidson and Keith Needham, assured that the Newsletter’s quality will only improve under their direction. Following graduation and after taking the Oklahoma bar exam, I look forward to beginning my legal career in Oklahoma City at Crowe & Dunlevy, primarily practicing energy and natural resources law. Finally, included in this issue of the Newsletter is a paper prepared by third-year law student, Cullen Sweeney, discussing the Oklahoma Supreme Court’s recent decision in Baytide Petroleum, Inc. v. Continental Resources, Inc. The Newsletter staff extends a special thanks to Cullen for his contribution.

Oklahoma Bar Association Mineral Law Section Newsletter

<table>
<thead>
<tr>
<th>Doug Nix</th>
<th>Jay Albert</th>
<th>Grant Eidson</th>
</tr>
</thead>
<tbody>
<tr>
<td>Associate Editor</td>
<td>Editor-in-Chief</td>
<td>Associate Editor</td>
</tr>
</tbody>
</table>

All case citations are correct as of 5-5-2010. The citations given do not reflect changes due to Lexis, Westlaw, or addition to a reporter after that date. Cases pulled for briefing through 4-16-2010. This PDF version of the newsletter is word-searchable. If you have any suggestions for improving the Newsletter, please e-mail the editorial staff at ou.mineral.law@gmail.com.
Baytide Petroleum and the Termination of an Oklahoma Oil and Gas Lease

Baytide Petroleum, Inc. v. Continental Resources, Inc., 2010 OK 6

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I. Introduction
II. The Facts of Baytide
III. Analysis of the Oklahoma Supreme Court’s Opinion
   A. Background: The Nature of the Interest Created by an Oklahoma Oil and Gas Lease
   B. Duration and Termination of the Oklahoma Oil and Gas Lease
   C. Impact and Practical Effect of the Court’s Decision
IV. Conclusion

I. Introduction

Getting something and keeping something are two different things. One who wishes to acquire an oil and gas lease can know with great certainty at what point the lease in fact becomes his own: negotiations are made, money changes hands, penstrokes sweep across the pages of a contract, and a new lease is born. But the lifespan of the newly formed lease cannot be so readily ascertained in advance, for the duration of the lease depends not so much on the fixity of contract as it does on the vagaries of circumstance. The lease may produce or it may not. It may produce in abundance for a period of time and then not at all. It may lie dormant and then come surging back to life. It may be long-lived; it may be stillborn. In short, to endeavor to develop an oil and gas lease “is, at the best of times, a risk and oftentimes simply a gamble.”

Prior to this year, the inherent gamble of the Oklahoma oil and gas lessee had been made even more precarious by the fact that the Oklahoma Supreme Court had never directly addressed the question of whether an unproductive lease remained effective until a court officially ordered the lease cancelled for failure to produce in paying quantities. Although the question may seem dryly academic, its resolution is of vital significance to anyone who wishes to terminate (or to prolong) the “life of a lease.” Because the rights and responsibilities of an oil and gas lessee remain in force up to the moment the lease ceases to exist, the possibility that a non-producing lease could still remain “alive” until a court formally decreed it to have terminated—a point months or even years after the bringing of the initial suit to cancel the lease—clouded with uncertainty the relative status of parties claiming an interest in the lease.

In Baytide Petroleum, Inc. v. Continental Resources, Inc. the Oklahoma Supreme Court answered the first-impression question of whether an oil and gas lease terminates of its own terms or by the entry of a judicial decree of cancellation, holding that it is the failure to produce in paying

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3 2010 OK 6.
quantities rather than a court’s formal acknowledgment of such failure that ends the lease. In so holding the court expressly overruled two contrary opinions of the Oklahoma Court of Civil Appeals, perhaps surprising many practitioners of Oklahoma oil and gas law who had previously relied on those opinions.

Nevertheless, the court’s holding in Baytide does not represent a radical departure from its earlier jurisprudence. The rule of lease termination announced in Baytide builds on an unbroken line of previous Oklahoma Supreme Court case law to create a far more nuanced understanding both of the interest conveyed by an Oklahoma oil and gas lease and the way in which that interest can terminate. In the wake of Baytide, it may now accurately be stated that the leasehold interest in Oklahoma will not terminate at the exact instant production in paying quantities ceases, but also that the lease will not remain viable until the very moment a court issues a decree of cancellation. Instead, the expiration of the oil and gas lease will be determined by an equitable, fact-specific inquiry into the failure of production within the greater context of a “period of time found to have exceeded the bounds of reasonableness.”

II. The Facts of Baytide

The dispute in Baytide featured what the court described as “a tortured procedural and factual background,” with a trail of litigation spanning two counties and four appeals over the course of eight years before the state supreme court granted certiorari in the fall of 2009. In 2000 the plaintiff, Baytide Petroleum, obtained the working interests in and operating equipment of two oil and gas wells located in Alfalfa County, Oklahoma. The defendant, Continental Resources, took top leases on Baytide’s wells the next year. Trouble quickly ensued. In July 2001 Continental brought suit in Alfalfa County District Court alleging that Baytide’s lease—the bottom or base lease—had terminated for failure to produce in paying quantities.

Matters were further complicated a couple of months later when the Oklahoma Corporation Commission created the Aline Oswego Unit, establishing a plan of unitization encompassing the two wells in Alfalfa County and naming Continental as the unit operator. The plan of unitization gave each lessee in the unit the option of participating in the plan and also required that all operating equipment inside the unit be appraised and credited to its respective owners. Shortly

4 Id. ¶ 1, ¶ 23.
6 Baytide, ¶ 11.
7 Id. ¶¶ 4-5.
8 Id. ¶ 9.
9 Id. ¶ 5.
10 “Top leases take effect only if the pre-existing lease expires or is terminated. The earlier leases are commonly referred to as base leases.” Id. ¶ 5 n.6 (citing Smith v. Marshall Oil Corp., 85 P.3d 830, 833 n.4 (Okla. 2004); Voiles v. Santa Fe Minerals, Inc., 911 P.2d 1205, 1209 (Okla. 1996)).
11 Id. ¶ 5.
12 Id. “Unitization . . . is designed to regulate operations which involve an entire field or a large part of a field which require cooperation by various owners and operators in the field.” 5 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 78.1 (1991 ed.). The terms of 52 OKLA. STAT. § 287.4 (2001) provide the statutory authority for the Corporation Commission to create a plan of unitization.
13 Baytide, ¶ 5. Baytide appealed the Commission’s unitization order, which was later affirmed in 2003 by an unpublished opinion of the court of civil appeals. Id. ¶ 3 n.3, ¶ 4 n.5.
afterward the district court granted a temporary injunction sought by Continental that ordered Baytide to comply with the unitization plan and deliver its wells and equipment to Continental.\(^\text{14}\) Baytide subsequently elected to approve the valuation of its equipment in an amount totaling $13,200\(^\text{15}\)—a fact later strongly disputed by Baytide.\(^\text{16}\)

