

# STILL FUGACIOUS AFTER ALL THESE YEARS: A SEQUEL TO THE BASIC PRIMER ON ARKANSAS OIL AND GAS LAW

*Thomas A. Daily\* and W. Christopher Barrier\*\**

## I. INTRODUCTION

The roughly five years since publication of our original Primer<sup>1</sup> have been relatively busy ones for the development of Arkansas oil and gas law. In 2007, the Fayetteville Shale Play was in its infancy but had exciting promise. We published *Fugacious I* because interest in oil and gas law was on the rise. The Fayetteville Shale Play has since matured into a successful unconventional gas producing area, complete with a plethora of litigation. Several of those cases have resulted in appellate opinions, further developing the case law of the state. Meanwhile, the Arkansas General Assembly has enacted some new statutes, and the Arkansas Oil and Gas Commission has substantially modernized its rules and regulations.

Most recently, we read of a potential new oil and gas play, this time, curiously, in Arkansas's oldest producing area, Columbia and Union Counties.<sup>2</sup> In sum, it is time for an update.

This sequel will follow the same outline and topic headings as *Fugacious I*, in a somewhat pocket-part form. Those sections of *Fugacious I* that need neither revision nor supplementation will simply be noted as such. Those sections touched by recent cases, statutes, or regulations will be appropriately expanded.

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\* B.A., University of the South, 1967; J.D., University of Arkansas, 1970; Member, Daily & Woods, P.L.L.C., Fort Smith, Arkansas; Adjunct Professor of Law, University of Arkansas School of Law.

\*\* B.A., Hendrix College, 1964; L.L.B., Duke University, 1967; Of Counsel, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., Little Rock, Arkansas.

1. Thomas A. Daily & W. Christopher Barrier, *Well, Now, Ain't That Just Fugacious!: A Basic Primer on Arkansas Oil and Gas Law*, 29 U. ARK. LITTLE ROCK L. REV. 211 (2007) [hereinafter *Fugacious I*].

2. Southwestern Energy Company, the corporate parent of leading Fayetteville Shale producer, SEECO, Inc., announced, on July 28, 2011, that it had acquired oil and gas leases across the southern halves of these counties and adjacent parishes in northern Louisiana. The company's stated intent is to explore the Lower Smackover Limestone Formation, referred to locally as the "Brown Dense," for both oil and gas, using horizontal drilling techniques perfected in the Fayetteville Shale in North Central Arkansas. *Southwestern Energy Announces Second Quarter 2011 Financial and Operating Results*, SOUTHWESTERN ENERGY (July 28, 2011), [http://www.swn.com/investors/Press\\_Releases/2011/2Q%202011%20Earnings%20Release%20-%207-28-11.pdf](http://www.swn.com/investors/Press_Releases/2011/2Q%202011%20Earnings%20Release%20-%207-28-11.pdf).

## II. WHAT IS A MINERAL?

As we observed in *Fugacious I*, different minerals under the same lands may have different owners.<sup>3</sup> One area where controversy sometimes erupts from this principle involves the ownership of natural gas found within coal formations. This gas, called “coalbed methane,” has real value in times of favorable natural gas prices. But is it really gas, or is it part of the coal estate when those substances are differently owned?

Chemically, coalbed methane is clearly gas. In most instances it is produced by the use of wells, just like any other natural gas. Indeed, the only distinguishing characteristic of coalbed methane is its location, underground, within a seam of coal, causing it to be a mineral within a mineral.<sup>4</sup>

On the other hand, coalbed methane has long been a part of coal mining. Often present in underground coal seams, coalbed methane has many times been the cause of asphyxiation, mine explosions, or both. Thus, safe mining practices require coalbed methane to be vented away from active mining operations, often to be forever lost into the atmosphere. Clearly, the owner of the coal should be allowed to rid its operations of such an obvious danger.<sup>5</sup>

So then, if Tom owns the coal beneath Blackacre, but Chris owns the gas,<sup>6</sup> which of us owns the coalbed methane? The answer to that complex question depends upon Blackacre’s location because there is a clear split of authority. Courts in jurisdictions such as West Virginia,<sup>7</sup> Pennsylvania,<sup>8</sup> Alabama,<sup>9</sup> and Illinois<sup>10</sup> have resolved this ownership issue in favor of the coal owner. The gas owner has prevailed in cases in Montana,<sup>11</sup> and Wyoming.<sup>12</sup> In a particularly influential decision, the Supreme Court of the United States held that coalbed methane belongs to the gas owner under circumstances where the coal is owned by the United States or a Native American tribe whose mineral interests are administered by the Department of the Interior.<sup>13</sup>

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3. *Fugacious I*, *supra* note 1, at 213.

4. Gary C. Bryner, *Coalbed Methane Development: The Costs and Benefits of an Emerging Energy Resource*, 43 NAT. RESOURCES J. 519, 520–21 (2003) (discussing location of coalbed methane).

5. *Id.*

6. Or, more commonly, the oil and gas.

7. *Energy Dev. Corp. v. Moss*, 591 S.E.2d 135, 146 (W. Va. 2003).

8. *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380, 1383 (Pa. 1983).

9. *Vines v. McKenzie Methane Corp.*, 619 So. 2d 1305, 1309 (Ala. 1993).

10. *Cont'l Res. of Ill., Inc. v. Ill. Methane, LLC*, 847 N.E.2d 897, 903 (Ill. 2006).

11. *Carbon Cnty. v. Union Reserve Coal Co.*, 898 P.2d 680, 686 (Mont. 1995).

12. *Newman v. RAG Wyo. Land Co.*, 53 P.3d 540, 545 (Wyo. 2002).

13. *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 880 (1999).

Arkansas was without a decision on this interesting issue until March 2011, when the United States District Court for the Western District of Arkansas decided the case of *Enervest Operating, LLC v. Anadarko Petroleum Corp.*<sup>14</sup> The court's thorough opinion reviewed some of the plentiful authority on both sides of the issue before concluding that Arkansas was most likely to side with those jurisdictions favoring the gas owner.<sup>15</sup> The United States Court of Appeals for the Eighth Circuit affirmed the district court's decision.<sup>16</sup> In its opinion, the appeals court focused upon the express language of the deeds that separated coal ownership from gas ownership. It rejected the argument that coalbed methane is the property of the coal owner, as a matter of law, but made clear that its decision, which favored the gas owner, was not a holding that the gas owner owned coalbed methane as a matter of law either, leaving the possibility that a different result might be obtained in a case involving a deed or reservation with language suggesting an intent to convey or reserve gas along with the coal.<sup>17</sup>

Importantly, even in a gas ownership jurisdiction, the coal owner is free to vent coalbed methane away from its operations, as required by safe mining practices, and owes nothing to the gas owner for gas lost in the process.<sup>18</sup> What the coal owner may not do, however, is capture and sell the coalbed methane, without the gas owner's permission.<sup>19</sup>

### III. TYPES OF SEVERED MINERAL INTERESTS

Since the publication of *Fugacious I*, the Arkansas Court of Appeals has decided two cases dealing with some of the nuances of severing mineral interests. In *Barger v. Ferrucci*,<sup>20</sup> it construed the following reservation language within a warranty deed: "[s]ubject to reservation of all oil, gas and other minerals," which appears, after the legal description, in the deed's granting clause.<sup>21</sup> The Arkansas Court of Appeals affirmed the trial court's ruling that the deed was unambiguous and that the quoted language was indeed a mineral reservation, as opposed to a mere limitation upon the grantor's warranty, as the appellee, the successor in interest to the deed's grantee, had argued.<sup>22</sup>

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14. No. 2:09-CV-02135 (W.D. Ark. Mar. 31, 2011).

15. *Id.*

16. *Molina-Gomes v. Welinski*, 676 F.3d 1144, 1149 (8th Cir. 2012).

17. *Id.*

18. *Id.* at 1147-49.

19. *Id.*

20. 2011 Ark. App. 105, 2011 WL 514662.

21. *Id.* at 3, 2011 WL 514662, at \*2.

22. *Id.* at 7, 2011 WL 514662, at \*6.

In *Burgess v. Lewis*, a suit was brought by the mineral owners against the successors of a former owner, who had reserved a non-participating royalty interest in a 1921 deed with the following language: “[H]ereby retain One Half interest in any and all royalties that may at any time derive from this land, in any way, from [o]il, gas, or mineral. This land was [l]eased on the First day of August 1921 for Mineral, Oil & Gas.”<sup>23</sup> The current mineral owners contended that the non-participating royalty interest, thus created, was limited to the enumerated 1921 lease, and, thus, had expired.<sup>24</sup>

The Arkansas Court of Appeals held otherwise, affirming the trial court’s determination that the reference to the 1921 lease was designed merely to protect the grantor from breach of the deed’s general warranty of title.<sup>25</sup>

#### IV. ARKANSAS’S *STROHACKER* DOCTRINE: A UNIQUE RULE OF PROPERTY

In the short time since *Fugacious I*, we have seen significant developments in the *Strohacker* Doctrine. Obviously, the newfound prosperity of some landowners within the Fayetteville Shale Play has inspired others, whose claims of mineral ownership were doubtful, to try suing their way in. A popular target of such litigation has been the corporate successor to the various railroad companies, whose generic mineral reservations first led to *Strohacker*.

While most prior *Strohacker* decisions involved reservations within deeds executed before 1910 (within the Shale Play’s counties), some were contained within later deeds executed in the 1930s. Nevertheless, landowners reasoned that since these Central Arkansas counties had seen no real oil and gas development before 2005, oil and gas could not have been within the meaning of the term “minerals” way back then. They missed the point, as the Arkansas Supreme Court explained in *Staggs v. Union Pacific Railroad Co.*<sup>26</sup>

*Staggs* involved a generic mineral reservation contained within a deed executed by a railroad in Independence County in 1934.<sup>27</sup> The Arkansas Supreme Court had little problem with that one, affirming the circuit court’s holding for the railroad’s successor.<sup>28</sup> In its opinion, the court indicated that at some point<sup>29</sup> “between 1905 and 1937, it became common knowledge in Arkansas that a reservation of mineral rights [in Arkansas] included oil and

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23. 2011 Ark. App. 362, at 2, 2011 WL 1795523, at \*2.

24. *Id.*, 2011 WL 1795523, at \*3.

25. *Id.* at 5, 2011 WL 1795523, at \*5.

26. 2012 Ark. 156, 2012 WL 1222225.

27. *Id.* at 1, 2012 WL 1222225, at \*1.

28. *Id.* at 6, 2012 WL 1222225, at \*6.

