



WEST OKLAHOMA BAR JOURNAL

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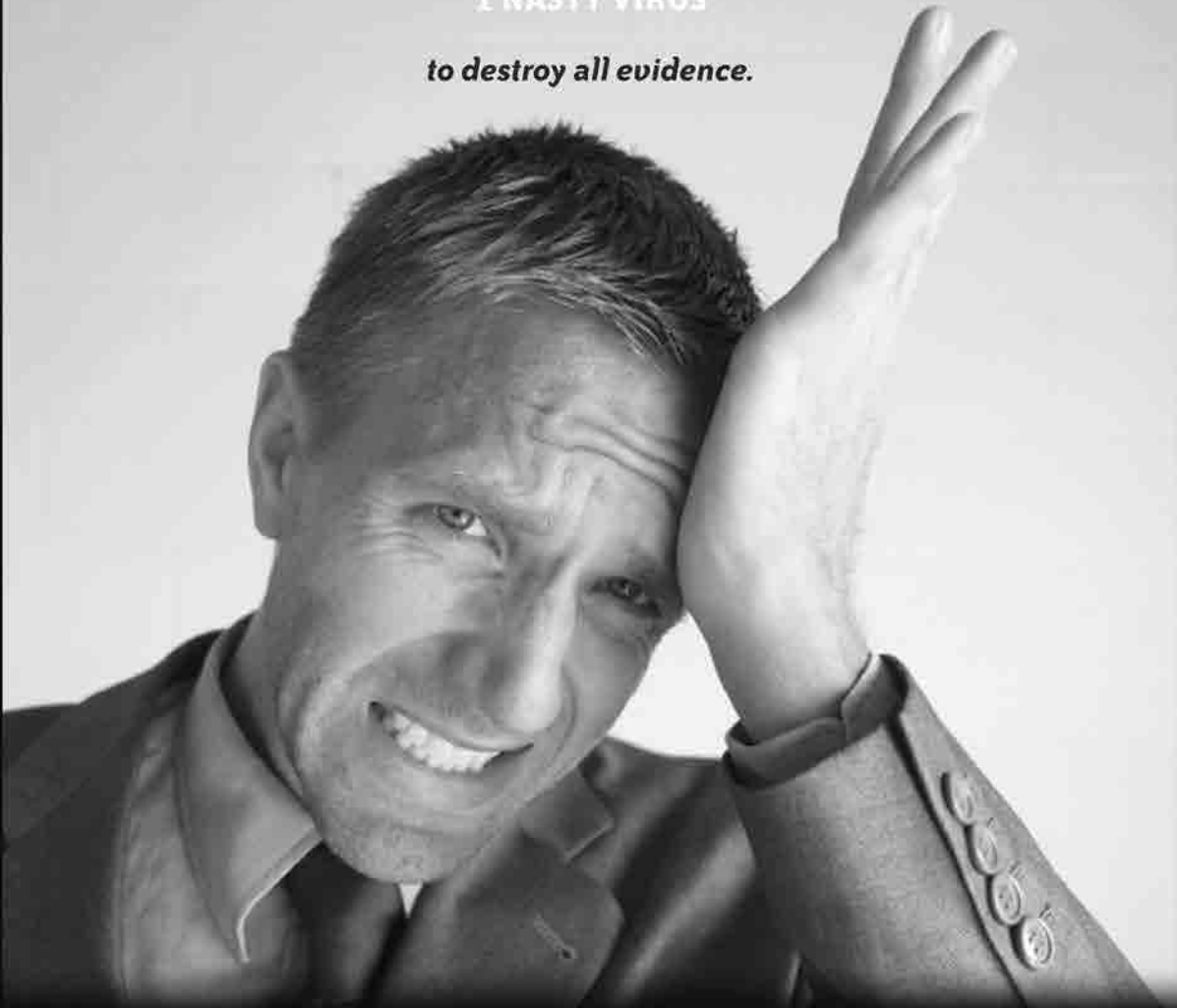
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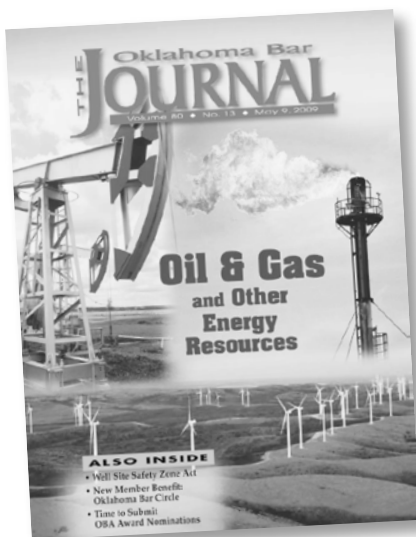
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THEME:
OIL & GAS
AND OTHER ENERGY RESOURCES
EDITOR: JULIA RIEMAN

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Wind turbine photo courtesy of Clinton Chamber of Commerce and photographer Simon Hare.

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NEW MEMBER
BENEFIT

OBA Selects New General Counsel

By Jon K. Parsley

We began the nationwide search for a new general counsel in December 2008, and my top priority coming into office in January was to find the right person to fill that vacancy.

I am excited to report that the OBA Board of Governors, with concurrence from the Professional Responsibility Commission, unanimously selected Gina Hendryx to lead the OBA Office of the General Counsel.

It makes me feel good to have accomplished my #1 goal as OBA president, and I have every confidence that in Gina Hendryx we indeed found the right person for the job.

For the past six years, Gina has been OBA ethics counsel, assisting bar members facing ethical dilemmas in their practice of law, lecturing and writing on current ethics issues, registering out-of-state attorneys for *pro hac vice* admission and implementing the diversion program.

She began her legal career in law school working as a legal intern for John W. Norman in Oklahoma City and became an associate with the firm upon graduation. She litigated a myriad of personal injury matters including products liability, environmental torts and trucking accidents. For seven years, she was lead counsel on 443 products liability cases stemming from asbestos exposure at an Oklahoma tire plant. Her responsibilities included managing a staff of attorneys and legal assistants. In 1997, she opted to explore the nonprofit legal sector with Legal Aid Services of Oklahoma in Oklahoma City and was the litigation attorney in its Senior Law Project. She represented low income senior citizens in civil disputes and trained new attorneys in addition to assisting attorneys with trial presentations. She left the nonprofit to become the OBA's first ethics counsel.

Gina holds a bachelor of science degree from Oklahoma City University and earned her law degree from OCU School of Law.

In her new position, she will act as the chief disciplinary counsel supervising a staff of 12 and will serve as the association's counsel on other legal matters. She will also be responsible for supervising the attorney diversion program and making presentations concerning lawyer ethics



Gina Hendryx

and disciplinary issues. She will work with the Professional Responsibility Commission and serve as a liaison to the OBA Board of Governors, OBA committees, the courts and other local and national entities concerning lawyer ethics issues.

Gina's experience in the courtroom combined with her recent duties as OBA ethics counsel are allowing her to quickly transition to her new responsibilities that began immediately following the announcement on April 27. The OBA Board of Governors and the Professional Responsibility Commission are pleased that she has accepted the challenges of this position. We had many excellent candidates, and the decision was extremely difficult. After lengthy deliberations and consultations with the final candidates, the board determined that Gina exhibited all the qualities we need for this important position.

cont'd on page 1069



Jon K. Parsley

President Parsley
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EVENTS CALENDAR

MAY 2009

- 11 **OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
OBA Alternative Dispute Resolution Section Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 12 **OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Deborah Reheard (918) 689-9281
- 13 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Shariisse O'Carroll (918) 584-4192
- 14 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 15 **OBA Lawyers Helping Lawyers Assistance Program Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom Riesen (405) 843-8444
- 16 **OBA Title Examination Standards Committee Meeting;** Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100
- 19 **OBA Civil Procedure Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
OBA Law-related Education Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark Jr. (405) 232-4271
- 21 **OBA Leadership Academy Reception;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 22 **OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 23 **OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478
- 25 **OBA Closed – Memorial Day Observed**
- 27 **OBA Work/Life Balance Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Julie Rivers (405) 232-6357
OBA Member Services Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Keri Williams Foster (405) 385-5148

For more events go to www.okbar.org/news/calendar.htm

The Oklahoma Bar Association's official Web site: **www.okbar.org**

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Wind Energy Agreements in Oklahoma: Dealing with Energy's New Frontier

By Shannon L. Ferrell

Consider this scenario: it is shortly after the turn of the century, and Oklahoma is buzzing about a new industry in the state that will take what were previously thought to be marginal lands and extract a resource that will be used to power the entire nation. However, the industry is new to many Oklahomans, and there remain many issues, technological and legal, that are still to be resolved. Optimism at the fortunes to be made overnight is tempered by uncertainty as to how the industry will eventually impact the state.

Now – was it the turn to the 20th century or the 21st? The answer could easily be “both,” as the explosive growth of Oklahoma’s oil and gas industry in the early 1900s echoes in the tremendous growth of its wind power industry in this opening decade of the 2000s. This analogy poses both opportunities and pitfalls for the practitioners in evaluating clients’ opportunities to participate in wind power development. While lessons from the oil and gas industry may illuminate the legal issues clients face in understanding wind energy agreements, the practitioner must understand that these agreements (and this industry) also carry unique challenges that require an understanding of how wind energy development works.

One must understand that standing on the precipice of this new industry carries significant apprehension to the client who stares at a 30 to 50-page document filled with terms unfamiliar to them. As a result, the legal practitioner has an important role to play in guiding the landown-

ers through a full and reasoned consideration of the opportunity for wind energy development on his or her property. To serve that role, though, the practitioner will need an understanding of the wind power industry itself, as well as its legal environment.¹ To that end, this article will provide the practitioner with a “primer” on Oklahoma’s wind power industry, examine some of the economics at the heart of wind power projects, discuss some of the most critical points to consider in evaluating wind energy agreements, and provide a list of references that can help the practitioner find more information to guide them along the way.

‘WHERE THE WIND COMES SWEEPING DOWN THE PLAIN’ — AN OVERVIEW OF THE WIND POWER INDUSTRY IN OKLAHOMA

For better or worse, wind is part of Oklahoma’s geographic and cultural identity, as famously observed by its state song. Wind quickly

became a resource to settlers moving into the newly-opened territory, though, as the use of windmills for pumping water from the its deep aquifers made productive land out of plains that might not see settlement otherwise.² It may surprise many people that the first use of windmills to generate electricity occurred at almost the same time, with limited commercial sales of windmills designed for residential electric generation in the 1890s.³ But what caused the sudden growth of wind-powered electrical production in recent years, and why has Oklahoma become such a “hot spot” for the industry? Answering these questions requires a very brief (and relatively painless) lesson in the physics of windmills, or “wind turbines” as they are most often called.

The essence of the wind power industry derives from one equation:⁴

$$P = \frac{1}{2} \rho v^3 \Pi r^2$$

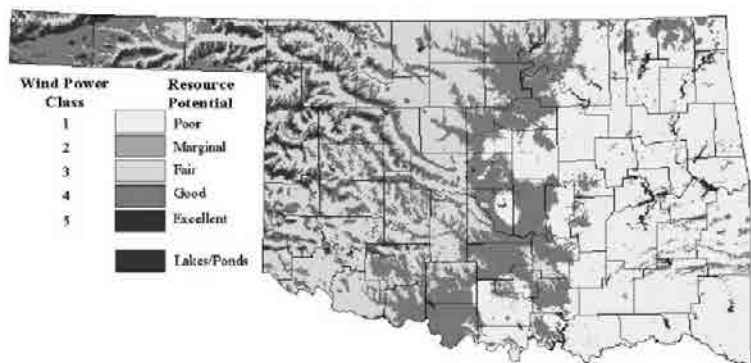
To put this equation into English, “P” is the power available from the wind, and is primarily a function of two variables.⁵ The first, “v,” represents the velocity of the wind. While one intuitively expects a faster wind to carry more power than a slower one, the magnitude of that difference may come as a surprise. Since “v” has an exponent of 3, the power carried by the wind increases as a cube of its speed. In other words, if the wind speed increases from 10 miles per hour to 20 miles per hour – a doubling in speed (2 x) – then the resulting increase in power is cubed (2 x 2 x 2), or eight times the power of the original wind. This means that wind speed has a tremendous impact on the amount of power one can generate from the wind, which is why locating a site with an optimal range of wind is crucial in the economic viability of a project. Factors such as regional geography impact average wind speeds, but

highly localized factors such as the topography of the turbine site and its elevation above the ground’s surface can have significant effects as well.⁶ As a result, siting decisions are of paramount importance to the profitability of a wind power project, and drive many wind energy agreement terms.

The second variable in the equation, “r,” represents the radius of a circle. If one looks at the blades of a wind turbine as forming a circle (called the turbine’s “rotor disc”), then the length of a blade is the radius of that circle. Since the familiar formula for the area of a circle, Πr^2 , demonstrates that the area of a circle varies as the square of its radius, one can see that doubling the length of a blade (2 x) gives us 2 x 2, or four times more area in the rotor disc. Since a bigger rotor disc represents the ability to capture more wind, turbine manufacturers have constantly sought means of making turbines bigger and bigger. Advances in composite materials and computer control technology in the mid to late 1990s made these large turbines possible, and enabled the industry to become cost-competitive with other electrical generation sources.⁷

These two factors not only drive individual turbine performance; they have also led to the rapid growth of the state’s wind industry. Oklahoma has a tremendous wind energy resource, ranked eighth among all states.⁸ Western Oklahoma holds most of the state’s potential, with its richest concentration in the panhandle as illustrated below. While the “v” in the equation certainly favors development in Oklahoma, the “r” favors the state as well. One can observe that most of Oklahoma’s wind resource can be found in counties with low population densities. In fact, of the 20 counties in the state that lost population between 1990 and 2000, all but three have at least some Class 3 wind resource or better.¹⁰ This means that

Figure 1 – Wind Power Potential of Oklahoma⁹



larger turbines, as part of large turbine arrays, can be placed in many of Oklahoma's high-resource areas without the problems caused by placing turbines in more population-dense areas (although such placements are not entirely without consequence, as discussed in more detail below).

Additionally, the "r" factor holds particular importance to integrating wind energy with Oklahoma's unique electrical generation portfolio. As a state with abundant and (for the most part) inexpensive natural gas resources, Oklahoma relies more on natural gas for its electrical generation needs than most states. When natural gas prices started an upswing in the mid 1990s, Oklahoma's utilities bore a heavy increase in fuel prices. At about the same time, the technological advances leading to bigger, more efficient wind turbines (increasing the "r") rendered turbines that in some cases became cost-competitive with natural-gas generated electricity.¹¹ As a result, Oklahoma's utilities looked to the wind, and the state's utility-scale wind power capacity took off from a standing start in 2002 to reach 10th among all states by the end of 2007 and is anticipated to reach over 830 megawatts of capacity by the start of 2009.¹²

This pronounced growth of wind power in the state is all the more remarkable when one considers that all the states with more wind power than Oklahoma impose a requirement that utilities purchase a specified amount of energy from renewable sources (commonly called a Renewable Portfolio Standard or RPS), while Oklahoma does not.¹³

WIND PROJECT ECONOMICS

The economics of wind power project development and finance is an expansive topic, and this article will speak only in broadest detail about the primary factors influencing project profitability. In short, wind energy projects face a dichotomy: while projects' ongoing "fuel" costs consist only of payments to landowners for access to the wind resource, they face tremendous initial capital costs. A general

industry "rule of thumb" estimates the cost of installing one megawatt of turbine capacity at approximately \$2 million of capital.¹⁴ Given a common project size of around 100 megawatts of capacity, one can see that a wind power project carries formidable "up front" costs. This magnifies the importance of the project's revenue streams and costs in paying back debt and equity investments.

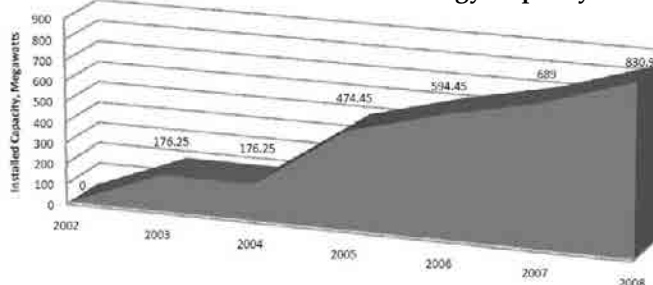
The market for electrical power obviously influences project profitability. While market prices for fuel drove much of Oklahoma's development, its wind industry was without the benefit of a state RPS which would serve to increase demand for wind-generated power. However, individual projects may be able to mimic the effect of an RPS via the Public Utilities Regulatory Policy Act (PURPA).¹⁵ Under PURPA, some renewable energy facilities were able to meet the requirements to be "qualifying facilities" and as such, the facilities' power had to be purchased by FERC-regulated utilities at

the "avoided cost" of such electricity (*i.e.* the estimated cost of producing the purchased amount of power if the utility had produced the power itself).¹⁶ However, the Energy Policy Act of 2005 significantly modified PURPA. Section 1253 of that act terminated the mandatory power

purchase and sale requirements of PURPA.¹⁷ Nevertheless, a power project can still take advantage of mandatory power purchase and sale requirements if it can show that it does not have access to open power markets.¹⁸

Available incentives provide another revenue component for projects. These may include state and local tax credits for renewable energy production. One of the most important federal incentives for renewable energy development has been the "Production Tax Credit" or "PTC." This credit applies to the generation of electricity from wind, solar, biomass, geothermal, irrigation-hydroelectric, or municipal solid waste resources. Currently, the federal PTC stands at \$0.021 per kilowatt-hour of power generated and sold to an unrelated party.¹⁹ Oklahoma has also established a number of incentives to take advantage of the state's abundant opportunities

Figure 2 — Oklahoma's Installed Wind Energy Capacity



in renewable energy. First, Oklahoma has a tax credit somewhat similar to the PTC. The Oklahoma Zero-Emission Facility tax credit provides a credit of \$0.0050 per kilowatt-hour of power generated by wind, solar, hydroelectric, or geothermal facilities with a production capacity of one megawatt or greater.²⁰ Importantly, these tax credits are transferable.²¹ Yet another form of incentive may be renewable energy credits, also known as RECs or “green tags.” In some states with RPS, a utility may purchase a REC from a wind power project to offset its own generation of power through nonrenewable sources, and these credits may represent a significant source of revenue.

While market and regulatory forces hold great sway over the economics of the wind power industry, the financial viability of individual projects also depends on factors that rest within the control of the project developer and the project landowners: the location of the project and the commercial terms negotiated between developer and landowner.

Location clearly plays a role in project profitability due to the “v” factor previously discussed; placing a turbine where it can have the best possible wind resource can have a tremendous impact on the power generated by the turbine and thus, its profitability. However, the proximity of the project to large utility transmission lines that can handle the power generated by the project carries much weight as well. These are large lines that form the “backbone” of the electrical system – capable of carrying three-phase power at 69 kilovolts or more – and



Photo by Simon Hare

“The commercial relationship between the project developer and landowner is where most practitioners enter the fray, and constitute the balance of this article’s discussion.”

not the small “distribution lines” that are much more common.²² Since it can be quite expensive to build high-voltage lines to connect a wind power project to the electrical grid, project developers must balance the location of prime wind resource against its distance from existing utility lines. One can think of this problem as a see-saw: tilting one way, a developer may be willing to locate a project further away from transmission lines if it means reaching a superlative wind resource – tilting the other way, the developer may be willing to locate within a less-exceptional resource area if it is in tight proximity to transmission capacity. Perhaps ironically, Oklahoma’s greatest wind resource areas are located in areas with the lowest density of transmission lines, as heretofore transmission lines appeared where elec-

trical demands were greatest, not where potential generation resources could be found. Thus, the vast majority of Oklahoma’s electrical transmission infrastructure is clustered around its population centers. Policy makers have taken notice of the potential that increased transmission capacity has to unlock Oklahoma’s wind resource.²³ Additionally, the Oklahoma Legislature recently passed House Bill 2813, which would pave the way for increased transmission capacity built by state utilities.²⁴ Regional electrical transmission organizations have also instituted plans to add transmission lines in those areas with high wind resource to enhance grid reliability while tapping into this new resource.²⁵

The commercial relationship between the project developer and landowner is where most practitioners enter the fray, and constitute the balance of this article's discussion.