On November 19, 2002 the Alfalfa County District Court issued a decree of lease cancellation in favor of Continental declaring that Baytide’s lease had terminated for failure to produce in paying quantities.\(^\text{17}\) The district court found that Baytide’s lease had expired under its own terms following a twenty-eight-month cessation of production for which “no reasonable basis” had been offered by Baytide in explanation.\(^\text{18}\) Claiming that it still held a valid lease, Baytide appealed.\(^\text{19}\)

In 2006 Baytide abandoned its appeal of the lease cancellation\(^\text{20}\) and brought a new action in neighboring Garfield County District Court.\(^\text{21}\) Baytide now claimed that it had not in fact been a lessee when the Aline Oswego Unit was formed in 2001\(^\text{22}\) because its lease had already expired under its own terms significantly in advance of the Alfalfa County District Court’s decree of cancellation. In essence, Baytide argued that if it did not have a valid leasehold interest in the proposed unit, then it need not have complied with the requirements of the plan of unitization. Accordingly, Baytide alleged that Continental had wrongfully converted Baytide’s operating equipment when it assumed control of the newly formed unit, thereby unjustly enriching itself at the expense of Baytide, the putative former lessee.\(^\text{23}\)

The Garfield County District Court quieted title in the equipment in favor of the unit and awarded Baytide the $13,200 for which the equipment previously had been appraised.\(^\text{24}\) Baytide appealed the decision of the district court, which was subsequently affirmed by the court of civil appeals in May 2009.\(^\text{25}\) In affirming the orders of the district court regarding the valuation of the operating equipment and the dismissal of Baytide’s other claims, the court of civil appeals also held that Baytide continued as the lessee until the Alfalfa County District Court cancelled its lease in November 2002.\(^\text{26}\) In other words, the court of civil appeals found that the oil and gas lease did not terminate until the district court entered its final decree of lease cancellation.

In support of its conclusion the court of civil appeals relied on the earlier opinions of two civil-appels divisions, Texxon Resources, Inc. v. Star West Petroleum, Inc.\(^\text{27}\) and Duerson v.

\(^{14}\) Id. ¶ 6. Baytide also opposed the district court’s temporary injunction, which was likewise affirmed in 2003 by a separate unpublished opinion of the court of civil appeals. Id. ¶ 3 n.3, ¶ 4 n.5.

\(^{15}\) Id. ¶ 3.

\(^{16}\) See infra note 35.

\(^{17}\) Id. ¶ 7.

\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id. ¶ 8.

\(^{22}\) Id.

\(^{23}\) Id.

\(^{24}\) Id. Apparently, the district court did not reach—and indeed need not have reached—the issue of whether Baytide remained the lessee prior to the Alfalfa County District Court’s decree of lease cancellation, instead resolving Baytide’s claims against Continental on the basis of Baytide’s purported agreement to accept $13,200 for its operating equipment. The Oklahoma Supreme Court affirmed in full the decision of the trial court. Id. ¶ 0, ¶ 23.

\(^{25}\) Id. ¶ 9.

\(^{26}\) Id.

Characterizing as a “false premise” Baytide’s argument that it was not a lessee at the time of the unit’s formation, the court of civil appeals found that “termination of a lease for non-production is not automatic,” and thus “Baytide was considered by law to be a lessee of the subject tract until its lease was judicially cancelled.” On petition by Baytide the Oklahoma Supreme Court granted certiorari.

III. Analysis of the Oklahoma Supreme Court’s Opinion

Although the Oklahoma Supreme Court has been called to interpret the law of oil and gas since the earliest days of statehood, it had not previously been directly confronted by the issue presented in Baytide: “whether an oil and gas lease sought to be terminated for failure to produce in paying quantities during the secondary term remains effective until the lease has been judicially cancelled.” Despite the novelty of this precise question, the court drew from a substantial store of precedent in holding that “a lease terminates not because of the entrance of a court order but for failure to produce in paying quantities under the lease’s habendum clause.”

For the parties in Baytide, the timing of the expiration of the lease was crucial because it affected their rights to the operating equipment on the well sites. The court’s decision in Baytide, however, will resonate far beyond the immediate facts and parties involved in the litigation. It now stands resolved that an Oklahoma oil and gas lease can and will terminate before a court issues a decree canceling the lease. And although the court’s opinion does not speak in the language of common-law property terminology in defining the nature of the lease, the court’s clear

30 Id. at 7.
31 Id. at 6.
33 Id. ¶ 1.
34 Id. ¶ 23. The habendum clause of an oil and gas lease “describe[s] the duration of the interest granted, subject to other provisions contained in the lease which may provide for an earlier or later termination under prescribed circumstances or upon the happening of certain events.” 2 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 26.1 (1989 ed.).
35 Even though the court accepted Baytide’s argument that its lease expired by its own terms before the Aline Oswego Unit was created, Baytide’s victory proved hollow. Under the unique facts of the case, Baytide cannot reap the full benefit of the court’s decision because the court also held that Baytide’s agreement to the valuation of its operating equipment at $13,200 obligated it to accept that amount from Continental.
36 Justice Joseph Watt wrote the opinion in Baytide for a unanimous court.
pronouncement on the manner in which a lease terminates nevertheless creates something that had previously eluded scholars and practitioners of oil and gas law: an effectively definitive label for the property interest created by the Oklahoma oil and gas lease.

A. Background: The Nature of the Interest Created by an Oklahoma Oil and Gas Lease

The advent of oil and gas exploration in the nineteenth century demanded a rethinking of traditional concepts of rights in property, for here was a wholly new thing to be extracted from the earth and reduced to possession that did not fit neatly within the established rubrics of property law. Indeed, early court decisions in the nascent field of oil and gas law seemed acutely aware of the quandary posed by the newness of the oil and gas lease. Because the law demands stability and uniformity of outcome even (and perhaps especially) in the face of rapid change, courts proved adept at absorbing the oil and gas lease into the vocabulary of common-law property rights.

Two theories of ownership soon developed: “ownership in place” and “exclusive right to take.” Under the ownership-in-place theory, “the landowner owns all substances, including oil and gas, which underlie his land.” Under the exclusive-right-to-take theory, “the landowner does not own the oil and gas which underlie his land. He merely has the exclusive right to capture such substances by operations on his land.” The distinction between the two theories is largely academic—Professor Eugene Kuntz memorably observed that the difference between them was “about the same as the difference between describing a checkered pattern as consisting of black checks on a white background or as consisting of white checks on a black background”—but the classification served as a useful yardstick for courts grappling with an understanding of the oil and gas lease in the early years of the petroleum industry’s development.

