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Recommended Citation

Perkins, G. Alan, "Unconventional Litigation in Unconventional Plays: A View from the Trenches" (2013). *Annual of the Arkansas Natural Resources Law Institute*. 101.

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A VIEW FROM THE
TRENCHES

G. Alan Perkins

**UNCONVENTIONAL LITIGATION IN UNCONVENTIONAL PLAYS:
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A DISCUSSION OF ONGOING OIL AND GAS LITIGATION IN ARKANSAS

Presented at the 52nd Annual Natural Resources Law Institute,
Arkansas Bar Association
February 27-29, 2013, Hot Springs

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UNCONVENTIONAL LITIGATION IN UNCONVENTIONAL PLAYS: A VIEW FROM THE TRENCHES

G. Alan Perkins

Abstract

During the last decade, Arkansas has seen the most dramatic increase in oil and gas activity in the State's history, with the possible exception of the original Smackover oil boom in the 1920s. The Fayetteville Shale Play introduced central Arkansas to the natural gas industry in a big way. Exploration, extensive leasing activities, drilling natural gas wells, building roads, compressor stations, pipelines, and underground injection (disposal) wells, are now commonplace in "the Shale Counties" where none existed before. Along with increased industry activity, comes increased legal activity – including numerous transactions, new regulations and legislation, and, of course, litigation. The increase in litigation tends to follow the increase in activity, with some lag time.

Early cases during the Shale Boom tended to be primarily quiet title cases involving severed minerals and a host of other title issues, which continue with regularity today. Next came surface-use skirmishes, including numerous actions related to surface access for operations and surface use damage issues. As producing wells came on line, oil and gas lease issues began to hit the courts. Now, with a few years of Fayetteville Shale operations under our belts, Arkansas is experiencing a wave of environmental actions involving hydraulic fracturing ("fracking"), compressor station nuisance cases, and the "disposal wells cause earthquakes" cases, among others, resembling litigation trends in other areas of the country where new shale plays are occurring.

Practitioners dealing with oil and gas issues would be well-advised to stay current with developing litigation trends and decisions. Novel causes of action, new applications for old rules, and filling in the gaps of Arkansas's body of oil and gas law are very much in play. Like the general population living in the Shale Counties, many lawyers, legislators, *and judges* are learning for the first time about oil and gas development and the laws that apply to the industry. The application of what may be perceived as time-honored rules of law to new situations can result in unexpected outcomes. Therefore, for an oil and gas practitioner to be an effective advocate, he or she often must also serve as a teacher of history, earth science, and engineering, as well as the law.

Selected Cases

CASE NAME	VENUE	SUMMARY COMMENTS
LEASE DISPUTES / TITLE DISPUTES / MISC.		
<i>Walls v. Petrohawk Properties, LP, et al.</i>	Eastern District of Arkansas	Plaintiff alleged she was entitled to termination of her oil and gas lease due to lease assignment without her consent, failure to timely pay royalties and improper expense deductions from royalty payments from her "gross royalty" lease. Defendant had reimbursed plaintiff for all deductions and had resumed timely payment of royalties before lawsuit was filed. The court granted partial summary judgment to defendants on the basis that the problems plaintiff complained of were not sufficient grounds to void the lease under Arkansas law. Trial scheduled for June 2013.
<i>Walls v Holden, et al.</i>	White County Circuit Court	Plaintiffs allege that they are the owners of 1/2 mineral interest in the subject lands due to a reservation of mineral interests in a past deed. The plaintiffs leased to SEECO. The Holdens received a tax deed years ago on the same lands based on severed mineral tax forfeiture. The Holdens leased to Chesapeake. Plaintiffs contend the tax deed is void based on lack of subjoinder. Holdens contend the suit is barred by Ark. Code Ann. § 18-61-601 which provides that no action for the recovery of lands can be brought against a holder of a tax deed unless the plaintiff was seized or possessed of the lands within 2 years of the action being filed. The court granted summary judgment to Defendant, holding that plaintiffs were not in possession within 2 years of the action being filed since production of minerals had commenced outside of the 2-year period by Chesapeake, the Lessee of the Defendants. On appeal.
<i>Alta Resources, LLC et al. v Gawenis et al v. Petrohawk Properties LP et al.</i>	Van Buren County Circuit Court	Initially filed as a reformation action to cure problems with property descriptions. Gawenis filed counterclaims and third-party claims seeking to terminate his OGL due to lease assignment without consent, failure to timely pay royalties and improper expense deductions from royalty payments from the "gross royalty" lease. The leasing parties reimbursed all improper expense deductions prior to trial, and the Court entered a directed verdict for Lessees on remaining issues. On appeal.