29. Which the court did not define.

gas.”<sup>30</sup> Actually, *Staggs* was the fourth reported case involving reservations made after 1930. The other three, all federal court cases, reached the identical result.<sup>31</sup>

*Nicholson v. Upland Industrial Development Co.*,<sup>32</sup> involved a much earlier reservation. The deed in *Nicholson* was executed by St. Louis, Iron Mountain, and Southern Railway Company on February 16, 1903.<sup>33</sup> Its reservation, “[a]lso reserving all coal and mineral deposits in and upon said lands,” was identical to the language of reservation in *Strohacker*.<sup>34</sup> The *Nicholson* deed conveyed lands in White County, though it was actually executed and acknowledged in Pulaski County.<sup>35</sup>

The landowners presented a simple argument: There was no evidence presented showing production of oil and gas, or instruments conveying, reserving or leasing oil and gas in White County prior to February 1903.<sup>36</sup> Thus, they reasoned, under *Strohacker*, the 1903 reservation could not have included oil and gas.<sup>37</sup>

Upland presented a much broader case.<sup>38</sup> Through the testimony of its expert witness, a history professor specializing in Arkansas history, Upland introduced numerous newspaper articles, advertisements, and books tending to show that by around 1900, residents of White County and the area surrounding White County were aware that oil and gas were minerals, potentially productive in Arkansas.<sup>39</sup> Upland’s expert testified that by 1900 these articles, advertisements, and books were widely circulated in White County, which enjoyed daily rail service from Little Rock and St. Louis. The trains carried newspapers, which were read by White County residents, who, according to census data, had a rather high literacy rate.

The circuit court found Upland’s evidence to be persuasive and held that, as a matter of law, oil and gas were within the generic definition of

30. *Staggs*, 2012 Ark. 156, at 5, 2012 WL 1222225, at \*5.

31. *Griffis v. Anadarko, E & P Co.*, 606 F.3d 973, 974 (8th Cir. 2010); *Froud v. Anadarko, E & P Co., L.P.*, No. 4:09-CV-00936-WRW, 2010 WL 3516906 (E.D. Ark. Sept. 1, 2010); *Robertson v. Union Pac. R.R. Co.*, No. 1:09-CV-00020-JLH, 2010 WL 3363400 (E.D. Ark. Aug. 24, 2010).

32. 2012 Ark. 326, \_\_\_ S.W.3d \_\_\_.

33. *Id.* at 1, \_\_\_ S.W.3d at \_\_\_.

34. *Missouri Pac. R.R. Co. v. Strohacker*, 202 Ark. 645, 152 S.W.2d 557 (1941).

35. *Nicholson*, 2012 Ark. 326, at 5, \_\_\_ S.W.3d at \_\_\_.

36. *Id.*, \_\_\_ S.W.3d at \_\_\_.

37. *Id.*, \_\_\_ S.W.3d at \_\_\_.

38. Co-author Thomas A. Daily attended the trial of *Nicholson* and authored an amicus brief submitted to the Arkansas Supreme Court. Upland’s expert witness was Dr. Michael Dougan, Retired Distinguished Professor of History at Arkansas State University. His testimony is set out beginning at page 1167 of the transcript of the circuit court trial. That transcript is within the Arkansas Supreme Court’s *Nicholson* appellate case file (Case No. 11-1106).

39. *Nicholson*, 2012 Ark. 326 at 5–6, \_\_\_ S.W.3d at \_\_\_.

minerals on February 16, 1903.<sup>40</sup> The Arkansas Supreme Court affirmed, rejecting the notion held by many<sup>41</sup> that each *Strohacker* analysis was required to stop, arbitrarily, at its county line.<sup>42</sup> Instead, the court recognized that the “area” where evidence of the knowledge of oil and gas as mineral was relevant, was just that, an area, and not precisely limited to the county containing the lands. Thus, the court has focused future *Strohacker* inquiries more generally, inviting evidentiary presentations similar to Upland’s presentation in *Nicholson*.

The Arkansas Supreme Court concluded that the circuit court’s decision, based upon that evidence, was not clearly erroneous.<sup>43</sup> Thus, it affirmed.<sup>44</sup> We suspect, however, that had the circuit court held against Upland,<sup>45</sup> that decision would likewise have been upheld. The reality is that the *Strohacker* doctrine is less of a rule of property, announced by the Arkansas Supreme Court, than a series of affirmed lower court rulings that well might also have been affirmed had they gone the other way.<sup>46</sup>

#### V. PROBLEMS WITH SEVERING MINERALS: CAN YOU “DUHIG” IT?

The Arkansas appellate courts have decided two cases involving the *Duhig* Rule since the publication of *Fugacious I*. The first of those was the Arkansas Supreme Court’s somewhat confusing decision in *Sutton v. Sutton*.<sup>47</sup> An understanding of the case requires a fairly detailed review of its facts.

Ronald and Bonnie Sutton are the parents of Lonnie Sutton, who was formerly married to Lorene Sutton.<sup>48</sup> In 1987, while Lonnie and Lorene were married, the four Suttons purchased a farm in Scott County from William and Etta White.<sup>49</sup> However, the Whites’ deed named only Ronald and Bonnie as grantees.<sup>50</sup> In that deed, the Whites reserved a one-half mineral interest.<sup>51</sup> Two years later, but before the deed was recorded, Lonnie and

40. *Id.* at 2–3, \_\_\_ S.W.3d at \_\_\_.

41. And even suggested in *Fugacious I*.

42. *Nicholson*, 2012 Ark. 326, at 6–7, \_\_\_ S.W.3d at \_\_\_.

43. *Id.*, \_\_\_ S.W.3d at \_\_\_.

44. *Id.* at 12, \_\_\_ S.W.3d at \_\_\_.

45. I.e., that oil and gas were not within the generic meaning of minerals in White County and its surrounding area in February 1903.

46. For a recent and thorough review of the *Strohacker* Doctrine, see Jaimie G. Moss, *The Strohacker Doctrine: Its Application in Arkansas Courts and the Need for an Updated Rule*, 64 ARK. L. REV. 1095 (2011).

47. 2009 Ark. 109, 314 S.W.3d 272.

48. *Id.* at 1, 314 S.W.3d at 273.

49. *Id.*, 314 S.W.3d at 273.

50. *Id.*, 314 S.W.3d at 273.

51. *Id.*, 314 S.W.3d at 273.

Lorene's names were added to the deed by interlineation.<sup>52</sup> Sometime after that, Lonnie and Lorene divorced.<sup>53</sup> Later, almost ten years after originally acquiring the farm, Ronald and Bonnie conveyed it, by warranty deed, to Lonnie.<sup>54</sup> That warranty deed, which is the principal one involved in the litigation, purports to reserve a one-half mineral interest to the grantors, Ronald and Bonnie, with the following language:

SUBJECT, however, to a reservation by the seller of an undivided one-half interest in and to all of the oil, gas, coal and other minerals in and under the said property, together with the right to enter on the property for the purpose of exploration for or development of the same.<sup>55</sup>

Next, Lonnie quit-claimed his entire interest to Lorene.<sup>56</sup> The Arkansas Supreme Court found that the "quitclaim deed also reserved fifty percent of the mineral rights."<sup>57</sup> But, this was an incomplete statement of the facts. Actually the "mineral reservation" in the quit-claim deed merely purported to acknowledge the reservation in the warranty deed previously given to Lonnie by his parents.

The question before the court was, Who owns the minerals under the farm? Of course, the Whites owned a one-half interest, but what about the other half? That involves the *Duhig* Rule.<sup>58</sup> As we observed in *Fugacious I*, the *Duhig* Rule was adopted in Arkansas but limited to conveyances by warranty deed in two contrasting Arkansas cases, *Peterson v. Simpson*<sup>59</sup> and *Hill v. Gilliam*,<sup>60</sup> which were decided in the same term-of-court in 1985.<sup>61</sup> *Duhig* requires the subtraction of any outstanding mineral reservation from any new exception or reservation unless the new reservation is clearly and expressly made in addition to the previous one.<sup>62</sup> In Arkansas, *Duhig* applies to warranty deeds<sup>63</sup> but not to quit-claim deeds.<sup>64</sup> The express purpose of *Duhig*'s application is to provide a bright-line rule of property to relieve innocent purchasers for value of the duty to ascertain the specific intent of previ-

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52. *Id.* at 2, 314 S.W.3d at 273.

53. *Sutton*, 2009 Ark. 109, at 2, 314 S.W.3d at 273.

54. *Id.*, 314 S.W.3d at 273.

55. *Id.* at 3, 314 S.W.3d at 273.

56. *Id.*, 314 S.W.3d at 273 (possibly as part of their divorce settlement).

57. *Id.*, 314 S.W.3d at 273.

58. *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940).

59. 286 Ark. 177, 690 S.W.2d 720 (1985).

60. 284 Ark. 383, 682 S.W.2d 737 (1985).

61. *Fugacious I*, *supra* note 1, at 217.

62. *Duhig*, 144 S.W.2d at 880.

63. *Peterson*, 286 Ark. at 181, 690 S.W.2d at 723.

64. *Hill*, 284 Ark. at 387, 682 S.W.2d at 739.

ous grantors in warranty deeds.<sup>65</sup> The doctrine applies to warranty deeds but not quit-claim deeds because, in a warranty deed, the warranty trumps inconsistent ambiguous language of reservation or exception. Not so in a quit-claim deed, which has no such warranty.

According to the Arkansas Supreme Court, Lorene owns the missing half mineral interest.<sup>66</sup> Ronald and Bonnie's "reservation" failed because of *Duhig*.<sup>67</sup> While the court failed to make this clear, Lonnie's reservation also failed because it was not really a reservation.<sup>68</sup>

A reader may, nevertheless, be troubled by the *Sutton* result since it does not appear that any of these Suttons were innocent purchasers without notice. They are all kinfolks, sort of. Here is a possible explanation: *Sutton* was an action to quiet title, brought by Ronald and Bonnie. In a quiet title action, a plaintiff must prevail upon the strength of his own title. Ronald and Bonnie should have brought an action for reformation of their warranty deed to conform to the parties' intentions. Had that occurred, the court would have been squarely presented with the intent issue and likely would never have needed *Duhig* at all.