Oklahoma courts soon embraced the exclusive-right-to-take theory. The landmark case of Rich v. Doneghey established that “[t]he right so granted or reserved, and held separate and apart from the possession of the land itself, is an incorporeal hereditament; or more specifically, as designated in the ancient French, a profit à prendre, analogous to a profit to hunt and fish on the land of another.” A century of Oklahoma Supreme Court case law thus teaches that an oil and gas lease conveys to the lessee a profit à prendre, a non-possessory interest in real property granting the lessee the exclusive right to remove oil and gas from the leased lands. This baseline definition of

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37 See, e.g., Brown v. Vandergrift, 80 Pa. 142, 147-48 (Pa. 1875) (“The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainly only by actual development founded upon experiment.”).
38 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.4 (1987 ed.).
39 Id.
40 Id.
41 Id.
42 177 P. 86, 89 (Okla. 1918). The court in Rich further noted that the instrument commonly described “in deference to custom” as an oil and gas lease “strictly speaking, is not such, but is in effect a grant in praesenti of all the right to the oil and gas to be found in the lands described.” Id. at 90. “In praesenti” is a Latin term meaning “at present” or “right now.” BLACK’S LAW DICTIONARY 863 (9th ed. 2009). See also Kolachny v. Galbreath, 110 P. 902, 906 (Okla. 1910) (describing the oil and gas lease as granting an “incorporeal hereditament”). An “incorporeal hereditament” is “[a]n intangible right in land.” BLACK’S LAW DICTIONARY 794 (9th ed. 2009). Cf. Texas Co. v. Daugherty, 176 S.W. 717, 722 (Tex. 1915) (holding that the oil and gas lease “creates a freehold interest in the land itself”).
43 The term “profit à prendre” translates from Law French (the hybrid language of early modern English and Norman French used in English courts in the centuries following the Norman Conquest) as “profit to take”
the nature of the lessee’s ownership interest presents a springboard for understanding a question of much greater practical significance: when and under what circumstances the lease may be lost.

B. Duration and Termination of the Oklahoma Oil and Gas Lease

It is a truth universally acknowledged in the law of oil and gas that “[l]eases are purchased with the intent to produce.” Simply put, the lease will not last forever, but rather only for so long as it continues to produce in a manner that is economically beneficial to both the lessor and lessee. The termination of an oil and gas lease is thus not a question of “if,” but one of “when.” Put another way, the lease is “subject to defeasance on the happening of some future event”—the future event being “the failure to produce in paying quantities under the habendum clause during the lease’s secondary term.”

Two forms of common-law defeasible estates remain highly relevant in understanding the termination of an oil and gas lease: the fee simple determinable and the fee simple subject to a condition subsequent. An estate conveyed in fee simple determinable “will automatically end and reverts to the grantor if some specified event occurs,” leaving the grantor with a future interest called a possibility of reverter. An estate conveyed in fee simple subject to a condition subsequent is given “subject to the grantor’s power to end the estate if some specified event happens,” retaining in the grantor a future interest known as a power of termination or right of entry. The principal difference between the two estates is that the fee simple determinable terminates automatically, while the fee simple subject to a condition subsequent comes to an end only by an affirmative act undertaken by the grantor.

Although Texas courts, for example, long ago labeled the oil and gas lease as granting a fee simple determinable, Oklahoma courts have never spoken to the classification with such clear language. In the absence of a definitive pronouncement by the Oklahoma Supreme Court on the defeasibility of an oil and gas lease, practitioners, academics, and lower courts have been left to sift through language reasonably susceptible of differing interpretations in ascertaining a lease’s point of termination. Perhaps no statement has proved as troublesome as the court’s observation in the signal case of Stewart v. Amerada Hess Corp. that “[a] decree of lease cancellation may be

and is defined as “[a] right or privilege to go on another’s land and take away something of value from its soil or from the products of its soil.” BLACK’S LAW DICTIONARY 1330 (9th ed. 2009).

47 Unlike oil-and-gas-producing jurisdictions such as Texas, Oklahoma classifies the oil and gas lessee’s ownership interest as a profit rather than an estate in fee. Although the language of the fee estate is used to denominate a defeasible interest, e.g., a fee simple determinable, the profit à prendre is no less subject to defeasance, and the terminology of defeasance is easily transferable to it, e.g., a profit à prendre subject to a condition subsequent.
48 BLACK’S LAW DICTIONARY 692 (9th ed. 2009).
49 Id.
50 See, e.g., Frensley v. White, 254 P.2d 982, 984 (Okla. 1953) (explaining the difference between determinable fees and fees subject to a condition subsequent).
51 See, e.g., Stanolind Oil & Gas Co. v. Barnhill, 107 S.W.2d 746, 748 (Tex. App. 1937) (“It is not an open question in Texas as to the nature of the title or interest of the lessee in an oil and gas lease . . . . It invests the lessee and his assigns with . . . . a determinable fee . . . .”).
rendered” when it is demonstrated that a lease has ceased producing in paying quantities and that such cessation is unreasonable under all the facts and circumstance involved.\(^{52}\)

The idea expressed in *Stewart* (and later restated with approval in subsequent Oklahoma Supreme Court cases dealing with lease termination)\(^{53}\) that a court may in some manner be involved in finally canceling a lease led some pre-*Baytide* courts and commentators to the reasonable inference that the Oklahoma oil and gas lease creates an interest subject to a condition subsequent. For example, the current supplement to the *Kuntz Treatise on the Law of Oil and Gas* states that, “[u]nlike [in] most other jurisdictions,” the habendum clause of the Oklahoma oil and gas lease grants “an estate on a condition subsequent.”\(^{54}\) The treatise explains that the lease “does not automatically terminate when the wells are no longer capable of producing in paying quantities; rather, the lessor, who has retained right of entry rather than a possibility of reversion as in other jurisdictions, must bring an action to terminate the lessee’s interest.”\(^{55}\)

Though a fair interpretation of the law prior to *Baytide*, the conceptualization of the oil and gas lease as creating an interest subject to a condition subsequent is no longer tenable in light of the court’s holding in *Baytide*. The hallmark of the estate on a condition subsequent is the requirement that the grantor, who retains a power of termination, must take some affirmative step to declare a forfeiture following the breach of the condition. At early common law the grantor exercised his power of termination by physically entering the property (hence, the “right of entry”).\(^{56}\) Modern law understandably has replaced the need for actual physical entry with the more subdued (but perhaps no less hostile) requirement that the grantor bring a lawsuit to eject the wayward grantee from the premises.\(^{57}\)

*Baytide* now declares that a judicial decree of cancellation does not terminate a lease.\(^{58}\) This holding cannot exist in tandem with a classification of the oil and gas lease as subject to a condition subsequent, for the court’s holding explicitly announces that a lease will terminate of its own terms in advance of any judicial determination. Moreover, the Oklahoma Supreme Court long ago established that it is the act of bringing suit, rather than the eventual court order, that terminates an estate on a condition subsequent.\(^{59}\) In such cases a court will merely be called to “quiet a title

\(^{52}\) 604 P.2d 854, 858 (Okla. 1979).