EVALUATING WIND ENERGY AGREEMENTS

The Nature of the Wind Energy Agreement

For the purposes of this article's discussion, the term "wind energy agreement" will refer to the document or documents that collectively establish and govern the relationship between the landowner and the party constructing and operating the wind power project.

When a practitioner sits down to evaluate a wind energy agreement for a client, intuition often leads them to use the same tools they would use in reviewing an oil and gas lease. After all, the analogy is facially compelling: a company wants to enter a landowner's property, construct facilities, extract an energy resource, and send that resource to market. However, when one compares a typical Producers 88 oil and gas lease side-by-side (literally) with a wind lease, the differences can be quite apparent. While an oil and gas lease may often be a two-page, "fill-in-the-blank" document, the wind energy agreement frequently exceeds 30 or 40 pages. The difference? First, the oil and gas lease comes with a century of case law, statutes, regulations, and industry custom imputed to it, while the wind energy agreement is often cut from whole cloth (as a caveat, though, the author has seen some elements of old cellular tower agreements and substation easements cut-and-pasted into some of the more poorly drafted ones). Second, while the primary duty for a mineral interest owner is often "just stay out of the way," the relationship between wind power developer and landowner is much more complex and must be (or at least, should be) spelled out in detail within the agreement. Finally, the typical financing arrangements for an oil and gas well differ starkly from those for a wind power project, and a great deal of the language and terms contained in the wind energy agreement may be dictated by lenders or investors rather than the developer itself, complicating the negotiation process.

In evaluating the agreement, the practitioner must understand that they may be looking at one document that may purport to be an option, easement and lease simultaneously. As each of these tools can have markedly different

impacts on the client's property interests, the practitioner must make careful note of the potential interactions among them all.

Many wind energy agreements commence with an option contract between the developer and the landowner in which the landowner grants an exclusive right to the developer to investigate the suitability of the project for development, and if the developer should so choose, to enter into a full development contract and commence project construction and operation. During this option period, the developer will likely deploy meteorological data equipment to verify the wind resource, conduct environmental and wildlife impact studies, and analyze construction suitability. Option periods often vary widely, in some cases as short as one or two years, and extending to 10 years in other cases. Some states have limited option periods by statute²⁶ but as of this writing, no such limitations are found in Oklahoma law.

Another feature often included in wind energy agreements is a confidentiality agreement covering the site data developed during the option and, in many cases, most of the terms of the overall agreement. Many landowners are unfamiliar with confidentiality agreements, and thus practitioners should be careful to apprise clients of the strictures such agreements impose.

Some developers take an approach of negotiating the agreement in its entirety before execution of the option, while other developers provide only the option agreement with a term sheet for the subsequent, full agreement with the details to be negotiated if and when the option is triggered. Both approaches carry advantages and disadvantages; it is the opinion of the author that landowners may be better served completing negotiation of the agreement at the time of the option signing, so as to resolve the complexities of the relationship up front.

Should the option period investigations indicate that a project is indeed viable, the developer will then trigger the option and enact the full agreement. In many wind energy agreements, the assurances needed by the developer to enable project construction and operation may take the form of a system of easements and/or a general lease of the effected property.²⁷ A brief synopsis of some of the typical terms (be they presented as easements, covenants, or contractual lease terms) follows:

Table 1
Common Landowner Terms

Term	Description
Access	Developer has right to access the property and construct roads for evaluation of site and construction, operation, and maintenance of equipment.
Construction	Developer may use portion of surface for access to construction equipment and “lay-down” areas.
Transmission	Allows for construction of underground and above-ground transmission lines, construction and operation of substations.
Non-obstruction	Landowner will not construct any improvements that could interfere with airflow patterns on property, nor permit obstructions to occur.
Overhang	Landowner acknowledges that turbine rotor discs may overhang property lines or improvements on the property.
Noise	Landowner acknowledges that certain noise levels may be caused by the project (may sometimes provide for a decibel limit and a specified radius from turbines).

Most of the wind energy agreement will likely revolve around securing these terms, establishing the compensation package for the landowner, and defining the other parameters of the parties’ legal relationship. While hundreds of pages could be written about the issues to be considered in evaluating a wind energy agreement, this article will focus on what are arguably the five most important questions for the practitioner to analyze as they evaluate his or her client’s proposed agreement. These questions are:

1. How will current uses of the property be affected by the project?
2. How long will the agreement last?
3. What are the landowner’s obligations under the agreement?
4. How will the landowner be compensated?
5. What happens when the project ends?

Each question will be addressed in turn.

Question 1: How will current uses of the property be affected by the project?

Assuming that the developer proceeds to build and operate the project, the landowner will be “sharing” the surface of his or her property with the project. While this should result in a new revenue stream for the landowner, in all likelihood the landowner will want to continue his or her existing uses of the property to the maximum extent possible, thereby making the wind power project revenues “supplemental” rather than “replacement” funds.

Generally, a wind power project will only physically occupy three acres of land per megawatt of turbine capacity.²⁸ For most Oklahoma projects, this will equate to roughly five to seven acres of property per turbine with turbines spaced approximately 800 feet apart in an east-west direction and turbine lines spaced approximately a mile apart in a north-south direction to minimize turbine interference.²⁹ While this often leaves much of the property available for crop, livestock, or recreational uses, inconveniences can be caused by changed fencing configurations, the fragmentation of crop areas, blockages to irrigation systems, and changes to drainage patterns. Landowners should raise these concerns during the initial contract negotiations and determine if reasonable accommodations can be reached either to minimize these disruptions or for additional compensation to mitigate them. This may be in the form of liquidated damages language that provides agreed-to compensation for each event (for example, a specified dollar amount for each fence breach, each linear foot of terrace repair needed, etc.). Some states have also proposed guidelines for maintaining the agricultural viability of property under wind power development, addressing issues such as drainage pattern preservation, minimizing soil disturbance, preserving vegetative cover, and the like.³⁰

Another frequent use of land that may be impacted by wind power development is recreational leasing, frequently in the form of hunting agreements. In many wind energy agreements, hunting may be completely prohibited on the affected property during the construction phase to minimize risk to construction crews. However, wind energy agreements may also contain broad indemnification language that makes the landowner responsible for injuries of project personnel or damage to project equipment caused by hunting lessees or other assignees of the landowner (for a discussion of these indemnity issues, see the subsection "What are the landowner's obligations under the agreement" later). Landowners should discuss compensation for loss of lease revenues to the extent such losses are caused by the project.

Aesthetic uses of the property, as well as of surrounding property, may also be a concern. These may include noises from the turbines as well as visual impacts. Noise impacts may be easier to quantify in the terms of the agreement, and often come in the form of a noise easement whereby the landowner stipulates that the turbines may cause certain noise levels (often defined in decibels or "dB") within a certain range of the turbines. Visual impacts are far more difficult to address.

In the most recent case regarding aesthetic impacts, *Rankin v. FPL Energy LLC*, Texas' Eleventh Court of Appeals refused to grant injunctive relief against the operation of a wind power project on the basis that aesthetics were not a sufficient basis upon which to bring a claim for nuisance.³¹ Several other cases have also cited the subjectivity of aesthetics claims in suits involving wind power projects.³² Nevertheless, both developer and landowner should consider possible opposition to projects by neighbors.

The landowner's participation in governmental programs can also have an impact on the use of the property for wind energy development. Several USDA programs such as the Conservation Reserve Program (CRP), Environmental Quality Incentives Program (EQIP),

the Grassland Reserve Program (GRP) and other common programs for Oklahoma landowners require participants to have multi year contracts and plans for the use and maintenance of the land under contract. Constructing wind power equipment on such lands in contravention of those contracts or plans could trigger the forfeiture of future payments, the return of past payments or even penalties.³³ If the project lands are any under USDA program contracts, the appropriate agencies should be contacted to discuss integration of the project under the contract plans prior to execution of the wind energy agreement.³⁴ Any loss of revenues from such programs caused by the wind power project should be compensated by the developer.

Finally, landowners should explicitly reserve the right to use the property for agricultural, recreational and other uses. From the landowner's perspective, such a reservation should be

“...landowners should also be careful not to grant away access to other resources on the property without fair compensation.”

as expansive as possible while still allowing the developer the rights reasonably necessary to construct, operate and maintain the project. Similarly, landowners should also be careful not to grant away access to other resources on the property without fair compensation. Many wind energy agreements may contain provisions granting the developer free access to water, rock, and other

materials without any additional payment to the landowner.³⁵

Question 2: How long will the agreement last?

With some of the early leases circulated in Oklahoma, the sum of the primary lease terms plus the automatic renewals could be up to 150 years. This fact alone frequently shocked landowners to the point of rejecting any further consideration of the lease. For some historic perspective, if a lease on the first oil well drilled in the United States (the Titusville Well, completed in 1859 – almost two years before the start of the Civil War) was under a 150 year lease, that lease would still be in effect as this article goes to press. Long lease terms reflect the classic struggle, seen for many years in the oil and gas industry as well: a resource

developer wants to secure access to the resource at a fixed price for as long as possible, while the landowner would like to continually offer access to the resource back to the market if a better price may be secured. While some leases with these “sesquicentennial” terms may still be offered, the general trend seems to be toward shorter periods, often ranging between 20 and 40 years.³⁶ From the developer’s perspective, a lease period must be of sufficient length to recapture the project’s costs and return an acceptable profit to project investors. Many wind turbines today have an expected lifespan of approximately 20 years, and thus developers may be reluctant to agree to a term less than that period.

The effect of these circumstances may lead to long-term leases with renewals that are solely in the discretion of the project developer. However, while it may be difficult to get initial terms in smaller increments, there may be opportunity for negotiating the terms of lease renewals. Thus, the first step for the practitioner is to fully dissect the agreement’s durational terms. Some agreements are quite forthright in defining a duration, but others may be laced with a number of contingencies.

Next, if the project developer is unwilling to negotiate the overall length of the agreement, it may be possible to negotiate a “reopener” term that allows for negotiation of some commercial terms at renewal periods. It is important that such reopeners be coupled with the compensation terms of the agreement to minimize downside risk with a price floor for the landowner if electrical markets should trend downward at the time of lease renewal. The landowner may also wish to reopen the entire agreement if the project is to be “repowered” (that is, existing project turbines are removed and replaced with new larger or more efficient turbines).³⁷

Finally, many landowners and practitioners alike may overlook the fact that entering into a

wind energy agreement may impact their estate plans. The length of these agreements makes it quite possible that successors to the land in question will take the property subject to the agreement. Thus, landowners may need to involve those successors in discussions about the agreement as part of their succession planning efforts.

Question 3: What are the landowner’s obligations under the agreement?

As mentioned above, wind energy agree-



Photo by Simon Hare

ments differ significantly from oil and gas agreements in that there may be many more ongoing affirmative obligations faced by the landowner under a wind energy agreement. First among these obligations is likely the non-obstruction term of the agreement that requires the landowner to avoid (and in some agreements, actively defend against) the creation of any condition that could interfere with the flow of wind over the surface of the property. While this may not seem like a significant constraint, studies have shown that even relatively low structures such as houses and barns can cause turbulence downwind of the structure for distances of 15 to 20 times the structure’s height.³⁸ Depending on the size of the parcel in question, this principle, or an express set-back provision in the agreement, may effectively preclude the construction of any new improvements on the land unless an agreement is in place that allows for discussion of potential improvements with project engineers. If the landowner has any plans for improvements, such plans should be raised to the attention of the developer as the agreement is considered. Landowners also need to examine the agreement to see if it requires them to affirmatively eliminate other obstructions, such as trees and if it prohibits the leasing of the land for any other uses such as cellular towers.

Another significant burden for landowners may lurk within the indemnification provisions of the wind energy agreement. The concept of indemnification itself may be foreign to them. Exacerbating this is the fact that the indemnification provisions of many wind energy agreements are the agreements' most adhesive elements.³⁹ Indeed, some agreements will effectively hold the landowner liable for any damages or injuries that are not the result of negligence or willful misconduct by the developer. Landowners may also be required to take on greatly increased insurance limits to satisfy these indemnification obligations.

These terms are to be expected given that the agreements are almost universally drafted by the developers, but landowners should seek a balanced and fair indemnity relationship. For example, if the project site is under a hunting lease, the landowner and developer may consider a standard indemnification agreement to be executed by the hunting lessee that provides the lessee will be responsible for any damages or injuries caused by its presence on the property. Landowners should also consider negotiating indemnity language that explicitly exonerates the landowner from liability for the actions of trespassers and any other parties that are not under the direct control of the landowner. Finally, increases in insurance requirements for the landowner should be a consideration in compensation negotiations.⁴⁰ Concordantly, landowners should insist on being named insureds under the project developers' insurance policies, with proof of payment of premiums made available to the landowner.⁴¹

Another potential hazard for landowners may come from the legal interests created in the property by the wind energy agreement. If the land is subject to an agreement with a secured creditor, it is quite likely that creation of an interest in the property without the consent of the secured party could constitute an event of default in that separate agreement. As a result, creditors' consent may be needed prior to execution of a wind energy agreement.⁴² Conversely, many wind energy agreements often require the landowner to secure subordination agreements from creditors and may restrict or prohibit the creation of any new encumbrances on the property. Landowners' equity in real property may be a significant source of capital, especially in agriculture, and such provisions could pose challenges for

accessing that equity. At a minimum, landowners should involve their lenders in the wind energy agreement discussion and work out an arrangement that will allow the landowner to meet their lending and liquidity needs, prior to executing the wind energy agreement.⁴³

Finally, a natural concern for developer and landowner alike is the potential conflict between development of the surface for wind energy projects and the development of the property's oil and gas resources. It is one of the more well-established points of Oklahoma law that the mineral estate is dominant over the surface estate.⁴⁴ However, it would also appear that a shift toward a greater accommodation of surface interests has been underway. Early cases held that an oil and gas lease necessarily implied that a lessor or claimants under him would not improve land *at all*, thereby interfering with lessee's rights to the surface.⁴⁵ However, those rights have been increasingly constrained by the concept of reasonableness. For many years, Oklahoma's common law provided that those with interests in the surface were entitled to damages for use of the surface that exceeded the "reasonable and necessary" use of the surface by the mineral interest owner.⁴⁶ This "reasonable and necessary" concept has been applied by Oklahoma courts seeking to set the boundaries of previously undefined easements for use of the surface of land.⁴⁷

Thus, one must wonder what would happen in the event that a wind turbine and an oil well needed to occupy exactly the same location. The preceding discussions have established that optimal wind turbine placement is critical to project profitability. It is also conceivable that geologic conditions could dictate that a mineral interest owner place a well at the same location in order to access the oil and gas resource. Holding to a strict "dominance" concept would mean that the wind turbine loses in this scenario, but one must ask whether asking a surface estate owner (or in this case, his or her lessee) to move or at least deactivate a multimillion dollar turbine would constitute an "unreasonable" interference with surface use.

Some wind energy agreements purport to override any previously-granted rights to develop the mineral estate underlying the surface property, but these provisions should be struck as a nullity under Oklahoma law. On the other hand, some newer wind energy agreements ask that the developer be forwarded notice of any indication that the mineral inter-

est owner intends to undertake development of mineral estate so that the parties can arrive at a mutually-agreed upon plan to develop all of the parcel's resources. It seems that in all but the most extreme cases, this strategy can allow for the development of the property to the satisfaction of all parties.

Question 4: How will the landowner be compensated?

At the core of every wind energy agreement is the issue of compensation, and there are almost as many different ways to calculate landowner payments as there are landowners. However, there are a number of measures that are commonly used across agreements.

When evaluating the payment terms of a lease, one should consider whether the payments vary by the "phase" of the project. Generally, wind power projects are divided into an "option" or "pre-construction" phase (during which the project's viability is evaluated), a "construction phase" (occurring after the option has been exercised but before commercial production of energy has commenced), an "operation phase" (during which the project is generating and selling power), and possibly a "decommissioning" phase (when the project has wound up and is dismantled). The landowner should be aware of how the project's phases will affect payments, and what milestones trigger each phase.

One common factor used as a compensation basis is the acreage involved. While this is often the denominator for rural land leases, it bears mention that the acreage held by a landowner may hold little proportion to the other important metrics of the wind power project, such as the number of turbines in place on the property or the turbines' generating capacity. Terrain and project geometry may mean that a smaller landowner may have more turbines than his or her larger counterparts.

Another frequent factor in calculating landowner payments is the number of turbines in place on the property. In the past, landowners often received a flat amount per turbine, but the recent trend seems to be toward a per-turbine payment that is based on the nameplate capacity of the turbine.⁴⁸ Shifts in the dynamics of the turbine market and in the turbine technology itself have sometimes led to projects that may have multiple turbine designs, capacities, and even manufacturers represented, and

this can lead to differing generating capacities. A capacity-based turbine payment enables the landowner to capture the "upside" potential of new equipment installations.

Lastly, many agreements now provide for a "royalty"⁴⁹ payment to the landowner based on the production of the turbines on his or her property. This element of the landowner payment is often the most complex to understand, calculate and verify. While the concept of a payment based on the electrical production of the project seems fairly simple, there are a number of variables that may be in play. First, the landowner must understand the basis of the payment, which may be the megawatt or kilowatt-hours of power produced, "gross proceeds" from sales of electricity, "net revenues" from the power sold, *etc.* It is critical that the definition of these terms within the agreement be analyzed thoroughly. If a royalty is based on "gross proceeds," do those proceeds include revenues from the sale of transferable tax credits or renewable energy credits (RECs)? If the payment is based on "net revenues," what costs are deductible by the developer – and if the project sells its power on the spot market rather than under a long-term power purchase agreement (PPA), will the landowner be at the mercy of market fluctuations? Market-based measures may give landowners the opportunity to participate in favorable price swings, but should be tempered with minimum-payment provisions to secure against downside risk.⁵⁰

Given that a wind power project incurs the vast majority of its costs in its first few years of development and operation, many leases are now including a royalty "escalator" clause that increases the royalty percentage at specified intervals. The escalator clause can prove to be a mutually-beneficial provision for both developer and landowner, allowing for more rapid cost-recovery by the developer while allowing the landowner to increase his or her participation in project profits during later years. Such escalators need to include either an explicit function for increases (specifying the intervals at which royalties will increase and in what proportion) or be indexed to an objectively-determinable, publicly available number (*ex.* the U.S. Bureau of Labor Statistics Consumer Price Index, U.S. Energy Information Agency wholesale electrical price, *etc.*).

While royalty payments often represent the best returns for landowners, they are accompanied by the need for landowners to audit payments. As many practitioners in Oklahoma and other oil and gas producing states are well aware, numerous class action suits have been waged by royalty owners alleging mismeasurement of resources, miscalculation of royalties due, “market” prices skewed by affiliate transactions, and the like. It should be remembered that this litigation came about even under statutory requirements for reporting of specified information to allow calculation of royalty accuracy by the royalty owner.⁵¹ No such statutory “audit right” exists for landowners in wind power projects, though, and landowners must make sure that such rights are made part of the agreement.

In evaluating the wind energy agreement, the practitioner must also consider the contingency in which the client may execute the agreement and the project is built, but the project configuration does not allow for placement of a turbine on the landowner’s property. In such a situation, one should consider some form of minimum payment to the landowner that is burdened by the agreement but has not received the element – a turbine – that triggers most payment obligations. One means of achieving this is a “pooled”, “community” or “project” payment. These payments are made to landowners, based not on the performance of turbines located on their property, but rather the production of the project as a whole. These payments may serve a number of functions including compensating landowners whose property is part of the project but did not receive a turbine, as well as “leveling” the performance among turbines (where geographic conditions may make some turbines markedly more or less efficient than neighboring turbines).

