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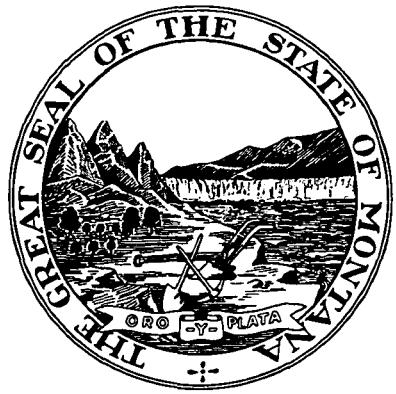

By: Stephen R. Brown[1]

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A. Burlington Resources Oil & Gas Co. v. Lang & Sons, Inc.[2]

1. Background Facts

In *Burlington Resources Oil & Gas Co. v. Lang & Sons, Inc.*, the Montana Supreme Court evaluated the issue of what damages a mineral owner must pay to a surface owner to use pore space for wastewater disposal.

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2. Burlington Res. Oil & Gas Co. v. Lang & Sons, Inc., 259 P.3d 766 (Mont. 2011).

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The case arose in the East Lookout Butte Unit ("ELOB") in Fallon County, in eastern Montana. Lang owned the surface and used it to operate a cattle ranch. Burlington owned the minerals. In 1992, Lang's predecessor, Votruba, executed an oil and gas lease with Meridian Oil, Burlington's predecessor. At the time of the lease, Votruba owned the entirety of the mineral and surface estate. The lease granted Meridian the right to use the surface estate as necessary in oil and gas operations.

In 1993, Meridian commenced operations by drilling well #42-25 in the Red River Formation. The well produced oil for a couple years until it lost pressure and was ultimately plugged in 1995.

In 1995, three years after Votruba executed the oil and gas lease, and the same year that Meridian plugged the well, Burlington petitioned the Montana Board of Oil and Gas Conservation ("MBOGC") to unitize the Red River Formation into the ELOB pursuant to the Montana unitization statutes.[3] The unitization was designed to allow additional oil and gas to be extracted with secondary recovery efforts. Once these secondary recovery efforts went into effect, more oil was produced, but the wells within the unit also produced significant amounts of wastewater.

Votruba sold its interest in the property to Lang in 2003. Votruba reserved the minerals, although the mineral reservation was not directly relevant to the case.[4] After Lang had acquired the surface and Burlington acquired the leasehold interest, Burlington sought and received approval from the MBOGC to convert the #42-25 well into a wastewater well. Burlington offered to pay Lang in anticipation of additional surface disruption in piping wastewater to the well. Lang declined the offer, so Burlington began construction work. Lang then blocked Burlington's access to the well by denying access to the property.

Burlington sued seeking to compel Lang to grant access to the property. Lang then counterclaimed for compensation for use of the pore space. By the time the trial started, Burlington had disposed of more than two million barrels of wastewater from approximately 150 ELOB wells into the single well on Lang's property.

2. Ownership of Pore Space

The Montana Supreme Court began its analysis by evaluating ownership of the pore space beneath Lang's property. The Court con-

3. MONT. CODE ANN. § 82-11-201 (2011).

4. Votruba entered into the lease, which included the rights to use the surface prior to the time the ranch was sold to Lang. Thus, Lang bought the ranch subject to the lease. Because the lease remained in effect, the Court did not have to reach the issue of whether Votruba's mineral reservation included the right to use the pore space. Instead, the issue of pore space use was analyzed under the terms of the pre-existing lease.

cluded that Votruba sold the land to Lang and reserved "all of the coal, oil, gas, and other minerals in and under" the surface. The reservation did not include the pore space. Thus, the Court assumed that absent a specific reservation, ownership of the pore space passed to Lang with the 2003 deed and continued to be owned by Lang for purposes of the dispute. After resolving this issue, the Court continued to analyze whether Burlington had any right to use Lang's pore space, and if so, whether compensation was due to Lang and in what amounts.