<p><i>CEU Fayetteville, LLC et al. v. Chesapeake Exploration, LP et al.</i></p>	<p>White County Circuit Court</p>	<p>Claims for contractual interference, slander of title, unjust enrichment, civil conspiracy, breach of contract, and other claims arising from a claim that landmen leased certain landowners with actual knowledge of an unrecorded prior existing oil and gas lease, and promptly recorded the new leases, later claiming race-notice priority and BFP protection. Pending - summary judgment phase.</p>
<p><i>SEECO, Inc. v. Gales, et al.</i></p>	<p>Conway County Circuit Court</p>	<p>Case began as interpleader and SEECO deposited royalties into court registry. A counterclaim was filed claiming that the relevant lease had expired before operations commenced. There is an existing producing cross-unit well that is attributed 80% to the unit in question, but no surface well location physically located in the section.</p>
<p><i>SEECO, Inc. v. Stanton et al.</i></p>	<p>Van Buren County Circuit Court</p>	<p>ON APPEAL – the primary issue was the meaning of a form mineral conveyance that contained a blank: “...do hereby grant, bargain, sell and convey unto the said J. S. Martin Trustee and to his heirs and assigns forever, an undivided _____ interest in and to all of the oil, gas and other minerals, in, under and upon the following described lands lying within the County of Van Buren and State of Arkansas...” The Court determined this deed conveyed 100% of the minerals owned by Grantor.</p>
<p><i>First Tennessee Bank, Trustee, et al. v. Pathfinder, et al.</i></p>	<p>Eastern District of Arkansas</p>	<p>In this case, the oil and gas lease contained a “drill or pay” type drilling commitment. Lessee released the lease prior to the end of the primary term and did not drill or pay. The lease contains an explicit clause allowing Lessee to release the lease.</p>
<p><i>Gay v. SEECO, Inc.</i></p>	<p>Cleburne County Circuit Court</p>	<p>SEECO mailed renewal option payments certified mail to Plaintiffs, but the address was missing one digit on the PO Box number. The Postmaster gave actual notice to the plaintiffs, the plaintiffs’ representative went to the post office and was presented with the certified letter; the representative called the plaintiffs, who instructed her to refuse it. Plaintiffs later claimed the lease terminated for lack of timely renewal payment. SEECO argued that the payment was tendered and, therefore, renewal was effective. Jury verdict for SEECO on 3/7/2013.</p>
<p><i>Dorchester Minerals v. Chesapeake</i></p>	<p>Eastern District of Arkansas</p>	<p>This case, based on the language in a negotiated OGL between industry players, involves the interpretation of a “no deductions” (gross royalty) clause. Its precedential value may be small given the unique lease language. A primary issue involves the extent to which a Lessee can be forced to pay true third-party charges for the Lessor.</p>