Despite the fact that the court in *Baytide* did not expressly overrule *Danne*, to the extent *Danne* supports the proposition that the grantor must exercise a right of entry to terminate the lease, it stands effectively overruled by *Baytide*.


\(^{57}\) *Id.*

\(^{58}\) *Baytide*, ¶ 1, ¶ 23.

\(^{59}\) *Ross v. Sanderson*, 162 P. 709, 709 (Okla. 1917) (Syllabus by the Court) (stating that “an action may be maintained . . . upon the breach of a condition subsequent, without re-entry, demand, or possession, or notice of forfeiture; the commencement of an action being deemed equivalent thereto”).
already forfeited.” But as Baytide now explains, it is neither the act of bringing suit nor the judicial decree that triggers the end of the lease.

As support for its holding, the court in Baytide pointed to two of its previous opinions in which oil and gas leases definitely terminated prior either to the bringing of an action to cancel the lease or a judicial decree of cancellation. In Smith v. Marshall Oil Corp. a district court quieted title to a lease in August 2001 based on a cessation of production occurring between 1996 and 1998. Under the terms of its lease, the lessee had six months after a cessation of production to recover its operating equipment from the lease site. The court in Smith held that the period of cessation of production in paying quantities, not the district court’s order, had marked the six-month period during which the lessee could have retrieved its equipment. Likewise, in the earlier case of Fisher v. Dixon, the court affirmed a trial-court order that a lease terminated for failure to produce in paying quantities on June 28, 1938, even though the suit to cancel the lease was not filed until September 6, 1938. Both cases demonstrate that the expiration of an oil and gas lease can precede both the initial lawsuit and the ensuing decree of lease cancellation.

Baytide makes clear that the Oklahoma oil and gas lease is not granted on a condition subsequent, for the requisite elements demarcating that interest are absent from the court’s description of how an oil and gas lease terminates. The definition of an interest on a condition subsequent is incompatible with the court’s analysis. But although an oil and gas lease in Oklahoma is no longer properly understood to grant an interest subject to a condition subsequent, it does not follow that the lease is therefore subject to automatic termination.

The Oklahoma Supreme Court’s opinion in Stewart v. Amerada Hess Corp., authored by Justice Marian Opala, provides the best contemporary explanation of why the oil and gas lease does not automatically terminate in Oklahoma at the moment it ceases to produce. If the lease truly expired automatically, then “any cessation of production [in the paying-quantities sense of the term]” would be sufficient to terminate the leasehold interest. But this will not happen in Oklahoma, for “Oklahoma has rejected that literal a view” of an oil and gas lease’s termination. Because of “the strong policy of our statutory law against forfeiture of estates” memorialized in title

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60 Id. at 710.
61 The two opinions of the court of civil appeals overruled by Baytide expressed differing views on lease termination. The opinion in Texxon stated that “the grantor must bring an action to cause forfeiture of the leasehold estate.” Texxon Resources, Inc. v. Star West Petroleum, Inc., 994 P.2d 1192, 1195 (Okla. Civ. App. 1999), overruled by Baytide, 2010 OK 6. In contrast, the opinion of the court of civil appeals in Duerson stated that “it requires a court order to cancel a lease.” Duerson v. Mills, 684 P.2d 1276, 1278 (Okla. Civ. App. 1982), overruled by Baytide, 2010 OK 6. In light of the early precedent set by the state supreme court in Ross v. Sanderson that the bringing of the action (rather than the entry of a court order) effects an end to an interest granted on a condition subsequent, the opinion in Texxon reflected the state of the law pre-Baytide more accurately than did Duerson.
62 Baytide, ¶ 15.
63 85 P.3d 830 (Okla. 2004).
64 Baytide, ¶ 15.
65 Id.
66 Id. (citing Smith, 85 P.3d at 838).
67 105 P.2d 776 (Okla. 1940).
68 Baytide, ¶ 15 n.12 (citing Fisher, 105 P.2d at 778).
70 Id. at 858.
71 Id.
23, section 2 of the Oklahoma Statutes, the harsh rule of the common law has been moderated to allow for the contemplation of all facts and circumstances surrounding the cessation in determining whether an oil and gas lease has indeed come to an end. A lessee’s successful marshalling of “compelling equitable considerations” against the threat of termination will operate to preserve a lease that would otherwise be subject to cancellation for failure to produce in paying quantities.

For this reason the Oklahoma oil and gas lease cannot be called a “true” determinable property interest. But neither may the lease accurately be described as one subject to a condition subsequent, expiring upon the lessor’s assertion of the power of termination following the condition’s breach, because Baytide and its precursors have established that a lease can and will terminate for failure to produce in paying quantities before an action for cancellation is brought and long before a court ever issues its decree of cancellation.

The court in Stewart modified the determinable estate (or interest in land) of the common law by reference to Oklahoma’s strong statutory policy against forfeitures, superimposing on the common-law conditional limitation the recognition that the automatic defeasance of a lease should be avoided as a matter of public policy. But the fact that an oil and gas lease does not grant a traditional determinable interest does not mean that it instead grants an interest on a condition subsequent, and the fact that an oil and gas lease does not grant an interest on a condition subsequent does not mean that it instead grants a traditional determinable interest. Rather, “the lease continues in existence so long as interruption of production in paying quantities does not extend for a period longer than reasonable or justifiable in light of all the circumstances involved.”

The court’s interpretation of the anti-forfeiture provisions of title 23, section 2 of the Oklahoma Statutes acts in derogation of the common law’s requirement of automatic termination. And while it is not practically necessary to affix a common-law label to describe the modern oil and gas lease, it now appears fairly accurate to call the interest granted in Oklahoma a modified profit à prendre determinable—a profit à prendre determinable that stands modified by the imposition of a statute abrogating the common law in the interest of an overarching public policy against the forfeiture of leases reasonably capable of producing in paying quantities.

72 Id. “The terms of 23 O.S. 1971 § 2 clearly mandate that courts avoid the effect of forfeiture by giving due consideration to compelling equitable circumstances.” Id. See also Pack v. Santa Fe Minerals, 869 P.2d 323, 326-27 (Okla. 1994) (reaffirming the continued validity of the anti-forfeiture statute and the court’s reasoning in Stewart).

73 See also Doss Oil Royalty Co. v. Texas Co., 137 P.2d 934, 936 (Okla. 1943) (“[S]uits for the cancellation of oil and gas leases call for the exercise of the equity power of the courts. Equity was evolved to escape the rigidity and technicalities of the common law. It looks at substance rather than form. It seeks justice rather than technicality.”).