Lastly, negotiating a “most favored nation” clause may be possible in some projects. As the name implies, such a clause enables the landowner to capture the most favorable easement or lease terms granted to any other landowner

“...the ability of the landowner to terminate the agreement will be extremely limited, and will likely be based on the nonpayment of amounts due the landowner within a certain timeframe.”

within the same project. This can help the landowner overcome potential oversights in the negotiating process or a lack of information regarding comparable terms. The problem with such a clause, of course, lies in its verifiability, which is complicated by the confidentially agreements typically tied to the project. An alternative for landowners is collective negotiation of a lease with their neighbors. This can increase

the landowners’ bargaining power and allows them to spread legal costs amongst themselves. Some developers even favor these arrangements, as they allow the developer to secure large areas of land through the negotiation of one agreement, rather than “piecing” a project together through individual negotiations and risking a checkerboard pattern in the land under lease.

Question 5: What happens when the project ends?

When asked by the author about project termination clauses, one developer stated “Hey, if we develop your project, we’ve likely sunk hundreds of millions of dollars into it, so we’re not going to terminate your agreement on a whim.” While this is a valid argument, landowners must understand the conditions that provide either party the ability to terminate the agreement. Often, agreements will provide a host of potential causes that can enable the developer to terminate the agreement. In such case, landowners should require, at a minimum, the immediate payment of all sums then due to the landowner. Some practitioners have also suggested requiring a “termination fee” that is a function of a historic course-of-payments for the landowner (*ex.* a termination fee equal to the past three years of payments to the landowner).⁵²

In virtually every case, the ability of the landowner to terminate the agreement will be extremely limited, and will likely be based on the nonpayment of amounts due the landowner within a certain timeframe. Further, the landowner will likely be required to provide written notice of a potential termination event to the developer and provide a specified cure

period. Thus, landowners should be advised to keep sound records of payments and project milestones, and to provide prompt notice of any potential defaults so as to preserve their rights if termination is warranted.⁵³

All parties to a wind power agreement must contemplate the fact that the project may eventually end, whether by completion of the operational life of all the equipment, introduction of some new energy technology, or the dissolution of the developer. A frequent fear of landowners is that the developer will default or dissolve, and the landowner will be left with huge inoperable machines on his or her property. Those fears are not born from idle imagination, but stem directly from the host of abandoned oil and gas wells that once littered the Oklahoma landscape after the first half of the 20th century. To that end, many landowners have requested that wind energy agreements contain some form of “decommissioning” language that, at the end of the project, requires the developer to remove all equipment, restore the land to its original grade, vegetation, and soil condition, and to remove sub-surface materials to a specified depth. Further, landowners are also seeking a “performance bond” from the developer, the funds from which are to be used to ensure performance of the decommissioning obligations.

Decommissioning language is not found in all agreements, and frequently must be requested by the landowner. Further, the posting of a bond or other security in an amount sufficient to cover the complete costs of a decommissioning project could become cost-prohibitive for some developers. A compromise offered by some companies is a “salvage value” decommissioning clause whereby the salvage value of the equipment in a project is evaluated at a specified period (for example, every five years) relative to the estimated cost of decommissioning activities. If the salvage value of the equipment falls below the estimated decommissioning costs, bonds are posted in an amount sufficient to cover the difference.

An Additional Thought on Representing Clients in Wind Energy Agreement Negotiation

At the risk of stating the obvious, reviewing a highly technical 40 page lease presenting a host of novel issues will take more of the practitioner’s time than reviewing a two-page oil



Photo by Simon Hare

and gas lease with familiar provisions. Clients who realize this may be reluctant to engage an attorney for fear of the cost and attorneys may be hesitant to take clients due to the time-intensive nature of the enterprise. Collective action may serve both groups well. Most Oklahoma wind power projects will involve tens of thousands of acres, which in turn will mean numerous landowners will be involved. Such landowners may enhance their bargaining power by forming a negotiation group that enables them to share in the expense of legal services while providing the developer the ability to negotiate one agreement binding the entire group, rather than numerous individual agreements. Also, landowners should ask developers if they will provide for reimbursement of legal fees incurred in reviewing the agreement; many developers will provide such fees up to a capped amount.

CONCLUSION AND REFERENCES FOR FURTHER INFORMATION

This paper has discussed the basics of Oklahoma’s rapidly-expanding wind energy industry, its economics, and issues practitioners should carefully examine in evaluating wind energy agreements. The novelty of this area poses both a challenge and opportunity for the practitioner who is willing to play the role of physicist, engineer, scholar, and pioneer as they draw upon the lessons of Oklahoma’s energy heritage to help wind energy propel the state into prominence for the 21st century.

To learn more about the basics of the wind energy industry, Oklahoma’s wind resources, and negotiating wind energy agreements, the following resources are commended to the reader:

Oklahoma Wind Power Initiative Home Page:
www.seic.okstate.edu/owpi/

The Law of Wind: A Guide to Business and Legal Issues

Prepared by Stoel Rives LLP

www.stoel.com/webfiles/LawOfWind.pdf

Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind

Prepared by Farmers Legal Action Group Inc.

www.flaginc.org/topics/pubs/index.php#FGWE

"Negotiating Wind Energy Property Agreements"

Prepared by Farmers Legal Action Group, available at

www.flaginc.org/topics/pubs/arts/Wind-PropertyAgrmnts2007.pdf

"Wind Energy Easement and Lease Agreements"

Prepared by Windustry

www.windustry.com/sites/windustry.org/files/LandEMain.pdf

"Wind Energy Easement and Leases: Compensation Packages"

Prepared by Windustry

www.windustry.com/sites/windustry.org/files/LandECompPackages.pdf

[Please note: this document was prepared in 2005 from publicly available information and may represent conservative estimates of project compensation amounts, especially in light of the quality of many Oklahoma wind resource areas.]

"Leasing Your Land to a Developer,"

Prepared by Windustry

www.windustry.com/leases

Wind Energy Explained: Theory, Design, and Application

J.F. Manwell, J.G. McGowan and A.L. Rogers
John Wiley & Sons Ltd., 2002.

University of Texas Wind Energy Institute
CLE, June 1-2, 2006 (available from Texas Bar Association).

1. Many of the issues raised in this article derive from the author's experiences in reviewing wind power development agreements from a number of developers, but attribution of direct sources will in most cases be precluded by confidentiality.

2. See DICK HAYS & BILL ALLEN, *WINDMILLS AND PUMPS OF THE SOUTHWEST*, 2 (Eakin Press 1983).

3. See T. LINDSAY BAKER, *A FIELD GUIDE TO AMERICAN WINDMILLS* 45 (University of Oklahoma Press, 1985).

4. PAUL GIPE, *WIND ENERGY BASICS* 7 (Chelsea Green Publishing Co., 1999).

5. The variable "p" (the Greek "rho") is the density of the air, which is largely a function of a location's elevation and temperature. Since this impact of this factor compared to the other two is negligible, it will not be discussed at further length for the purposes of this article.

6. For an excellent discussion and illustrations of factors that can impact wind speeds at a turbine site, refer to the discussion "Turbine Siting" presented by the Danish Wind Industry Association at www.windpower.org/en/tour/wres/shear.htm. A more thorough and technical discussion may be found in J.F. MANWELL, J.G. MCGOWAN AND A.L. ROGERS, *WIND ENERGY EXPLAINED: THEORY, DESIGN, AND APPLICATION* 21-82 (John Wiley & Sons Ltd., 2002).

7. See GIPE, *supra* note 4, at 1.

8. American Wind Energy Association, *Top 20 States with Wind Energy Resource Potential*, available at www.awea.org/pubs/factsheets/Top_20_States.pdf.

9. Oklahoma Wind Power Initiative, *Oklahoma Wind Resource Map*, available at www.ocgi.okstate.edu/owpi/. Reprinted with permission.

10. See U.S. Census Bureau, *Oklahoma Quick Links*, available at quickfacts.census.gov/qfd/states/40000lk.html; see also Oklahoma Wind Energy Resource Map, available at www.ocgi.okstate.edu/owpi/.

11. See California Energy Commission, *Comparative Cost of California Central Station Electricity Generation Technologies*, available at www.energy.ca.gov/reports/2003-06-06_100-03-001F.PDF.

12. See Oklahoma Wind Power Initiative *Oklahoma Wind Farms*, available at www.ocgi.okstate.edu/owpi/OKWindInfo/OWPI_documents/Oklahoma_Wind_Farms.pdf, see also American Wind Energy Association, *3rd Quarter 2008 Market Report*, available at www.awea.org/publications/reports/3Q08.pdf.

13. See U.S. Department of Energy, Energy Efficiency and Renewable Energy Office, *States with Renewable Portfolio Standards*, available at www.eere.energy.gov/states/maps/renewable_portfolio_states.cfm.

14. See University of Texas Wind Energy Institute Seminar, Roundtable on Wind Deals, June 1, 2006 (available from Texas Bar Association). This seminar's panel estimated the costs at approximately \$1.3 to \$1.7 million per megawatt of capacity, but follow-ups to this event indicate the escalation of such costs to the \$2 million range.

15. Pub. L. 95-617.

16. 16 U.S.C. §§ 824a-3 *et seq.*

17. Pub. L. 109-58.

18. See 16 U.S.C. §§ 824a-3 as amended by Pub. L. 109-58.

19. 26 U.S.C. § 45.

20. 68 O.S. § 2357.32A.

21. 68 O.S. § 2357.32A(F).

22. See Windustry, *Community Wind Toolbox*, Chapter 14: *Interconnection – Getting Energy to Market*, available at windustry.advantagelabs.com/sites/windustry.org/files/Interconnection.pdf.

23. See, e.g., Jim Roth, *Oklahoma Wind Power has Vast Potential*, *TULSA WORLD*, May 8, 2008.

24. House Bill 2813, 2008 Regular Session of the 51st Legislature of the State of Oklahoma, signed by Governor on May 12, 2008.

25. See Southwest Power Pool, *Wind Integration*, available at www.spp.org/publications/SPP_Wind_Integration_QA.pdf.

26. See, e.g. SOUTH DAKOTA CODE §43-13-19 (limiting option periods to five years).

27. See generally Windustry, *Wind Energy Easement and Lease Agreements*, available at www.windustry.org/sites/windustry.org/files/LandEMain.pdf.

28. See American Wind Energy Association, *Wind Energy and the Environment*, available at www.awea.org/faq/wwt_environment.html. The American Wind Energy Association estimates the total "land use" per megawatt of capacity is 60 acres, with three acres physically occupied by the project, and the remaining 57 acres used only as an unobstructed clear area to preserve wind flow to the turbine array.

29. Most turbines installed at Oklahoma projects range from 1.5 to 2.2 megawatts in capacity. See Oklahoma Wind Power Initiative, *supra* note 12; see also American Wind Energy Association, *supra* note 12.

30. See, e.g. New York State Department of Agriculture and Markets, *Guidelines for Agricultural Mitigation for Wind Power Projects*, available at www.farmlandinfo.org/documents/30658/NYS-DAM-Wind-Power-Guidelines.pdf.

31. See *Rankin v. FPL Energy LLC*, — S.W.3d —, 2008 WL 3864829 (Tex. App. 2008).

32. For a compilation of such cases, see generally Stephen Baron, New Meets Old: Wind Turbines and the Common Law of Nuisance, University of Texas Wind Energy Institute (February 19-20, 2008, Austin, Texas), available at www.utcle.org/eLibrary/preview.php?asset_file_id=15069.

33. See, e.g., 7 C.F.R. § 1410.32(h), providing that termination of a CRP contract will trigger repayment of all amounts received by the landowner under the contract, plus interest.

34. For an excellent discussion of these programs, see generally Farmers Legal Action Group Inc., *Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind* and its discussion of "Impact[s] on Farm

Program Eligibility" at pp. 4-8 *et seq.*, available at www.flaginc.org/topics/pubs/index.php#FGWE.

35. Agreements that seek water rights from the landowner are of particular concern. Wind energy facilities do not require water for their operation, and thus landowners confronted with such a provision must undertake special care to determine the proposed use of, and compensation for, their water by a project developer.

36. See Windustry, *supra* note 27.

37. See Windustry, *Wind Energy Easements and Leases: Best Practices and Policy Recommendations*, available at www.windustry.org/sites/windustry.org/files/LandEBestPractices.pdf.

38. See MANWELL ET AL, *supra* note 6, at 47.

39. See Neil Hamilton, *Roping the Wind: Legal Issues in Wind Energy Development in Iowa*, American Agricultural Law Association Symposium, (October 25, 2008, Minneapolis, Minnesota).

40. For a thorough discussion of liability issues for landowners, see generally Farmers Legal Action Group Inc. *supra* note 34, Ch. 5, available at www.flaginc.org/topics/pubs/index.php#FGWE

41. See Windustry, *supra* note 37.

42. See Farmers Legal Action Group, *Negotiating Wind Energy Property Agreements*, available at www.flaginc.org/topics/pubs/arts/WindPropertyAgrmnts2007.pdf.

43. See *id.*

44. See, e.g. *Enron Oil & Gas Co. v. Worth*, 947 P.2d 610 (Okla. Civ. App. 1997).

45. See *Conway v. Skelly Oil Co.*, 54 F.2d 11 (10th Cir. 1932).

46. See *Houck v. Hold Oil Corp.*, 867 P.2d 451,458 (Okla. 1993).

47. See *Head v. McCracken*, 102 P.3d 670, 677 (Okla. 2004), stating:

[I]f said attributes [including the location and extent of the easement] are not so fixed by the terms of the granting or reservation instrument, the owner of the dominant estate ... is ordinarily entitled to a right of way of such width, length, and location as is sufficient to give necessary or reasonable ingress and egress over the other person's land.

48. See generally Windustry, *Wind Energy Leases and Compensation Packages*, available at www.windustry.org/sites/windustry.org/files/LandECompPackages.pdf.

49. Real property and oil & gas scholars may contest the use of the term "royalty" to describe these payments. For the purposes of this discussion, the term will be used to describe a payment that is correlated to the production of electrical power from the project (rather than correlated to acres or turbines).

50. See generally Windustry, *Wind Energy Leases and Compensation Packages*, available at www.windustry.org/sites/windustry.org/files/LandECompPackages.pdf.

51. See Oklahoma Production Revenue Standards Act, 52 OKLA. STAT. §§ 570.1 *et seq.*

52. University of Texas Wind Energy Institute CLE, *The Ultimate Guide to Wind Leases*, June 2, 2006 (available from Texas Bar Association).

53. See Farmers Legal Action Group, *supra* note 42.

ABOUT THE AUTHOR



Shannon Ferrell is an assistant professor of agricultural law in the OSU department of agricultural economics. He spent a number of years in private practice, focusing on environmental, energy and corporate law, and served as the Oklahoma Renewable Energy Council president for 2006. His research at OSU focuses on energy law issues for Oklahoma landowners, renewable energy and legal issues in production agriculture.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF DANIEL MORGAN DILLING, SCBD #5515 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Daniel Morgan Dilling should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, June 18, 2009**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NOTICE OF PROPOSED LOCAL RULE CHANGES

Pursuant to Rule 83, Fed. R. Civ. P., the Court hereby gives notice and opportunity for comment on proposed changes to its local civil rules. Numerous modifications have been made, including revisions which incorporate many of the Court's previous General Orders. The revisions are found in the following Civil Local Rules:

CIVIL RULES:

- LCvR3.7** Social Security Cases: Motion for Attorney Fees.
This revision incorporates General Order 07-6 which requires a motion for attorney fees in social security cases to include a certification of notice to plaintiff and a notice to plaintiff.
- LCvR16.1 (a)(1)** Pre-Trial Procedures.
This revision deletes scheduling times which are inconsistent with Federal Rule 26(f).
- LCvR23.6** Discovery Material Not to be Filed.
This revision adds "notice of depositions" to discovery materials not to be filed.
- LCvR30.1(c)** Procedure for Designation of Deposition Testimony for Use at Trial.
Revision requires filing designations and counter-designations consistent with Federal Rule 26 (a) (3) (A) (ii).
- LCvR39.3** Use of Electronic Devices, Photographs or Tape Recorders.
This revision incorporates General Order 06-15 which provides specific examples of electronic communication devices.
- LCvR47.1** Random Selection of Grand and Petit Jurors.
This revision incorporates General Order 05-13 which provides instructions on documents identifying jurors and potential jurors.
- LCvR67.1** Deposit and Withdrawal of Funds in Court.
This revision strikes "in interest bearing accounts" in order to require all court orders regarding deposit of registry funds to contain language of service to the clerk or chief deputy.
- LCvR79.1** Sealed Documents.
This revision incorporates General Order 08-11 regarding use of confidential information in civil cases.
- LCvR83.2** Attorneys.
This revision incorporates General Order 06-16 regarding waiver of Pro Hac Vice fees as a matter of course under certain circumstances.
- LCvR83.6** Discipline by the Court.
This revision clarifies procedures for suspension and disbarment.
- Miscellaneous Revisions:** All References to Federal Civil Rules 6(e) have been changed to 6(d) based on a change in the Federal Rules. Certain judges have been added and deleted based on changes in the Court. All references to ECF Policy Manual have been changed to read "Administrative Guide" which has become the popular name for the manual.

Copies of the proposed Local Civil Rules containing red strike-outs (deletions) and blue highlights (additions) are available at the District Court Clerk's Office. An electronic copy with strikeouts and highlights is available on the court's public website under Announcements at www.okdn.uscourts.gov.

The Court invites written comments from any interested persons. Send comments to the Court Clerk, attention: Proposed Rule Changes, 333 W. 4th, room 411, Tulsa, Oklahoma, 74103. Comments will be accepted by the Court until May 29, 2009.



The Oil and Gas Lease in Oklahoma: A Primer

By Ryan A. Ray

Oklahoma has the second most crude oil wells of any state in the United States, and the third most natural-gas wells.¹ Oklahoma is also the third-leading producer of natural gas and the seventh-leading producer of crude oil among the United States and federal offshore territories.² Given these numbers, the likelihood that an Oklahoma attorney will encounter an oil and gas lease in practice is high. Yet, oil and gas leases present unique legal issues, and the law governing their execution, duration and interpretation is distinct from ordinary principles of property law or contract law.

Attorneys should be familiar with the basic legal rubric that applies to oil and gas leases before undertaking even the slightest encounter with an oil and gas lease. Otherwise, the risk of serious error is quite real. It is far beyond the scope of this article to cover the vast array of legal issues and doctrines that oil and gas leases bring into play. Rather, this article will present the basic concepts of Oklahoma law on oil and gas leases with which every Oklahoma attorney should be familiar.

OWNERSHIP OF OIL AND GAS

Before examining the law governing oil and gas leases, it is helpful to discuss the basic principles of oil and gas ownership. Under Oklahoma law, the owner of a tract of land does not hold an ownership interest in the oil or gas under his land until those substances are extracted to the surface and reduced to possession.³ The Oklahoma doctrine of oil and gas ownership is commonly referred to as the “exclusive-right-to-take” theory.⁴ Early on, the Oklahoma courts recognized that oil and gas

are “fugacious [substances] and are not susceptible to ownership distinct from the soil.”⁵

With this realization, the courts concluded that the rule of capture applied to fugacious minerals — such as oil and gas — that were capable of subsurface migration within a reservoir. Under the law of capture, a landowner or mineral owner has the “exclusive right to drill for, produce, or otherwise gain possession of [petroleum-based] substances.”⁶ Included in these exclusive rights is “the right to reduce to possession oil and gas ‘coming from land belonging to others.’”⁷ The rule of capture allows a landowner or mineral owner to drill as many wells as they wish, drill those wells as close to the boundary line of neighboring tracts of land, and operate the wells in the most efficient manner possible. The neighboring landowner’s remedy is not an action for conversion or equitable relief to prohibit or reduce their neighbor’s operations. Rather, their remedy is to drill their own well. In modern times, the rule of capture has been made subject to the Conservation Act, which sets

limits on well spacing and drilling in order to prevent waste and protect correlative rights.⁸

The mineral owner holds several rights as a result of their exclusive right to take the oil and gas underlying a certain tract. Included in these rights are 1) the right to develop the minerals 2) the executive right (*i.e.*, the power to execute a lease conveying the development right); 3) the right to receive bonus (*i.e.*, a cash payment made for execution of a lease); 4) the right to receive delay-rental payments; 5) the right to receive royalty; and 6) the right to receive shut-in royalty.⁹ The owner of the mineral estate may, in theory, sever any or all of these interests to different persons.¹⁰

Before reviewing the nature and attributes of the oil and gas lease, it also bears noting that the surface owner may or may not be the owner of the exclusive right to take oil or gas. Under the common — law maxim *cujus est solum ejus est usque ad coelum et ad inferos* — “the owner of the soil owns to the heavens and also to the lowest depths” — the owner of the surface tract of land also owns the exclusive right to take oil and gas from under that land.¹¹ Consistent with general property law, however, the exclusive right to take is freely alienable, devisable and descendible.¹² In other words, the surface owner may sever their interest in the petroleum substances that underlie their land. After severance, the interest in oil and gas will be a separate estate, commonly referred to as the “mineral estate.”

