A Glance at The Second Boom: Oilfield Litigation in Arkansas

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I. Introduction

Oilfield litigation has boomed throughout oil producing states like Louisiana, Oklahoma, and Texas for the past two decades. This litigation trend has only recently hit Arkansas state and federal courts. Much of the property that is the subject of litigation throughout the country involves older fields that now have little or no production activity. Often, the current surface owner/plaintiff inherited the land on which the field is located and derives little or no financial benefit from the field once teeming with oil during previous ownership. Some of these property owners may turn to litigation as a way to make dry ground "productive" again.

This article will provide a short history lesson on the first Arkansas oil boom. Then, it will provide you with a glance at history in the making: the second boom also known as oilfield litigation in Arkansas. You will be introduced to oilfield litigation in Arkansas state courts including a look at the parties, allegations, causes of action and possible defenses. Next, you'll step into oilfield litigation in federal court and review causes of action and defenses there. Finally, you will be provided with a quick review of pertinent case law in Arkansas and other states.

II. Brief History of the Arkansas Oil Boom

The first oil producing well of the El Dorado field, Busey #1, blew-in on January 10, 1921.[1] The well produced 1,000 to 1,500 barrels of oil daily but was abandoned in March of 1921.[2] By June of 1921 more than one hundred wells had been drilled and another 340 derricks were under construction in the field.[3] El Dorado grew in population from 4,000 to 15,000 in a matter of weeks.[4]

At its peak, the wells in the El Dorado field produced 1,746,294 barrels of crude per month.[5] Production exceeded available storage and transportation mechanisms. Therefore, oil was stored in creeks, ravines and earthen pits.[6] This was a common practice in oil fields across the country. At its highest production in 1922, the field was producing 10, 560,841 barrels.[7] Ultimately, production operations reached ten miles long and two miles wide covering 7,740 acres. By 1947, production had slowed to 382,000 barrels.[8]

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[1] KENNY A. FRANKS & PAUL F. LAMBERT, EARLY LOUISIANA AND ARKANSAS OIL: A PHOTOGRAPHIC HISTORY, 1901-1946 from The Montague History of Oil Series: No. 3, p. 108 (Texas A&M University Press 1982).
[2] *Id.*
[3] *Id.* at 109.
[4] *Id.* at 110.
[5] *Id.*
[6] *Id.* at 109.
[7] *Id.*
[8] *Id.*

Smackover field was discovered in 1922.[9] "Smackover was the last U.S. oil field where large-scale earthen storage was constructed and was one of only three regions where earthen tank farm storage was used by 1930 . . . . In its first 10 years of production, perhaps five to ten million barrels of oil were lost and over one billion barrels of saltwater were poured out onto the ground."[10]

III. Arkansas State Court Litigation

A. Who Are the Parties?

The Plaintiffs in the state court cases are alleged to own surface rights to the property described in the complaint. However, not all of the Plaintiffs sought out an attorney because of some underlying suspicion of contamination to the property. These plaintiffs were invited to attend public meetings by notices such as the one listed below claiming "RADIOACTIVE CONTAMINATION OF AREA PROPERTY CREATES SERIOUS RISKS."[11] And so they came.

One might assume from the allegations made in the complaint that the defendants are oil producers and operators. While some of the defendants fit this description, several of the defendants have never owned or engaged in the business of operating oil, gas, and/or salt water disposal wells, production equipment, disposal pits, or other facilities and equipment. These defendants have never participated in any oil and gas production activities, nor held any oil and gas lease concerning the real property. Some of the defendants are merely oil brokers. Of course, these non producer/non-operator defendants have filed motions for summary judgment on the basis that they never performed any of the activities Plaintiffs allege are responsible for the damage to their property. Plaintiffs' respond that even if these defendants did not conduct operations on Plaintiffs' property, they are liable if they bought oil from a producer known to be in violation of any other oil and gas commission regulation, citing to Ark. Oil & Gas Comm'n Rule E-1(A). The defendants have argued that the cited regulation is not applicable and that this "guilt by association" theory would lead to absurd results. The stated purpose of this regulation is to "provide orderly production of crude oil without waste and to give equal opportunity for marketing oil to all operators bringing wells into production . . . ." Rule E-1(C). The Court has not yet ruled on this issue.

