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ARKANSAS

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There is very little to report in Arkansas this year. The 92nd General Assembly made no substantive changes to the law of oil and gas in Arkansas. In addition, the federal courts produced no significant developments.[1] In state court, there were two notable cases.

The case of *Arkansas Oil & Gas Comm'n v. Hurd*, began as an examination of the Oil and Gas Commission's authority regarding compulsory leasing and pooling but ended with a bizarre twist. In the administrative proceeding, SWN Arkansas Production Company, LLC sought to show that the leases of two mineral owners were "self-dealing, non-arm's length" transactions.[2] These owners received a 25% royalty under the alleged self-dealt leases, while SWN gave no more than a 1/7 royalty in leases it negotiated in the unit.[3] The

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1. Smith v. SEECO, 922 F.3d 398 (8th Cir. 2019) (deciding the only oil and gas case in the federal courts on procedural grounds with no special impact on the law of oil and gas).
2. *Id*. at 409.
3. *Id.*

Commission sided with SWN, and the mineral owners appealed to Pulaski County Circuit Court pursuant to the Arkansas Administrative Procedures Act.[4]

During the appeal to the circuit court, the Arkansas Supreme Court issued the opinion of *Board of Trustees of the University of Arkansas v. Andrews*. This opinion held that the State of Arkansas cannot waive its sovereign immunity via laws enacted by the General Assembly.[5] The Commission moved to dismiss the appeal utilizing *Andrews* to argue that being named a defendant in circuit court under the Arkansas Administrative Procedures Act violated the sovereign immunity doctrine.[6] The Circuit Court of Pulaski County granted the Commission's motion to dismiss, but not before holding that the lack of a right of review of administrative action in light of the *Andrews* decision rendered the entire Arkansas Administrative Procedures Act unconstitutional.[7]

The Arkansas Supreme Court took the Commission's appeal from the circuit court.[8] Using a clever pivot on the issue of the Commission's status as a party to the appeal to circuit court, the Court found that the Commission was not a defendant in the action. Instead, the Commission was "akin to a trial court in an appellate proceeding; it has no vested interest in the outcome of the appeal other than whether its decision is upheld."[9] As a result, the Court abrogated and remanded the circuit court's opinion.[10]

The decision was a sensible compromise allowing the continuing operation of the Oil & Gas Commission. If the trial court's

4. *Id.* ARK. CODE ANN. § 15-72- A-2(j)(1)(c) (2019) (requiring an applicant seeking force pooling to provide information on the highest bonus and royalty known in the unit); ARK. CODE ANN. §15-72-304(b)(4) (explaining this is the basis under which an unleased mineral owner who fails to affirmatively elect to participate in the unit gets compensated for transfer of his rights under); Walls v. Arkansas Oil & Gas Comm'n, 390 S.W.3d 88 (Ark. 2012) (explaining information about the "highest" bonus and royalty is only an evidentiary requirement, then the information is then subject to "reasonable consideration and a reasonable basis" and is not "fair market value." As such, some mineral owners subject to force pooling react by entering into leases with entities they own at higher terms than those proposed by the applicant. This case is a test of how far mineral owners who self-deal may go).

5. Ark. Oil and Gas Comm'n v. Hurd, 564 S.W.3d 248, 250 (Ark. 2018) (explaining the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts"); ARK. CONST. art. 5, § 20.

6. Board of Trustees v. Andrews, 535 S.W.3d 616, 622–23 (Ark. 2018).

7. *Arkansas Oil and Gas Comm'n*, 564 S.W.3d at 250–51.

8. *See id.* at 253.

9. *Id.* at 255.

10. *Id.*

decision had stood, it would practically end the functionality of all state administrative agencies. In addition, the trial court opinion would require an amendment of the Arkansas Constitution. The language of the Constitution is very clear, and it was the basis of the *Andrews* decision. Unfortunately, the merits of the underlying issue in the *Hurd* case are not yet reported, though an appeal is pending.

A class was successfully certified for thirty-six persons in a claim against a gas producer in *Stephens Production Company v. Mainer*. The trial court certified the class as those underpaid royalties on "proceeds" leases within a certain production unit in Franklin County, Arkansas.[11] The gas producer's resistance to the class action certification was principally the size of the class.[12] In a prior case cited by the producer, a class of seventeen persons failed to meet the numerosity requirement of Arkansas's Rule Civil Procedure 23 regarding class actions.[13] The Court reiterated that it has no bright-line test on the exact number needed to satisfy the numerosity requirement and that "common sense" controls.[14] Not elaborating on this standard of common sense, the Court instead noted there was no abuse of discretion by the trial court.[15] More importantly, in a close case of whether or not there is numerosity, erring on the side of certification is favored by the Court because it is possible to decertify the class at a later date.[16]

Justices Wood, Kemp, and Womack dissented from the majority's opinion.[17] The thrust of the dissent was that there were no findings by the trial court on "geographic dispersion of class members, the size of individual claims, the financial resources of the class members, or the ability of claimants to institute individual suits."[18] Without these findings, the dissent would have found that the trial court abused its discretion.[19]

Stephens Production Company seems to allow a presumption that lessors in a production unit under a common lessor are a viable class of plaintiffs. If so, this may result in a new round of litigation of

11. Stephens Prod. Co. v. Mainer, 571 S.W.3d 905, 907 (Ark. 2019).
12. *Id.*
13. *Id.* at 908.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 910.
18. *Id.*
19. *Id.*

"micro" class actions. One could certainly imagine the use of this tactic in both royalty disputes within units and implied covenant cases within units in Arkansas.