<p><i>XTO Energy Inc. v. Snowden</i></p>	<p>Cleburne County Circuit Court</p>	<p>Another reformation v. after-acquired-title case. XTO bought its lease after all of the events which triggered the after-acquired-title statute had occurred. XTO asserts it is a BFP who purchased in reliance on record title, and that reformation cannot be asserted against a BFP. Snowden is arguing that because the record title includes a deed where a party purported to convey something he didn't own, inquiry notice applies, and inquiry would have revealed the facts underlying the Snowden's reformation claim.</p>
<p><i>City of Clinton v. Petrohawk Properties, LP</i></p>	<p>Eastern District of Arkansas</p>	<p>In January 2009, Petrohawk leased various mineral tracts owned by the City of Clinton, and paid an \$8000/acre bonus. The City is claiming it owns additional minerals (60+ acres) and that Petrohawk should be required to lease the additional minerals at the same rate it received in 2009, based in part on the Mother Hubbard clause in the lease, and Petrohawk's alleged promise to both identify and lease ALL of the minerals owned by the City. The City initially sued, and later dismissed, XTO (as successor to Petrohawk's lease) and Western Land Services, who conducted a title search for Petrohawk.</p>
<p><i>KCS Resources, LLC et al. v. Packers Plus Energy Services (USA), Inc., et al.</i></p>	<p>Van Buren County Circuit Court</p>	<p>KCS (a subsidiary of Petrohawk) as Operator, joined by other participating WI owners, sued Packers Plus (and later others) for breach of contract, negligence, and breach of various express and implied warranties. Packers Plus was the service company hired to conduct completion work on a well drilled by KCS in Van Buren County. Packers Plus installed the wrong DV tool, eventually resulting in total failure of the well, after failed workover attempts. Confidential settlement following mediation.</p>
<p><i>Vaughan, Executrix et al. v. SEECO and XTO</i></p>	<p>Cleburne County Circuit Court</p>	<p>Sequel to <i>Petrohawk Properties, LP v. Heigle</i>, 2011 Ark. App. 709 (2011). In <i>Heigle</i>, the Court ruled that Plaintiffs' lease expired at the end of the primary term for lack of production. Plaintiffs have now sued XTO (the successor-in-interest to the working interest under the failed leases) and SEECO (the operator of the relevant Unit) for civil conspiracy, unjust enrichment, breach of prudent operator statute, trespass, and statutory non-payment claims. The Court recently denied XTO's motion to dismiss based on claim preclusion (for failure to raise these issues in the first lawsuit). Since the case was first filed (solely against SEECO at that time), XTO integrated the plaintiffs' unleased mineral interests, and the plaintiffs elected the non-consent option and did not appeal the AOGC Order.</p>

Logan v. XTO Energy Inc.	Eastern District of Arkansas	Plaintiffs allege lease termination for failure to achieve production prior to end of primary term (based on same lease language as in <i>Petrohawk Properties v. Heigle</i>). Primary remaining issues involve what remedies are available, if any, beyond lease termination.
Logan v. XTO Energy Inc.	Cleburne County Circuit Court	Appeal from XTO's integration of unleased mineral owners, asserting constitutional issues. Same plaintiffs/mineral interests as the E.D. Ark. case above.
ROYALTY CASES		
<i>Snow et al. v. SEECO, Inc.</i>	Conway County Circuit Court	Improper royalty payment case with class action allegations. No class has been certified.
Smith et al v. Southwestern Energy Company	Eastern District of Arkansas	This case was recently amended to add improper royalty payment claims on behalf of some plaintiffs who have OGLs with SEECO. Plaintiffs brought initial claims against Southwestern alleging nuisance, negligence, and strict liability claims related to a compressor station in the vicinity of Plaintiffs.
Pruitt et al v. Southwestern Energy Company	Eastern District of Arkansas	Carbon copy of Smith case, above – different compressor station. This case was first filed as an amendment to the Smith case, above, but was severed by the Court, and refiled as a separate case. It also includes royalty claims coupled with the compressor station claims.
FRACKING / ENVIRONMENTAL CASES		
<i>Hiser v. XTO Energy Inc.</i>	Eastern District of Arkansas	XTO Energy drilled 5 horizontal wells from a single well pad on property adjacent to property where Ms. Hiser had constructed her house about 10 years earlier. Hiser claimed that vibrations from the nearby drilling rig had caused cracked tiles, molding separation, foundation cracks, and other structural damages to her home. At trial, Ms. Hiser failed to produce a qualified expert to opine that the house was, in fact, damaged by vibrations emanating from the adjacent well site. Her sole theory at trial was that her house was fine before the drilling started, that she felt vibrations during, and that the house was falling apart after the drilling activity ceased. XTO put on an expert who testified the damages were caused by poor construction. During deliberations, the jury sent out a question to the