The second *Duhig* decision, *Mason v. Buckman*, involved a 1944 deed from grantors (the Masons), who at the time owned only a one-half interest in the minerals in dispute.<sup>69</sup> In that deed, the Masons reserved "1/2 of mineral rights with power to mine reserved."<sup>70</sup> The trial court ruled that, because of the *Duhig* Rule, the one-half interest, which was owned by the Masons, passed to the grantee, leaving the Masons with nothing.<sup>71</sup> On appeal, the Masons contended that the language of their deed's reservation was materially different from that at issue in *Peterson v. Simpson*, so the *Duhig* Rule should not apply.<sup>72</sup> More interestingly, they contended that an application of the *Duhig* Rule to their 1944 deed constituted a retroactive application of the Rule, since it had been adopted in Arkansas by the *Peterson* decision in 1985.<sup>73</sup> The Arkansas Court of Appeals rejected both arguments.<sup>74</sup> In dealing with the retroactive-application claim, the court apparently held that while *Peterson*<sup>75</sup> was the Arkansas Supreme Court's first opportunity to recognize

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65. Willis H. Ellis, *Rethinking the Duhig Doctrine*, 28 ROCKY MTN. MIN. L. INST. 947 (1982) (quoted by the Arkansas Supreme Court in *Peterson*, 286 Ark. at 179, 690 S.W.2d at 722).

66. *Sutton v. Sutton*, 2009 Ark. 109, at 5, 314 S.W.3d at 274.

67. *Id.*, 314 S.W.3d at 274.

68. *Id.*, 314 S.W.3d at 274.

69. 2010 Ark. App. 256, 2010 WL 962054.

70. *Id.* at 2, 2010 WL 962054, at \*2.

71. *Id.* at 3, 2010 WL 962054, at \*3.

72. *Id.* at 4, 2010 WL 962054, at \*3.

73. *Id.*, 2010 WL 962054, at \*3.

74. *Id.* at 6-7, 2010 WL 962054, at \*6-7.

75. *Mason*, 2010 Ark. App. 256, at 6-7, 2010 WL 962054, at \*6-7.

that the *Duhig* Rule was part of Arkansas law, it did not, in and of itself, change that law.<sup>76</sup> Indeed, as the court observed, *Peterson* itself involved a 1948 deed.<sup>77</sup>

#### VI. LIFE ESTATES: VERY TRICKY INDEED

The authors are not aware of any developments justifying an update to this section of *Fugacious I*.<sup>78</sup>

#### VII. TAX FORFEITURES OF SEVERED MINERAL INTERESTS: ASSESSOR SHORTCOMINGS MUDDY THE WATER

In *Fugacious I*, we opined that every purported tax forfeiture of a severed mineral interest for a tax year prior to 1986 was void for failure of the tax assessors in Arkansas's various counties to properly subjoin mineral assessments to surface assessments of the same lands prior to 1985 legislation which removed the subjoinder requirement.<sup>79</sup> That opinion was proven accurate in the one recent case where a tax sale purchaser attempted to assert an interest based upon a pre-1986 tax year tax deed.<sup>80</sup>

The 2009 Arkansas General Assembly changed the landscape regarding mineral taxation, going forward, by enacting Act 421 of that year.<sup>81</sup> The Act sets the ad valorem tax value of a non-producing mineral interest at zero.<sup>82</sup> Previously, many counties attempted to tax non-producing mineral interests when severed from the surface, but never thought to increase the assessment of a tract with unsevered minerals to reflect the additional value attributable to its unsevered mineral interest. That was a clear violation of the requirement of the Arkansas Constitution, which required tax assessments to be "equal and uniform throughout the State."<sup>83</sup>

*Jones v. Flowers*,<sup>84</sup> decided in 2006, represents a more important development. In that case, which involved a surface interest, the Supreme Court of the United States held Arkansas's tax sales statute, which required only that the delinquent taxpayer be notified by certified mail, was constitu-

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76. *Id.*, 2010 WL 962054, at \*6–7.

77. *Id.* at 6, 2010 WL 962054, at \*6–7.

78. *Fugacious I*, *supra* note 1, at 218–20.

79. *Id.* at 220–21.

80. *Selrahc Ltd. P'ship v. Seeco, Inc.*, 2009 Ark. App. 865, 374 S.W.3d 33.

81. Act of Mar. 13, 2009, No. 421, 2009 Ark. Acts 421 (codified at ARK. CODE ANN. § 26-26-1110(c) (LEXIS Supp. 2012)).

82. *Id.*

83. ARK. CONST. art. XVI, § 5.

84. 547 U.S. 220, 225 (2006).

tionally deficient, at least as applied to the facts of that case.<sup>85</sup> Because the *Jones* ruling was somewhat dependent upon its particular facts and because the Supreme Court declined to prescribe a constitutional-in-every-case notice method,<sup>86</sup> we were left to determine, case-by-case, whether notice of a pending tax sale was constitutionally copasetic. There are a couple of recent cases to help us along with that process.

In *Morris v. LandNPulaski, LLC*,<sup>87</sup> two separate pre-sale notices to the taxpayer, Morris, were returned and marked “unclaimed.”<sup>88</sup> The tax sale then ensued, without further notice to Morris.<sup>89</sup> However, after the sale, but still during the statutory redemption period, the commissioner sent a third notice to Morris, via regular mail, which “advised Morris that his property had been sold and that ‘in order to cancel the sale and retain the ownership of the parcel, all taxes, penalties, interest and fees must be paid in full before 8/6/2005.’”<sup>90</sup>

The Arkansas Court of Appeals upheld the *Morris* tax sale, holding that the after-sale regular mail notice satisfied the due process objection based upon *Jones*.<sup>91</sup> This result can be justified by a highly mechanical reading of *Jones*, where the Supreme Court of the United States did suggest that a regular mail notice might be sent after the commissioner learns that his certified notice failed.<sup>92</sup> However, there are other facts that might justify the result in *Morris*, while not establishing the premise that regular mail notice would suffice in every case. In *Morris*, there was no dispute that the address to which all notices were sent was Morris’s correct address.<sup>93</sup> There was also some testimony that Morris once admitted to receiving the third notice.<sup>94</sup>

A somewhat contrasting case is *Linn Farms & Timber Ltd. Partnership v. Union Pacific Railroad Co.*, involving mineral rights owned, of record, by Missouri Pacific.<sup>95</sup> Missouri Pacific, formerly headquartered in Fort Worth, Texas, had merged into Union Pacific, with headquarters in Omaha, Nebraska.<sup>96</sup> Oblivious to that, both the Van Buren County tax collector and the Commissioner of State Lands sent certified notices addressed to Missouri

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85. The certified notice was returned, “unclaimed,” and the Commissioner took no other steps to notify the taxpayer, though the return of the notice informed him that the notice had not been received. *Id.* at 224.

86. *Id.* at 231.

87. 2009 Ark. App. 356, 309 S.W.3d 212.

88. *Id.* at 2, 309 S.W.3d at 214.

89. *Id.*, 309 S.W.3d at 214.

90. *Id.* at 7, 309 S.W.3d at 216.

91. *Id.* at 9, 309 S.W.3d at 218.

92. *Jones v. Flowers*, 547 U.S. 220, 234 (2006).

93. *Morris*, 2009 Ark. App. 356, at 1, 309 S.W.3d 212, 214.

94. *Id.* at 3, 309 S.W.3d at 214.

95. 661 F.3d 354, 356 (8th Cir. 2011).

96. *Id.*

Pacific at its former Fort Worth post office box.<sup>97</sup> These notices, sent two years apart, were each returned with the notation “NOT DELIVERABLE AS ADDRESSED—UNABLE TO FORWARD.”<sup>98</sup> No further notice to Missouri Pacific was attempted.<sup>99</sup>

The record before the United States Court of Appeals for the Eighth Circuit established that the commissioner actually had used the Railroad’s correct Omaha address in connection with tax matters in other counties, but, through lack of internal communication, continued to use the old Fort Worth address for lands in Van Buren County.<sup>100</sup>

The Eighth Circuit voided the sale to Linn Farms, holding that the notice was constitutionally deficient.<sup>101</sup> The court faulted the commissioner for not discovering the correct address within his own records and also noted that a simple internet search for a business as prominent as the Railroad would have enabled it to be located.<sup>102</sup>

In an unrelated matter, the Arkansas Supreme Court upheld the dismissal of a challenge to Arkansas’s method of valuing producing mineral interests for tax purposes in *May v. Akers-Lang*.<sup>103</sup> The taxpayers sought to challenge, as an illegal exaction, an ad valorem tax based upon a valuation, which was established by a formula requiring multiplication of the previous year’s production by an “average contract price.”<sup>104</sup> That number, assumed income, is then further massaged to calculate an assessed value and reduced to the fraction of the royalty owner’s interest.<sup>105</sup> The calculation serves administrative convenience, but, in the real world, it would be difficult to defend with a straight face.

The complaint raised a plethora of other constitutional claims, all of which were dismissed by the trial court.<sup>106</sup> The Arkansas Supreme Court affirmed the dismissal.<sup>107</sup> Its denial of most of the claims was based upon its ruling that they lacked substance.<sup>108</sup> However, it dismissed the valuation claim for procedural reasons, saying that the taxpayers are first required to pursue administrative remedies before the counties’ equalization boards.<sup>109</sup>

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97. *Id.*

98. *Id.*

99. *Id.* at 356–57.

100. *Id.* at 360.

101. *Linn Farms & Timber Ltd. P’ship*, 661 F.3d at 363.

102. *Id.* at 361–63.

103. 2012 Ark. 7, 383 S.W.3d 378.

104. A mostly “made-up” number, produced by the Arkansas Assessment Coordination division, which is unrelated to the actual price received for the taxpayer’s royalty gas.

105. *Akers-Lang*, 2012 Ark. 7, at 4, 383 S.W.3d at 381.

106. *Id.* at 6, 383 S.W.3d at 381.

107. *Id.* at 12, 383 S.W.3d at 385.

108. *Id.*, 383 S.W.3d at 385.

109. *Id.*, 383 S.W.3d at 385.