How do the Plaintiffs in the state court cases determine who to sue? It is likely that the Plaintiffs research records found in the Oil and Gas Commission that are catalogued by Section, Township, and Range. Using a description of the subject property, Plaintiffs can locate well cards and files containing the names of various persons and entities. The documents, however, do not always identify the role of these

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[9] MARY L. BARRETT, THE OIL WASTE HISTORY OF SMACKOVER FIELD, ARKANSAS, Environmental Geosciences, Vol. 8, No. 4, p. 231 (2001).
[10] *Id.*
[11] James Scott Parker, A Deeper History: The Oil Book of the 1920s in Union County, Arkansas (2000) (unpublished M.A. thesis, University of Arkansas) (on file with the University of Arkansas Library).

persons and entities, i.e. owner, operator, producer, broker, etc. It appears that anyone listed in these records is a potential target for litigation in state court.

B. Allegations and Causes of Action

The oilfield litigation complaints filed in State Court all contain the same allegations and causes of action. The complaints make general allegations allegedly applicable to all of the named defendants in the same degree. The Plaintiffs make the following "General Allegations":

- Defendants owned and/or were engaged in the business of operating certain oil, gas, and/or salt water disposal wells, production equipment, disposal pits, and other facilities and equipment in _____ County, Arkansas, and particularly on Plaintiffs' property.

- While conducting operations on or adjacent to Plaintiffs' property from the aforesaid wells, and while using the production equipment, tanks, lines, pits, separators, and heater treaters, the Defendants willfully, wantonly recklessly, and negligently caused the Plaintiffs' real and personal property to become contaminated with radioactive scales, residues, precipitates, and other harmful and hazardous materials.

- In addition to harmful radioactive materials, the Defendants caused the contamination of Plaintiffs' real property with salt water, oil and grease, heavy metals, and other harmful and hazardous substances from their oil and gas production activities, causing damage to Plaintiffs' real property.

Based on these general allegations, Plaintiffs maintain the following causes of action:

1. Negligence/Negligence Per Se

Plaintiffs allege the defendants failed to exercise reasonable and ordinary care while conducting operations on the Plaintiffs' property including the failure to inspect, failure to warn, failure to properly maintain, failure to properly remove and dispose of certain substances, and failure to communicate the known or suspected hazards associated with certain substances. Plaintiffs further allege that the defendants violated certain unnamed statutes and regulations.

2. Private and Public Nuisance

Plaintiffs allege the defendants' conduct and activities have unreasonably interfered with Plaintiffs' lawful use of the land constituting a private nuisance, and defendants have interfered with Plaintiffs' lawful exercise of public rights and have created a health hazard, constituting a public nuisance.

3. Continuing Trespass to Land

Plaintiffs claim that the defendants' have stored, released and disposed of harmful and toxic substances on Plaintiffs' property in such a way as to cause those substances to enter into and contaminate the soil and groundwater of Plaintiffs' property. Plaintiffs claim the past and continuing entry upon Plaintiffs' land to install, operate and maintain equipment and facilities that emit radioactive particles and rays, and generate, accumulate, and release harmful and toxic substances, constitutes past and continuing trespasses to Plaintiffs' land.

4. Breach of Contract

Plaintiffs allege defendants' operations and activities have exceeded the scope of activities authorized by the lease agreements governing the Defendants' conduct on Plaintiffs' land. Plaintiffs also claim that Defendants have breached express and/or implied covenants in the lease agreements that require the defendants to do nothing that would harm or impair the value of the Plaintiffs' property.

5. Waste

Plaintiffs assert that defendants' contamination, destruction, and devaluation of Plaintiffs property has caused Plaintiffs to suffer unnecessary surface loss constituting waste.

6. Strict Liability

Plaintiffs claim that through the production, handling, release, and improper disposal of radioactive and other harmful and hazardous materials, the defendants were engaged in abnormally dangerous and ultrahazardous activities.

7. Outrageous Conduct

Plaintiffs assert defendants have intentionally, recklessly, outrageously, and unlawfully interfered with Plaintiffs' legal rights.

8. Assault and Battery

Plaintiffs claim that radioactive wastes have emitted harmful particles and rays on Plaintiffs' property, and its non-radiological oilfield wastes have emitted harmful fumes, gases, and/or particulates in the proximate vicinity of Plaintiffs themselves which have impacted Plaintiffs' bodies and/or have created reasonable apprehension and fear among Plaintiffs themselves.

Plaintiffs seek money damages for the following injuries: property damage; disruption of bodily tissues and cells; emotional distress, mental anguish, anxiety, fear, aggravation, and inconvenience; restoration damage; economic damage; and nominal

damages. In addition, Plaintiffs request punitive damages, injunctive relief, and declaratory judgment.