THE NATURE OF THE OIL AND GAS LEASE

It is essential to observe at the outset that, although it is called a “lease,” the common-law doctrines governing real-property landlords and tenants do not apply to an oil and gas lease.¹³ The oil and gas lease is *sui generis*; it is part conveyance, part executory contract.¹⁴ The oil and gas lease is a conveyance, as it is through the lease that the mineral owner conveys a property right to the lessee — usually an oil company — “to explore for and produce oil and gas, reserving a royalty interest in production.”¹⁵ The lease is a contract in that the lessee accepts these property rights subject to certain express and implied promises to the lessor.¹⁶

The Oklahoma courts have determined that the property right conveyed in an oil and gas lease is a “profit à prendre capable of legal existence as a servitude ‘unattached’ to land (in gross), and may be transferred in gross, either

in whole or in part, as an estate in real property.”¹⁷ The profit à prendre, also known simply as the “profit,” is a common-law property interest that is a “liberty in one person to enter another’s soil and take from it the fruits not yet carried away.”¹⁸ The analogy that Oklahoma courts have often used to describe the profit is that it is similar to a right to enter onto another’s land and either hunt or fish.¹⁹

While the oil and gas lease does not convey absolute title to the oil and gas that may lie beneath the surface, it does convey an interest in the land. An oil and gas lease must therefore be in writing and signed, as it falls within the statute of frauds.²⁰ The lease must also identify the lessor, the lessee, the interest conveyed, and an adequate description of the leased premises.²¹ Also like a deed, an oil and gas lease must be delivered in order to be effective.²²

THE GRANTING CLAUSE — THE RIGHTS GRANTED

The granting clause of an oil and gas lease, much like the granting clause of a garden-variety deed, identifies the nature of the interest granted. Three types of granting clauses are commonly found in leases throughout the oil and gas industry.²³ The “exclusive right” granting clause purports to grant the lessee the exclusive right to mine and produce petroleum products from the leased premises.²⁴ The “lease and let” granting clause purports to either 1) lease and let the land to the lessee for the limited purpose of producing petroleum products, or 2) lease and let the oil and gas on the premises to the lessee for the purpose of producing them.²⁵ The “conveyance of title” granting clause purports to grant title to all petroleum products in place under the land, along with the exclusive right to take those substances.²⁶

In Oklahoma, however, the distinction between these clauses is largely, if not entirely, academic. Given the Oklahoma theory of oil and gas ownership, the Oklahoma courts have determined that regardless of which type of granting clause is in a particular lease, the interest conveyed will be an exclusive right to take — the above-described profit à prendre.²⁷ A typical granting clause in an oil and gas lease might read as follows: the lessor hereby “grant[s], demise[s], lease[s] and let[s] unto the said lessee for the sole and only purpose of exploring by geophysical and other methods, mining and operating for oil and gas, and of laying of pipelines on the described premises.”²⁸

While it may not appear expressly on the face of the lease, the execution of an oil and gas lease also impliedly conveys to the lessee an easement for reasonably necessary surface usage.²⁹ This implied easement arises because, for purposes of oil and gas development, the mineral estate is recognized as the dominant estate, and the surface estate is recognized as the servient estate.³⁰ The implied easement of reasonably necessary surface usage allows the lessee to “surface ingress and egress and the authority to occupy the surface to the extent reasonably necessary for exploring and marketing the oil and gas.”³¹ These rights are, however, limited both by the reasonableness standard, as well as the provisions of the Oklahoma Surface Damages Act.³² The Surface Damages Act provides that “the oil and gas lessee must engage in negotiations with the surface owner and seek an appraisal of surface damages, and the surface owner is entitled to damages caused by the reasonable use of the surface by the oil and gas lessee.”³³

THE HABENDUM CLAUSE

While the granting clause sets forth the interest that is granted, the habendum clause sets forth the duration of that interest. The typical habendum clause provides for a fixed term — called the “primary term” — that is usually a term of years, during which the lessee has the option, but not the duty, to begin production of oil or gas. The usual clause also provides for a term of potentially infinite duration — called the “secondary term” — after the expiration of the primary term, during which the lessee retains the exclusive right to take so long as petroleum products are produced from the leased premises. Thus, a typical habendum clause would read, “It is agreed that this lease shall remain in force for a term of [five years] from this date and as long thereafter as oil or gas of whatsoever nature or kind is produced from said leased premises or on acreage pooled therewith, or drilling operations are continued as hereinafter provided.”³⁴

The Primary Term

During the primary term of the habendum clause, the face of the lease does not expressly place any duty upon the lessor to drill an exploratory well.³⁵ Early in the history of the oil and gas industry, however, the courts held that there was an implied covenant to drill an exploratory well. The rationale behind this implied covenant was that the true consider-

ation behind the oil and gas lease was the payment of royalty, irrespective of any bonus the lessor may have received.

But this implied duty was problematic for the typical lessee. It was not a cost-effective reality for the lessee to have the duty to drill an exploratory well on every tract of land upon which it held a lease. Enter the drilling clause, also known as the delay-rental clause. The delay-rental clause gives the lessee the choice between paying payments, at the time interval provided by the lease, and drilling an exploratory well. A typical delay-rental clause might read as follows:

If drilling operations or mining operations are not commenced on the leased premises on or before one year from [the date of lease execution], this lease shall then terminate as to both parties unless lessee on or before the expiration of said period shall pay or tender to lessor, or to the credit of lessor in [the lessor’s bank] or any successor bank, the sum of one hundred seventy and no/100ths-dollars, (\$170.00), hereinafter called “rental” which shall extend for 12 months the time within which drilling operations or mining operations may be commenced.³⁶

This type of delay-rental clause is known as an “unless” clause. If the lessee fails to either drill a well or pay delay rentals as provided for in the delay-rental clause, the lease terminates by its own terms.³⁷ The lessee’s intent to comply, good-faith efforts, or mistakes by the lessee will not excuse the lessee’s failure to satisfy the provisions of the delay-rental clause. For the delay-rental clause is strictly construed against the lessee. The lessee must pay delay rentals in the proper amount, on or before the due date, to the proper persons, and in the proper manner. But if the failure to satisfy the delay-rental clause is caused “by independent causes not contributed to by the lessee,” a court may excuse the failure.³⁸ Further, the lessor may be estopped from asserting that the lease has terminated if prior to the due date, the lessee makes a good-faith payment of a delay rental but the payment is inadequate due to a reasonable mistake by the lessee, and the lessor failed to advise the lessee of the payment’s inadequacy.³⁹

Another option is the so-called “paid-up lease.” In a paid-up lease, the lessee simply pays all delay rentals in advance and the

parties agree that there is no duty on the lessee to drill an exploratory well during the primary term. An example of a provision denominating a lease as paid up is as follows: "This is a PAID-UP LEASE. In consideration of the down-payment, Lessor agrees that Lessee shall not be obligated, except as otherwise provided herein, to commence or continue any operations during the primary term or make any rental payments during the primary term."⁴⁰ While the paid-up lease may seem superior at first blush, it is not without problems all its own. The lessee runs the risk that the lessor will convey their interest to a third party during the primary term, and the lessee will then owe delay rentals to the new owner.⁴¹ One way to alleviate this risk is the change-of-ownership clause, which provides that the lessor must give notice to the lessee if the mineral ownership changes.⁴² If the lessor does not provide notice after an ownership change, the lessee is not relieved of the duty to pay delay rentals. But payment of delay rentals to the previous owner will prevent lease termination during the primary term.

The Secondary Term

After the primary term has expired, the lease will remain in force "as long thereafter as oil or gas is produced" from the leased premises. Under Oklahoma law, the term "produced," as used in the habendum clause, means "production in paying quantities."⁴³ "Production in paying quantities," in turn, means "production of quantities of oil and gas sufficient to yield a profit to the lessee over operating expenses, even though the drilling costs or equipping costs are never recovered, and even if the undertaking as a whole may result in a loss to the lessee."⁴⁴ The phrase "in paying quantities" signifies a return to the lessee beyond its "lifting expenses" — in other words, those "costs associated with lifting the oil from the ground after the well has been drilled."⁴⁵

But in order to meet the production-in-paying-quantities standard, Oklahoma law does not require that the lessee actually market or sell the oil or gas. Rather, to propel the lease into the secondary term, the lessee need only "have found oil or gas upon the premises in paying quantities by completing a well" on the leased premises prior to the expiration of the primary term.⁴⁶ Oklahoma law expressly rejects the requirement of marketing the oil or gas to propel the lease into the secondary term.

During the secondary term, a variety of conditions can arise that may affect the lessee's ability to maintain the oil or gas well in a manner capable of producing in paying quantities. Thus, a variety of clauses has developed that will serve as substitutes for production.

One of these provisions is the shut-in royalty clause. The shut-in royalty clause provides that the lessee may make cash payments to the lessor a substitute for production during the secondary term. The shut-in royalty clause usually only applies to a gas well, because there is almost always a market for oil, and even if there were not, oil can be stored above ground.⁴⁷ Gas, on the other hand, cannot be stored above ground. So if there is not a nearby market and a pipeline connection available at the end of the primary term, the lease may terminate. This problem is greatly diminished in Oklahoma, due to the Oklahoma view that production "in paying quantities" does not require marketing. But the shut-in royalty clause is not irrelevant in Oklahoma. At a given well, it may be years before a field of wells produces sufficient quantities for a pipeline company to make a pipeline connection available.⁴⁸ And despite having satisfied the habendum clause's production requirement, the lessee may have additional duties under the implied covenant to market for which the tender of shut-in royalty payments could substitute.⁴⁹

Many leases also contain a well-completion clause, also known as a continuous-operations clause. The importance of the well-completion clause depends upon whether the lease on its face requires completion of a well prior to the expiration of the primary term or whether the lease only requires commencement of a well.⁵⁰ If the habendum clause of the lease requires completion, a continuous-operations clause would allow the lessee to complete a well first drilled during the primary term.⁵¹ In order for a continuous-operations clause to allow the lessee to maintain the lease, drilling of the well must have been commenced during the primary term of the lease.⁵²

Another clause that allows a lessee to maintain the lease when there is not an actively producing well after expiration of the primary term is the dry-hole clause. The dry-hole clause allows the lessee to drill another well if the lessee commences drilling of a well during the primary term — but upon completion of the well during the secondary term, it turns out the well is a dry hole.⁵³ A typical dry-hole

clause might read as follows: "If prior to discovery of oil or gas on said land, lessee should drill a dry hole or holes thereon, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter."⁵⁴

When small tracts of land are involved, where state regulations under the Conservation Act limit the number of wells that can be drilled, where a group of lessees wish to allocate risks, or for a large number of other reasons, a group of leases may be pooled together. The leased premises pooled together in this manner are typically referred to as the pooled unit. Pooling may be voluntary or it may be compulsory, as the result of action by the Corporation Commission.⁵⁵ To facilitate pooling of interests, many leases have a pooling clause that deems "production or operations anywhere on the pooled unit...constructive production for purposes of the lease."⁵⁶ A typical pooling clause would read: "production, drilling, or reworking operations anywhere on a unit that includes all or part of this lease shall be treated as if it were production, drilling or reworking operations under this lease."⁵⁷

Yet another clause typically found in an oil and gas lease is the force-majeure clause. A force-majeure clause "excuses [the] lessee from performing if prevented from doing so by any circumstance or condition beyond its control."⁵⁸ Force-majeure clauses are, however, strictly construed. For example, inability to sell gas at a profit due to market conditions is not sufficient to invoke the force-majeure clause.⁵⁹ Moreover, the force-majeure clause will only maintain the lease during the secondary term; the clause does not apply where the event beyond the lessee's control occurs during the primary term.⁶⁰ But the force-majeure clause may apply where an

order of the Oklahoma Corporation Commission or other applicable law prevents the lessee from producing on the premises.⁶¹ In any event, the lessee must provide notice to the lessor as a prerequisite to invoking the force-majeure clause.⁶²

A final clause commonly found in the oil and gas lease that may serve to modify the secondary term is the cessation-of-production clause. In the absence of a cessation-of-production clause, Oklahoma courts do apply the temporary-cessation-of-production doctrine. Under this doctrine, a temporary cessation of production during the secondary term will not automatically result in termination of the lease.⁶³ Rather, the lessee will maintain the lease if, considering all facts and circumstances, the cessation of production was not unreasonable in length and the lessee acted diligently in seeking to restore production.⁶⁴ Not wanting to be relegated to questions of fact and equitable considerations, the lessees developed the cessation-of-production clause. A typical cessation-of-production clause might read, "If after expiration of the primary term production shall cease, the lease shall not terminate provided lessee resumes operations for drilling within 60 days."⁶⁵ The lessee's trade-off for the certainty of the cessation-of-production clause is that it operates in derogation of the common-law temporary-cessation-of-production doctrine.⁶⁶ In other words, if the lessee does not resume production within

the period provided for by the clause, it will lose the lease.

THE ROYALTY CLAUSE

The royalty clause provides for payment to the lessor of a share of production. The lessor is paid its share of production or its proceeds free from the costs of production.⁶⁷ There has



“By statute, Oklahoma requires that royalties be paid to the lessor or the other persons legally entitled to receive the royalty payments.”

been substantial litigation over what costs are "costs of production." For present purposes, it suffices to note that the lessee bears the costs required to achieve the first marketable product.⁶⁸ As to oil, the royalty clause typically provides that the lessor receives a one-eighth (1/8) share of gross production.⁶⁹ In contrast to oil, gas royalties are typically paid from the proceeds after the lessee sells the gas. The typical gas royalty clause often makes a distinction between gas that is sold "off the premises" and gas that is sold "at the wellhead." For gas sold "off the premises," the lessor's royalty is paid based upon the "market value" of the gas. For gas sold "at the wellhead," the lessor's royalty is paid based upon the "amount realized."⁷⁰

For purposes of the royalty clause, "market value" is the price at which a willing, non-obligated buyer would buy and at which a willing, non-obligated seller would sell.⁷¹ Where the lessee has entered into a long-term gas-purchase contract at arm's length, that contract price is the market price in Oklahoma.⁷² Otherwise, there are three methods by which "market value" may be proved: 1) the actual sales price; 2) the prevailing market price; and 3) the work-back method. Under the actual-sale method, "[if a] producer enters into an arm's-length, good faith gas purchase contract with the best price and terms available to the producer at the time, that price is the 'market price' and will discharge the producer's gas royalty obligation."⁷³ Under the prevailing-market-price method, the market value is established by looking to "[a]rm's-length wellhead sales or offers of purchase from the same well and close in time to the sale at issue...[or] arm's-length sales from other wells in the vicinity."⁷⁴ When using the work-back method, "the market value at the wellhead is calculated by subtracting allowable costs and expenses from the first downstream, arm's-length sale."⁷⁵

By statute, Oklahoma requires that royalties be paid to the lessor or the other persons legally entitled to receive the royalty payments.⁷⁶ The well operator is also liable if it fails to make royalty payments "to the legal royalty owners as a result of failing to act diligently in determining these owners."⁷⁷ The lessor or other person legally entitled to receive royalties can recover damages in the amount of the royalty that should have been paid, along with interest at a rate of 12 percent.⁷⁸

COVENANTS IMPLIED IN THE OIL AND GAS LEASE

In addition to the express clauses discussed above, there are a number of covenants that are implied in the oil and gas lease. The most important of these covenants is the implied covenant to protect against uncompensated drainage. This implied covenant obligates the lessee "to protect the lessors' land from drainage of the minerals from under their land caused by wells on adjoining lands."⁷⁹ The covenant may require the lessee to drill an offset protection well or seek administrative exceptions at the Oklahoma Corporation Commission.⁸⁰ But the implied covenant to protect against uncompensated drainage is measured by the reasonably prudent operator standard. Under the reasonably prudent operator standard, "the lessee [is required] to drill the offset well only if, in the judgment of a reasonably prudent operator, it would be a profitable undertaking."⁸¹ Further, for the lessee to be in breach of the implied covenant the drainage must be "substantial."⁸² Unless the lessee owns a greater interest in the draining well (a situation called "fraudulent drainage"), the lessee is not an insurer against drainage.⁸³

There is also an implied obligation on the lessee to maintain a well so long as the well is capable of producing in paying quantities. Under this implied covenant, the lessee may not plug a well that is capable of producing in paying quantities.⁸⁴ If the lessee does plug or destroy a well capable of producing in paying quantities, the lessor may recover damages.⁸⁵

An implied covenant also obligates the lessee to market the oil or gas from wells on the leased premises. Under the implied covenant to market, the lessee must, within a reasonable time after the discovery of oil or gas sufficient to satisfy the habendum clause, obtain a market and actually produce and sell oil or gas.⁸⁶ The actual length of time within which the lessee may satisfy this duty to market "depend[s] upon the facts and circumstances of each case."⁸⁷ As with other implied duties, the lessee must act as a reasonably prudent operator in marketing the oil or gas.⁸⁸ The failure to comply with this duty may result in termination of the lease.⁸⁹

Oklahoma courts may recognize an implied obligation of further development through additional drilling if a reasonably prudent operator would undertake further develop-

ment under the circumstances.⁹⁰ While other jurisdictions have adopted an implied covenant of further exploration, which would require additional drilling on portions of the leased premises previously unexplored, the Oklahoma Supreme Court has expressly rejected this doctrine.⁹¹ The court found that the implied covenant of development and the reasonably prudent operator standard were sufficient to protect the lessor's interests and that a separate implied covenant of further exploration would not recognize the economic realities of the industry.

CONCLUSION

The law governing oil and gas leases is unique. This article has only set forth the most basic provisions of these leases and the elementary legal doctrines governing this field of law. Beyond the basic principles described in this article, there are a host of remedies available to both the lessor and the lessee for breaches of the express and implied terms of an oil and gas lease, including lease cancellation. The principles governing oil and gas leases are derived in part from contract law, in part from property law, and in part from the ingenuity of the courts and lawyers that have shaped the law in this area.

But given the high level of mineral ownership and the high level of oil and gas production in this state, all lawyers are likely to encounter this area of the law at some point in their careers. From the litigator to the title examiner, from the family-law attorney to the transactional lawyer, all will probably encounter the oil and gas lease in some form or fashion. And attorneys must have more than a basic knowledge of the core concepts governing the oil and gas lease to effectively represent, draft for, and advise their clients who have needs that concern the oil and gas lease.

1. See IPAA OIL AND GAS PRODUCING INDUSTRY IN YOUR STATE, at 9, available at www.ipaa.org/reports/econreports/IPAAOI.pdf.

2. See *id.*

3. *Arrowhead Energy Inc. v. Baron Exploration Co.*, 1996 OK 120, n.1, 930 P.2d 181, 182 n.1; *Bonner v. Okla. Rock Corp.*, 1993 OK 131, ¶ 20, 863 P.2d 1176, 1185.