### VIII. ADVERSE POSSESSION OF SEVERED MINERAL INTERESTS: DARN NEAR IMPOSSIBLE

The authors are not aware of any developments justifying an update to this section of *Fugacious I*.<sup>110</sup>

### IX. INGRESS AND EGRESS: THE SURFACE OWNER'S SURPRISE

Most of the time, when we think of a mineral owner's right of surface ingress and egress, or that of his lessee, we think of well drilling operations. Certainly, those operations use some surface, but drilling is not the only reason for reasonable surface use by the owner or lessee of the oil and gas. Modern exploration is often preceded by seismic surveys,<sup>111</sup> a process where a scientist called a geophysicist maps the subsurface by measuring echoes from seismic vibrations, usually caused by small controlled explosions a few feet below the surface and measured by sensitive instruments placed within a planned array.<sup>112</sup> This process is expensive, but, when used successfully, has the potential to materially reduce exploration costs by reducing the incidence of wells drilled in the wrong location.<sup>113</sup> It was over one of these seismic surveys that the Arkansas Supreme Court revisited the matter of a mineral owner's right of surface ingress and egress in *El Paso Production Co. v. Blanchard*.<sup>114</sup> The circuit court had ruled in favor of Blanchard, who owned surface and a one-half mineral interest, on a claim that he was damaged when El Paso trespassed on his surface to conduct its seismic tests.<sup>115</sup> A major issue in the case was whether seismic testing was within the meaning of "reasonable surface use" permitted to a mineral owner.<sup>116</sup> The court held that seismic testing was such a "reasonable use."<sup>117</sup> However, the court held that a trespass had nevertheless occurred because El Paso was required to have permission from the "landowner" under the Arkansas Oil and Gas Commission's General Rule B-42,<sup>118</sup> which regulates seismic testing, and had failed to secure Blanchard's permission.<sup>119</sup> El Paso argued, unsuccessfully, that the rule did not require express permission and, if it did, that it was an unconstitutional taking of El Paso's right of ingress and egress, de-

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110. *Fugacious I*, *supra* note 1, at 222.

111. Technically, "reflection seismology" or "seismic reflection."

112. See EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 12.7 (1987).

113. *Id.*

114. 371 Ark. 634, 269 S.W.3d 362 (2007).

115. *Id.* at 640, 269 S.W.3d at 368.

116. In this case, the owner of the other one-half mineral interest under Blanchard's surface.

117. *Blanchard*, 371 Ark. at 642, 269 S.W.3d at 375.

118. *Id.* at 641-42, 269 S.W.3d at 369.

119. *Id.* at 642, 269 S.W.3d at 369.

rivative from its oil and gas lease.<sup>120</sup> The Arkansas Supreme Court affirmed the trial court on that point, apparently holding both that the commission's rule required express permission, notwithstanding El Paso's ingress and egress right, and that the rule was a legitimate exercise of the state's police power and, thus, not a taking.<sup>121</sup> While the *Blanchard* case was pending, the commission realized that its rule's permission requirement was unintended and revised the rule to require mere notice to a surface owner.<sup>122</sup> Thus, the trespass-for-violation-of-Rule-B-42 issue is but a historical footnote. As for the court's conclusion that the former rule did not authorize a taking, we will never know whether it was a correct interpretation of federal constitutional law because no application for writ of certiorari to the Supreme Court of the United States was made.<sup>123</sup> The lasting importance of *Blanchard* to Arkansas oil and gas law is its holding that the mineral owner's right of ingress and egress includes the right to conduct seismic testing.

Pipelines are another aspect of the mineral owner's right of ingress and egress, particularly in the case of natural gas development. Pipelines are the only practical way to get the gas from well to market; so, understandably, a mineral owner's right to surface use must include the right to lay such pipelines. In *DeSoto Gathering Co. v. Smallwood*,<sup>124</sup> the Arkansas Supreme Court dealt with that facet of the mineral owner's right of ingress and egress. Janice Smallwood was the lessee of the surface of ten acres of a sixty-acre tract owned by Richard and Shirley Chandler, who owned the minerals beneath the entire tract.<sup>125</sup> The lease between the Chandlers and Ms. Smallwood expressly reserved the mineral interest beneath the ten acres to the Chandlers and permitted them to "encumber" the ten acres during the term of the lease.<sup>126</sup> After the lease was executed, the Chandlers executed an oil and gas lease covering the entire sixty acres, as well as a pipeline right of way in favor of DeSoto Gathering.<sup>127</sup> After a well was completed, DeSoto installed a pipeline, which crossed the ten-acre tract.<sup>128</sup> Ms. Smallwood sued, claiming trespass, and was awarded over \$50,000 by the circuit court judge.<sup>129</sup> The Arkansas Supreme Court reversed and dismissed the case,

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120. *Id.* at 640, 269 S.W.3d at 368.

121. *Id.* at 642–44, 269 S.W.3d at 369–71.

122. 178 ARK. CODE R. § 1-B-42 (LexisNexis 2009).

123. El Paso had little incentive to petition for United States Supreme Court review because it essentially won the case when the Arkansas Supreme Court reversed the circuit court's damage award of almost \$375,000 and remanded the case to determine actual damage to Blanchard's land, which was minimal.

124. 2010 Ark. 5, 362 S.W.3d 298.

125. *Id.* at 2, 362 S.W.3d at 299.

126. *Id.*, 362 S.W.3d at 299.

127. *Id.*, 362 S.W.3d at 299.

128. *Id.*, 362 S.W.3d at 299.

129. *Id.* at 4, 362 S.W.3d at 300.

holding that Ms. Smallwood had no mineral interest and had no right, as a surface lessee, to prevent the construction of DeSoto's pipeline.<sup>130</sup>

Common law rights of ingress and egress extend only to the mineral owner's property line; however, real world pipelines are seldom that short. A producer may combine the ingress and egress rights of adjoining mineral owners within a unit to move gas, by pipe, across the unit, but those rights stop at the unit's boundary, usually the governmental section line. Gas pipeline companies attempt to negotiate rights-of-way outside the unit in order to get the gas to a point of sale, but that is not always successful. As a last resort, pipeline companies have the right of eminent domain. However, Arkansas's statutes concerning the eminent domain rights of non-public-utility pipelines leave a bit of clarity to be desired. Those statutes are as follows:

#### Common carriers - Eminent domain

(a) All pipeline companies operating in this state are given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service.

(b) The procedure to be followed in the exercise of the right shall be the same as prescribed in Sec. 18-15-1201 et seq. relating to railroad companies, telegraph companies, and telephone companies.<sup>131</sup>

#### Pipelines and logging and tram roads

(a) Any corporation organized by virtue of the laws of this state for the purpose of developing and producing mineral oil, petroleum, or natural gas in this state, and marketing it, or transporting or conveying it by means of pipes from the point of production to any other point, either to refine or to market the oil or to conduct the gas to any point to be used for heat or lights and any corporation organized under the laws of this state for the purpose of manufacturing lumber, and which may find it necessary or expedient to lay out and build a logging railroad or tram road at least five (5) miles in length in order to reach its timber may:

(1) Construct, operate, and maintain a line of pipe for that purpose along and under the public highways and streets of cities and towns with the consent of the authorities thereof; and

(2) Construct logging roads or tramways over and across the lands of any individual or corporation, or across and under the waters and over any lands of the state and on the lands of individuals, and along, under, or parallel with the rights-of-way of railroads and the turnpikes of this state.

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130. *DeSoto*, 2010 Ark. 5, at 9, 362 S.W.3d at 302-03.

131. ARK. CODE ANN. § 23-15-101 (LEXIS Repl. 2002 & Supp. 2011).

(b) The ordinary use of the highways, turnpikes, and railroad rights-of-way shall not be obstructed thereby, nor the navigation of any waters impeded. Just compensation shall be paid to the owners of the land, railroad rights-of-way, or turnpikes, by reason of the occupation of the lands, railroads rights-of-ways, or turnpikes by the pipeline or by the log roads.

(c) The right-of-way for any logging railroad or tram road shall not exceed in width fifty feet (50').<sup>132</sup>

#### Procedure for condemnation

In the event any company fails, upon application to individuals, railroads, or turnpike companies, to secure the right-of-way by consent, contract, or agreement, then the corporation shall have the right to proceed to procure the condemnation of the property, lands, rights, privileges, and easements in the manner provided by law for taking private property for right-of-way for railroads as provided by Sec. 18-15-1201 18-15-1207, including the procedure for providing notice by publication and by certified mail in Sec. 18-15-1202.<sup>133</sup>

In *Linder v. Arkansas Midstream Gas Services Corp.*, the Arkansas Supreme Court rejected a challenge to the constitutionality of Midstream's eminent domain taking of a right-of-way for a gas gathering pipeline.<sup>134</sup> The appellants contended that the taking was for a private rather than public use and that the trial court's construction of the enabling statute,<sup>135</sup> which authorized the taking, rendered that statute unconstitutional.<sup>136</sup> The court held otherwise, clarifying the distinction between public and private use.<sup>137</sup> If members of the public have the right to use the right-of-way, it is subject to condemnation, regardless of whether the public actually makes use of it.<sup>138</sup> The statute declares "pipeline companies" to be common carriers, thus satisfying the right-to-use test.<sup>139</sup> However, the court cautioned that subsequent failure to grant access to others into the pipeline would be inconsistent with the common carrier requirement and would, thus, void the taking.<sup>140</sup>

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132. *Id.* § 18-15-1301 (LEXIS Repl. 2003).

133. *Id.* § 18-15-1303 (LEXIS Repl. 2003).

134. 2010 Ark. 117, at 15, 362 S.W.3d 889, 889.

135. The court focused upon section 23-15-101 of the Arkansas Code Annotated and gave no meaningful discussion of sections 18-15-1301 to -1303 in the code.

136. *Linder*, 2010 Ark. 117, at 5–7, 362 S.W.3d at 893.

137. *Id.* at 7–15, 362 S.W.3d at 894–98.

138. *Id.* at 13, 362 S.W.3d at 897.

139. *Id.* at 12–13, 362 S.W.3d at 896–97.

140. *Id.* at 14, 362 S.W.3d at 897.

The court reached the same result in a slightly later case, *Smith v. Arkansas Midstream Gas Services Corp.*<sup>141</sup> In both cases, the discussion focused upon Arkansas Code section 23-15-101, to the exclusion of the other two statutes.

#### X. THE OIL AND GAS LEASE: WHAT YOU GIVE AND WHAT YOU TAKE

In *Fugacious I*'s discussion of the oil and gas lease's Granting Clause, we showed an example of "Mother Hubbard" language, which is commonly placed within that clause to guard against an incomplete or incorrect legal description.<sup>142</sup> Language similar to that example was at issue in *Barber v. Chesapeake Exploration, LLC*,<sup>143</sup> a suit brought by a lessor who had executed an oil and gas lease describing an entire governmental section, rather than a specific tract within the section, but who was originally paid a bonus based upon the fifty-nine acres, which he was known to own. When Chesapeake later realized that Barber owned twenty additional mineral acres within the section, it tendered an additional bonus, which Barber refused.<sup>144</sup> Among other things, Barber challenged the lease's nonspecific legal description as invalid.<sup>145</sup> Citing decisions of the Arkansas Supreme Court, the United States District Court Judge agreed with the lessee that the lease's description was adequate and unambiguously expressed the parties' intent that Barber's entire interest in the section be covered by the lease, regardless of how it was described.<sup>146</sup>

In *Fugacious I*, we discussed Arkansas Code section 15-73-201<sup>147</sup> which, though poorly drafted, appeared to require an oil and gas lessee to drill at least one well, per year, after the expiration of the primary lease term, in order to maintain the lease, until all units covered by the lease had been explored.<sup>148</sup> For the reader's convenience, we will set out the statute here, as well:

Lease extended by production – Scope

(a) The term of an oil and gas, or oil or gas, lease extended by production in quantities in lands in one (1) section or pooling unit in which there is

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141. 2010 Ark. 256, at 13, 377 S.W.3d 199, 207.