		<p>Court which asked, “Was fracking used on the well?”, to which the Court responded “you have all the evidence and must make your decision based on what you have.” At no time during any part of the trial was fracking or hydraulic fracturing mentioned by any witness or attorney for either party. After approximately 5 hours of deliberation, the jury returned a verdict of \$100,000 in compensatory and \$200,000 in punitive damages in Ms. Hiser’s favor. The Court allowed post-trial contact with jurors, resulting in post-trial motions by XTO claiming that the jury had not been persuaded by any proof put on by XTO, that the gas company could afford to pay Ms. Hiser for a new house and, in the words of one juror, just simply felt sorry for Ms. Hiser.</p> <p>The federal court is considering post-trial motions.</p>
<i>Yankee v. Fayetteville Gathering</i>	Faulkner County Circuit Court	Nuisance/noise case brought by landowner in vicinity of compressor station.
<i>Ginardi et al. v. Frontier Gas Services, et al.</i>	Eastern District of Arkansas	Plaintiffs sought class certification on behalf of all Arkansans who live or own property within 1 mile of any natural gas compressor and/or transmission station. Claims included strict liability, nuisance, trespass, and negligence (\$1mm comp./\$5mm pun.) The Court denied class certification and the case was settled.
<i>Bartlett, et al. v. Frontier Energy Services, LLC</i>	Eastern District of Arkansas	Carbon copy of <i>Ginardi</i> case, above; settled after class certification was denied in <i>Ginardi</i> .
<i>Berry v. Southwestern Energy Company</i>	Eastern District of Arkansas	<p>Consolidated purported class action cases, based on residents/property owners within 3 miles of any gas well, inside an area within 20 miles of Quitman, AR. Both cases made similar allegations related to contamination of the water, air, and soil near plaintiffs’ homes due to hydraulic fracturing. The <i>Berry</i> case involved the Cleburne County incident involving natural gas and water spewing from an uncapped abandoned water well. Causes of action included strict liability, nuisance, trespass, and negligence, seeking \$1 million compensatory, \$5 million punitive damages per each putative plaintiff. Cases settled relatively early, without significant substantive proceedings; no class certification.</p>
<i>Tucker v. Southwestern Energy Company</i>	Eastern District of Arkansas	

<p><i>Smith et al v. Southwestern Energy Company</i></p>	<p>Eastern District of Arkansas</p>	<p>Plaintiffs brought initial claims against Southwestern alleging nuisance, negligence, and strict liability claims related to a compressor station in the vicinity of Plaintiffs. The case was more recently amended to include improper royalty payment claims on behalf of some plaintiffs who have OGLs with SEECO.</p>
<p><i>Pruitt et al v. Southwestern Energy Company</i></p>	<p>Eastern District of Arkansas</p>	<p>Carbon copy of Smith case, above – different compressor station. This case was first filed as an amendment to the Smith case, above, but was severed by the Court, and refiled as a separate case. It also includes royalty claims coupled with the compressor station claims.</p>
<p><i>Scoggin et al v. Southwestern Energy Company</i></p>	<p>Eastern District of Arkansas</p>	<p>Initially, these plaintiffs sued SEECO in White County Circuit Court, claiming nuisance, negligence, trespass, and strict liability related to a drill-site across the county road from Plaintiffs’ home, and sought a TRO to stop continued drilling and hydraulic fracturing (which was denied). After 17 months, plaintiffs dismissed the state court case voluntarily and filed this case in federal court against Southwestern (SEECO’s parent corporation), adding class action allegations – purported to be all persons who live or own property within 500 feet of any well operation by Southwestern Energy, its agents, or subsidiaries. The Complaint seeks \$10 million compensatory and \$15 million punitive damages per plaintiff / purported class member. Discovery not yet commenced.</p>
<p><i>Hill et al. v. Southwestern Energy Company, et al.</i></p>	<p>Eastern District of Arkansas</p>	<p>Plaintiffs filed a class action complaint against Southwestern Energy, Chesapeake, and XTO, based on their respective disposal well operations, claiming violation of RICO, deceptive trade practices, and some common law causes of action. The Complaint seeks \$2 million compensatory and \$15 million punitive damages per plaintiff / purported class member. Motions to dismiss are pending.</p>
<p><i>Miller et al. v. Chesapeake Operating, Inc. et al.</i></p>	<p>Eastern District of Arkansas</p>	<p>Plaintiffs sued CHK and BHP, claiming their two disposal wells, located within what later became the “moratorium area” caused numerous earthquakes in the area. The Complaint includes claims for public and private nuisance, strict liability, negligence, trespass, deceptive trade practices, and outrage; alleged damages include property damage, diminution in fair market value of real estate, and emotional distress. <i>Filed March 11, 2013.</i></p>