4. *Sabine Corp. v. ONG Western Inc.*, 725 F. Supp. 1157, 1178 (W.D. Okla. 1989); *In re Levy*, 1939 OK 355, ¶ 2, 94 P.2d 537, 538.

5. *Sunray Oil Co. v. Cortez Oil Co.*, 1941 OK 77, ¶ 8, 112 P.2d 792, 793.

6. *Atl. Richfield Co. v. Tomlinson*, 1993 OK 106, ¶ 20, 859 P.2d 1088, 1094; see also *Feely v. Davis*, 1989 OK 163, ¶ 8, 784 P.2d 1066, 1068; *Frost v. Ponca City*, 1975 OK 141, ¶ 8, 541 P.2d 1321, 1323.

7. *Tomlinson*, 1993 OK 106, ¶ 20, 859 P.2d at 1094 (quoting *Kuykendall v. Corp. Comm'n*, 1981 OK 105, ¶ 17, 634 P.2d 711, 716); see also *Wood Oil Co. v. Corp. Comm'n*, 1950 OK 207, ¶ 10, 239 P.2d 1023, 1026.

8. See 52 OKLA STAT. §§ 86.1 – 153. A comprehensive discussion of the Conservation Act is far beyond the scope of this article. For current

purposes, it is sufficient to note that the Conservation Act vests the Oklahoma Corporation Commission with the authority to regulate the number of wells that may be drilled, the capacity at which those wells may be operated, and may also require unitization of several tracts into a well spacing and drilling unit.

In the context of the oil and gas Conservation Act, "waste" refers to the common-law doctrine of waste, as well as economic waste and inefficient use or production of either oil or gas. See 52 OKLA STAT. §§ 86.2 – 86.3. "Correlative rights" refers to the "relative rights of owners in a common source of supply to take oil or gas by legal operations limited by duties to the other owners 1) not to injure the common source of supply and 2) not to take an undue proportion of the oil and gas." *Kingwood Oil Co. v. Hall-Jones Oil Corp.*, 1964 OK 231, ¶ 10, 396 P.2d 510, 512.

9. See OWEN L. ANDERSON, ET AL., *HEMINGWAY OIL AND GAS LAW AND TAXATION*, § 2.1, at 39 (4th ed. 2004).

10. See *Anderson v. Mayberry*, 1983 OK CIV APP 10, ¶¶ 3-6, 661 P.2d 535, 536.

11. *Lewis v. Sac & Fox Tribe of Okla. Housing Auth.*, 1994 OK 20, ¶ 30 & n.30, 896 P.2d 503, 516 & n.30.

12. See *Cuff v. Koslosky*, 1933 OK 487, ¶ 15, 25 P.2d 290, 294.

13. See *Rich v. Doneghey*, 1918 OK 689, ¶ 8, 177 P. 86, 90; *Cont'l Supply Co. v. Marshall*, 152 F.2d 300, 305-06 (10th Cir. 1945).

14. EUGENE KUNTZ, ET AL., *A TREATISE ON THE LAW OF OIL AND GAS*, § 18.2 (1964).

15. JOHN S. LOWE, ET AL., *CASES AND MATERIALS ON OIL AND GAS LAW*, 125 (4th ed. 2002).

16. *Id.*

17. *Shields v. Moffitt*, 1984 OK 42, ¶ 11, 683 P.2d 530, 532.

18. *Bonner*, 1993 OK 131, ¶ 10, 863 P.2d at 1182.

19. *Id.*

20. *James Energy Co. v. HCG Energy Corp.*, 1992 OK 117, ¶ 16, 847 P.2d 333, 338.

21. See KUNTZ, *supra* note 14, §§ 22.2 – 22.3. Professor Kuntz notes that, consistent with both property and contract law, the identities of the lessor and the lessee, along with the description of the leased premises, may be proved by extrinsic evidence.

22. *Allen v. Morris*, 1958 OK 78, ¶ 3, 323 P.2d 736, 738.

23. KUNTZ, *supra* note 14, § 23.1(a).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Rich v. Doneghey*, 1918 OK 689, ¶ 8, 177 P. at 89; see also *Ewert v. Robinson*, 289 F.2d 740 (8th Cir. 1923); *Nicholson Corp. v. Ferguson*, 1925 OK 783, ¶ 26, 243 P. 195, 199.

28. This language comes from the granting clause at issue in *21st Century Inv. Co. v. Pine*, 1986 OK CIV APP 27, ¶ 34, 734 P.2d 834, 842.

29. *DuLaney v. Okla. State Dep't of Health*, 1993 OK 113, ¶ 8, 868 P.2d 676, 680.

30. *Id.*

31. *Id.*

32. See *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 20, 139 P.3d 897, 903. The Surface Damages Act is found at 52 OKLA STAT. §§ 318.2 – 318.9.

33. *Lierly*, 2006 OK 47, ¶ 20, 139 P.3d at 903 (internal citation omitted).

34. This was the habendum clause at issue in *Geyer Bros. Equip. Co. v. Standard Resources L.L.C.*, 2006 OK CIV APP 924, ¶ 2, 140 P.3d 563, 564-65.

35. *Berton v. Coss*, 1929 OK 384, ¶¶ 25-31, 280 P. 1093, 1096-97; *Donaldson v. Josey Oil Co.*, ¶¶ 2-5, 232 P. 821, 822; *New State Oil & Gas Co. v. Dunn*, 1919 OK 204, ¶¶ 7-8, 182 P. 514, 515.

36. This was the delay-rental clause at issue in *Latham v. Cont'l Oil Co.*, 558 F. Supp. 731, 733 n.1 (W.D. Okla. 1980).

37. *Phillips Petroleum Co. v. Curtis*, 182 F.2d 122, 125 (10th Cir. 1950); *Petroleum Engineers Producing Corp. v. White*, 1960 OK 71, ¶ 10, 350 P.2d 601, 604; *Ellison v. Skelly Oil Co.*, 1951 OK 122, ¶ 14, 244 P.2d 832, 835.

38. *Knight v. Yoakam*, 1959 OK 65, ¶ 26, 338 P.2d 1075, 1080 (quoting *Superior Oil Co. v. Jackson*, 1952 OK 336, ¶ 23, 250 P.2d 23, 27).

39. *Latham*, 558 F. Supp. at 733.

40. *Lowe*, *supra* note 15, at 167.

41. KUNTZ, *supra* note 14, § 28.6.

42. *Id.* § 37.9.

43. *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 9, 85 P.3d 830, 833; *Pack v. Santa Fe Minerals*, 1994 OK 23, ¶ 8, 869 P.2d 323, 326; *Barby v. Singer*, 1982 OK 49, ¶ 4, 648 P.2d 14, 16; *Stewart v. Amerada Hess Corp.*, 1979 OK 145, ¶ 5, 604 P.2d 854, 857.

44. *Smith*, 2004 OK 10, ¶ 9, 85 P.3d at 833 (quoting *Hininger v. Kaiser*, 1987 OK 26, ¶ 6, 738 P.2d 137, 140).

45. *Stewart*, 1979 OK 145, ¶ 6, 604 P.2d at 857. "Lifting expenses" include but are not limited to the following: costs of pump operation, pumper's salaries, costs of supervision, gross production taxes, royalties

payable to the lessor, electricity, telephone repairs, depreciation, and other incidental lifting expenses.” *Smith*, 2004 OK 10, n.5, 85 P.3d at 833 n.5; see also *Hininger v. Kaiser*, 1987 OK 26, n.4, 738 P.2d 137, 139, n.4.

46. *Pack*, 1994 OK 23, ¶ 8, 869 P.2d at 326; *State ex rel. Comm’rs of the Land Office v. Carter Oil Co. of W. Va.*, 1958 OK 289, ¶ 36, 336 P.2d 1086, 1094.

47. *ANDERSON*, *supra* note 9, § 6.5, at 273.

48. *Id.* For a discussion of applicability shut-in royalty clauses under Oklahoma law, see *Gard v. Kaiser*, 1978 OK 110, 582 P.2d 1311. See also Maurice H. Merrill, *Use and proper drafting of shut-in royalty clauses*, 43 OKLA. B.J. 2247 (1972).

49. See *Royce Realty & Developing Inc. v. Watson*, 1990 OK CIV APP 21, ¶¶ 7-9, 791 P.2d 821, 823-24.

50. If the habendum clause of the lease only requires commencement of a well, then the commencement language is said to modify the termination aspect of the habendum clause, giving the lessee a reasonable time within which to complete the well, if it is acting in good faith. *Simons v. McDaniel*, 1932 OK 34, ¶ 17, 7 P.2d 419, 420-21; see also *Vincent v. Tideway Oil Programs Inc.*, 1980 OK CIV APP 23, ¶ 10, 620 P.2d 910, 914. If, on the other hand, the lease itself expressly requires the lessee to complete a well prior to the expiration of the primary term in order to maintain the lease, *Simons* does not apply and the lessee must complete the well. *Carter Oil*, 1958 OK 289, ¶ 36, 336 P.2d at 1094.

51. See *Statex Petroleum v. Petroleum Inc.*, 308 F.2d 815, 818-19 (10th Cir. 1962).

52. *Id.* at 819.

53. *KUNTZ*, *supra* note 14, § 47.2.

54. *ANDERSON*, *supra* note 9, § 6.8, at 293.

55. See 52 OKLA. STAT. § 87.1(e); see also *Chesapeake Operating Inc. v. Burlington Res. Oil & Gas Co.*, 2002 OK CIV APP 125, ¶ 23, 60 P.3d 1052, 1056-57.

56. *LOWE*, *supra* note 15, at 223.

57. *Id.* at 222.

58. *Pine*, 1986 OK CIV APP 27, ¶ 28, 734 P.2d at 841.

59. *Golsen v. ONG W. Inc.*, 1988 OK 26, ¶ 12, 756 P.2d 1209, 1212; see also *Kaiser-Francis Oil Co. v. Producer’s Gas Co.*, 870 F.2d 563, 566 (10th Cir. 1989).

60. *Kardokus v. Walsh*, 1990 OK 39, ¶¶ 15-16, 797 P.2d 322, 325.

61. *Kuykendall v. Helmerich & Payne Inc.*, 1987 OK 51, ¶¶ 10-12, 741 P.2d 869, 873-74.

62. *Sabine Corp. v. ONG Western Inc.*, 725 F. Supp. 1157, 1168 (W.D. Okla. 1989).

63. *Smith v. Marshall Oil Corp.*, 2004 OK 10, ¶ 11, 85 P.3d 830, 834; *Hunter v. Clarkson*, 1967 OK 114, ¶ 8, 428 P.2d 210, 212; *Cotner v. Warren*, 1958 OK 208, ¶¶ 6-8, 330 P.2d 217, 219-20.

64. *Smith*, 2004 OK 10, ¶¶ 11-12, 85 P.3d 830, 834; *Danne v. Texaco Exploration & Prod. Inc.*, 1994 OK CIV APP 138, ¶¶ 24-26, 883 P.2d 210, 217-18; *Barby v. Singer*, 1982 OK 49, ¶¶ 6-7, 648 P.2d 14, 16-17; *Carter Oil*, 1958 OK 289, ¶¶ 43-44, 54, 336 P.2d at 1095-96.

65. This was the cessation-of-production clause at issue in *Hoyt v. Cont’l Oil Co.*, 1980 OK 1, ¶ 10, 606 P.2d 560, 562 (internal alterations omitted for readability).

66. *Id.* at ¶ 10, 606 P.2d at 563-64.

67. *LOWE*, *supra* note 15, at 230.

68. *Mittelstaedt v. Santa Fe Minerals Inc.*, 1998 OK 7, ¶¶ 29-30, 954 P.2d 1203, 1210; *Wood v. TXO Prod. Corp.*, 1992 OK 100, ¶ 11, 854 P.2d 880, 882-83; *TXO Prod. Corp. v. State ex rel. Comm’rs of the Land Office*, 1994 OK 131, ¶ 16, 903 P.2d 259, 263.

69. *KUNTZ*, *supra* note 14, § 39.1.

70. See, e.g., *Nisbet v. Midwest Oil Corp.*, 1968 OK 115, ¶ 24, 451 P.2d 687, 694; *ANDERSON*, *supra* note 9, § 7.4, at 327-36.

71. *Howell v. Texaco Inc.*, 2004 OK 92, ¶ 17, 112 P.3d 1154, 1159.

72. *Tara Petroleum Corp. v. Hughey*, 1981 OK 65, ¶ 20, 630 P.2d 1269, 1275.

73. *Id.* at ¶ 14, 630 P.2d at 1273.

74. *Howell*, 2004 OK 92, ¶ 19, 112 P.3d at 1159.

75. *Id.* at ¶ 20, 112 P.3d at 1159.

76. See 52 OKLA. STAT. § 570.10(A).

77. *Goodall v. Trigg Drilling Co. Inc.*, 1997 OK 74, ¶ 10, 944 P.2d 292, 294; *Olansen v. Texaco Inc.*, 1978 OK 139, ¶ 19, 587 P.2d 976, 981-82.

78. See 52 OKLA. STAT. § 570.10(D).

79. *Leck v. Cont’l Oil Co.*, 1989 OK 173, ¶ 10, 800 P.2d 224, 227; see also *Fransen v. Conoco Inc.*, 64 F.3d 1481, 1487 (10th Cir. 1995); *Rogers v. Heston Oil Co.*, 1984 OK 75, ¶ 19, 735 P.2d 542, 546; *Indian Territory Illuminating Oil Co. v. Rosamond*, 1941 OK 410, ¶ 16, 120 P.2d 349, 354.

80. *Leck*, 1989 OK 173, ¶ 10, 800 P.2d at 227; *Rogers*, 1984 OK 75, ¶ 20, 735 P.2d at 546; *Spaeth v. Union Oil Co. of Cal.*, 710 F.2d 1455, 1458 (10th Cir. 1983); *Sinclair Oil & Gas Co. v. Bishop*, 1967 OK 167, ¶¶ 54-55, 441 P.2d 436, 447.

81. *Leck*, 1989 OK 173, n.5, 800 P.2d at 227 n.5.

82. See *Rogers*, 1984 OK 75, ¶ 24, 735 P.2d at 546; *ANDERSON*, *supra* note 9, § 8.4, at 423.

83. *ANDERSON*, *supra* note 9, § 8.4, at 423-24. For a discussion of the circumstances constituting fraudulent drainage, see *Hall Jones Oil Corp. v. Claro*, 1969 OK 113, ¶ 9, 459 P.2d 858, 863.

84. *Okmulgee Supply Corp. v. Anthis*, 1940 OK 428, ¶ 5, 114 P.2d 451, 452-53.

85. *Gallaspy v. Warner*, 1958 OK 30, ¶ 8, 324 P.2d 848, 852. These damages are reduced to present value. *Id.* at ¶¶ 8-14, 324 P.2d at 853-54.

86. *Pack*, 1994 OK 23, ¶¶ 26-28, 869 P.2d at 330; *Carter Oil*, 1958 OK 289, ¶¶ 44-45, 336 P.2d at 1095.

87. *Pack*, 1994 OK 23, ¶ 26, 869 P.2d at 330.

88. See *id.*

89. *Id.* ¶ 26, 869 P.2d at 331; *Hunter*, 1967 OK 114, ¶ 9, 428 P.2d at 212; *Townsend v. Creeknore-Roomey Co.*, 1958 OK 265, ¶ 7, 332 P.2d 35, 38.

90. *Dixon v. Anadarko Prod. Co.*, 1972 OK 165, ¶ 8, 505 P.2d 1394, 1396; *West v. Sun Oil Co.*, 1971 OK 138, ¶¶ 10-14, 490 P.2d 1073, 1075-76; *Carter v. U. S. Smelting, Refining & Min. Co.*, 1971 OK 67, ¶ 23, 485 P.2d 748, 753; *Spiller v. Massey & Moore*, 1965 OK 143, ¶¶ 18-20, 406 P.2d 467, 471-72.

91. *Mitchell v. Amerada Hess Corp.*, 1981 OK 149, ¶ 23, 638 P.2d 441, 449-50.

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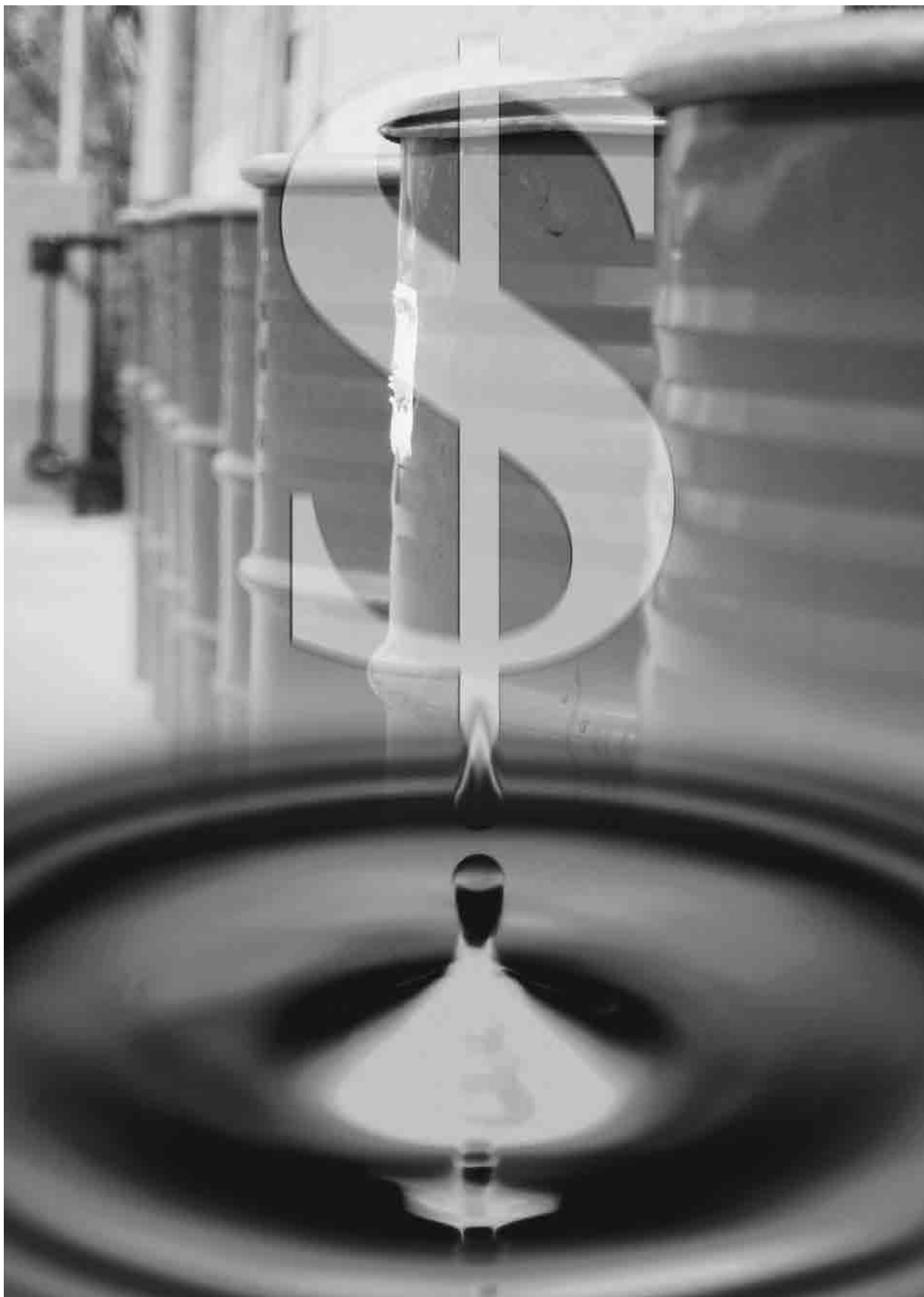
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The SemGroup Bankruptcy and the Ramifications for Oklahoma Producers

By Wade D. Gungoll

On July 22, 2008, SemGroup LP, the parent entity of the various SemGroup subsidiaries, filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the District of Delaware, even as the price of crude oil was in excess of \$140 per barrel.^{1,2} As a major purchaser of production from Oklahoma oil and gas producers, SemGroup's bankruptcy thrust a host of unresolved legal issues into the limelight. Of those issues, perhaps none were more relevant and pressing than 1) the level of priority given to the hundreds of producers who sold to SemGroup prior to its bankruptcy; and 2) whether Oklahoma's Oil and Gas Owners' Lien Act permits an operator to file a lien on behalf of all interest owners. As such matters would be implicated in any future bankruptcy filing by a purchaser of production affecting Oklahoma producers, this article will address each of these important topics in detail.