3. Rights to Use Pore Space

The ELOB unitization plan allowed Burlington to use secondary recovery to extract oil from the Red River Formation. The extraction process required Burlington to inject water into the formation to drive oil to wellheads within the unit. The oil production also resulted in excess water of which Burlington had to dispose. The unit plan for the ELOB approved by the MBOGC gave Burlington the "right to use as much of the surface of the land as may be reasonably necessary for the operation and the development of the Unit Area." The plan also stated:

> [T]he parties hereto, to the extent of their surface rights and interests owned anywhere within the Unit Area, hereby grant to the Unit Operator the right to use as much of the surface of the land within the Unit Area as may be reasonably necessary for the operation and the development of the Unit Area hereunder.

The plan further provided for payment of damages to the surface owner under the provisions of the Montana Surface Owner Damage and Disruption Compensation Act ("SODDCA").[5]

Even though the Court concluded that the pore space ownership stayed with the surface owner not the mineral owner, the Court also concluded that Burlington had the right to use the pore space for wastewater disposal. The Court cited several reasons for this conclusion. First, the Court stated that Montana law "permits the owner of a dominant mineral estate to use reasonably the surface estate in the production of the mineral."[6] This conclusion suggests that in Montana surface rights associated with exercise of the mineral estate include the right to use the surface to conduct secondary recovery operations. Montana had not yet reached this conclusion in previous cases, although it has recognized the general rule that a mineral fee owner has incident rights to go upon the "surface" and to conduct operations necessary to produce oil and gas.[7] Other states have held that surface

5. MONT. CODE ANN. § 82-10-501 (2011).

6. Burlington Res. Oil & Gas Co. v. Lang & Sons Inc., 259 P.3d 766, 770 (Mont. 2011).

7. N. Cheyenne Tribe v. Hollowbreast, 349 F. Supp. 1302, 1310 (D. Mont. 1972) (mineral developer not liable for damages arising from reasonably necessary explora-

rights include the rights necessary to conduct secondary recovery operations.[8]

Second, and likely more importantly for purposes of the opinion, the unit plan expressly gave Burlington the right to use Lang's surface estate where necessary for unit operations.[9] Because the unit contemplated secondary recovery, the unit operations apparently anticipated more than just a traditional oil or gas production well. Although not specifically addressed by the Court, presumably Lang was on notice of the unit plan when it acquired the property from Votruba. Because there does not appear to have been any dispute that wastewater disposal was necessary under the unit plan, Lang apparently took the property subject to the possibility that the existing lease and unit plan might result in wastewater disposal activities in the existing well.

4. Compensation for Use of Pore Space

The primary dispute in the case was the amount of compensation due to Lang. Lang used two arguments to seek recovery of damages. First, it claimed that the Montana SODDCA statute required Burlington to compensate it based upon an amount per barrel rate. Lang contended this was the standard in the industry in Montana and offered several witnesses who testified in support of this standard. The Supreme Court upheld the district court's rejection of this argument. SODDCA does require compensation to landowners but limits compensation to "loss of agricultural production and income, lost land value, and lost value of improvements" caused by oil and gas operations.[10] Because Lang's "per barrel" measure of damages did not fit within any of these three categories, the Court concluded that Lang had failed to produce evidence of damages recognized as compensable under SODDCA.

Lang's second damages theory was based upon a more general theory that SODDCA's policy statement requires compensation to a landowner for impacts to the surface estate, which in Lang's case was the use of the pore space. Although Lang did produce witnesses who

tion activities), *rev'd on other grounds sub nom.* N. Cheyenne Tribe v. N. Cheyenne Defendant Class of Allottees, Heirs and Devisees, 505 F.2d 268 (9th Cir. 1974), *rev'd sub nom.* N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); Hurley v. N. Pac. Ry. Co., 455 P.2d 321 (Mont. 1969) (oil and gas lease allows lessee to use so much of the surface as is reasonably necessary to perform its obligations under the lease); Stokes v. Tutvet, 328 P.2d 1096, 1100 (Mont. 1958) (mineral fee grantee has incident rights to go upon and to conduct exploratory operations and produce oil and gas).