142. *Fugacious I*, *supra* note 1, at 229.

143. No. 4:11CV00234 JLH, 2012 WL 113280, at \*4 (E.D. Ark. Jan. 13, 2012).

144. *Id.*

145. *Id.* at \*4–6.

146. *Id.* at \*5 (citing *Ketchum v. Cook*, 220 Ark. 320, 247 S.W.2d 1002 (1952); *Turrentine v. Thompson*, 193 Ark. 253, 99 S.W.2d 585 (1936); *Snyder v. Bridewell*, 167 Ark. 8, 267 S.W. 561 (1924)).

147. ARK. CODE ANN. § 15-73-201 (LEXIS Supp. 2005) (amended 2011).

148. *Fugacious I*, *supra* note 1, at 229–30.

production shall not be extended in lands in sections or pooling units under the lease where there has been no production or exploration.

(b) This section shall not apply when drilling operations have commenced on any part of lands in sections or pooling units under the lease within one (1) year after the expiration of the primary term, or within one (1) year after the completion of a well on any part of lands in sections or pooling units under the lease.

(c) The provisions of this section shall apply to all oil and gas, or oil or gas, leases entered into on and after July 4, 1983.<sup>149</sup>

That statute has now been twice construed by the Arkansas Supreme Court, in *Snowden v. JRE Investments, Inc.*<sup>150</sup> and *Southwestern Energy Production Co. v. Elkins*,<sup>151</sup> after which it was amended by the General Assembly. The lessors in those cases contended that their leases expired one year after the primary terms' expiration, regardless of the fact that additional wells were drilled on lease lands without longer than one year's interruption.<sup>152</sup> Of the two cases, *Snowden*, which had pretty ugly facts, came to the court first.<sup>153</sup> In *Snowden*, the original lessee, JRE, assigned the lease to Chesapeake Exploration, LLC, which had dutifully drilled at least one well every year after the expiration of the primary term.<sup>154</sup> However, every one of those wells was in the original section.<sup>155</sup> Still, the court held that section (b) of the statute prevented section (a) from terminating the lease.<sup>156</sup> In effect, the statute merely requires one well per year somewhere on the lease.<sup>157</sup>

*Elkins's* facts were even more favorable to the lessee than were *Snowden's* facts because the additional wells drilled by the lessee were in different sections.<sup>158</sup> However, *Elkins* was decided by the circuit court<sup>159</sup> and was adverse to the lessee, while *Snowden* was argued before the Arkansas Supreme Court.<sup>160</sup> Thus, *Southwestern* was obligated to appeal *Elkins*, to get

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149. ARK. CODE ANN. § 15-73-201 (LEXIS Supp. 2005) (amended 2011).

150. 2010 Ark. 276, 370 S.W.3d 215.

151. 2010 Ark. 481, 374 S.W.3d 678.

152. *Id.*, at 9–12, 374 S.W.3d at 683–85; *Snowden*, 2010 Ark. 276, at 8–10, 370 S.W.3d at 220–21.

153. *Snowden*, 2010 Ark. 276, at 1, 370 S.W.3d at 216.

154. *Id.* at 3, 370 S.W.3d at 217.

155. *Id.*, 370 S.W.3d at 217.

156. *Id.* at 8–10, 370 S.W.3d at 220–21.

157. *Id.*, 370 S.W.3d at 220–21 (citing ARK. CODE ANN. § 15-73-201 (LEXIS Supp. 2005) (amended 2011)).

158. *Sw. Energy Prod. Co. v. Elkins*, 2010 Ark. 481, at 2–3, 374 S.W.3d at 680.

159. *Id.* at 3–5, 374 S.W.3d at 680–81.

160. *Snowden*, 2010 Ark. 276, at 1–2, 370 S.W.3d at 216.

that trial court ruling reversed.<sup>161</sup> The result in the Arkansas Supreme Court was consistent.<sup>162</sup>

Justice Danielson, who participated in *Elkins* only, dissented from that decision.<sup>163</sup> His dissenting opinion encouraged the General Assembly to rewrite the statute to say clearly what Justice Danielson believed the General Assembly really meant to say, rather than what the majority of the court held the General Assembly had said, whether intended or not.<sup>164</sup>

Well, the General Assembly went right to work revising the statute. Here is the result of that effort:

Lease Extended by Production – Scope

(a)(1) The term of an oil and gas, or oil or gas, lease extended by production in quantities in lands in one (1) section or pooling unit in which there is production shall not be extended in lands in sections or pooling units under the lease where there has been no activity.

(2) Subsection (a) of this section does not prevent the parties to the lease from agreeing to a continuous drilling provision in order to extend the lease term to additional lands drilled or included in another section or unit if the lessor's waiver of the right to terminate the lease to the additional lands, sections or units where no activity has occurred before the expiration of the lease is fully set forth in the lease or another agreement in bold, enlarged, or other distinctive print.

(b) After the primary term of a lease in an uncontrolled oil field with no spacing requirements, a producing well shall contain a maximum of one (1) governmental quarter-quarter section as a production unit.<sup>165</sup>

Thus, in subpart (a), “production or exploration” has been replaced with “activity.”<sup>166</sup> We do not see the improvement. “Activity” certainly has a dictionary meaning, but it is not a term of art in the oil and gas business, unlike “production” and “exploration.”

The former subpart (b) is gone altogether, eliminating the ability of a producer to hold its lease by continuous development, as occurred in *Snowden* and *Elkins*. It was replaced by (a)(2), which permits a lessor to opt out of the statute by lease language “set forth . . . in bold, enlarged, or other distinctive print.”<sup>167</sup> Presumably that sort of language might be incorporated

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161. *Elkins*, 2010 Ark. 481, at 1, 374 S.W.3d at 679.

162. *Id.*, 374 S.W.3d at 679.

163. *Id.* at 13, 374 S.W.3d at 685–86 (Danielson, J., concurring in part and dissenting in part).

164. *Id.*, 374 S.W.3d at 685–86.

165. ARK. CODE ANN. § 15-73-201 (LEXIS Supp. 2011).

166. *Id.* § 15-73-201(a).

167. *Id.*

into a multi-section lease executed by a professional mineral owner but is unlikely to show up in many other lease forms.

The new subpart (b), dealing with the “uncontrolled oil field,” is confusing.<sup>168</sup> Read literally, it appears to make no sense. Lands contain wells, not vice versa. Even if we make that correction, the statute does not clearly state which “quarter-quarter section” might be the “production unit.”<sup>169</sup> Worse, the word “maximum” implies that there will be instances where the “production unit” may be smaller than even that.<sup>170</sup>

Sadly, the legislative drafters failed to fix the most glaring problem of the statute. They still confuse the terms “sections” and “pooling units,”<sup>171</sup> apparently assuming that they are, in all cases, one and the same. That is often, but not always, true. In South Arkansas, most current units are one-fourth (1/4), one-eighth (1/8), one-sixteenth (1/16), or less of the governmental section. The result of the statute, applied to situations where the lease covers lands both inside and outside the unit, but all inside the section, is not what the General Assembly probably intended. A similar problem is presented by those North Arkansas units that are composed of parts of more than a single section.<sup>172</sup>

Unlike the previous statute, the statute, as amended, is without an effective date. As originally introduced, the changed law would have had the same effective date as the original, making it purport to apply, retroactively, to leases entered into on or after July 4, 1983.<sup>173</sup> When it was realized that the United States Constitution prohibits impairing the obligation of contracts, the bill was amended to strike subpart (c) from the statute altogether.<sup>174</sup>

It is now possible that we will see a case filed upon the premise that the amended statute retroactively applies to existing leases because it does not specifically say that it does not so apply. Such an argument should not succeed. In addition to the constitutional problem,<sup>175</sup> the Arkansas Supreme Court has held that statutes have prospective application only, unless a contrary legislative intent is clear.<sup>176</sup>

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168. *Id.* § 15-71-201(b).

169. *Id.*

170. *Id.*

171. “Pooling” is unnecessary. It is not otherwise used in Arkansas’ oil and gas statutes in connection with “unit.”

172. “Sections” is totally superfluous, in context, and this particular confusion would be eliminated were it removed from the statute, wherever it appears.

173. S.B. 265, 88th Gen. Assemb., Reg. Sess. (Ark. 2011).

174. *Id.*

175. *See Adams v. Spillyards*, 187 Ark. 641, 61 S.W.2d 686, 687 (1933).

176. *Ark. Rural Med. Practice Student Loan & Scholarship Bd. v. Luter*, 292 Ark. 259, 261, 729 S.W.2d 402, 403 (1987).

In *Fugacious I*, we observed that there is a lack of clear Arkansas case law as to the extent that costs such as gathering, transportation, compression, and treatment of gas may be deducted prior to calculating gas royalty.<sup>177</sup> In one of the cases cited there, *Hanna Oil & Gas Co. v. Taylor*,<sup>178</sup> the Arkansas Supreme Court did infer that such costs would be deductible if such deduction was expressly authorized by the lease. Certainly oil and gas leases are not all identical. Each is a contract entitled to be construed according to its own express terms. Compare the following two royalty clauses:

Lessee shall pay Lessor one-eighth of the proceeds derived from the sale of all gas (including substances contained in such gas) produced, saved, and sold by Lessee. Proceeds are defined as the actual amount received by the Lessee for the sale of said gas. *In calculating the proceeds derived from the sale of gas produced, saved and sold by Lessee, Lessee shall be entitled to deduct all reasonable gathering, transportation, treatment, compression, processing and marketing costs that are incurred by Lessee in connection with the sale of such gas.*<sup>179</sup>

Lessee shall pay Lessor one-eighth of the proceeds derived from the sale of all gas at the well (including substances contained in such gas) produced, saved, and sold by Lessee. Proceeds are defined as the actual amount received by the Lessee for the sale of said gas *in an arm's length, non-affiliated transaction. In the event that the sale is to an Affiliate ("Affiliate" being defined as having a ten percent (10%) common ownership), then the proceeds derived from the sale of all gas shall be a price no less than that received from any other purchaser within the governmental township and range in which the lease is situated.*<sup>180</sup>

The first gas royalty clause set out above clearly and unambiguously authorizes deduction of the enumerated costs. The second does not, though it does not absolutely prohibit their deduction either. As we publish this sequel, at least three putative class actions filed on behalf of royalty owners alleging improper deduction of such costs are pending. Two, filed in United

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177. *Fugacious I*, *supra* note 1, at 229; see also Lisa-Marie France, *Deciding to Tolerate Ambiguity: Rogers v. Westerman Farm Co. and "At the Well" Language to Determine Royalty Allocation in Oil and Gas Leases*, 56 ARK. L. REV. 903 (2004).