THE OKLAHOMA OIL AND GAS OWNERS' LIEN ACT

In the wake of a recently released A.G. opinion, 2008 OK AG 31, oil and gas producers selling production in Oklahoma can persuasively argue that the proceeds of their production are subject to a statutory trust, and, accordingly, their interests should *not* be subject to the bankruptcy estate, as would otherwise be the case for liens filed under the Oklahoma Oil and Gas Owners' Lien Act.

Oklahoma has two statutory regimes that provide protection to producers of oil and gas

who sell their production but are not paid for that production by the purchaser. Producers have rights to a statutory lien under the Oklahoma Oil and Gas Owners' Lien Act, 52 O.S. §§ 548 et seq. (Lien Act) and producers have rights to a statutory or resulting trust under the Oklahoma Production Revenue Standards Act. 52 O.S. § 570.1 et seq. (PRSA). In a case such as the SemGroup bankruptcy case, these acts can provide priority to producers that could serve to elevate their rights to payment over the rights of general unsecured creditors.³ However, where the purchaser of production has loans from banks or other entities that are secured by

mortgages and other security interests that are perfected by the filing of financing statements under the Uniform Commercial Code (UCC) in inventory of the purchaser, and where the perfection of those liens predates the sale of the production to the purchaser, questions of priority arise. Such a dispute is now playing out in the SemGroup bankruptcy.

Where there are existing perfected security interests, predating any producer lien filing or sale of production, certain provisions of the Lien Act create problems for a producer attempting to assert priority over the perfected lender. Under the Lien Act, when producers of oil and gas are not paid by the first purchaser of the production, the producers have lien rights (producer's lien) in the production sold and the proceeds of such production.⁴ The producer's lien can be perfected by the filing of verified lien statement no later than 90 days from the time when payment is otherwise due under the Lien Act and when timely perfected, the producer's lien relates back to the date when severance of the production occurred.⁵ The Lien Act provides that the producer's lien takes priority over the rights of all persons whose rights or claims arise or attach to the production or the proceeds, including those which arise or attach between the time the producer's lien attaches (the date of severance) and the time of filing of the producer's lien, with certain exceptions.⁶

The most difficult issue for producers who sell production to a purchaser who fails to pay arises from § 548.6(C) of the Lien Act which provides that nothing in the Lien Act "shall be construed to impair or affect the rights, priorities, or remedies of any person under the provisions of the UCC, and the provisions of this act shall be deemed cumulative to and not a limitation on or a substitution for any rights or remedies otherwise provided by law to a creditor against his debtor." It is this provision that the debtors and their lenders in the SemGroup case will likely rely upon to argue that the liens of the lenders in the inventory of the debtors, which were perfected under the UCC before the date of severance of the production sold and not paid for, have priority over the subsequently perfected producer's liens.

The Oklahoma appellate courts have not yet had occasion to opine on these provisions of the Lien Act and there is only a federal case that is instructive on this point. In *Arkla v. Northwest Bank of Minneapolis, N.A.*, 948 F.2d 656

(10th Cir. 1991), the 10th Circuit significantly restricted the priority of oil and gas producers who sell to purchasers of production that fail to pay and then file for bankruptcy when there is a preexisting perfected security interest in inventory, including production, in the possession of the purchaser. The *Arkla* decision addressed the specific question of whether a claimant with a lien in inventory perfected under the UCC has superior rights in bankruptcy to a lien claimant under the Lien Act, where the UCC claimant's lien predates a lien filed under the Lien Act. Following the language of 52 O.S. § 548.6(C), the *Arkla* court held that an earlier-filed UCC lien in inventory including production has superior priority, and that later-filed liens under the Lien Act must be subordinated to earlier-filed liens whose origins are in the UCC.⁷ Accordingly, under the interpretation of the statute in the *Arkla* decision, the Lien Act is of no benefit in a lien contest between royalty owners and producers against a first purchaser's bank lender with an earlier perfected lien in the production.⁸

Against this background, it would appear inevitable that a lien claimant under the Lien Act would have its interests subordinated to all earlier-filed UCC liens in a bankruptcy proceeding. As of the date of its filing, SemGroup had tens of millions of dollars in outstanding payments due to the oil and gas producers from whom it had purchased production. The prospect of being subordinated to SemGroup's lenders with earlier-filed UCC financing statements is clearly disfavored among the producers because, given the magnitude of the debt owed to lenders, there likely will be insufficient proceeds from the production to pay both the lenders and the producers.⁹

Counsel for the producers who sold to SemGroup made the argument that the PRSA, 52 O.S. § 570.1 et seq., should be construed to impose an implied trust upon a bankrupt purchaser for the benefit of producers. Under such a statutory trust theory, the adverse limitations of the *Arkla* decision would be avoided: any unpaid production and the proceeds from such production would not be the property of the bankruptcy estate.¹⁰ Under the statutory trust theory, the purchaser would not acquire an equitable property interest in the production unless and until the producer gets paid. Thus, the only interest of the debtor that could be property of the bankruptcy estate under 11 U.S.C. § 541 would be bare legal title. The equi-



table rights to the production and the proceeds of any production would be held by the debtors as trustee for the benefit of the Oklahoma producers who sold that production to the debtors. Consequently, creditors with a preexisting UCC financing statement could not claim an interest to any unpaid production or proceeds from such production because it would not belong to the debtor. The lien of the creditor with the preexisting UCC financing statement would not have attached to the equitable interest under the UCC since the lien attaches only when the debtor obtained rights in the property that the lender argues is subject to its lien.¹¹ Moreover, any purchaser of production with outstanding payment obligations would be rigorously subjected to the duties required of a trustee.

In consultations with the bankruptcy court, and with the statutory trust theory in mind, counsel for the producers urged the court to enter a procedures order for the resolution of lien claims and statutory trust claims under Oklahoma law. On Sept. 17, 2008, the court entered an Order Establishing Procedures for the Resolution of Liens Asserted Pursuant to Producers' Statutory Lien or Similar Statutes (procedures order) that specifically addressed the producers' concerns.¹² The procedures order provides for declaratory judgment actions for each state implicated in the bankruptcy proceedings, including Oklahoma. The Oklahoma action seeks a determination of the priority of *both* statutory trust and statutory lien claims of Oklahoma producers.

The procedural method outlined in the procedures order will allow the affected producers to adjudicate the statutory trust argument in their attempt to obtain greater bankruptcy protection:

The Declaratory Judgment Actions shall seek declaratory judgments as to the rights,

“ All proceeds from the sale of production shall be regarded as separate and distinct from all other funds of any person receiving or holding the same until such time as such proceeds are paid to the owners legally entitled thereto. ”

status, priority, and other legal relations of the Producers related to the Debtors and their Pre-Petition Secured Parties. The Declaratory Judgment Actions, as may be amended pursuant to the Federal Rules of Civil Procedure, will seek a declaration on the threshold questions of law germane to the Statutory Lien Claims *and/or the Statutory Trust Claims* [emphasis added] for any Goods delivered or received prepetition or resulting proceeds under the laws of each state in which Debtors purchased Goods from Producers, including, but not limited to, the legal issues related to validity and priority of such claims.¹³

Of great importance, not only as it relates to the SemGroup case but also for any future bankruptcy involving a purchaser of Oklahoma production, is that the Oklahoma attorney general has endorsed the producers' statutory trust argument. In 2008 OK AG 31, issued Nov. 5, 2008, Attorney General Drew Edmondson thoroughly examined both the language and legislative history of the PRSA and concluded that it must be interpreted to create a statutory trust for the benefit of producers.

Central to the attorney general's analysis was 52 O.S. § 570.10(A), which states:

All proceeds from the sale of production shall be regarded as separate and distinct from all other funds of any person receiving or holding the same until such time as such proceeds are paid to the owners legally entitled thereto. Any person holding revenue or proceeds from the sale of production shall hold such revenue or proceeds for the benefit of the owners legally entitled thereto. Nothing in this subsection shall create an express trust.¹⁴

According to the attorney general, 52 O.S. § 570.10(A)'s mandatory language creates a trust relationship between a producer and its purchaser of production:

First, by using the word "shall" the Legislature made the provisions of Section 570.10(A) mandatory... Thus, it is mandatory that the proceeds be regarded as separate and distinct from all other funds of the person receiving or holding those proceeds. Also, it is mandatory that the person receiving those revenues or proceeds hold them for the benefit of the owners legally entitled to them.

Second, since the proceeds are regarded as separate and distinct from all other funds of the person receiving or holding them, and since it is mandatory that the person receiving or holding the revenue or proceeds holds them for the benefit of the owners legally entitled to them, it follows that the person receiving or holding such revenue or proceeds acquires no rights in the revenue or proceeds. The "holding for the benefit of another" principle is at the heart of Section 570.10(A). That principle is analogous to the fundamental structure of a trust relationship; *i.e.*, "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." *Riedell v. Stuart*, 2 P.2d 929, 933 (Okla. 1931).¹⁵

While 52 O.S. § 570.10(A)'s pronouncement that "Nothing in this subsection shall create an express trust" could be construed against the creation of a trust relationship, the attorney general dismissed such a notion due to the distinction between "express" and "implied" trusts. In his strongest statement in support of the statutory trust concept, the attorney general declared that the PRSA would be rendered meaningless without the incorporation of an implied trust for the benefit of producers:

A statute plain on its face may not be added to or expanded under the guise of statutory interpretation... Consequently, since there has been a long-standing and universal distinction in Oklahoma jurisprudence between express trusts and implied trusts, there is nothing ambiguous about the phrase "express trust" when used in Section 570.10(A). If the legislature had intended to negate all manner of trusts (including implied trusts), it could easily have done so

by not using the word "express" or by employing language such as, "Nothing in this subsection shall create a trust of any nature." The principles of statutory construction in Oklahoma preclude any attempt to expand or rewrite the term "express trust" to mean or include implied trusts. In fact, without the imposition of an implied trust, Section 570.10(A) is nothing more than a hollow statement of intent without an enforcement mechanism. Therefore, the conclusion is compelling that the Legislature intended an implied trust under Section 570.10(A).¹⁶

As to the nature of the implied trust, the attorney general opined that the PRSA creates both a resulting trust and a constructive trust which function in conjunction with one another for the benefit of producers:

Section 570.10(A) declares that proceeds from the sale of production shall be the property of the owners legally entitled to them. Section 570.10(A) directs that the holder of the revenue or proceeds hold them for the benefit of those legally entitled to them. If a holder of the revenue or proceeds tried to exercise ownership of or rights in the revenue or proceeds for the holder's benefit, or the benefit of others who were owners not legally entitled to the revenue or proceeds, such conduct would be in direct disregard of statutory language and the duties imposed by the section and hence would be "unconscionable" and against "equity and good conscience." It would be against equity and good conscience for the holder to hold the revenue or proceeds of production and not pay them to the owners legally entitled thereto in violation of the statute.

Additionally, not enforcing Section 570.10(A) through the imposition of a constructive trust would promote unjust enrichment. It would give the holder of the revenue or proceeds both legal and beneficial title to and use of property of others not only in violation of law, but also for which the holder had not paid. Thus, the holder of those proceeds would obtain legal and beneficial title to the property of others in violation of State law and at the actual expense of those who sold presumptively in reliance on the State law. Consequently, if Section 570.10(A) were found not to create a resulting trust, Section

570.10(A) would impose a constructive trust on the holder of such funds.¹⁷

With 2008 OK AG 31 on the books as a source of persuasive legal authority concerning the obligations established in the PRSA, practitioners who represent producers will certainly want to utilize it to their advantage. Attorneys can use the opinion both for purposes of avoiding subordination of the liens of their producer clients to preexisting liens under the UCC, and as an independent basis to bring suits for the recovery of production proceeds.

FILING A LIEN ON BEHALF OF NON-OPERATING INTEREST OWNERS

The Oklahoma Oil and Gas Owners' Lien Act is ambiguous as to whether an oil and gas operator may file a lien on behalf of non-operating interest owners.

Another interesting aspect related to the SemGroup bankruptcy involves an interpretation of whether the Lien Act authorizes oil and gas operators to file liens on behalf of the appropriate non-operating interest owners. In the wake of the SemGroup filing, hundreds of SemGroup's creditors and purchasers of production took the necessary steps to protect their interests in the bankruptcy proceedings. Numerous operators secured their interests in the production and proceeds of sold production by filing oil and gas liens under the Lien Act. Many of such liens were filed by operators not only on their own behalf but also on behalf of the various royalty owners, overriding royalty owners, and non-operating working interests owners in wells operated by those operators whose interests were affected by SemGroup's bankruptcy filing. Remarkably, the language of the Lien Act does not explicitly specify whether an oil and gas operator is entitled to file a lien on behalf of all other affected interest owners.¹⁸

The statutory language defines an "interest owner" as "a person owning an entire or fractional interest of any kind or nature in the oil or gas at the time it is severed, or a person who has a right, either express or implied, to receive a monetary payment determined by the value of the oil or gas severed."¹⁹ Additionally, an "operator" is defined as "any person engaged in the severance of oil or gas for himself, for himself and other persons or for other persons."²⁰ As to perfecting a lien, 52 O.S. § 548.2 provides that an "interest owner... shall have a continuing security interest in and a lien upon

the oil and gas severed, or the proceeds of sale if such oil or gas has been sold, to the extent of his interest until the purchase price has been paid to the interest owner."²¹

Noticeably absent from the statutory text is whether the operator is permitted to file a lien on behalf of the non-operating interest owners. Although the issue has never been judicially determined, the strongest argument in favor of interpreting the Lien Act to allow operators to file liens on behalf of other interest owners is found in 52 O.S. § 548.4, the form for "Perfection of Security Interest and Lien by Filing of Verified Notice of Lien." Below the signature line of the form notice are the words "(Signature of interest owner or operator)," which would seemingly indicate that operators are permitted to file liens and notice of liens on behalf of other interest owners.

Note, however, that whether the conjunctive "or" in the signature line actually suggests that operators may file liens and notices of liens on behalf of interest owners is certainly open to interpretation. From a practical standpoint, it would be difficult to imagine that the Legislature intended for the potential chaos of requiring hundreds of individual interest owners, irrespective of the sizes of their interests, to file liens or risk losing their security interests in a bankruptcy proceeding. On the other hand, history suggests that the "intent" of a state Legislature can be difficult to decipher.

On a tangentially related note, counsel for producers in the SemGroup bankruptcy made the argument that the court should explicitly recognize that operators are permitted to file proofs of claim on behalf of non-operating interest owners. The court accommodated the producers' request through subsection (h) of the Procedures Order, which states in part:

Producers who are the operators of oil or gas wells and/or properties ("Operating Producers") may (but are not required to) file proofs of claims for Statutory Lien Claims and/or Statutory Trust claims on their own behalf and on behalf of all non-operating interest owners in any such oil or gas wells and/or properties, including, but not limited to, working interest owners, royalty owners, and/or overriding royalty interest owners (the "Non-Operating Interest Owners"). When asserting a claim on behalf of Non-Operating Interest Owners, the Operating Producer need only file a single proof of claim form which clearly

references the wells or properties for which Statutory Lien Claims and/or Statutory Trust Claims are asserted, and include a list of the Non-Operating Interest Owners for whom the proof of claim is filed, or, alternatively, identify the specific division order(s) or other contract(s) with the Debtor(s) that lists the Non-Operating Interest Owners for each such well or property.²²

While the procedures order does not remedy the Lien Act's ambiguity because it does not address lien filing, it nevertheless serves as an example, in a similar circumstance, of a court's determination that the proper course is to allow operators the opportunity to file claims on behalf of non-operating interest owners.

The bottom line is that unless and until the Lien Act's operator/non-operating interest owner issue is definitively addressed by an Oklahoma court decision or executive opinion, counsel for oil and gas entities conducting business in Oklahoma need to be aware that the Lien Act contains an ambiguity with potentially drastic implications.

CONCLUSION

If an oil and gas entity such as SemGroup can go bankrupt amidst record high crude prices, then it stands to reason that the same is possible for other companies, particularly in less favorable market conditions. Numerous of Oklahoma's energy companies, engrained with the difficult lessons learned from the bust of the 1980s, have likely approached the ever-so volatile energy markets with an abundance of caution this time around. However, future energy-related bankruptcy filings by Oklahoma companies are not out of the purview of possibilities, and counsel for oil and gas producers will want to incorporate these important aspects related to the SemGroup bankruptcy into their practice.

1. *In re: SemCrude, L.P., et al.*, Case No. 08-11525 (Bankr.D.Del. 2008).

2. Walton, Rod. "SemGroup companies file for bankruptcy." *Tulsa World*, as published July 22-23, 2008, available online at www.tulsa-world.com/news/article.aspx?articleID=20080722_11_SemC687402.

3. It should be noted that in addition to the rights under the Lien Act and the PRSA, the Bankruptcy Code and provisions of the UCC also provide some additional protections applicable to producers. The Bankruptcy Code coupled with the UCC protects the reclamation rights of a producer for any production sold to the debtor in the 45 days before the filing of bankruptcy. See, 12, O.S. §2-702 and 11 U.S.C. § 546(c). In addition, the Bankruptcy Code grants an administrative claim for production sold in the 20 days preceding the filing of bankruptcy. See 11 U.S.C. §503(b)(9). A detailed discussion of these provisions is beyond the scope of this article.

4. 52 Okla. Stat. § 548.4(A).

5. *Id.*

6. See, 52 Okla. Stat. § 548.4(C) which provides: "Upon perfection by filing, the security interest and lien of the interest owner shall relate

back to and be effective as of the date on which the severance occurred and shall take priority over the rights of all persons whose rights or claims arise or attach to the oil or gas unpaid for, or the proceeds of oil or gas if such oil or gas has been sold, including those which arise or attach between the time the security interest and lien attaches and the time of filing. The security interest and lien created pursuant to this act shall not have priority over the security interest and/or lien rights previously created and perfected pursuant to Section 144 of Title 42 of the Oklahoma Statutes, subsection (e) of Section 87.1 of Title 52 of the Oklahoma Statutes, or an operating agreement or other voluntary agreement for the development and operation of the property."

7. 948 F.2d 656 at 659. The court stated: "[U]nder the unambiguous language of section 548.6.C, a lien authorized under the Lien Act shall not 'impair or affect the rights and remedies of any person under the provisions of' the Oklahoma UCC. Thus, as the bankruptcy and district courts held, while the Lien Act, by its clear language, authorizes a lien to secure payment from oil or gas to an interest owner, it also ensures that security interests under the Oklahoma UCC are not subordinated to that lien. Any other reading of the Lien Act is simply contrary to the plain language used by the Oklahoma Legislature.

8. Terry I. Cross, *Oil and Gas Product Liens — Statutory Security Interests for Producers and Royalty Owners under the Statutes of Kansas, New Mexico, Oklahoma, Texas, and Wyoming*, 50 Consumer Fin. L.Q. Rep. 418 (1996).

9. Schedules of Assets and Liabilities of SemGroup Holdings, L.P., entered on December 2, 2008, and available online at www.kcccl.net/documents/0811532/081153208120300000000001.pdf; See also Sem-Group Claims Register Report, available online at www.kcccl.net/Creditor/CR130.asp.

10. It should be noted that there will still be issues of tracing of trust fund proceeds that will be raised by the debtors and their lenders in an attempt to defeat the rights of producers even if the court determines that the Oklahoma producers do have rights to statutory trusts.