C. Defenses

Most of the parties have moved for dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The assault and battery allegation dramatically illustrates the looseness with which some of the causes of action are pled. The Complaint alleges that all of the named Defendants have emitted various oilfield wastes "in the proximate vicinity of Plaintiffs themselves." As a result, according to the Complaint, all of the named Defendants committed assault and battery on all of the named Plaintiffs. Most of the Plaintiffs live out of state and many have admitted that they have never laid eyes on the subject property.

And, as previously discussed, many of the non-operator/non-producer defendants have moved for summary judgment because they have not performed any of the actions alleged by Plaintiffs to have caused damage to the property.

The defendants have also raised defenses related to the statute of limitations. For example, actions sounding in negligence[12], nuisance,[13] and trespass carry a three-year statute of limitation. Assault and battery actions must be commenced within one year after the cause of action accrues.[14] Actions for breach of a written contract must be brought within five years after the cause of action accrues.[15] Many of the defendants commenced operations during the great oil boom of the 1920s and ceased operations in the same decade.

Another defense asserted by the defendants in the state oilfield cases is a failure to exhaust administrative remedies. The Arkansas Oil and Gas Commission (AOGC) has "jurisdiction and authority of and over all persons and property necessary to administer and enforce effectively the provisions of this act and all other acts relating to the production and conservation of oil and gas."[16] "The commission drafts and enforces rules and regulations in a cradle to grave approach. More than 37,000 permits to drill oil, gas, and brine wells have been issued by the Arkansas Oil and Gas Commission."[17] The defendants assert that the AOGC, the entity charged with the duty of regulating all persons involved in oil and gas production activities, should be given notice of violation and an opportunity to use its specialized knowledge to direct any necessary action. In Mississippi, the Supreme Court recently held that the Plaintiffs must their exhaust administrative remedies before the Oil and Gas Board before bringing suit against the Defendants.[18] This case is discussed more fully below.

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[12] Ark. Code Ann. § 16-56-105.
[13] Ark. Code Ann. § 16-56-105.
[14] Ark. Code Ann. § 16-56-104(2).
[15] Ark. Code Ann. § 16-56-111.
[16] Ark. Code Ann. § 15-71-110(a)(1).
[17] Arkansas Oil and Gas Commission, What We Do, *at* http://www.aogc.state.ar.us.
[18] *Chevron v. Smith*, No. 1999-CA-01658-SCT, 2002 WL 31320495 (Miss. Sup. Ct. 2002).

IV. Federal Court Litigation

A. Causes of Action

The Federal Court complaints assert the following causes of action:

1. Violations of Resource Conservation and Recovery Act (RCRA)

Plaintiffs allege that Defendants' past and present handling, storage, treatment, transportation, and/or disposal of solid wastes in the form of exploration and production wastes have polluted and contaminated plaintiffs' property and the surrounding area. Plaintiffs claim this ongoing, unremediated pollution and contamination constitutes an imminent and substantial endangerment to the environment on and surrounding plaintiff's property.

2. Violations of the Arkansas Solid Waste Management Act (ASWMA)

Plaintiffs assert that defendants have polluted plaintiffs' property with exploration and production wastes and other toxic and harmful substances which are "solid wastes" under the ASWMA. Plaintiffs claim that Defendants have violated several sections of the ASWMA including Ark. Code Ann. § 8-6-205(a)(1-5). Plaintiffs claim that Defendants' violation of the ASWMA are the proximate cause of a continuing, temporary, intermittent, recurring and abatable public nuisance, a public health hazard, and pollution.

3. Nuisance

Plaintiffs assert that the defendants' unreasonable and unwarranted conduct constitutes an unreasonable interference with plaintiffs' use and enjoyment of their property and has caused plaintiffs' injury.

4. Trespass

Plaintiffs claim that defendants, without plaintiffs' consent and without legal right, intentionally, willfully and recklessly caused toxic and harmful oil field wastes to enter upon plaintiffs' property and have allowed same to continue migrating in the soil and water thereof. Plaintiffs claim this unauthorized invasion constitutes trespass.

5. Breach of Implied Covenants in Lease

Plaintiffs assert this cause of action against only one defendant who is alleged to have been the assignee of oil and gas leases containing an implied covenant of reasonable use and a duty to restore the surface, as nearly as practicable, to the same condition as it was before drilling was commenced. Plaintiffs claim this defendant failed and refused to restore plaintiffs' property to its condition prior to Defendants' activities on the property provided under the lease in violation of the implied covenant.