8. *See, e.g.*, Colburn v. Parker & Parsley Dev. Co., 842 P.2d 321, 327 (Kan. Ct. App. 1992) (standard lease permits lessee to drill a salt water disposal well on the leased premises); Dunn v. Sw. Ardmore Tulip Creek Sand Unit, 548 P.2d 685 (Okla. Civ. App. 1976) (holding use of salt water well located on surface estate permissible).

9. *Burlington*, 259 P.3d at 770.

10. MONT. CODE ANN. § 82-10-504(1)(a) (2011). Even though SODDCA was enacted in 1981, there has been relatively little litigation under it and no prior Montana Supreme Court opinions.

testified as to the customary fee, the Court declined to find a general basis for compensation to Lang when Lang failed to introduce evidence that fit within one of the three specific statutory categories. In other words, the Court found that the statute did not support the type of damages evidence that Lang proposed.

Lang's next argument was based on a general common law trespass theory. Although the Court held that SODDCA does not preclude common law remedies, the Court declined to accept Lang's argument because Lang "had not explained its trespass claim or other common law claim on appeal."[11]

Lang's final argument was that the Court should defer to the expertise of the MBOGC as to damages. Lang introduced testimony from two MBOGC employees, including the long-time MBOGC administrator that it was customary for an operator to pay a landowner for the use of pore space. Based on this testimony, Lang sought to have the Court defer to the expertise of MBOGC as to whether Burlington should have compensated Lang. However, the Court found that the MBOGC opinions "were [made] in their individual capacities" and did not represent a general agency interpretation of the statute.[12] Thus the Court placed little weight on the opinions, especially since they did not fit within any of the compensation schemes authorized under the statute.

5. Implications of the Case

The case has several implications. First, it represents the first ruling from the Montana Supreme Court that, absent some specific conveyance, pore space is not part of the mineral estate. In reaching this conclusion, the Court confirmed that Montana law is consistent with that of other Rocky Mountain States that the surface owner, not the mineral owner, owns the pore space.[13]

Although the Court did not reference it, the Court's opinion coincides with a 2009 law passed by the Montana Legislature; the law expressly states that unless determined otherwise from language of the deed or another conveyance instrument, the pore space is part of the surface estate.[14]

The *Lang* case also illustrates the difficulties landowners face when seeking to recover statutory damages under SODDCA when pore

11. *Burlington*, 259 P.3d at 771.

12. *Id.* at 772.

13. *See* Owen L. Anderson, *Geologic CO[2] Sequestration: Who Owns the Pore Space?*, 9 WYO. L. REV. 97 (2009).

14. With the passage of Senate Bill 498, Montana joined its neighboring states North Dakota and Wyoming in presuming that pore space is owned by the surface owner. The statute was primarily aimed at gas storage projects. Even though the Supreme Court did not mention the statute, it tacitly upheld its presumption with its ruling on pore space ownership.

space is used for wastewater disposal. It seems fairly obvious that the Montana Legislature did not contemplate this use of the surface estate when it passed the statute in 1981.

B. Summer Night Oil Co. v. Munoz[15]

This case represented another chapter in a protracted dispute between two companies over oil and gas wells in Daniels County. The two companies, Miocene Oil & Gas ("Miocene") and Summer Night Oil Co., ("Summer Night"), seemed to resolve their dispute in 2007 and appeared in court to report their settlement. They then executed and filed a settlement agreement with the state district court.

Prior to the settlement agreement, Miocene was fined $28,000 by the Environmental Protection Agency for allegedly disposing of 25,000 barrels of oil field brine into an injection well without a permit.[16] As part of the settlement, Summer Night agreed to pay Miocene $14,000 of the fine. Miocene presumably remained responsible for the other half. Miocene notified the EPA of the terms of the settlement on August 17, 2007.[17] The specific settlement terms that led to the dispute were the following:

> 1. To settle any interest of Miocene in Anderson 27–1 and Anderson 27–2, Summer Night will pay the following:
> a) Summer Night will pay [one half] of the fine due from Miocene to the EPA. Miocene and Summer Night will agree to use their best efforts to honestly report that a dispute existed between the parties regarding operation of the well and Miocene will use their best efforts to attempt to reduce the fine.
> b) Within six months of July 25, 2007, Summer Night will pay to Miocene the sum of $75,000 for its investment and equipment located at Anderson 27–1 and Anderson 27–2. That said monies will be generated from the sale to investors and thus each parties' best efforts to clear title is presumed.[18]

Although these terms are not models of clarity, apparently the deal the parties struck called for Miocene to convey the Anderson wells and some other assets to Summer Night. Miocene was to go to its investors to get necessary consents for the sale. In exchange, Summer

15. Summer Night Oil Co. v. Munoz, 259 P.3d 778 (Mont. 2011).

16. According to documents on the EPA's website, Summer Night Oil Co. also was fined for certain other separate violations of the Safe Drinking Water Act. Both sets of violations occurred on the Fort Peck Indian Reservation in northeastern Montana. Press Release, U.S. Envtl. Prot. Agency, Agreement Reached Concerning Injection Well Violations on Fort Peck Indian Reservation (June 13, 2007), *available at* http://yosemite1.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/c01f94df1e531071852572f90052cb4d!OpenDocument&Start=5.4&Count=5&Expand=5.4.

17. *See* Letter from Manuel Munoz, President, Miocene Oil Co., L.L.C., to Elyana R. Sutin, Attorney (Aug. 17, 2007), *available at* http://yosemite.epa.gov/OA/RHC/EPAAdmin.nsf/Filings/4651123866BF57408525764E0068FCE3/$File/Miocene%20Letter.pdf.

18. Summer Night Oil Co. v. Munoz, 259 P.3d 778, 779 (Mont. 2011).

Night was to pay the $75,000 plus a share of the EPA fine that Miocene had agreed to try to mitigate.

The lawsuit arose when two years went by without Summer Night tendering payment. Summer Night raised a variety of arguments that it claimed excused payment. For example, Summer Night took the position that Miocene had failed to timely remove liens on the assets, which made it more difficult for Summer Night to resell them during a time when the market value of the assets was declining.

The Montana Supreme Court analyzed the dispute as a straight contract action, looking to the intent of the parties as evidenced in the written settlement agreement. Under Montana law, settlement agreements are considered to be legally enforceable contracts.[19] Although the agreement did not specifically say when Summer Night was required to make the payments, the agreement did require that payments be made. The Court followed Montana statutes that state when a time for performance is not specified, the law implies a reasonable time.[20] Although the Court declined to adopt a "one size fits all" approach, the Court did uphold the District Court's decision that two years was too long.

Although *Summer Night Oil* is not a pure oil and gas decision, it does show that if parties resolve their disputes over oil and gas issues that the resolution will be enforced under general principles of Montana law. While the Court did look to the nature of the industry in determining the time for payment, ultimately, the Court concluded that a contract is a contract and will be enforced if reduced to writing. Thus, while *Summer Night Oil* does not establish any new oil and gas precedent in Montana, it is instructive to show that parties will be held to the bargains they strike in resolving oil and gas disputes, and the resolution of disputes will start with basic contract law rules.

II. Federal Oil and Gas Leasing Litigation

Litigation over federal oil and gas leasing in Montana continued in 2011. In 2008, several environmental groups sued the Bureau of Land Management ("BLM") alleging that it failed to take into account climate change effects when issuing oil and gas leases on federal lands.[21] These groups included the Montana Environmental Information Center, Earthworks Oil & Gas Accountability Project, and WildEarth Guardians. After the initial lawsuit was filed, the parties entered into a settlement agreement that called for the BLM to prepare a fast-track environmental impact statement to address climate change effects. As part of the settlement, the BLM suspended oil and gas leases

19. *Id.* at 781.
20. *Id.* at 781–82.
21. Complaint at 1, Mont. Envtl. Info. Ctr. v. U.S. Bureau of Land Mgmt., No. CV-08-178-M-DWM (D. Mont. Dec. 17, 2008).

on sixty-one leases in Montana that the BLM had sold in 2008. The Federal District Court approved the settlement in March 2010.