<p><i>Hearn v. BHP Billiton Petroleum (Arkansas) Inc., et al.</i>, consolidated with <i>Frey, Lane</i>, and <i>Palmer</i> cases</p>	<p>Eastern District of Arkansas</p>	<p>Four Earthquake Class Action cases have been consolidated in federal court, claiming that disposal well operations caused a “swarm” of earthquakes, causing damages to landowners. The Plaintiffs seek damages for physical damage to homes and commercial real estate, loss for the purchase of earthquake insurance, loss in the fair market value of the property, economic loss due to temporary stoppage of business operations, and emotional distress, along with punitive damages and injunctive relief.</p>
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Selected Resources you can find on the Internet

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Cohen, Abbi L.; Ix, John M.	What's the Deal with Fracking? Regulation, Litigation and Due Diligence	The Bureau of National Affairs, Inc. --Bloomberg BNA Daily Environment Report	4/26/2012
Cohen, Adam; Lawrence, Robert; Pilkington, Jeff; Sigler, Lisa; Stevenson, Shannon; Wurtzler, Gail	First Lessons From Fracking Litigation	Davis Graham & Stubbs LLP-- Presentation	4/21/2011
Erickson, David R.; Howard, Justin W.	Fighting for a Lone Pine Order In Complex Toxic Tort Litigation	FDCC Quarterly/Summer 2007	2007
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Hagstrom, Earl	Hydraulic Fracturing Litigation Is on the Rise	Sedgwick, LLP-- Hydraulic Fracturing Digest http://www.sdma.com/hydraulic-fracturing-litigation-is-on-the-rise-09-19-2011/	Sept. 2011
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Kresse, Timothy M.; Warner, Nathaniel R.; Hays, Phillip D.; Down, Adrian; Vengosh, Avner; Jackson, Robert B.	Shallow Groundwater Quality and Geochemistry in the Fayetteville Shale Gas-Production Area, North-Central Arkansas, 2011	USGS, Scientific Investigations Report 2012-5273	7/4/1905
Luxton, Steven A.; McAleese, John; Nes, W. Brad	Daubert, Groundwater Contamination and the Future of Fracking Litigation	The Advocate	Winter, 2012
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McGlinchey Stafford, PLLC	Alert: Shale Gas Litigation - Coming Soon to a Court Near You		
Mullen, John F.; Hollaender, Kim	Digging Deep: Fracking Litigation Trends (Insurance Coverage and Liability)	Claims Magazine -- Property Casualty 360, Summit Business Media, www.propertycasualty360.com	2/1/2012
Nicholson, Barclay; Blanson, Kadian	Tracking Fracking Case Law: Hydraulic Fracturing Litigation	Amer. Bar Assoc., Natural Resources & Environment - Vol. 26, No. 2	Fall, 2011
Nicholson, Barclay; Blanson, Kadian; Fair, Andrea	Fracking's Alleged Links to Water Contamination and Earthquakes	Section of Litigation: Energy Litigation	5/9/2012
Smith, Nicole Vanderlaan	Trend in Fracking Groundwater Contamination Litigation	Law360, Portfolio Media, Inc.	10/30/2012
Watson, Blake (Professor)	Fracking and Contamination Litigation	University of Dayton School of Law	9/14/2012