75 Stewart, 604 P.2d at 858.

76 In Oklahoma the common law remains in effect “as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people.” 12 OKLA. STAT. § 2 (2001). See also Bowman v. Presley, 212 P.3d 1210, 1217-18 (Okla. 2009) (“The common law . . . remains in force unless a legislative enactment expressly states otherwise . . . .”)

77 This sets Oklahoma apart from most other states. Although most states, either by a statute or judicial decree, acknowledge that equity abhors forfeitures, they do not view an estate or interest in land that terminates by its own terms as a forfeiture. Rather, such an estate or interest fixes the duration as intended by the parties, and no forfeiture occurs. See, e.g., Ludwig v. William K. Warren Found., 809 P.2d 660, 662 (Okla. 1990) (“[I]t is not precisely correct to speak of forfeiture of the estate granted on condition.”). While recognizing the technical incorrectness of saying that an interest that expires of its own terms is “forfeited,” the Oklahoma Supreme Court has consciously modified the common-law conceptions both of automatic
C. Impact and Practical Effect of the Court’s Decision

Despite its overruling of the opinions of two civil-appeals divisions, the Oklahoma Supreme Court has not so much broken with its prior jurisprudence as it has clarified and continued it. Indeed, the court has from its earliest years acknowledged that an oil and gas lease can expire by its own terms. Nevertheless, prior to the court’s ruling in Baytide it had also remained a legitimate inference that a court order officially canceling the lease, in conjunction with a suit brought by a lessor or other party for that purpose, was in some way an essential ingredient in completely terminating a lessee’s interest.

The court’s decision in Baytide now makes clear that, although a judicial decree “may be necessary to adjudicate the rights of the parties” when a party asserts that a lease has ended, the decree itself does not terminate the lease. Rather, the court order simply recognizes that a lease has previously terminated and accordingly settles the rights of the parties involved. Lessors and lessees alike may now be armed with the knowledge that a leaseholder’s rights in a non-producing oil and gas lease will be completely foreclosed sometime prior both to the commencement of an action to declare the lease terminated and the formal judicial declaration of the same.

As a practical matter, however, Baytide likely will not significantly change the actions of lessors and lessees in a dispute over whether a lease has terminated for failure to produce in paying quantities. Even though the filing of an action does not terminate the lease, the bringing of the action remains the only method by which a lessor or top lessee can protect itself from the possibility that the lessee may indeed still have a valid lease. It is thus practically impossible for the lessor to be safe from potential tort liability to a putative lessee without the judicial declaration of the lease’s end, although Baytide now establishes that neither the declaration nor the antecedent lawsuit will be the events that terminate the lease.

Although it now stands beyond question that an Oklahoma oil and gas lease can terminate of its own terms prior to the entry of a judicial decree of cancellation, the essential role of state courts in confirming termination has not been lessened by the court’s decision in Baytide. The Oklahoma Supreme Court has long acknowledged that no oil and gas lease automatically terminates at the exact instant it ceases to produce in paying quantities, instead emphasizing “that the result in each case must depend upon the circumstances that surround cessation.” In other words, the ultimate question of termination must be decided in light of the entirety of the facts and circumstances attendant to an asserted failure to produce in paying quantities. Such determinations are necessarily the realm of the courts, and ordinary prudence would dictate that any party that believes a particular lease has terminated in its favor would still seek the security offered by the finality of a judicial decree.

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79 Baytide, ¶ 10.
80 Stewart, 604 P.2d at 858.
IV. Conclusion

After *Baytide Petroleum, Inc. v. Continental Resources, Inc.*, Oklahoma courts as much as ever before remain the arbiters of the “bounds of reasonableness” on which the continued existence of an oil and gas lease depends. But to say after the court’s decision in *Baytide* that a judicial decree of cancellation terminates an oil and gas lease is rather akin to saying that a criminal defendant does not commit a crime until a jury returns a verdict of guilty: the defendant’s rights now stand adjudicated, but only in light of an event that has already occurred.
**Federal**

**Sixth Circuit (Kentucky)**


Class representatives brought claims for, *inter alia*, fraud and breach of contract, asserting that lessees improperly calculated royalties on volumes of gas and improperly deducted certain losses and expenses from royalties. Following a fairness hearing, the district court ordered final approval of the parties’ proposed settlement agreement and found that the plan for allocating settlement funds to class members was fair and reasonable.

**State**

**Arkansas**


Real estate purchaser filed a complaint to void a correction deed presented by Seller and to quiet title to mineral interests. The trial court denied the purchaser’s quiet-title claim and reform the deed to reflect the mineral reservation. The court of appeals affirmed, holding that the trial court’s decision to reform the deed based on mutual mistake and denying claims of estoppel were not clearly erroneous. Additionally, the court reversed the trial court’s finding that it lacked the statutory authority to award attorney’s fees.

**Colorado**


Fracturing companies hired by Noble charged a sales tax on proppant used. Noble filed for a refund on the taxed materials, arguing that there was no purchase of tangible personal property, and that separators used were also exempt. The Colorado Department of Revenue denied Noble’s claims, and the district court reversed on both issues. On appeal, the court held that the fracturing materials were inseparable from the service provided and therefore, were not subject to sales tax. Moreover, the court determined that proppant was not tangible personal property. The court did conclude, however, that the separators were not used for “manufacturing” and as such, were not exempt.

**Illinois**


ICG filed suit to cancel leases covering more than 60,000 acres of coal and coal-bed-methane rights. The 99-year leases contained no development obligation, required no advance or minimum royalties or other payments in lieu of production, and provided that the lessor would receive payments only upon the production of minerals. The trial court refused to find the leases void *ab initio*, reasoning that “today’s energy market” provided a basis for overlooking Illinois precedent prohibiting royalty leases for want of mutuality, and ICG appealed. Reemphasizing the long-standing precedent in Illinois that royalty leases are void *ab initio*, the appellate court reversed, holding that the defendants failed to provide good cause or compelling reasons to judicially abandon the rule.

**Louisiana**


Interstate natural gas companies filed suit alleging Commerce Clause violations from Louisiana’s tax scheme, which taxed rate-regulated pipeline companies 25% of their property’s fair market value while taxing non-rate-regulated companies only 15%. The district court and the court of appeals found the tax scheme unconstitutional, and the Supreme Court of Louisiana reversed. In reaching its decision, the court held that the tax scheme was not discriminatory on its face because the tax rate was based on whether the intrastate or interstate company was subject to rate-regulation, not whether it operated intrastate or interstate. Furthermore, the tax scheme did not place an undue burden on interstate commerce because property values for rate-regulated companies and non-rate-regulated companies were calculated differently, and the plaintiffs failed to show that the valuation method used would require them to pay higher taxes than non-regulated intrastate companies.

