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I. Introduction

This Article summarizes and discusses important developments in Wyoming's oil and gas law between August 1, 2015 and July 31, 2016. During this time period there were cases of note which dealt with the regulation of hydraulic fracturing on public lands, the effect of assignment of contractual rights, and the application of statute of limitations to the Wyoming Royalties Payment Act. The Wyoming legislature amended rules concerning the regulation of the injection of carbon dioxide. Also, the Wyoming Oil and Gas Conservation Commission ("WOGCC") amended its rules to impose more restrictive venting, flaring and bonding regulations. Finally, the Governor issued an executive order concerning protection of greater sage-grouse habitat.

II. Legislative and Regulatory Developments

A. Legislation

Effective as of July 1, 2016, the Wyoming legislature enacted amendments to the statutes regulating carbon dioxide sequestration, revising specifically when the regulation of carbon dioxide sequestration shall be transferred from the WOGCC to the Wyoming Department of Environmental Quality ("WDEQ").[1] The amended statute clarifies that the WOGCC regulates the storage of carbon dioxide that is incidental to oil and gas recovery operations, while the WDEQ regulates long term carbon dioxide storage (also called "geologic sequestration").[2] Such regulation changes to the WDEQ when an oil and gas operator expressly converts to geologic sequestration upon the cessation of oil and gas recover operations, or injects carbon dioxide for the express purpose of long term storage that results in an increased risk to an underground source of drinking water.[3] In

1. WYO. STAT. ANN. § 35-11-313(c) (West 2016); S. Enrolled Act 26, 2016 Leg. 63d Budget Sess. (Wyo. 2016).
2. *Id.*
3. *Id.*

order to determine whether an operator is injecting carbon dioxide for the express purpose of long term storage that results in an increased risk to an underground source of drinking water, the director of the WDEQ shall consider the findings of the supervisor of the WOGCC, which findings shall be made after a hearing of the WOGCC examiners and an opportunity for public hearing before the WOGCC.[4]

B. Venting and Flaring

Effective April 1, 2016, the WOGCC revised its venting and flaring rules to restrict further the ability of an oil and gas operator to use venting and flaring of natural gas. The revised rules lowered to twenty MCF the daily venting limit for a well or a "lease facility" which serves multiple wells.[5] The allowable daily flaring rate remained at sixty MCF.[6] In order to flare above the sixty MCF level, an operator must apply to the WOGCC for authority, and the supervisor may grant allowable flaring up to 180 days at a rate up to a monthly average of 250 MCF per day, with full WOGCC approval required for authorization to flare above that average or for longer than 180 days.[7] The revised rules also added new items to the reports due to the WOGCC from operators who flare or vent. For venting below twenty MCF per day and flaring below sixty MCF per day, operators are required to submit a compositional analysis of the gas vented or flared within six months of the start of venting or flaring and every five years thereafter while venting or flaring under those levels.[8] If the Operator is flaring pursuant to an approved application for authority to flare from the WOGCC, such compositional analysis must be submitted within three months of the authorization.[9]

Venting of gas containing a hydrogen sulfide content in excess of fifty parts per million is not allowed; however, an operator may obtain supervisor approval for venting above that level for "specific job tasks in controlled environments."[10]

4. *Id.*
5. 055-003 WYO. CODE R. § 39(b)(iv)(C) (2016).
6. *Id.* § 39(b)(iv)(A).
7. *Id.* § 39(c)(i).
8. *Id.* § 39(a)(v)(A).
9. *Id.* § 39(a)(v)(B).
10. *Id.* § 39(e).

C. Bonding

Effective February 1, 2016, the WOGCC revised its bonding rules to increase the required bond amounts. Now, an individual well bond is ten dollars per foot of length of the well bore[11] and the blanket bond amount covering all wells of an operator is one hundred thousand dollars.[12]

D. Greater Sage-Grouse Protection

Effective September 18, 2015, the WOGCC issued its Greater Sage-Grouse Core Area Protection Policy, which affirms that all oil and gas operators must comply with the Wyoming Governor's Executive Order 2015-4, Greater Sage-Grouse Core Area Protection (the "SGEO").[13] Pursuant to the SGEO, if proposed activities are within areas defined in the SGEO as Greater Sage-Grouse Core Population Area, Connectivity Area, Winter Concentration Area, or Non-Core Area within two miles of an occupied sage-grouse lek, certain notices must be sent to the WOGCC and certain use stipulations (which include surface occupancy restrictions and seasonal use limitations) must be followed.[14]

III. Judicial Developments

A. Retained Obligations of Original Contracting Party after Assignment of Contract: Pennaco Energy, Inc. v. KD Co. LLC

Pennaco Energy, Inc. ("Pennaco") obtained oil and gas leases in Wyoming, and then entered into surface use agreements with landowners of the related surface estate; in those surface use agreements Pennaco committed to pay for surface damages and for use of the land, and to restore the land to its prior condition after all operations ceased.[15] Pennaco subsequently assigned its interests in the oil and gas leases and the surface use agreements to CEP-M Purchase, LLC, who then assigned its interest to High Plains Gas, Inc.[16] Since Pennaco's assignment, no party had made any of the payments to the surface owners required under the surface use agreements.[17] The surface use agreements did not contain an exculpatory