178. 297 Ark. 80, 759 S.W.2d 563 (1988).

179. This is SEECO, Inc.'s commonly used lease form, which is used to lease many thousand acres within the Fayetteville Shale Play. (emphasis added) (on file with the authors).

180. Arkansas Oil and Gas Commission, *Integration Lease Form No. 357*, ARK. OIL & GAS COMMISSION, <http://aogc2.state.ar.us/PDF/JOA%20Archive/AOGC%20Lease.pdf> (last visited Feb. 21, 2013).

States District Court,<sup>181</sup> purport to be limited to putative classes of royalty owners subject to the second above quoted clause, while the third, filed in a state court, seeks to make a single class of all royalty owners, regardless of the differing express terms of their leases.<sup>182</sup> A similar effort to homogenize differing lease clauses was rejected by one United States District Court Judge, who refused to certify its putative class because, with its mixture of widely varying royalty clauses, common issues did not predominate over individualized questions.<sup>183</sup>

Two recent Arkansas state court cases further confirm that, in Arkansas, an oil and gas lease provision is likely to be individually examined by a court to determine its meaning, rather than permitting generalized conclusions that a certain named lease provision has this meaning or that one. They each involve the Continuous Drilling or Continuous Operations Clause, discussed in *Fugacious I*,<sup>184</sup> but the actual clauses at issue differ materially, leading to opposite results. In *Garner v. XTO Energy Inc.*,<sup>185</sup> the appellants contended that an oil and gas lease expired when its primary term expired.

The *Garner* Continuous Drilling or Continuous Operations Clause reads as follows:

If prior to the discovery of oil or gas on the leased premises, Lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof shall cease for any cause, this Lease shall not terminate if Lessee commences additional operations as provided herein within ninety (90) days thereafter, or, if it be within the primary term, then not until the expiration thereof. If at, or after the expiration of the primary term oil or gas is not being produced on the leased premises, but Lessee is then engaged in operations thereon as provided herein, this Lease shall remain in force so long as operations are prosecuted (whether on the same or successive wells) with no cessation of more than ninety (90) days, and, if production results therefrom, then as long as production is maintained pursuant to the terms hereof.<sup>186</sup>

Drilling began prior to the primary term's expiration, but the well was not completed until two months after the primary term expired.<sup>187</sup> Appellants suggested interpretation of the above-quoted lease language caused it to

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181. *Collins v. SEECO, Inc.*, No. 4:11-CV-761 DPM, 2012 WL 2309080 (E.D. Ark. June 18, 2012); *Vanoven v. Chesapeake Energy Corp.*, No. 4:10-CV-0158 BSM, 2011 WL 1042251 (E.D. Ark. Mar. 22, 2011).

182. *Snow v. SEECO, Inc.*, No. CV2010-126 (Conway Cnty. Cir. Ct. May 7, 2010).

183. *Reidel v. XTO Energy Inc.*, 257 F.R.D. 494 (E.D. Ark. 2009).

184. *Fugacious I*, *supra* note 1, at 236.

185. 2011 Ark. App. 606, 2011 WL 4824319.

186. *Id.* at 3, 2011 WL 4824319, at \*1.

187. *Id.*, 2011 WL 4824319, at \*3.

apply only in situations where a dry hole had been drilled or a productive well had ceased to produce.<sup>188</sup>

The Arkansas Court of Appeals was unconvinced by that novel argument, which it termed “a monolithic set of conditions, all of which must be satisfied, in order for the primary term to be extended.”<sup>189</sup> Rather, the court found the language to clearly extend the lease when operations were ongoing at the primary term’s expiration.<sup>190</sup>

Contrast that decision with that of the Arkansas Court of Appeals in *Petrohawk Properties, LP v. Heigle*.<sup>191</sup> Here the “equivalent” lease provision was differently and somewhat clumsily written:

It is agreed that this lease shall remain in force for a term of *Five* (5) years from the date (herein called the *primary term*) and so long thereafter as oil and gas, or either of them, is produced from said land by the Lessee, *and* as long thereafter as operations, as hereinafter defined, are conducted upon said land with no cessation for more than ninety (90) consecutive days.<sup>192</sup>

When, as in *Garner*, the lessee sought to perpetuate the lease by commencing operations just before the end of the primary term, the lessors sued.<sup>193</sup> According to those lessors, the word “and” is not ambiguous.<sup>194</sup> “And” implies both production and operations. Operations, alone, will not extend the lease term. Both are required. This lease form has an unfortunate, but obvious, scrivener’s error. “And” is supposed to be “or.” If you make that simple change, suddenly the lease makes sense, and order is restored to our universe. Unfortunately for the lessee, the Arkansas Court of Appeals was not inclined to rewrite its lease.<sup>195</sup> Instead, what you say is what you get.

*Heigle* was not the full-blown disaster for the lessee that it could have been. Through divine grace, and another of the lease form’s provisions, “operations” are defined to include production.<sup>196</sup> Therefore, as confirmed in the Arkansas Court of Appeals’ opinion, production will extend the lease, because, by definition, “production” is both “production” and “operations.”<sup>197</sup> Here, because of the lease form’s awkward language, we meet ourselves traveling both from and toward. “Production,” a single condition, satisfies

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188. *Id.*, 2011 WL 4824319, at \*3.

189. *Id.*, 2011 WL 4824319, at \*3.

190. *Id.* at 4, 2011 WL 4824319, at \*4.

191. 2011 Ark. App. 709, 386 S.W.3d 657.

192. *Id.* at 2, 386 S.W.3d at 659 (second emphasis added).

193. *Id.* at 1, 386 S.W.3d at 658–59.

194. *Id.* at 2, 386 S.W.3d at 659.

195. *Id.* at 5, 386 S.W.3d at 660.

196. *Id.* at 6, 386 S.W.3d at 661.

197. *Heigle*, 2011 Ark. App. 709, at 7–8, 386 S.W.3d at 661–62.

the conjunctive conditions of the lease, but “operations,” the other condition, is one condition short of the goal.

Royalty under-payment lawsuits, complex by their very nature, are even more complicated here, because of Arkansas’s statutory royalty payment regimen.<sup>198</sup> One-eighth of gas sold is classified as “royalty gas.”<sup>199</sup> Each lessee who separately sells gas is required to remit that one-eighth of its sale proceeds, “less all lawful deductions,”<sup>200</sup> to the operator, who distributes the one-eighth, proportionately, to all of the royalty interest owners within the drilling unit.<sup>201</sup> Thus, each royalty owner is paid his one-eighth on the basis of the weighted average of all prices received by all selling lessees. However, any lessee who is burdened by lease royalty exceeding one-eighth,<sup>202</sup> is required to pay that excess directly to the entitled royalty owner.<sup>203</sup> So, as to the excess, royalty owners receive a fraction of their own lessee(s) proceeds, often in a separate payment.

The detail on the stub of each royalty check received by the royalty owner from the unit operator is likely to contain a baffling array of data relating to gas sales by multiple sellers, each of which may have its own opinion of what constitutes a “lawful deduction.” To further confuse, royalty remitted to the operator by other lessors takes longer to distribute than royalty from the operator’s own sales, so the operator’s royalty checks almost always remit royalties on sales made in two or more production months.

Thus, a royalty owner entitled to a three-sixteenth royalty will be paid based upon the weighted average price for his one-eighth royalty in a check from the unit operator. Then, his own lessee(s) price(s) will be the basis for his one-sixteenth excess royalty. The check containing the one-eighth will remit for a mixture of production months, while the excess check(s) should cover only one. In an ideal world, the recipient of royalty should be able to figure out whether he is being paid correctly. Unfortunately, Arkansas’s royalty world is not ideal.

In *Fugacious I*, we published an example of an “Assignment and Change of Ownership Clause” in an oil and gas lease.<sup>204</sup> We now note that Arkansas’s 2009 General Assembly thereafter enacted the following statute, requiring that the lessor be given notice of certain assignments of a lease:

Transfer of mineral lease - Notice

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198. ARK. CODE ANN. § 15-72-305(a) (LEXIS Repl. 2009).

199. *Id.* § 15-72-305(a)(3).

200. *Id.* § 15-72-305(a)(3)(B)(i).

201. *Id.*

202. Referred to within the oil and gas industry as “excess royalty.”

203. ARK. CODE ANN. § 15-72-305(a)(8)(C) (LEXIS Repl. 2009).

204. *Fugacious I*, *supra* note 1, at 235.

(a) A person holding a mineral lease shall notify the owner of the mineral rights upon which the lease has been given upon the first transfer of the mineral lease to another person if the transfer occurs within twenty-four (24) months after the execution of the lease.

(b) The written notice shall include:

- (1) The name of the buyer of the mineral lease;
- (2) The address of the buyer of the mineral lease; and
- (3) Information on how to contact the buyer of the mineral lease.

(c) The written notice shall be sent through the United States Postal Service by first class mail.

(d) This section shall apply to a mineral lease entered into after August 1, 2009.<sup>205</sup>

This new act contains no sanctions for its violation. Were the violation to result in some injury to a leased mineral owner, perhaps a cause of action relating to the breach of duty would exist, but that would have to be supported by the facts.

There is a clause that recently has started appearing in recorded oil and gas leases covering Arkansas minerals. It is, in effect, a renewal option, authorizing the lessee to extend the primary term of the lease, upon payment of additional bonus to the lessor. Here is an example:

Lessee is hereby given the exclusive right and option to extend the primary term of this lease as to all or any portion of the land covered hereby for an additional five (5) years from the expiration of the original primary term. This option may be exercised by Lessee at any time during the original primary term hereof by paying the sum \$\_\_\_\_\_ per net mineral acre to Lessor and other parties designated by Lessor. Payment shall be considered made and option exercised by mailing payment to last known address of Lessor and or assigns. If this option is exercised as to just a portion of the acreage, Lessee shall execute and place of record an instrument identifying the land as to which the option has been exercised. Should this option be exercised as herein provided, it shall be considered for all purposes as though this lease originally provided for a primary term of ten (10) years.