When the Louisiana State Mineral Board granted a mineral lease on land that Justiss Oil Company was operating a natural gas well on, Justiss brought suit to establish its title to an undivided one-half interest in the mineral rights. The defendants argued that Art. IV, §2 of the La. Const. reserved the mineral rights to the State in 1935 when it issued the patent. Justiss contended that the property rights vested in 1919 when a lieu warrant was issued, and therefore Art. IV, §2 was inapplicable. The trial court granted Justiss’s motion for summary judgment. On appeal, the court reversed, holding that property rights vested at the time of the 1935 patent application, and consequently, the patent was obtained subject to the State’s mineral reservation.


Meaux filed a Petition for Possessory Action asserting acquisitive prescription of property contained within a producing oil and gas unit. Successors in interest to a prior lease covering the property defended the action by alleging that more than one year passed between the date on which Meaux’s alleged possession was disturbed by the mineral production and the date the suit was filed. The trial court agreed with Defendants and Meaux appealed. The court of appeals affirmed, holding that Meaux failed to introduce evidence that he or his predecessors possessed the property for thirty years or that the possessory action was filed within a year of the disturbance. Additionally, the court found that production was a disturbance in fact, which occurred more than a year before Meaux filed suit.


Nelson Energy, as a competing claim holder, argued that a previously recorded lease was invalid because inaccuracies prevented third parties from identifying with certainty the property covered. The trial court granted summary judgment to the previously recorded leaseholders, and Nelson appealed. The court of appeals affirmed, finding that while not entirely accurate, the lease made adequate reference to another recorded document, and as such, the description was sufficient to put third parties on notice.


Duhon filed suit seeking damages for contamination of her property as a result of oilfield operations and alleging that required restoration of the premises had not been performed. Defendants argued that the Louisiana Department of Natural Resources had primary jurisdiction and contended that the underlying leases had not expired, failing to trigger the restoration requirement. The trial court entered judgment in favor of Defendants, and Duhon appealed. The appellate court reversed, finding that it is the responsibility of the district court to determine whether environmental damage exists and who is legally responsible prior to referral to the Department of Natural Resources. The court further held that Defendants failed to satisfy their burden of proving the leases had not expired.

Oklahoma

Weber v. Mobil Oil Corp., 2010 OK 33

Royalty owners filed a class action alleging that Mobil underpaid royalties. The trial court certified the class, and the Court of Civil Appeals affirmed the certification of all claims except those for conversion, fraud, deceit, and constructive fraud. On appeal, the Supreme Court of Oklahoma held that the potential weakness of a fraud claim was not grounds for refusing to certify a class, and certification need not be denied where written misrepresentations had been made to royalty owners and the Corporation Commission. Additionally, the court found that even though some royalty owners relied on Mobil’s representations in other states, Oklahoma “had a more weighty contact with the occurrence,” and therefore, the claims of fraud, deceit, constructive fraud, and punitive damages were appropriate for class certification.
Cactus Petroleum Corp. v. Chesapeake Operating, Inc., 2009 OK 67

Working interest owners filed a class action suit against Chesapeake alleging that Chesapeake improperly billed for certain well costs and failed to properly account to working interest owners for the market value of production. After notice of a proposed settlement was delivered to class members, two of the prospective members filed written objections contesting the marketing fees portion of the settlement. The trial court held a fairness hearing, and ultimately approved the settlement proposal. The Court of Civil Appeals reversed, however, finding that an intra-class conflict existed regarding marketing-fee arrangements. On certiorari review, the Oklahoma Supreme Court vacated the appellate court opinion and held that the distinction between the members of the class who signed marketing agreements and those who did not was without legal significance.

Bays Exploration, Inc. v. Jones, 2010 OK CIV APP 28

In an action instituted under the Surface Damages Act, the Court of Civil Appeals awarded a landowner costs and attorney fees in Jones I, 2007 OK CIV APP 111. On remand the trial court issued its order setting the award, to which Bays appealed. Bays’s argument, in essence, was that the trial court erred as a matter of law in awarding attorney fees and costs. Finding that it was bound to give effect to the decision in Jones I, the court determined that law of the case precluded it from granting Bays the relief requested.


O’Brien Oil proposed re-entry operations through an existing wellbore on Landowners’ property. Landowners objected, and O’Brien commenced this action for declaratory judgment. The trial court found for O’Brien, and the court of appeals affirmed, finding that because O’Brien was acting pursuant to a Permit to Re-Enter granted by the Corporation Commission, Landowners could not prevent O’Brien’s re-entry into the abandoned wellbore. Moreover, the court held that Landowners’ right to compensation for use of the abandoned wellbore should be determined under the Surface Damages Act, but their right to compensation for use of the casing should be measured by the rental value of the casing.


Nelson, owner of an overriding royalty interest in oil and gas produced and sold by Defendant, sought an accounting and damages for conversion and violation of the Oklahoma Production Revenue Standards Act. She argued that Oklahoma law proscribed recovering royalty overpayments on production from one well with production payments due from a different well. Both the trial court appellate court disagreed. In reaching its decision, the Court of Civil Appeals held that nothing in the Production Revenue Standards Act prohibited the offset of revenue due from one well against the overpayment of revenue attributable to another well.


Landowners brought an action asserting that Chesapeake failed to comply with the requirements of the Surface Damages Act (“Act”) by entering to drill without fully negotiating surface damage agreements with both co-tenants. Chesapeake denied the landowner’s allegations and moved for summary judgment, contending that it had satisfied the Act’s requirements by securing a signed agreement for surface damages with one of the co-tenants. The trial court found in Chesapeake’s favor, and Landowner’s appealed. The Court of Civil Appeals reversed, holding that the Act requires an operator to negotiate and obtain a signed surface damage agreement with all undivided interest owners or to otherwise file a petition to appoint appraisers pursuant to § 318.5(A) prior to entry.
Pennsylvania


Landowners filed a complaint for declaratory judgment seeking to invalidate their lease, arguing that the net-back method for calculating royalties violated the one-eighth royalty requirement of Pennsylvania’s Guaranteed Minimum Royalty Act (“GMRA”). The trial court granted summary judgment in favor of the Gas Companies, finding that the statute did not prohibit the inclusion of post-production costs when calculating royalties. On petition to the Pennsylvania Supreme Court for extraordinary relief, the court affirmed. Holding that the GMRA should be read to permit the calculation of royalties at the wellhead, the court rejected the landowners’ contentions that royalties should be calculated based upon the point of sale. Specifically, the court was persuaded that at the time the GMRA was passed, which was prior to the deregulation of the natural gas industry, virtually all royalties to landowners were based upon the value of unprocessed natural gas at the wellhead.

Texas


Heirs of an assignment of rights to an oil and gas lease asserted entitlement to a retained royalty interest. They filed suit when Lyle, operator and successor to a portion of the net profit interest from the original lessee, refused an accounting. The trial court found in favor of the heirs and Lyle appealed. The court of appeals affirmed, finding that the assignment clearly provided for a reservation of a royalty interest and not a carried interest or a production payment. Moreover, the court held that Lyle had notice of and was bound by the original assignment and as such, was obligated to account to the heirs for their share of royalty. The court concluded by determining that, because the assignment contemplated a monthly accounting and payment, only payments accruing after the four-year statute of limitation were barred.