11. See, 12 O.S. § 9-203 which provides in pertinent part that "a security interest is not enforceable against... third parties with respect to the collateral and does not attach unless ... the debtor has rights in the collateral."

12. Order Establishing Procedures for the Resolution of Liens Asserted Pursuant to Producers' Statutory Lien or Similar Statutes, Dkt. #2397, entered September 17, 2008 in Case No. 08-11525 (Bankr. D.Del. 2008).

13. *Id.*, at 3.

14. 52 O.S. § 570.10(A).

15. 2008 OK AG 31 at 5-6.

16. *Id.*, at 8-9.

17. *Id.*, at 10-11.

18. 52 Okla. Stat. §§ 548 et seq.

19. 52 Okla. Stat. §548.1.

20. *Id.*

21. 52 O.S. §548.2.

22. *Supra* Note 7 at 5.

ABOUT THE AUTHOR



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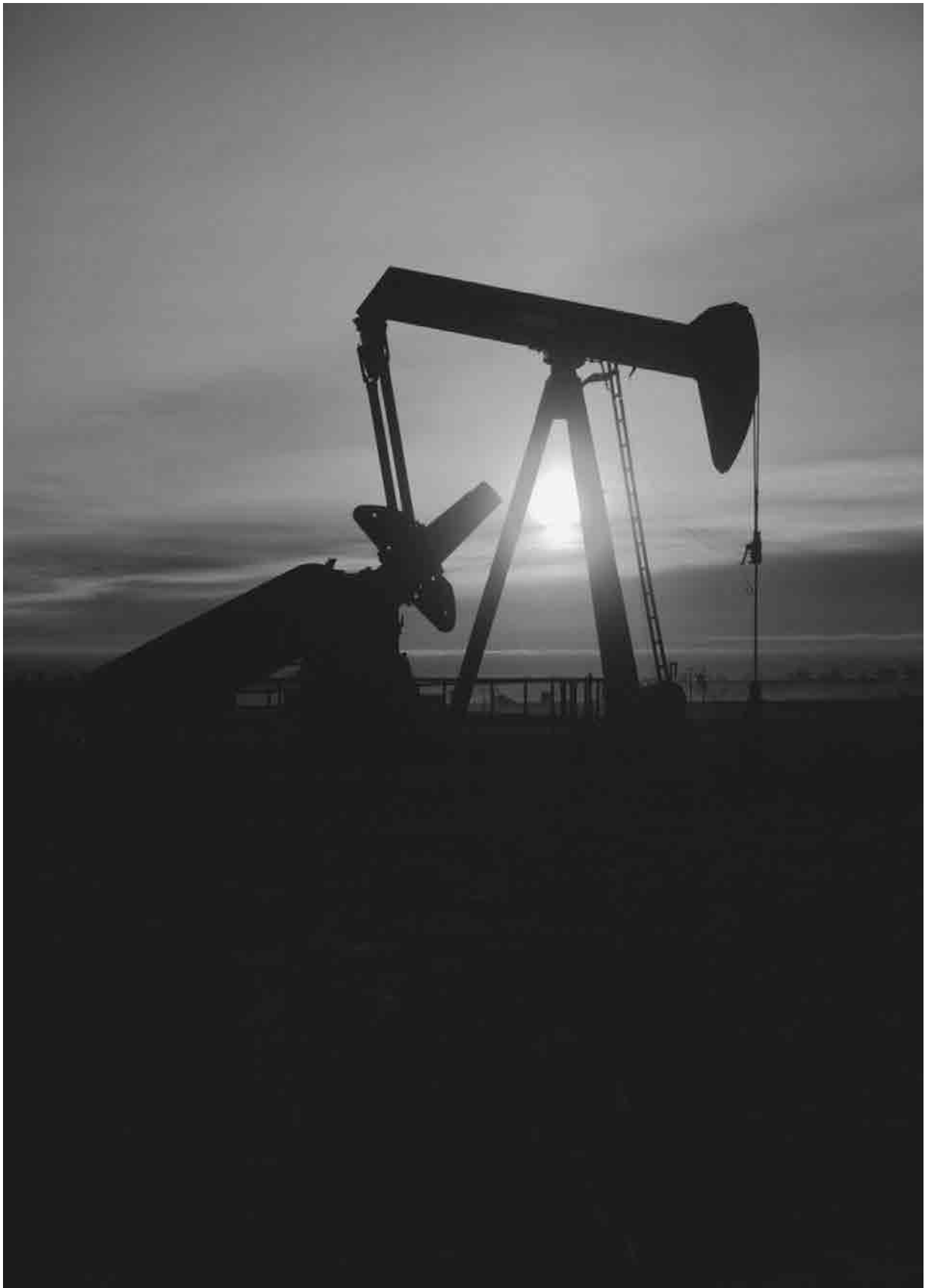
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The Oklahoma Surface Damage Act: Basics for the ‘Non-Oil-and-Gas’ Practitioner

By Shannon L. Ferrell

Oklahoma has been producing oil and gas since its territorial days¹ and has a rich body of oil and gas law in its statutes, regulations and case law. However, record-high oil prices in recent years and recent discoveries of new formations have unleashed a flurry of new oil and gas activity across the state, even into areas that had seen little such activity in the past (and even though these prices are well below those record levels as this article goes to press, there is also wide speculation that increases in global demand will place upward pressure on prices in the future). As a result, many practitioners may be facing issues of oil and gas law for the first time. Thus, this article will present a very basic overview of one of the fundamental pieces of Oklahoma’s oil and gas law: the Oklahoma Surface Damage Act.

WHAT IS THE SURFACE DAMAGE ACT?

Since recognition of the ability to sever real property into surface and mineral estates, a natural tension has existed between the two. As holder of the servient estate, the surface owner was obliged to allow the use of his or her property for the development of the mineral estate, generally without any compensation. Oklahoma’s rule had long been that a severed surface owner was not entitled to any payment for damages caused by the use of the surface for the production of oil and gas unless such use was negligent in scope or amount.² The basis given

for this rule was two-fold: that the surface owner (or his or her predecessor) must have paid a price for their interest that was “discounted” and that the mineral estate must necessarily carry with it the rights to access and develop that right.³

However, as Oklahoma’s oil and gas industry grew, this rule became fraught with practical challenges. The “reasonableness” standard frequently led to time-intensive judicial proceedings that could prove costly for both well operators and surface owners. Recognizing that a change was needed to protect both Oklahoma’s

energy and agricultural industries,⁴ the Oklahoma Legislature passed the Surface Damage Act⁵ that went into effect on July 1, 1982.

Under the act, oil and gas well operators must enter good-faith negotiations with the surface owner to determine the amount of damage that will be done to the surface, measured in terms of the difference in the fair market value of the property immediately before the drilling operations and its value immediately after those operations. If an agreement cannot be achieved, appraisers are appointed by the court to provide a third-party determination of these damages. If the parties still do not agree on this amount, they may demand a jury trial. These procedures represent the compromise at the core of the act: the mineral estate was afforded an expedited means of entering the property even over the objection of the surface owner – in exchange for the requirement to negotiate and pay damages for the use of the surface estate (even if such damages would have been “reasonable” under the old rule).

WHO AND WHAT ARE (AND AREN'T) COVERED BY THE ACT?

The parties under the act are the “operator” and the “surface owner” of the property where oil and gas operations will occur. “Operator” is defined as “a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas,” and “surface owner” as “the owner or owners of record of the surface of the property on which the drilling operation is to occur.”⁶ One implication of these definitions where the *surface* of the property is under lease, is that it is the surface landlord, and not the tenant, who is party to the act’s procedure. Landlords and tenants in areas where oil and gas development is likely should therefore be sure to address the possibility of mineral development and how any surface damages occurring during the lease will be handled.

The definition of “operator” has also been used to limit the scope of activities covered by the act. In *Anschutz Corp. v. Sanders*, the Oklahoma Supreme Court noted that the definition of operator as “one engaged in drilling or in preparations to drill” evinced an intent by the Oklahoma Legislature to limit the act to drilling and production operations, and held that the act did *not* apply to damages caused by seismic operations or other geophysical exploration activities.⁷ Thus, entry to the property for geophysical exploration is not subject to the

requirements of the act. Seismic exploration is governed by the Oklahoma Seismic Exploration Regulation Act⁸ and the rules promulgated under it by the Oklahoma Corporation Commission.⁹ While the Seismic Exploration Regulation Act requires only notice, and not compensation, for seismic operations, negotiation for such entry often occurs to expedite the operations. Further, compensation for geophysical operations may still be recovered if such operations cause an “unreasonable” amount of damage.¹⁰

Finally, while the act may prescribe the procedure for the award of damages caused to the surface estate by the drilling of the well, damages for pollution, nuisance, or other causes may still be recoverable via other means. However, the practitioner must use care in determining whether such actions are properly brought with a claim under the act or if they must be made in a separate action.¹¹

WHAT EXACTLY IS THE MEASURE OF ‘SURFACE DAMAGES?’

Curiously, the act contains no definition of “surface damages.” To set the parameters for what such damages must include, the Oklahoma Supreme Court noted that the procedures under the act essentially mimic a condemnation procedure, enabling the operator to “take” a limited amount of the surface for their operations.¹² Given this analogy, the court has determined that the proper amount of damages under the act is basically the same as that in a condemnation proceeding. The difference in the fair market value of the property before and after the triggering event, which, in the case of the act, is the drilling and operation of the well.¹³

While estimating a “before” and “after” value of property may sound like a simple exercise, one must bear in mind that this estimate must be made prior to the actual commencement of well operations. Thus, both parties must carefully examine the plans for well operations and the property affected thereby in determining damage amount. The Oklahoma Supreme Court has noted that the following items, while not necessarily individual items of compensable damages, are all factors that may play into the determination of the damages amount under the act:¹⁴

- 1) The location or site of the drilling operations.

- 2) The quality and value of the land used or disturbed by said drilling operations.
- 3) Incidental features resulting from said drilling operations which may affect convenient use and further enjoyment.
- 4) Inconvenience suffered in actual use of the land by the operator.
- 5) Whether the damages, if any, are temporary or permanent in nature.
- 6) Changes in physical condition of the tract.
- 7) Irregularity of shape and reduction, or denial, of access.
- 8) The destruction, if any, of native grasses, and/or growing crops, if any, caused by drilling operations.

As discussed later in this article, landowners may have some “homework” in preparing this valuation.

WHAT IS THE ACT’S PROCEDURE?

Prior to entering the property, the operator must provide via certified mail a notice letter to the surface owner stating the operator’s intent to drill and specifying 1) the proposed location of the well, and 2) the approximate date that drilling operations are scheduled to commence.¹⁵ Once this notice has been delivered, the operator has five days to commence “good-faith negotiations” with the surface owner. Assuming that the parties can negotiate an agreed amount of damages, the operator can enter the site once a written damages contract is executed.¹⁶ If this amount is properly paid, the act has been satisfied.¹⁷

If these negotiations do not yield an agreed amount of damages, the operator can still enter the property to commence operations if, and only if, it satisfies the next two requirements under the act’s procedure. First, the operator must file surety with the Oklahoma Secretary of State to ensure the payment of whatever damages awarded may eventually be determined.¹⁸ Second, the operator must petition the district court for the county in which the proposed well site is to be located for the appointment of appraisers who will be tasked with estimating the damages awarded under the act. Once the bond and petition requirements have been met, the operator is then entitled to enter the property and commence its operations.¹⁹ While it may seem counterintuitive to

the surface owner that the operator can enter the property without an agreement as to the damages amount, this is the compromise of the act, as discussed above.

If the operator petitions the district court for the appointment of appraisers, the surface owner must be given 10 days notice of such petition. Once service of this notice is achieved, the parties have 20 days to nominate their appraisers. One appraiser is nominated by the operator, and another is nominated by the surface owner. These appraisers then confer and nominate the third appraiser who must be a state-certified appraiser in good standing with the Oklahoma Real Estate Appraisal Board. Should the parties fail to submit their nominations (or should the first two appraisers fail to select a third), the district court will make its own appointment.²⁰ The compensation for the appraisers is set by the district court and is borne equally by the surface owner and the operator. Once appointed and sworn in, the appraisers have 30 days to inspect the property, estimate the amount of damages due the surface owner under the act, and submit a written report to the district court which is then forwarded by the court to the parties.²¹

The filing of the appraisers’ report marks the next watershed moment in a proceeding under the act at which the parties have basically three options from which to choose. First, if the parties agree to the appraised amount, the amount can be tendered by the operator, and the matter is essentially closed. Second, either party may, within 30 days of the filing of the report, file an exception to the report which triggers a review by the court followed by either confirmation, rejection, or modification of the report by the court, or an order for a new appraisal.²² Third, either party may, within 60 days of the filing of the report, file a demand for jury trial.²³ It should be noted here that the oil and gas operations at the site in question may continue even if an exception or demand for jury trial is made, so long as the operator posts an amount equal to the appraised damages with the court clerk.²⁴ The decision of the court on any exceptions to the appraisal report and the verdict of a jury trial are both appealable decisions.

The decision to demand jury trial should not be undertaken lightly, as it will trigger the act’s provisions regarding costs and attorneys fees, as discussed in greater detail in the paragraph to follow.

WHAT ABOUT ATTORNEYS FEES AND PENALTIES?

The act expressly provides for the award of costs and attorneys fees, with a number of caveats. Such costs and fees are only awarded by the court if a demand for jury trial has been made.²⁵ Further, costs and fees are only recoverable by a party if that party receives a verdict more favorable than the appraisal report.²⁶ The Oklahoma Supreme Court has noted that one purpose of this requirement is to promote the act's aim of providing compensation to the landowner as soon as possible after a taking has occurred "by ensuring that a demand for jury trial will not be filed as a delaying tactic but will only be used when a good-faith belief in success exists on the part of the party seeking a jury trial."²⁷

Aside from its provisions for attorneys fees, the act also carries a potent penalty for operators who fail to follow its dictates. If an operator knowingly enters a parcel without providing notice to the surface owner, or fails to carry through with the act's requirements (*i.e.* fails to either secure an agreement with the landowner or follow the appraisal and bonding requirements), the operator may be liable to the surface owner for triple the amount of surface damages eventually determined.²⁸

HOW CAN SURFACE OWNERS BE PROACTIVE IN HANDLING SURFACE DAMAGE ISSUES?

Given all this, what can a surface owner do to be prepared to make his or her best case if a notice letter comes? One important step is to gain a thorough understanding of the land that may be impacted. Thorough records regarding the property including soil data, agricultural production records, photographs, and financial performance reports can all aid the surface owner in proving the value of the property prior to its taking. The landowner can contact



“Assuming that the parties can negotiate an agreed amount of damages, the operator can enter the site once a written damages contract is executed.”

the local Natural Resource Conservation Service, Farm Service Agency, and OSU Cooperative Extension offices for resources to help in farm recordkeeping and information regarding the productivity of similar lands in the area.

Another step the landowner can take is to work with an attorney to prepare a "surface use agreement" or similar document in which the terms for the use of the property are spelled out in advance. Such agreements may include liquidated damages terms based on the acreage of property taken out of use by the wellsite and for any damage to crops or livestock, requirements for the maintenance and repair of fences and gates, requirements for preservation of drainage structures (such as terraces) and vegetative cover on exposed soils, specifications for the restoration of soils after operations, and so on. Sound, objectively-determinable

bases for the terms of the agreement (publicly available market prices, published materials on best agricultural practices, *etc.*) will help the surface owner pursue approval of the agreement by the operator.

CONCLUSION

Even though the Oklahoma Surface Damage Act has been around for some time, the movement of the oil and gas industry into new areas makes it important for practitioners to be familiar with some of its basics, so that they can help their clients — both well operators and surface owners alike — navigate its provisions and work together for the prosperity of the state.

1. See Muriel H. Wright, *First Oklahoma Oil was Produced in 1859*, 4 CHRONICLES OF OKLAHOMA, No. 4 December, 1926.

2. See *Davis Oil Co. v. Cloud*, 766 P.2d 1347, 1349-1350 (Okla. 1986).

3. See *id.*

4. See *Davis Oil Co.* 766 P.2d at 1349-1351:

It cannot be said that the surface of the land constitutes a less vital resource to the State of Oklahoma than does the mineral wealth which underlies it. The surface supports development for business, industrial and residential purposes. It also supports our vital agricultural industry. The passage of the surface damages act guarantees that the development of one industry is not

undertaken at the expense of another when the vitality of both is of great consequence to the well-being of our economy. In times when both the agricultural and oil and gas segments of our economy are suffering it is especially important that such legislation is enforced.

5. 52 OKLA. STAT. §§ 318.2 – 318.9.

6. 52 OKLA. STAT. § 318.2 (1), (2).

7. *Anschutz Corp. v. Sanders*, 734 P.2d 1290, 1291 (Okla. 1987).

8. 52 OKLA. STAT §§ 318.21 – 318.23

9. See generally OKLA. ADMIN. CODE. § 165:10-7-31.

10. For example, Oklahoma law provides strict liability on the use of explosives; see *Superior Oil Co. v. King*, 324 P.2d 847 (Okla. 1958), *Seismograph Service Corporation v. Buchanan*, 316 P.2d 185, 186-187 (Okla. 1957). Additionally, 52 OKLA. STAT. § 318.23 states that seismic test hole blasting within 200 feet of any habitable dwelling, building, or water well cannot be conducted without written permission from the owner of the property.

11. See *Ward Petroleum Corp. v. Stewart*, 64 P.3d 1113 (Okla. 2003), in which the Oklahoma Supreme Court held that claims for tort claim of pollution damage could bring claim in same case with claim under Act, but two causes must be kept on separate procedural tracks), see also *Dyco Petroleum Corp. v. Smith*, 771 P.2d 1006 (Okla. 1989), wherein the court held that act did not provide a remedy for nuisance but special concurrence observed that a separate action for such nuisance could be maintained.

12. See *Davis Oil Co.* 766 P.2d at 1353.

13. See *Davis Oil Co. v. Cloud*, 766 P.2d. at 1352-1353, *Andress v. Bowlby*, 773 P.2d 1265, 1267 (Okla. 1989), *Dyco Petroleum Corp.*, 771 P.2d at 1008 (Okla. 1989), *Houck v. Hold Oil Corp.*, 867 P.2d 451 (Okla. 1993).

14. *Davis Oil Co.*, 766 P.2d at 1352.

15. 52 OKLA. STAT. § 318.3. If the surface owner cannot be located with reasonable diligence, notification of the intended commencement of operations can be accomplished by filing an affidavit of the search efforts with the district court and publishing notice of the operations in the county newspaper. See 52 OKLA. STAT. § 318.3, 318.5(B)

16. 52 OKLA. STAT. § 318.5(A).

17. However, as noted elsewhere, separate claims for pollution or nuisance might still be available to the surface owner.

18. 52 OKLA. STAT. § 318.4(A). It should be noted, however, that each operator is only required to file one bond for all of its operations in the state, i.e. the bonding requirement applies per operator, not per well. See *Ranken Energy Corp. v. DKMT Co.*, 2008 OK CIV APP 61, ¶ 9.

19. 52 OKLA. STAT. § 318.4(C), 318.5(A).

20. 52 OKLA. STAT. § 318.5(C).

21. *Id.*

22. The decision of the court regarding the exceptions is appealable per 52 OKLA. STAT. § 318.6.

23. 52 OKLA. STAT. § 318.5(F).

24. 52 OKLA. STAT. § 318.6.

25. 52 OKLA. STAT. § 318.5(F). Note, however, that *Tower Oil & Gas Co. Inc. v. Paulk*, 776 P.2d 1279, 1281 (Okla. 1989), the court allowed attorneys fees in a case where a demand for jury trial was made and then later withdrawn by the operator. The court noted "the filing of the demand for jury trial is the activating event rather than the entry of a jury verdict."

26. 52 OKLA. STAT. § 318.5(F).