BLM completed the environmental impact statement called for in the settlement agreement in December 2010. Upon completion, BLM lifted the suspension and allowed the leases to proceed forward. The environmental groups did not believe that BLM had complied with the settlement agreement and filed a new lawsuit in March 2011.[22] These same groups, collectively referred to as "Climate Hawks," contended that BLM had failed to properly address methane and other greenhouse gas emissions that may result if the leases are developed. The case remains at issue and likely will develop further over the course of the next year.

III. The Montana Legislature

Montana's Legislature, which meets every two years, completed its 2011 session in April. Although the Legislature considered several oil and gas bills, including a bill to reform state mineral leasing[23] and two bills addressing disclosure of hydrofracturing fluids,[24] the Legislature did not pass any significant legislation. The Legislature did, however, pass a non-binding resolution urging the responsible development of the thirty-two million acres of federal land in Montana.[25]

IV. Administrative Rules

On August 26, 2011, Montana joined several other states in adopting rules calling for the disclosure of certain components of hydrofracturing fluids. The new rules require that oil and gas operators provide written information about the chemicals used in hydraulic fracturing operations. The rules require that reports be filed either with the Montana Board of Oil and Gas Conservation ("MBOGC") or the online site FracFocus.org, which is maintained by the Groundwater Protection Council and the Oil and Gas Conservation Commission.

The new rules followed several failed bills in the 2011 Montana Legislature. As a compromise, the MBOGC agreed to promulgate rules. The rules were originally proposed on May 26, 2011. The MBOGC received numerous written comments and also held a public hearing in Sidney, Montana on June 14, 2011.

There are several key aspects to the new Montana rules. They include:

22. Complaint at 2, Mont. Envtl. Info. Ctr. v. U.S. Bureau of Land Mgmt., No. CV-11-26-M-DWM (D. Mont. Feb. 7, 2011).

23. S.B. 394, 62d Leg., Reg. Sess. (Mont. 2011).

24. H.B. 586, 62d Leg., Reg. Sess. (Mont. 2011); S.B. 86, 62d Leg., Reg. Sess. (Mont. 2011).

25. S.J. Res. 12, 62d Leg., Reg. Sess. (Mont. 2011).

- The requirement to submit a report upon completion of a well that describes the amount and type of material used. The report must include the chemical ingredient name and the Chemical Abstracts Service ("CAS") registry number.
- The requirement to report to the MBOGC may be waived if the operator reports to FracFocus.org or any successor site.
- Operators may claim trade secret protection for the "formula, pattern, compilation, program, device, method, technique, process, or composition of a chemical that is unique to the owner or operator." If trade secret protection is claimed, the operator may provide an alternate type of report. The trade secret provisions also provide for disclosure to emergency responders and officials who execute a nondisclosure agreement.
- Hydraulic fracturing operations must demonstrate "suitable and safe mechanical configuration for the stimulation treatment proposed." There are several other operational changes, primarily to clarify operation standards set forth in existing rules.

In adopting the new rules, the MBOGC believed it was being proactive in setting forth disclosure standards.[26] However, the rules have been criticized by public interest groups as not requiring enough pre-fracking disclosure and for the opportunity to shield information under Montana trade secret laws.[27]

26. According to a press release on the Montana Department of Natural Resources and Conservation website, the MBOGC administrator described the rules as placing Montana "at the forefront of a national movement toward mandatory disclosure of all the chemicals used in hydraulic fracturing." Press Release, John Grassy, Mont. Dep't of Natural Res. and Conservation, New Rules for Oil & Gas Operators Require Listing of Hydraulic Fracturing Chemicals (Sep. 1, 2011), *available at* http://dnrc.mt.gov/News/Releases/2011/September1.asp.

27. *See, e.g.* Jim Magill, *Environmentalists Unhappy with New Montana Fracking Rules*, PLATTS.COM (Sept. 13, 2011), http://www.platts.com/RSSFeedDetailedNews/RSSFeed/NaturalGas/6474057.