Shell Oil Co. v. Ross, No. 01-08-00713-CV, 2010 WL 670549 (Tex. App.—Houston Feb. 25, 2010); 2010 Tex. App. LEXIS 1432

Ross filed suit alleging that Shell breached its obligation to pay royalties based on the amount realized from the sales of gas and that Shell had created a fraudulent scheme to deprive them of royalties. Shell argued that under the lease it was allowed to use a weighted average price to calculate royalties. The trial court ruled that Shell breached its contract by not basing royalty payments on the amount realized and upheld the jury’s findings of fraudulent concealment. Additionally, the court upheld the jury’s finding that the Rosses were unable to discover Shell’s failure to pay royalties during the period of concealment, tolling the limitations period. Finally, the court denied Shell’s proposed instruction on constrictive notice. The court of appeals affirmed.


Masgas and MHW acquired leases in the name of MHW and together operated wells until separating in 1994. In 1996, MHW conveyed its interest to the Andersons, who in 2005, stopped making payments to Masgas when it was unable to satisfy requests for title information proving its interest. Masgas thereafter filed suit, asserting that the Andersons knew it was entitled to distributions based on documentation provided by MHW in 1996. Masgas thereafter filed suit, asserting that the Andersons knew it was entitled to distributions based on documentation provided by MHW in 1996. MHW intervened, claiming it retained the disputed interest in the 1996 transfer. The trial court determined that the Andersons were the owners of the disputed interest, and both Masgas and MHW appealed. Finding that the operative language of the documents did not exhibit an intent to establish an interest in Masgas and because the granting clause in MHW’s conveyance to Anderson transferred “all” MHW’s interest, the appellate court affirmed and found the Andersons were the owners of the disputed interest.
Utah

Exxon Corp. v. Utah State Tax Comm’n, 2010 UT 16

ExxonMobil filed amended severance tax returns with the Utah State Tax Commission on behalf of its subsidiary claiming it had overpaid severance taxes based on improper sale valuation. Following ExxonMobil’s successful appeal in ExxonMobil Corp. v. Utah State Tax Comm’n, 2003 UT 53 (“Exxon I”), in which the court established a new test for determining the point of valuation for oil and gas sales, ExxonMobil filed several additional amended tax returns requesting refunds for overpaid severance taxes. Interpreting Exxon I to apply retroactively only to the claims at issue in the previous case of ExxonMobil’s subsidiary, the Tax Division denied ExxonMobil’s additional amended returns. Holding that the court did not limit retroactivity to only the claims at issue in Exxon I, the court determined that ExxonMobil was entitled to full retroactive application of the new severance tax valuation rule for all of its refund requests.

Wyoming


Parties to a lease assignment entered into a unit agreement and a unit net profit interest (“NPI”) agreement. After the unit was terminated, successors to the original assignor brought suit against the successor-working interest owners, alleging that the NPI agreement was still valid and that net profits remain due. The Supreme Court of Wyoming ultimately held that the NPI survived the termination of the unit, but that the working interest owners were required to make payments only after receiving notice of the NPI owners’ interest. Operating working interest owners were then held liable under the Wyoming Royalty Payment Act (“WRPA”) for failure to pay or escrow payments after receiving proper notice. Non-operating interest owners, while held in breach of the NPI agreement, were not found liable under WRPA. Additionally, a lease obtained after the unit terminated was deemed a “replacement lease” and was therefore burdened by the NPI.

CMS Oil & Gas Co. v. Morris, 227 P.3d 325 (Wyo. 2010)

Overriding royalty interest owner, Morris, brought suit against CMS alleging violations of the Wyoming Royalty Payment Act (“WRPA”). The district court determined that CMS ultimately paid royalties due; nonetheless, because it found that CMS had not fully complied with the WRPA, by failing to timely escrow funds and by not properly reporting production, the court imposed upon CMS statutory reporting penalties. Morris, however, believed additional royalties were due and continued litigation. The district court disagreed and assessed attorney’s fees against Morris for the costs of litigation occurring after the point in which CMS had satisfied its obligations under the WRPA. On appeal, the Wyoming Supreme Court affirmed in part, finding Morris was entitled to the reporting penalties, and after determining that Morris was a prevailing party, reversed the entry of attorney’s fees.
Alabama


Plaintiff brought an action against Solid Ground Development, LLC (“SG”) alleging Defendant unlawfully drained a lake, of which each owner shared a part, causing interference with her use and enjoyment of the lake and causing the smaller lake on her property to go dry. The trial court entered summary judgment in favor of SG, and Plaintiff appealed. The Supreme Court of Alabama affirmed, holding that an owner’s land extending beneath a non-navigable man-made lake within a corporate limit is subject to the common enemy doctrine, and the landowner possesses only the right to use and enjoy that portion of the lake residing above and within his defined property. No rights are held in the lake as a whole, and therefore, an adjacent landowner is not prohibited from draining that part of the lake overlying his property.

California


The Karuk Tribe of Northern California, and others, appealed the trial court’s finding of preemption of state law where federal law, under the Federal Power Act (“FPA”), governed the regulation of water quality in regard to the regulation of federally licensed hydroelectric dams operating within the state. Plaintiffs wished to impose regulations promulgated by the Porter-Cologne Water Quality Control Act, which requires submission of a Report of Waste Discharge and issues waste discharge requirements. The court of appeals held that the proprietary interests reserved to the state under FPA § 27 did not include the ability to impose state sponsored water quality control statutes upon a federally licensed hydroelectric power facility, as has been previously recognized by the United States Supreme Court and the 9th Circuit Court of Appeals.

Georgia


Landowners sought to enjoin an adjacent littoral landowner from increasing their use of a common pond for crop irrigation, which caused the pond’s water level to drop, killing fish and altering its aesthetic appearance. Determining that the use was reasonable, the trial court denied injunctive relief. On appeal to the Supreme Court of Georgia, the court vacated the trial court’s holding and remanded, stating that the landowner’s domestic use of the pond should be accorded a preference in regard to the right to appropriate water from the source.