11. 055-003 WYO. CODE R. § 4(b)(i)(A).
12. *Id.* § 4(b)(i)(B).
13. WOGCC Greater Sage-Grouse Core Area Protection Policy, eff. Sept. 18, 2015.
14. *Id.*
15. Pennaco Energy, Inc. v. KD Co., LCC, 2015 WY 152, ¶ 1, 363 P.3d 18, 20 (Wyo. 2015).
16. *Id.* ¶ 8, 363 P.3d at 21.
17. *Id.* ¶ 10, 363 P.3d at 21.

clause, whereby Pennaco would be expressly released of all obligations under the surface use agreements upon assignment of those agreements. The key issue for the court to decide in this case was whether the relationship between Pennaco and the surface owners was based on privity of contract or based on privity of estate.[18]

If a privity of contract was found, the court intended to rely on the well-settled principle of contract law that rights are assigned and duties are delegated; when a right is assigned, the assignor ordinarily no longer has any interest in the claim, but when a duty is delegated the delegating party continues to remain liable.[19]

If Pennaco's obligations under the surface use agreements were found to be covenants running with the land, Pennaco's relationship to the landowners would be based on privity of estate, and Pennaco would be released of its obligations to the surface owners upon assignment, due to the fact that privity of estate would be destroyed.[20]

Additionally, Pennaco argued that the exculpatory clause contained in the oil and gas leases should be incorporated by reference into the surface use agreements, due to the fact that the surface use agreements make mention of the oil and gas leases.[21] The court decided that because such an incorporation by reference is not expressly made in the surface use agreements, it could not be inferred (the mere mention of the oil and gas leases in the surface use agreements is not enough to incorporate the oil and gas lease provisions by reference).[22]

The court analyzed the surface use agreements and found no evidence of intent by the parties to create covenants running with the land. Therefore, the court held that under the principles of contract law stated above, and due to the absence of an express clause that terminates the original lessee-assignor's (Pennaco's) obligations upon assignment, Pennaco continues to be responsible to the surface owners after assignment for at least some of the covenants in the agreements under a contractual relationship.[23] The obligations that Pennaco remains liable for after assignment "are those

18. *Id*. ¶ 12, 363 P.3d at 22.

19. *Id*. ¶ 17, 363 P.3d at 23 (citing Joseph M. Perillo, *Contracts*, § 18.25, 665-666 (7th ed. 2014)).

20. *Id*. (citing 62-4 CAIL Annual Institute on Oil and Gas Law § 4.03 (Institute for Energy Law of the Center for American and International Law's 56th Annual Institute on Oil & Gas, 2015)).

21. *Id*. ¶ 76, 363 P.3d at 38.

22. *Id*. ¶ 82, 363 P.3d at 39.

23. *Id*. ¶ 87, 363 P.3d at 40.

requiring payments of rentals and/or royalties and restoration of the surface to its original condition once production activities have ceased."[24]

B. Applicable Statute of Limitations for Claims under the Wyoming Royalties Payment Act: Nucor, Inc. v. Petrohawk Energy Corp.

Nucor, Inc. and another plaintiff each owned a twenty-five percent working interest in a well from 1992 to 2006, but had not received royalty payments on the well during that time period; plaintiffs believed the well was taken out of production during that time period due to information in a letter received from Petrohawk Energy Corporation's predecessors in November of 1991.[25] However, the well had continued to produce, and in 2011 the plaintiffs received a letter from Petrohawk's successors seeking to clarify ownership rights of the well.[26] The plaintiffs then discovered the well had been operating and producing from 1992 to 2006, and sued the operators to recover their royalty payments under the Wyoming Royalties Payment Act ("WRPA").[27] In connection with hearing motions for summary judgment, an issue for the court to decide was what statute of limitations applies to claims brought under WRPA.

If WRPA was found as a whole to be a penalty, the applicable statute of limitations would be one year, whereas if WRPA was found to be compensatory in nature (except for the improper reporting penalty set forth in WRPA), the statute of limitations for a breach of contract action would apply (ten years for a written contract, eight years for a contract not in writing).[28] The Wyoming Supreme Court had previously stated in dicta that the improper reporting penalty in WRPA is a penalty and governed by the one year statute of limitations, but no Wyoming court had decided whether the one year statute of limitations for penalty or forfeiture statutes applied only to the improper reporting penalty or the entire WRPA.[29] The court held that because there is a preference in applying a longer statute of limitations, and because WRPA is remedial (and therefore predominately compensatory) in nature, the longer statute of limitations for breach of

24. *Id*. ¶ 19, 363 P.3d at 24.

25. Nucor, Inc. v. Petrohawk Energy Corp., No. 14-CV-132-ABJ, 2015 WL 7009114, *1 (D. Wyo. Nov. 12, 2015).

26. *Id*.

27. *Id*. at *2.

28. *Id*. at *4.

29. *Id*. at *5.

contract (ten years if in writing and eight if not in writing) applied to WRPA, except for the improper reporting penalty provision.[30]

30. *Id*. at *4-6.