*Hipp v. Vernon L. Smith & Associates, Inc.*<sup>206</sup> involved such a clause, though the validity of the clause was not questioned. Rather, the lessors con-

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205. Act of Apr. 7, 2009, No. 1183, 2009 Ark. Acts 1183 (codified at ARK. CODE ANN. § 15-73-208 (LEXIS Repl. 2009)).

206. 2011 Ark. App. 611, at 4, 386 S.W.3d 526, 528.

tended that the lessee, Smith, had falsely represented to them that the lease was for a primary term of five years and, thus, had obtained their signatures thereon by fraud.<sup>207</sup> The trial court granted the lessees' motion to dismiss, holding that the suit was barred by passage of the period of limitations.<sup>208</sup> The lessors had claimed fraudulent concealment of their cause of action by the lessees had tolled the period of limitations but proved no such fraud, other than the lessees' original failure to bring the renewal clause to their attention.<sup>209</sup> The Arkansas Court of Appeals held that the claimed fraudulent concealment exception to the statute of limitations failed, as a matter of law, since the lessors had possession of a copy of the lease throughout and could have discovered the renewal clause at any time by simply reading it.<sup>210</sup>

A few miscellaneous recent cases involving oil and gas leases are also worthy of mention. Occasionally, after obtaining an oil and gas lease, the lessee realizes that the lessor does not own the entire interest purportedly leased. That was the situation in *Robison v. Lee*.<sup>211</sup> Thomas Lee owned a life estate in the oil, gas and other minerals beneath a tract in Van Buren County.<sup>212</sup> The Robisons were the remaindermen.<sup>213</sup> SEECO, Inc. obtained an oil and gas lease from Lee and then, instead of acquiring a separate lease from the Robisons, obtained their signatures on a document that ratified the Lee lease.<sup>214</sup> The ratification recited that it was executed by the Robisons in exchange for nominal consideration, but the Robisons contended that no actual consideration had been paid to them.<sup>215</sup> The Arkansas Court of Appeals held that the ratification was valid and effectively committed the Robisons' remainder interest to the lease.<sup>216</sup> Citing its prior decision and one of the Arkansas Supreme Court,<sup>217</sup> the Arkansas Court of Appeals held that the Robisons' proffered evidence denying receipt of consideration contradicted the ratification's recitation and therefore was barred by the parol evidence rule.<sup>218</sup>

The Fayetteville Shale Play spawned a phenomenon not uncommon in the mineral business. As the news of a big new gas discovery in Arkansas broke, speculators from far and wide clamored for a piece of the action.

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207. *Id.* at 5, 386 S.W.3d at 529.

208. *Id.* at 2, 386 S.W.3d at 527.

209. *Id.* at 6–7, 386 S.W.3d at 530.

210. *Id.* at 8, 386 S.W.3d at 531.

211. 2010 Ark. App. 839, 2010 WL 5131917.

212. *Id.* at 1, 2010 WL 5131917, at \*1–2.

213. *Id.*, 2010 WL 5131917, at \*1–2.

214. *Id.* at 2, 2010 WL 5131917, at \*2.

215. *Id.* at 4, 2010 WL 5131917, at \*4.

216. *Id.* at 4–5, 2010 WL 5131917, at \*4–5.

217. *Hagans v. Haines*, 64 Ark. App. 158, 984 S.W.2d 41 (1998); *Pope v. Pennzoil Producing Co.*, 288 Ark. 10, 701 S.W.2d 366 (1986).

218. *Robison*, 2010 Ark. App. 839, at 4–5, 2010 WL 5131917, at \*4–5.

Many of those apparently had poor geologic advice, or none at all, though apparently they had a bit of money to spend chasing the play.<sup>219</sup> For a time, if a “prospect” lay west of Memphis, someone would lease it; though, as most Fayetteville Shale savvy geologists suspected, the play likely ends, abruptly, at the point near Searcy where the foothills end in flat land. When these speculators’ efforts turned sour, they spawned a few interesting cases. Windsor Weeping Mary<sup>220</sup> was such a speculator. It secured leases on a large tract of land<sup>221</sup> in Lee County, Arkansas, far removed from its more prudent competitors.<sup>222</sup> To complicate matters, the leases contained an addendum whereby Windsor Weeping Mary committed to drill two wells on the tract within eighteen months of the leases’ execution dates.<sup>223</sup> When Windsor Weeping Mary began to have second thoughts, it requested an extension of the deadline for the two promised wells, which the lessors refused.<sup>224</sup> Windsor Weeping Mary then simply filed releases of the leases and headed back north.<sup>225</sup> The lessors sued, contending that they had been damaged by breach of the promise to drill the two wells.<sup>226</sup> The Arkansas Court of Appeals affirmed the circuit court’s ruling that Windsor Weeping Mary had the right, under the leases’ Surrender Clause,<sup>227</sup> to release the leases as an alternative to performing its drilling commitment.<sup>228</sup> The court noted that Windsor Weeping Mary had already paid the lessors over a million dollars in a lease bonus for what turned out to be worthless leases.<sup>229</sup> Apparently, it had been punished enough.

The same gold rush mindset that caused Windsor Weeping Mary to consider prospecting in Lee County apparently contributed to David H. Arrington Oil and Gas, Inc.’s interest in far-away Phillips County.<sup>230</sup> However, unlike Windsor Weeping Mary, Arrington apparently figured out that it was in the wrong place before parting with the bulk of its bonus money.<sup>231</sup> In-

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219. Investors persuaded to contribute capital to such speculators are sometimes referred to, disparagingly, by industry insiders as “Canadian dentists;” though there are likely some in other professions and from other nations.

220. Actually, it was Windsor Weeping Mary, LLC, which was succeeded at some point by Windsor Weeping Mary, LP.

221. 7,152/28 net mineral acres.

222. *Frein v. Windsor Weeping Mary, LP*, 2009 Ark. App. 774, at 1, 366 S.W.3d 367, 369.

223. *Id.* at 3, 366 S.W.3d at 369.

224. *Id.* at 4, 366 S.W.3d at 370.

225. *Id.*, 366 S.W.3d at 370.

226. *Id.* at 5, 366 S.W.3d at 370.

227. *Fugacious I*, *supra* note 1, at 236–37.

228. *Frien*, 2009 Ark. App. 774, at 9, 366 S.W.3d at 372.

229. *Id.* at 6, 366 S.W.3d at 371.

230. Barely west of Memphis.

231. *See Smith v. David H. Arrington Oil & Gas, Inc. (Smith I)*, No. 2-09-CV-00101 BSM, 2010 WL 3523062 (E.D. Ark. Sept. 3, 2010).

stead, Arrington gave its prospective lessors bank drafts for the bonus, the acceptance of which was conditioned upon “approval of lease or mineral deed described hereon, and on approval of title to same by drawee not later than [a stated number of] banking days after arrival of this draft at Collecting bank, with the right to Re-Draft.”<sup>232</sup> Arrington was the designated drawee.<sup>233</sup> Within the time provided for acceptance, Arrington dishonored the drafts.<sup>234</sup>

In granting summary judgment to the lessor for the amount of the drafts, the United States District Court Judge concluded that dishonor was not triggered by Arrington’s good faith conclusion that the lessors’ title was faulty.<sup>235</sup> Rather, the court apparently believed that Arrington simply decided that Phillips County was not a particularly good place to be drilling wells targeting the Fayetteville Shale Formation in North Central Arkansas.

The United States Court of Appeals for the Eighth Circuit affirmed on the consolidated appeal of three of the district court decrees.<sup>236</sup> The Eighth Circuit rejected Arrington’s argument that it was not liable on the drafts, for lack of mutuality, and because of a clause within the drafts which exculpated the collecting bank and “any of the parties hereto” from liability.<sup>237</sup> The court reasoned that Arrington’s liability was based, not upon the drafts alone, but also upon the underlying contract between it and the lessors.<sup>238</sup> When the lessors submitted executed leases with the unaccepted drafts, they effectively accepted Arrington’s lease offer and were entitled to be paid unless, and only unless, their title was bad, which it was not.<sup>239</sup>

## XI. IMPLIED COVENANTS: THE REST OF THE LEASE STORY

As we discussed in *Fugacious I*, the standard of measuring a lessee’s performance of the implied covenants of an oil and gas lease is measured by the “prudent operator” standard, which is a specialized version of negligence law’s “reasonable man” standard.<sup>240</sup> In 2009, the Arkansas General Assembly, in Act 719 of that year, defined the “prudent operator” standard under an oil and gas lease.<sup>241</sup> The statute expressly states that a lessee is not a fidu-

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232. *Smith v. Arrington Oil & Gas, Inc. (Smith II)*, 664 F.3d 1208, 1211 (8th Cir. 2012), *reh’g denied* (Mar. 1, 2012).

233. *Id.*

234. *Smith I*, 2010 WL 3523062, at \*4.

235. *Id.*

236. *Smith II*, 664 F.3d at 1210.

237. *Id.* at 1211.

238. *Id.* at 1212–18.

239. *Id.* at 1216–18.

240. *Fugacious I*, *supra* note 1, at 239–40.

241. Act of Mar. 31, 2009, No. 719, 2009 Ark. Acts 719 (codified at ARK. CODE ANN. § 15-73-207 (LEXIS Repl. 2009)).

ciary.<sup>242</sup> The lessee does owe an obligation to perform the “covenants of the lease” in good faith and to develop the leased mineral estate as a prudent operator for the parties’ mutual benefit.<sup>243</sup> That is pretty much what we said in *Fugacious I* was already the law.