Massachusetts


Landowners brought suit for a declaration of their rights to tidal flats abutting their land after having removed the moorings for two boats within the area in dispute for which the boat owners brought separate suits, one for damages and another asserting the existence of a prescriptive easement. The Land Court Department declared that the town owned the tidal flats and awarded damages to the boat owner who sought recompense to replace his mooring. The appeals court affirmed, holding that the shore-front ownership vested in the town by grant in 1640, and further, the Colonial Ordinance passed in 1641 by the Massachusetts Bay Colony extended the town’s interest in shore-front property to the tidal flats. Additionally, the court stated that the boundary of the flats was the mean low water mark in accordance with the National Geodetic Vertical Datum standards, which places the boat owner’s moorings within the tidal flat area.
Moot v. Dep’t of Envt’l. Prot., 923 N.E.2d 81 (Mass. 2010)

Plaintiff appealed the final decision of the Department of Environmental Protection, which exempted a multi-use construction project from a regulation requirement calling for licensing and a public-benefit review under the waterways statute. On appeal, the Supreme Judicial Court held that the regulation was invalid and ordered a stay to afford the Legislature the opportunity to address the issue at bar. The Legislature then enacted legislation exempting landlocked tidelands from the licensing requirements of the waterways statute. On appeal, the Supreme Judicial Court ultimately affirmed, stating that the legislation enacted did not relinquish or extinguish public trust rights in the landlocked tidelands upon which the multi-use project was to be constructed. To accomplish relinquishment, such legislation must be explicit, and as such, the legislation enacted validates the regulation previously held invalid by the Supreme Judicial Court.

Montana

PPL Montana, LLC v. State, 2010 MT 64

The State of Montana sued wholesale electric generator, PPL, which operated several hydroelectric power facilities within Montana, seeking compensation for the use of state-owned riverbeds in its production of hydroelectric power. PPL’s principal argument was that compensation to the state was not required due to preemption by the federal navigational servitude and the Federal Power Act. The district court found for the state and awarded damages of $40,956,180.00 for the use of state-owned riverbeds from 2000 through 2007 at PPL’s hydroelectric sites on the Missouri, Madison, and Clark Fork rivers. The Supreme Court of Montana affirmed the award amount, stating that title to the riverbeds passed to the state when it acquired statehood in 1889 since, at that time, the rivers in question were navigable in fact, and under the equal footing doctrine, the disposition, use and ownership interests in the riverbeds vested in the state.

Oregon


In 2001 the federal government terminated the delivery of water from the Klamath River Basin to Plaintiffs, who used the water for irrigation and agricultural purposes. Plaintiffs asserted that they held a property right in the water and filed suit alleging an unconstitutional taking. Addressing certified questions from the United States Court of Appeals for the Federal Circuit, the Oregon Supreme Court held: that a 1905 Oregon statute authorizing the United States to appropriate water did not preclude Plaintiffs from acquiring a beneficial or equitable property interest in the water appropriated by the United States; in appropriating water pursuant to the 1905 statute, the United States had appropriated water for the use and benefit of landowners who would put it to a beneficial use; a person asserting only a beneficial or equitable property interest in a water right may hold an interest not subject to the Klamath Basin Adjudication.

Texas


Creedmoor, a member-owned water supply corporation (“WSC”), brought an action against a developer and the Texas Commission on Environmental Quality (“TCEQ”) for declaratory and injunctive relief. The TCEQ had previously issued an order permitting the developer’s expedited release from a portion of WSC’s service area as defined by a certificate of convenience and necessity. The district court dismissed the action for lack of subject matter jurisdiction and Creedmoor appealed. The court of appeals affirmed, holding, inter alia, the WSC’s allegations of “ultra vires” conduct on the part of the TCEQ were not facts that would demonstrate the TCEQ exceeded its authority, the exception of orders from judicial review regarding expedited release proceedings did not violate the state constitution’s “open courts” guarantee, and seeking relief under the Uniform Declaratory Judgment Act did not prevent the suit from being barred by sovereign immunity.
Maine

Friends of Lincoln Lakes v. Board of Envt’l Prot., 989 A.2d 1128 (Me. 2010)

Friends of Lincoln Lakes (“FOLL”) appealed the approval of Evergreen Wind Power’s application to construct a sixty megawatt wind farm. FOLL contended that the Department of Environmental Protection’s findings regarding sound level limits, public health impact, and impact on wildlife were not supported by substantial evidence. Moreover, FOLL argued that allowing direct appeal of expedited wind energy developments to the Supreme Judicial Court would constitute Equal Protection violations of both the United States and Maine Constitutions. The Supreme Judicial Court affirmed and held that the record did contain substantial evidence to allow an agency to fairly and reasonably come to a decision, and the statute allowing direct appeal of agency decisions to the Supreme Judicial Court in regard to expedited wind energy projects was not unconstitutional.
**Federal**

**Eighth Circuit (North Dakota)**


DJ Coleman Inc. (“Coleman”) brought an action against Nufarm Americas, Inc. (“NAI”), an herbicide manufacturer, alleging products liability, negligence, failure to warn, breach of warranties, and state law claims of false and deceptive advertising stemming from damages allegedly sustained to the farm’s sunflower crop. The district court granted in part NAI’s motion for summary judgment and held that the economic loss doctrine barred claims for products liability, negligence, and failure to warn due to the foreseeability of damages stemming from use of a defective herbicide. Additionally, the district court found NAI’s herbicide label had effectively disclaimed implied warranties, but an issue of fact remained as to whether Coleman proceeded according to the label’s instructions during application. Finally, the district court held that the Federal Insecticide, Fungicide, and Rodenticide Act preempted Coleman’s claim for deceptive advertising but did not preempt Coleman’s breach of warranty claims.

**Ninth Circuit**

National Meat Ass’n v. Brown, Nos. 09-15843, 09-15486, 2010 WL 1225477 (9th Cir. March 31, 2010); 2010 U.S. App. LEXIS 6608

The National Meat Association (“NMA”) brought an action against the State of California seeking declaratory and injunctive relief from enforcement of California Penal Code § 599f, which bans the slaughter and inhumane treatment of nonambulatory animals, against federally regulated swine slaughterhouses. The district court granted a preliminary injunction, and the State filed an interlocutory appeal. The court of appeals vacated the preliminary injunction and held that the Federal Meat Inspection Act did not preempt §599f as it pertained to the slaughter of nonambulatory animals, but the ban on inhumane treatment was expressly preempted.

**District of Columbia**


Plaintiffs brought suit alleging that the Department of Labor (“DOL”) violated the Administrative Procedure Act when promulgating the adverse effect wage rate (“AWER”). Plaintiffs asserted that the DOL improperly adopted a four-level system for calculating AWERs based upon data provided by the Bureau of Labor Statistics Occupational Employment Survey rather than using the Department of Agriculture’s Farm Labor Survey. The district court denied Plaintiffs’ motion for partial summary judgment, holding that the DOL’s decision to use data generated and gathered in this new manner was not arbitrary or capricious, as the DOL had offered support for its decision that the court deemed “reasonable.”
ARTICLES OF INTEREST

Oil and Gas


Christopher Bidlack, Regulating the Inevitable: Understanding the Legal Consequences of and Providing for the Regulation of the Geologic Sequestration of Carbon Dioxide, 30 J. Land Resources & Env'l L. 199 (2010).

Water


Wind


Agriculture