B. Defenses

The Defendants have generally asserted that each of the state law causes of action is barred by the applicable three-year statute of limitations. Defendants contend that nuisance is inapplicable because only one tract of land is involved and the allegedly interfering activity no longer exists. Defendants also argue that the ASWMA cannot be applied retroactively to acts that occurred prior to its effective date, March 9, 1971.

Aside from those defenses also raised in State court, the defendants have moved for summary judgment on the RCRA claims. In order to sustain a cause of action under RCRA, Plaintiffs must prove the existence of an "imminent and substantial endangerment." "An endangerment can only be 'imminent' if it 'threaten[s] to occur immediately.'"[19] The legislative history supports interpreting "imminent" in accordance with this plain meaning:

> Imminence ... applies to the nature of the threat rather than identification of the time when the endangerment initially arose. The section, therefore, may be used for events which took place at some time in the past but which continue to present a threat to the public health or the environment.[20]

And finally, an endangerment is "substantial" if it is "serious."[21] "Where the risk of harm is remote in time, completely speculative in nature, or *de minimis* in degree" no relief is appropriate.[22]

In *Price v. Navy Department,* 39 ERC 1673 (Ninth Cir. 1994) the Court defined the elements for an imminent and substantial endangerment as follows: (1) there must be a population at risk; (2) the level of contamination must be above levels that are considered acceptable by the State; and (3) there must be a pathway of exposure.

Defendants contend that the Court cannot determine whether there is any contamination remaining from a release that is creating an imminent and substantial endangerment without the analysis required by those Courts that have analyzed this issue. Plaintiffs must identify, with particularity, what population is at risk, what levels of contamination have been established to protect that population, and identify the remnants of defendants' spills that remain on the property. Having failed to present the necessary proof as to this element of the claim, defendants argue that Plaintiffs RCRA claim must

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[19] *Meghrig v. KFC Western,* 516 U.S. 479, 485 (alteration in original) (quoting Webster's New International Dictionary of English Language 1245 (2d ed. 1934)); *see also Dague v. Burlington,* 935 F.2d 1343, 1356 ("A finding of 'imminency' does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present[.]"); *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982); *Kara Holding*, 67 F. Supp. 2d at 310 (citing *Meghrig*); *cf. Envtl. Def. Fund v. EPA* , 465 F.2d 528, 535 [4 ERC 1523] (D.C. Cir. 1972) ("An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public." (internal quotations and citation omitted)).

[20] H.R. Comm. Print No. 96-IFC 31, at 32 (1979).

[21] *See U.S. Navy*, 39 F.3d at 1019.

[22] *Toledo v. Beazer Materials and Services, Inc. 41 ERC at 1599.*

be dismissed. To date, the federal court has not made a finding of imminent and substantial endangerment.

V. Pertinent Arkansas Case Law

This section will provide citations for some recent Arkansas case law along with a brief description of the holding pertinent to the discussion of natural resources law.

State v. Diamond Lakes Oil Co., 347 Ark. 618, 66 S.W.3d 613 (2002)

Diamond Lakes purchased a gas station in Malvern in 1992. At the time of this purchase, Diamond Lakes was aware that the Arkansas Department of Environmental Quality (ADEQ) had investigated the possibility of petroleum contamination emanating from the site. The investigation, however, had not identified any leaks at the station. In 1994, ADEQ ordered another assessment of the property after it received another complaint about gasoline smells around the property. ADEQ found no leaks and found the station was in compliance. In 1997, an adjoining landowner complained of gasoline leakage onto her property. ADEQ investigated, identified significant contamination under the station and ordered Diamond Lakes to remediate the property, for which Diamond Lakes would be eligible for reimbursement from the Regulated Substances Storage Tank Fund. *See* Ark. Code Ann. § 8-7-901 et seq.

Eventually ADEQ determined that another gas station nearby was the source of the contamination. In 1998 an adjoining landowner sued Diamond Lakes alleging that the contamination under its property migrated and contaminated the plaintiff's property. Diamond Lakes filed a thirty-party complaint against the owner of the other station from which the contamination came. ADEQ intervened due to its interest in protecting the fund.

ADEQ argued that Diamond Lakes' claim was barred by the three-year statute of limitations and Diamond Lakes could not recover damage based on clean-up costs because the fund was reimbursing Diamond Lakes for these costs. Diamond Lakes filed a motion in limine to keep ADEQ from introducing evidence regarding the value of the property arguing the value of the property was not relevant to Diamond Lake's claim which sought only temporary damages. The trial court granted Diamond Lakes' motion in limine and the jury awarded Diamond Lakes $200,000 in temporary damages and $100,000 in consequential damages. ADEQ appealed.