One of the lessee’s implied duties, discussed in *Fugacious I*, is the implied duty to operate with due regard to the surface owner, including the duty to restore the land to the extent reasonably practicable upon completing operations.<sup>244</sup> That duty was given an interesting look in *AJ & K Operating Co., Inc. v. Smith*,<sup>245</sup> a case that was originally filed in the Circuit Court of Union County seeking substantial damages for alleged pollution of the surface of the plaintiffs’ lands.<sup>246</sup> While the suit was pending, the defendants, who were the oil operators, sought to enter the lands for the purpose of plugging the wells, closing the pits, and otherwise restoring the lands but were restrained from doing so by a circuit court injunction.<sup>247</sup> The rationale for the injunction was that such restoration activities might destroy evidence of the pollution, to the detriment of the plaintiffs’ lawsuit for damages.<sup>248</sup> In other words, the plaintiffs sued for damages to their land, but in reality, they did not want their land returned undamaged. Rather, they wanted what many plaintiffs appear to want most—money. The Arkansas Supreme Court reversed and dissolved the injunction:

We hold that the contention in this case that remediation could destroy evidence for a trial on damages does not constitute irreparable harm. Although remediation efforts may ultimately affect the amount of damages awarded to the Landowners on their claims, those same remediation efforts could just as well benefit the Landowners by improving the state of their lands. Nor is trespass a sufficient demonstration of irreparable harm. An act of trespass, such as feared here, can be adequately compensated by money damages or otherwise redressed in a court of law.<sup>249</sup>

## XII. THE RULE OF CAPTURE: A LICENSE TO STEAL?

The authors are not aware of any developments justifying an update to this section of *Fugacious I*.<sup>250</sup>

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242. ARK. CODE ANN. § 15-73-207(a) (LEXIS Repl. 2009).

243. *Id.* § 15-73-207(b)(1).

244. *Fugacious I*, *supra* note 1, at 239.

245. 355 Ark. 510, 140 S.W.3d 475 (2004).

246. *Id.* at 512–13, 140 S.W.3d at 477.

247. *Id.*, 140 S.W.3d at 477.

248. *Id.* at 513, 140 S.W.3d at 477–78.

249. *Id.* at 520, 140 S.W.3d at 482–83.

250. *Fugacious I*, *supra* note 1, at 240–42.

## XIII. STATE REGULATION: THE RULE OF CAPTURE IS LIMITED

In this chapter of *Fugacious I*, we observed that drilling and completion technology had evolved to the point that near impermeable reservoir rock, such as the Fayetteville Shale, could be effectively drilled with horizontal wells producing from laterals 2000 feet or more in length.<sup>251</sup> Well, science marches on. Today, productive laterals in the Fayetteville Shale formation often exceed 6000 feet in length. How, you might wonder, can that be, if units are mere 640 acre governmental sections, a mere mile on each side? The answer lies in the extensive utilization of cross-unit wells, briefly discussed in *Fugacious I*.<sup>252</sup> These wells are shared by the units that they impact, using the sharing formula set out in the Arkansas Oil and Gas Commission's General Rule B-43(o).<sup>253</sup>

Here is how it works: Think of each unit as a business entity. Then, imagine that two or more of those business entities wish to enter into a joint venture, for the benefit of all of them. Now, since the commission has decided that wells must ordinarily be 560 feet from unit boundaries,<sup>254</sup> we will draw an ellipse with a radius of 560 feet around the entire wellbore from the first completion into the shale formation<sup>255</sup> to the last completion.<sup>256</sup> Our ellipse resembles a band-aid strip, does it not? That is why we call it a band-aid.<sup>257</sup> When we overlay our band-aid on a plat of the affected units, we are able to calculate both the total acreage within the entire band-aid and the acreage that the band-aid occupies within each unit. Each unit's share of the joint ventured well is then its included acreage divided by the band-aid's total acreage. We are informed by the Arkansas Oil and Gas Commission that more than seventy-five percent of all wells now drilled within the Fayetteville Shale Play are cross-unit wells.<sup>258</sup> Moreover, this simple idea

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251. *Id.* at 244–45.

252. *Id.* at 242–48.

253. 178 ARK. CODE R. § 1-B-43(o) (LexisNexis 2010).

254. The cross-unit well is, of course, an exception to that spacing requirement.

255. The heel perforation.

256. The toe perforation.

257. As you surely noted when you read *Fugacious I*, the oil and gas industry has a language all its own, composed mostly of “made-up” words. “Band-aid” is simply a continuation of that process.

258. According to the Arkansas Oil and Gas Commission's records, 853 wells were issued drilling permits in the counties where the Fayetteville Shale Play is primarily located (Cleburne, Conway, Faulkner, Independence, Van Buren and White). In the same year, 705 administrative applications for cross-unit wells were processed. Thus, we are tempted to say that 705 out of 853 wells drilled in the Shale Play in 2011 were cross-unit wells, since those wells require both types of permit. However, such permits are not issued, in every case, on the same day; so we may be off, one way or another, by a few wells due to arbitrarily limiting the time period exactly to the year 2011. Arkansas Oil and Gas Commission, *Hearing Appli-*

that originated in Arkansas is catching on. Both neighboring Oklahoma and Louisiana now permit cross-unit wells.<sup>259</sup> We can reasonably expect them to show up in other places with horizontal well development in years to come.

One area of the Arkansas Commission's jurisdiction that we did not discuss in *Fugacious I* is the commission's jurisdiction to regulate disposal wells.<sup>260</sup> Oil and gas wells often produce fluids, typically water, in addition to their oil and/or gas. This is particularly the case immediately after completion of a well by hydraulic fracturing, which involves the injection of volumes of water, containing sand, into the target formation outside the horizontal wellbore, in order to induce microscopic cracks through which oil and/or gas may then flow. Early in its life, such a well can be expected to recover much of the water thus injected, along with the oil and/or gas. Wells also sometimes produce salt-water native to the underground formations. Some of this water<sup>261</sup> is recycled by using it in the completion of another well but much is disposed of by injecting it deep into the earth—far from fresh water supplies and far from those strata that are prospective for oil or gas production.

A problem may arise, however, if that injection is into geologic communication with seismically active faults, even deeper within the earth, because mild tremors might be triggered as those deep faults are lubricated. Such a phenomenon may have occurred<sup>262</sup> in the vicinity of the towns of Guy and Greenbrier, in Faulkner County, Arkansas, in about 2010. That area had experienced small tremors throughout recorded history, but residents noted an increase coincidental with development of the Fayetteville Shale Play. Some geologists now believe that they have discovered new and previously unknown deep faults in the area that may have been influenced by deep injection of fluids from a handful of disposal wells.<sup>263</sup> In the exercise of

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*cations*      *Archive*,      ARK.      OIL      &      GAS      COMMISSION,  
[http://www.aogc2.state.ar.us/hearing\\_apps\\_archive2011.htm](http://www.aogc2.state.ar.us/hearing_apps_archive2011.htm) (last visited Feb. 21, 2013).

259. In Oklahoma, cross-unit wells are authorized by a recent statute. OKLA. STAT. ANN. tit. 52, §§ 87.6–87.9 (West Supp. 2013). In Louisiana, they have been approved, on an ad hoc basis, by the Louisiana Commissioner of Conservation. *See, e.g.*, LOUISIANA OFFICE OF CONSERVATION, ORDER NO. 109-X-146, ORDER CONCERNING PERMISSION TO DRILL (Jan. 13, 2012), *available* *at* <http://ucmwww.dnr.state.la.us/ucmsearch/UCMRedir.aspx?url=http%3a%2f%2fdnrumcm%2fucm%2fgroups%2fconservation%2fdocuments%2fooc%2f4071322.pdf>.

260. ARK. CODE ANN. § 15-71-110(d)(14) (LEXIS Repl. 2009); 178 ARK. CODE R. §§ H-1 to H-3 (LexisNexis Nov. 2010 & May 2012).

261. Particularly frack flowback.

262. No one really knows with certainty what triggers a given earthquake. Rather, we are left to deal in theories and possibilities.

263. See the testimony and exhibits in Arkansas Oil and Gas Commission Docket #180A-2011-07, which resulted in the Commission's order requiring the plugging of certain disposal wells and the establishment of a permanent moratorium area prohibiting the drilling of future disposal wells in proximity to the believed location of those deep faults.

its authority to regulate disposal wells, the Oil and Gas Commission ordered the implicated wells to be plugged and promulgated rules to prevent a recurrence.<sup>264</sup>

One recent decision of the Arkansas Supreme Court discussed and, it may be argued, expanded the subject matter jurisdiction of the Oil and Gas Commission. In *Great Lakes Chemical Corp. v. Bruner*,<sup>265</sup> the court reviewed a circuit court's affirmance of an order of the commission, requiring Great Lakes, the operator of a brine unit in Union County, Arkansas, to revert to its original method of accounting for costs of the unit.<sup>266</sup> Great Lakes subsequently installed a SAP cost accounting system that led to higher costs to participants in the unit, including Albemarle Corporation, which complained to the commission.<sup>267</sup>

The dispute came down to the interpretation of the unit's operating agreement, which had been approved by the commission order that approved the unit.<sup>268</sup> Over the objection of Great Lakes, the commission had interpreted the agreement in a manner favorable to the participants and unfavorable to Great Lakes.<sup>269</sup> A principal issue on appeal was whether the commission, an administrative agency, had the jurisdiction to interpret a contract, even one that was incorporated into an order that it clearly had jurisdiction to issue.<sup>270</sup> The Arkansas Supreme Court said yes in answer to that question, which seems a bit extraordinary.

Traditionally, the meaning of a contract is a pure matter of law, to be decided, as such, by the court. Moreover, review of such a decision of law, on appeal, is *de novo*. Here, however, an administrative agency, composed largely of non-lawyers, ruled as to the meaning of a complicated agreement with the standard of review on appeal being whether the decision was arbitrary and capricious. Then, because the commission is clearly without the ability to award damages or otherwise enforce the decision, we are left to wonder: What comes next? The case may be a poster-child example of the old adage: "Bad facts make bad law."

#### XIV. SUMMING UP: FUGACIOUS INDEED

As illustrated by the foregoing five-year update, few areas of the law have the capacity to generate complex litigation, unexpected conceptual twists, and even brand-new terminology as does oil and gas. Some of those

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264. 178 ARK. CODE R. §§ 1-H-1 to 1-H-3 (LexisNexis Nov. 2010 & May 2012).

265. 368 Ark. 74, 243 S.W.3d 285 (2006).

266. *Id.* at 78–79, 243 S.W.3d at 289.

267. *Id.* at 77, 243 S.W.3d at 288.

268. *Id.* at 79–81, 243 S.W.3d at 289–90.

269. *Id.* at 79–80, 243 S.W.3d at 289.

270. *Id.* at 79–81, 243 S.W.3d at 289–90.

new complexities, as noted, are the result of rapid changes in technology. Others grow out of the need to resolve ancient ambiguities or conflicts, as to which there seems to be an endless supply. And still others are spawned by the stubborn refusal of some lessors and lessees<sup>271</sup> to heed the wise admonitions of Mad Hatter and March Hare to mean what they say and, more importantly, when they are writing a lease or contract,<sup>272</sup> to say what they mean.<sup>273</sup>

Expect more sequels.

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271. Not to mention the Arkansas General Assembly.

272. Or statute.

273. See LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 97-98 (MacMillan & Co. 1946).