On the statute of limitations issue, the Arkansas Supreme Court held that the discovery rule, rather than the occurrence rule applied stating that Diamond Lakes did not know or have reason to know of its cause of action until it determined that the contamination was coming from another gas station. On damages, the Court refused to limit Diamond Lakes' recovery to the fair market value of the property. The Court stated that ADEQ ordered the clean-up, and the reasonable costs of that clean-up were recoverable as temporary damages.

Highland Industrial Park v. BEI Defense Systems Co., 192 F. Supp. 2d 942 (W.D. Ark. 2002)

Highland Industrial Park, lessor, sued BEI Defense Systems Company, former lessee, alleging that BEI disposed of hazardous wastes on a tract of land located in Highland Industrial Park causing groundwater contamination. Both parties requested partial summary judgment on the issue of the appropriate measure of damages and asked the court to decide whether the proper measure of damage is diminution in value of the property or the cost of remediation.

The district court found that the choice between the two measures of damages follows from the characterization of the injury as either temporary or permanent. The parties disagreed on whether the damage was temporary or permanent in nature. Highland argued that the damage was temporary and the cost of remediation is the proper measure of damage. BEI argued the proper measure of damage is the diminution in value of the property and that Highland is not entitled to recover the cost of remediation because the cost would be grossly disproportionate to the fair market value of the real property.

The Court found the damage remediable and therefore temporary. Based on this designation of damages, the Court found that the proper measure of damages is the cost of remediation of the contamination plus loss of the fair rental value, if any, before the remediation renders the property fit for the use and enjoyment of the owner.

An appeal of this decision and the Court's final judgment in this case is now pending before the Eighth Circuit Court of Appeals. [The Eighth Circuit has since reversed the District Court, *see Highland Industrial Park v. BEI Defense Systems Co.,* 357 F.3d 794 (8th Cir. 2004).]

Sewell v. Phillips Petroleum Co., 197 F. Supp. 2d 1160 (W.D. Ark. 2002)

The court stated that Texaco's activities on the property ended in 1943 and that injury has been open and obvious for many years. Texaco argued that the limitations period accrues when the original trespass occurs and even where continuing trespass is found, recovery is limited to activities occurring during the three years before the action is filed. Plaintiffs argued that the limitation period is tolled because the trespass is continuing in nature and because the waste left by Texaco is a temporary and abatable injury. The Court found that the statute of limitations will not bar the claims of common law trespass where the trespass is construed as continuing in nature. "If the injury is original but either the presence of the offending object is not ascertainable or the extent of the injury is not ascertainable, then the discovery rule will toll the statute for a time. However, where the trespass is not original (or a single event) and or the damage it causes is not complete and ascertainable at the completion of the act, the trespass is a continuing trespass."[23] "[W]here there is continuing trespass because of failure to

[23] *Sewell*, 197 F. Supp. 2d at 1168.

remove the offending object(s), the limitation period accrues from the date of the injury (or injuries) but is tolled by the defendant's failure to remove it."[24]

The court found that ASWMA has retroactive application, and the statute of limitation is not applicable to ASWMA. The Court dismissed the nuisance claim stating that "the Arkansas Supreme Court defines nuisance to contemplate separate parcels of property."[25]

VI. Case Law from Other States

Chevron U.S.A., Inc. v. Smith, 2002 WL 31320495 (Miss. Oct. 17, 2002)

Chevron appealed from a judgment against it awarding landowners $2,349,275.00 in damages. On appeal, Chevron argued that the judgment for property damages should be set aside because the damages are limited to diminution in property value which the landowners had already recovered from a settling defendant; that the judgment should be reversed in favor of Chevron because the landowners unreasonably refused to allow remediation by the current field operator; and that the jury's finding that Chevron did not act as a reasonably prudent operator was not supported by the evidence.

The Mississippi Supreme Court found that the trial court erred in allowing a jury trial because the landowners failed to exhaust administrative remedies before seeking relief in the trial court.

> This Court cannot allow a private landowner to pursue restoration of his or her land in the courts of this State by sidestepping a very vital and useful agency that could help protect the average Mississippian from the dangers of NORM pollution. Since no court can order the plaintiffs in this case to expend the award on decontaminating the property, the outcome allowed by the trial court does nothing to protect the citizens of Mississippi from the dangers of NORM contamination. Nor will this Court allow a windfall to the plaintiffs who obviously have no intention of cleaning up their property since they have refused all such offers of cleanup.

Chevron, 2002 WL 31320495 at *3.

[24] *Id.*
[25] *Sewell*, 197 F. Supp. 2d at 1171.