27. *Tower Oil & Gas Co. Inc.*, 776 P.2d at 1281.

28. 52 OKLA. STAT. § 318.9.

ABOUT THE AUTHOR



Shannon Ferrell is an assistant professor of agricultural law in the OSU department of agricultural economics. He spent a number of years in private practice, focusing on environmental, energy and corporate law, and served as the Oklahoma Renewable Energy Council president for 2006. His research at OSU

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# Don't Give Away the Farm Negotiating Surface Damage Cases

By Trae Gray

On the wall of my college adviser's office in Oklahoma State University's Ag Hall there was a printed piece of paper that read, "In business you don't get what you deserve — you get what you negotiate." This statement could be no more applicable than in the world of a landowner protecting their surface rights when an oil company comes to explore for minerals.

Oil and gas companies, typically with independent landmen, have a reputation for getting all they can when negotiating surface damages. Legally, there is nothing wrong with them getting all they can. But, the position from which these landmen negotiate results from the history of our law. Further, these negotiators are much more aware of what the law is and what the benefits of getting what they are negotiating for means to the oil company than are the landowners they are negotiating with.

Historically, the mineral owner, at no cost, was entitled to use as much surface as was *reasonably* necessary to access the mineral estate. This status of the law prevented a landowner from getting any meaningful remedy for surface damage to their land. The creation of our Surface Damage Act<sup>1</sup> (SDA) in 1982 created an obligation on the part of the mineral developer to pay for all surface damage caused by drilling operations. The SDA modified the common law rule that an oil and gas lessee was not liable to the surface owner for damages unless such damages were caused by wanton or negligent operations or if the operations affected more than a reasonable area of the surface.<sup>2</sup> After 1982, the duty of the mineral owner to landowners became one of

strict liability. Many in the oil and gas industry believed the SDA would curtail production or have a negative effect on the economy. This has not been the case. Since the enactment of the act, the predominant factor affecting activity in the industry continues to be market prices, availability of rigs, bottlenecks and availability of the industry workforce. The SDA is only helping to bring balance to a long unbalanced relationship. Nonetheless, because of this historic common law relationship, an environment still exists where landowners feel they have little or no rights or choice when mineral exploration occurs on their surface.

Negotiating within this environment allows landmen to contractually get a lot more, in terms, than what the SDA provides at the end of a jury verdict or acceptance of appraisal. The present misperceptions that were brought about by the common law and today's environment are what I will try to address in this article.

The biggest problem that landowners encounter with written agreements is how one-sided those agreements can be. Typically, for a limited amount of consideration, a landowner waives more rights than what they should or more

rights than what they would under an SDA appraisal acceptance or jury trial. Here are 10 examples of overly broad language, interpretations or releases used by energy companies in an effort to better protect their position followed by some law and reasoning as to why landowners should not cave to pressure to sign something like this when an SDA case is heading their way:

1) *No surface damages because an oil and gas lease was signed* — I presently have a case where the operator is arguing the SDA does not apply because the landowner also signed an oil and gas lease so the consideration provided for the lease bonus payment constitutes a release for surface damages because the estate is not severed. (Most leases have the magic language, “Lessee shall pay for all damages caused by its operations for growing crops on said land,” in my case, there are no crops, so the operator argues if the lessor/landowner wanted surface damages they should have specified so in the lease.) The argument goes on into the fact that the SDA states nothing should be construed to impair an existing contractual right;<sup>3</sup> here the oil and gas lease.

There is nothing contained in the SDA that states that a lessor, who is also a surface owner, is not entitled to the protection of the SDA. Operator and surface owner are both defined<sup>4</sup> by the SDA. If no agreement is reached prior to drilling, a petition must be filed and the strict liability of the SDA applies regardless of whether or not the landowner also owns the mineral estate.

This argument is way out in left field in my opinion. And, most landowners are not thinking about contractual surface damage rights incident to oil and gas leases<sup>5</sup> when they sign an oil and gas lease. Moreover, when they do sign a lease, most lessees will not allow them to insert surface provisions because of the effect those types of provisions have on the marketability of the leases. Nonetheless, it illustrates the lengths that an operator will take to run over a landowner. Thus, this example serves as a great starting point for these 10 examples. Many times in negotiations for landowners, I hear the

words “that issue will never come up.” This point just reinforces that eventually everything comes up if you don’t cover it!

2) *Landowner warrants and agrees to defend title and landowner agrees to indemnify operator* — The operator should be responsible for determining who owns the land the operator is drilling on and if they are wrong, the landowner should not be responsible for the operator’s mistake. Title problems can be expensive. The consideration for damages payments can many times be less than the legal expense for curative work. The landowner should not be burdened with this responsibility. Moreover, the apparent landowner should not be exposing itself to additional liability to the actual owner regarding representations made to the operator in good faith. The potential liability and risk generally outweigh the consideration received from surface damage payments.

3) *Release to operator and any assigns for ANY and ALL damage relating to drill site, pits, roads, pipelines and all other construction or damages of any kind OR all claims of every kind and character arising out of or in any way incident to* — Oklahoma law is well settled that a lessee in an oil and gas lease has only such rights to the surface of the leased land as may be necessarily incident to the exercise of his rights under the lease, and that he must protect the surface rights insofar as such incident necessity does not exist and must mitigate the harm to the surface.<sup>6</sup> The SDA did not relax the requirement to protect and mitigate harm. An SDA release should be limited to drilling operations commenced under the act and related operations and nothing more.

4) *Operations and continued development OR forever release and discharge ALL CLAIMS OR every claim which landowner now has or may have in the future* — Oklahoma law is clear that although a tort claim can proceed with an SDA case, the tort claim must proceed under a separate and distinct procedural track.<sup>7</sup> This holding clearly shows that the intent of the SDA is to compensate a landowner for damages to the surface during drilling operations only and that the SDA is not in place to compensate

“...in my case, there are no crops, so the operator argues if the lessor/landowner wanted surface damages they should have specified so in the lease.”

for ALL CLAIMS or every possible claim which could arise. An operator has always been liable to the surface owner for damages resulting from unreasonable entry on the land or unreasonable use to the surface.<sup>8</sup> These types of claims should never be waived in surface damage negotiations.

5) *Release as to all claims for surface and subsurface soil and water* — The analysis applicable to this type of language is very similar to the analysis above in No. 4. In *Vastar Resources Inc. v. Howard*,<sup>9</sup> a jury in an SDA case considered tort claims in the trial on the SDA issue. The court was clear that these types of torts are not part of the SDA and must procedurally be treated separately. Additionally, these types of claims typically fall under nuisance law which requires abatement<sup>10</sup> or they can be considered trespasses or wrongful invasions to be enjoined.<sup>11</sup> Again, these types of claims should never be waived in surface damage negotiations.

6) *On or around the property (described as a 160-acre tract in this particular agreement)* — These types of descriptions are simply too broad. The SDA is intended to compensate for drilling operations and activities incident thereto. This should be defined by a specific location in square feet and any other areas utilized outside of the pad area should additionally be defined.

One big misconception is that a landowner is required to give an easement under the act. This is simply not the case. SDA negotiations should never be interpreted to mean an operator has a right to take any property in fee via an easement. An oil and gas lessee does not have a common law right to enter a tract of land at each and every available point of entry and a lessee does not have a common law right to access an oil or gas well at any specific point of entry regardless of the desires of the surface owner.<sup>12</sup> The operator only has a right to utilize the surface for reasonable uses as those uses pertain to drilling operations.

Finally, it is important to always remember the SDA covers the diminution in value to the surface owner's entire property, including the stigma to the entire property from oil and gas operations.<sup>13</sup> Just compensation for surface damages is the value of property taken plus any injury to property not taken.<sup>14</sup> An operator can argue or designate a specific tract, but the jury can always look to the diminution in value to the entire property.<sup>15</sup>

7) *Perpetual right to enter the property* — The right of an oil and gas operator to enter the property comes from their rights to the dominant estate. Once that right no longer exists, there is no reason for them to be there. Thus, any lapses in time should be tied to their rights in the dominant estate. Perpetual is a long time and a landowner should not allow the pressure of an SDA case to force them to agree to this type of language.

8) *Landowner can utilize the property subject to the release subject to the operator's stipulations* — Once again, the operator has a right to reasonable use for its oil and gas operations, so long as the operator complies with the law. Nonetheless, the land still belongs to the landowner who can do whatever they want so long as that does not inhibit the operator in an unreasonable manner. Regardless, this is just another provision that should not be in negotiations under the SDA.

9) *Additional Well Bores on Same Pad* — In *Comanche Resources Co. v. Turner*,<sup>16</sup> a landowner had signed a release that was **specific**. The operator later entered the drilling site and drilled at a different location, the court held the first release did not cover the second hole even though the operator never exercised its rights under the first release.

10) *Drilling out of section leases* — Many operators desire to drill horizontal wells in shale plays. This can result in desired surface locations that are adjacent to the lessee's rights. Most landowners are not aware that neither the SDA nor the common law grants any right to an operator to locate a well on their surface in this situation. Once they figure this out a written agreement has usually been signed and a contractual right to access will then exist. To expand on this issue, if the desired surface location was never part of a fee tract underneath the lessee's mineral interest to be developed, there is no common law or statutory right for the surface location. This issue is a bit more complex where you have a lease covering two separate units with the surface location on one unit and the extraction of minerals from the adjacent unit. With that said, there is no case law or statute in Oklahoma supporting the position that a lease covering separate units grants surface rights for exploration in an adjacent unit. And, one of the most widely recognized oil and gas treatises quashes any theory of an operator's right of access absent an express written agreement of the surface owner.<sup>17</sup> The important

thing to remember here is that it is very unlikely that an operator can force the location through the SDA if the landowner does not want the well on their property.

These 10 examples were not all contained in one release, but they are all examples of language or attempts to go beyond the SDA. All of the examples listed above are from preliminary negotiations with landowners that I represented prior to the filing of an SDA case. When a landowner is faced with signing an overly broad release or proceeding under the SDA, I would advocate for the later. You have certainty with the SDA as you know when the assessment of damage stops and when you have the right to go back into court for additional claims or damages, if any. If you end the SDA process at the appraisal stage, you receive this protection and if you go to trial you receive the same. Many times operators and landowners are reluctant to move forward to a jury trial. Nonetheless, the jury trial is a sacred right in our country that promotes community representation, flexibility, democracy and freedom. The jury trial is the heart of our dispute resolution system and serves to protect the people. It is my belief it should be utilized if an adequate compromise cannot be reached.

This article should in no way be interpreted to be a dig toward the oil and gas industry. Many of the issues that arise in this article come about because of ignorance of the law or greed. My experience is that there are many knowledgeable operators in our state that are fair and operate properly. The oil and gas industry is arguably the most important to our state's economy and I support it. Nonetheless, negotiations with landowners should be fair. When that happens, the wealth can be spread and goodwill will result. This creates a better environment for landowners and operators to

coexist, prosper, preserve and utilize two of our state's most precious natural resources.

1. 52 OS §§ 318.2 to 318.9
2. *Ward Petroleum Corporation v. Stewart*, 2003 OK 11, 64 P.3d 1113.
3. 52 OS § 318.7
4. 52 OS § 318.2
5. "While an oil and gas lease carries within its implications, if not within its expression, such rights as to the surface as may be necessarily incident to performance of the objects of the contract, yet it is well settled that the implications go no further, and that the holder of a mining or oil and gas lease must protect the surface of the ground in so far as such incident necessity does not exist." See, also, *Cosden Oil & Gas Co. v. Hickman et al.*, 114 Okl. 86, 243 P. 226; *Sanders v. Davis*, 79 Okl. 253, 192 P. 694, and *Rennie v. Red Star Oil Co.*, 78 Okl. 208, 190 P. 391.
6. *Pulaski Oil Company v. Conner*, 62 Okl. 211, 162 Pac. 464 (1916).
7. *Ward Petroleum Corporation v. Stewart*, 2003 OK 11, 64 P.3d 1113.
8. *Lone Star Producing Co. v. Jury*, 1968 OK 124, 445 P.2d 284; *Wilcox Oil Co. v. Lawson*, 1959 OK 138, 341 P.2d 591.
9. *Vastar Resources Inc. v. Howard*, 2002 OK CIV APP 13, 38 P.3d 236.
10. 50 O.S. §13 and *Sheridan Oil Co. v. Wall*, 1940 OK 225, 103 P.2d 507, 510; *Tenneco Oil Co. v. Allen*, 1973 OK 129, 515 P.2d 1391, 1392; *Meinders v. Johnson*, 2006 OK CIV APP 35, 134 P.3d 858.
11. *Angier v. Mathews Exploration Corp.*, 1995 OK CIV APP 109, 905 P.2d 826.
12. *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, 139 P.3d 897.
13. *Chesapeake Operating Inc. v. Loomis*, 2007 OK CIV APP 55, 164 P.3d 254.
14. *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, 952 P.2d 483.
15. *Bays Exploration Inc. v. Jones*, 2007 OK CIV APP 111, 172 P.3d 217.
16. *Comanche Resources Company v. Turner*, 2001 OK CIV APP 127, 33 P.3d 688.
17. *Williams & Meyers, Oil and Gas Law*, Vol. 1 §218.4.

#### ABOUT THE AUTHOR



Trae Gray is a natural resources trial lawyer. Since opening his Coalgate office in 2007, he's handled over 300 energy industry matters for landowners and was recently chosen as the attorney of choice for the Oklahoma Landowners Association. He does criminal defense work where he successfully defended an innocent Norman Ranger in the politically charged allegations of computer crimes and conspiracy.

## Real Property Law Section

# Well Site Safety Zone Act

## New Life for Act

By Kraettli Q. Epperson

On March 26, 2009, the Oklahoma attorney general, in Opinion 09-5, interpreted the impact of the 2006 legislative recodification of a 2003 act (the "Well Site Safety Zone Act").<sup>1</sup> The A.G. opinion declared that the 2006 recodification clarified and confirmed that there was indeed a prohibition on the location of a habitable structure within 125 feet of an oil and gas wellbore, and within 50 feet of related surface equipment, "regardless of whether the structure is located on the surface land on which the oil and gas well is located or on adjacent lands."<sup>2</sup>

The apparent public purpose for the creation and maintenance of a safety zone is for the convenience and safety of the oil and gas operator who must continually have access to the well site, and for the safety of the home occupants who will find themselves being neighbors with a pump jack, tank battery and other oil field equipment.

This A.G. opinion makes it clear that through the 2006 recodification the Legislature had successfully overruled an earlier 2006 Oklahoma Supreme Court decision.<sup>3</sup> The 2006 court holding had severely limited the impact of the Well Site Safety Zone Act by concluding that this safety zone was created only in the instance where the surface interest on which the house was about to be built was owned by the same person who held title to the surface on which the well site sat. Under this 5 to 4 Supreme Court ruling, if the surface land on which a house was to be built was owned by someone other than the owner of the land under the well site itself, the 125-foot safety zone limitation did not apply. Consequently, a subdivision developer could avoid this construction limitation by conveying the home construction site to

a builder or other third party, thereby creating a difference in ownership of the two tracts. Making such conveyance is the standard practice, and its result helps achieve a developer's primary goal which is to maximize the land available for residential development purposes.

Specifically, the A.G. opinion held:

*Because 52 O.S.Supp.2008, §320.1 is no longer part of the Oklahoma Surface Damages Act, it must be read as an independent statute, prohibiting a habitable structure from being located within 125 feet of an active oil and gas well, or within 50 feet of surface equipment necessary to the operating of an active oil and gas well, absent the written agreement of the surface owner and the operator otherwise. The prohibition of a habitable structure in Section 320.1 applies regardless of whether the structure is located on the surface lands on which the oil and gas well is located, or on adjacent lands.*

### STEP-BY-STEP SUMMARY OF THE ANALYSIS

The sequence of events leading to the attorney general's conclusion is as follows:

- 1) The Surface Damages Act was enacted in 1982, providing for payment – by the oil and gas operator to the owner of the title to the surface lands underlying the well site – of compensation to offset the diminution in value of the surface, caused by the intrusion of a well site.<sup>4</sup>
- 2) The Well Site Safety Zone Act was enacted in 2003, providing for a prohibition against the location of a habitable structure (e.g., a house) within 125 feet of the wellbore.<sup>5</sup>

- 3) The Oklahoma Supreme Court issued an opinion in 2006 (the "YDF Case") declaring that due to the section numbering the 2003 Well Site Safety Zone Act was part of the 1982 Surface Damages Act and, due to the definitions language of the Surface Damages Act, *there would not be a safety zone created* in the situation where the lot owner or builder who was seeking to construct a home on his own land within 125 feet of a wellbore *did not also own the surface* under the well site.<sup>6</sup>
- 4) Within days after the YDF Case decision was handed down, the Oklahoma Legislature began the drafting and enactment of legislation which had the sole function of recodifying (*i.e.*, renumbering) the Well Site Safety Zone Act to move its location within the statutes away from its previous position adjacent to the Surface Damages Act. Specifically, the Surface Damages Act was initially codified at 52 O.S. §§318.2 to 318.9, and the Well Site Safety Zone Act was renumbered from 52 O.S. §318.10 to become §320.1.<sup>7</sup>
- 5) As of March 26, 2009, the impact of the 2006 recodification of the Well Site Safety Zone Act was examined and explained by this new A.G. opinion. The Well Site Safety Zone Act, as of the date of its recodification in 2006, prohibits the construction or location of any habitable structure within 125 feet of the well bore, without regard to who owns the surface under the planned structure.<sup>8</sup>

## CONSEQUENCES OF ATTORNEY GENERAL OPINION

The state constitution establishes the Office of the Attorney General, and the A.G.'s duties and responsibilities are prescribed by statute.<sup>9</sup> The A.G. is the chief law officer of the state.<sup>10</sup>

As the state's "chief law officer," the A.G. has been entrusted with the duty of providing legal guidance to public officers and advising them on questions of law which relate to their official duties.<sup>11</sup>

In analyzing the weight to be given to an A.G.'s opinion, the opinions are "persuasive authority," making them the equivalent of an opinion of the Court of Civil Appeals.<sup>12</sup>

An A.G.'s opinion is binding upon the state officials whom it affects. Public officers have

the duty to follow those opinions until they are judicially relieved of compliance.<sup>13</sup>

It is the duty of local public officers, including county officers, to follow and not disregard, the advice of the A.G.<sup>14</sup>

Hereafter, any and all state bodies, for example the Corporation Commission, and any and all counties and cities, including those approving subdivision plats and zoning applications and issuing residential building and occupancy permits, are on notice that they must abide by this pronouncement.

A public officer's failure to heed the A.G.'s advice to perform a duty required by law may result in civil penalties; while one who acts in conformity with the A.G.'s advice is afforded the law's protection from civil liability, as well as from forfeiture of office.<sup>15</sup> Whether this new A.G. opinion will rise to the level of being "advice to perform a duty required by law" is as yet unclear, but it certainly breathes new life into the Well Site Safety Zone Act. Other unanswered questions also remain, such as what to do about violations arising between 2006 and the present, and who bears the liability for financial loss for the homeowner's diminution in value upon resale, or for the costs for relocation of the home or well.

This A.G. opinion confirms that the Well Site Safety Zone Act acts as a sword in the hands of oil and gas operators attempting to beat back encroachments around their operating wells,<sup>16</sup> and as a shield to subsequent challenge if the surface owner and operator reach a written agreement to allow development closer than 125 feet.<sup>17</sup>

1. A copy of this Attorney General Opinion 09-5 may be found online at: [www.oag.state.ok.us](http://www.oag.state.ok.us), click on "Opinions," click on "Recent Attorney General Opinions" and click on Attorney General Opinion 09-5. Legal research on this matter was provided to the attorney general's office, through the requesting state representative, by this attorney author, Kraettli Q. Epperson, OKC. Mr. Epperson gratefully acknowledges receiving input in the development of such research from attorneys Doug Wilguess and Shawn Roberts, both of OKC, and University of Oklahoma law student Blaine Dyer.

2. 52 O.S.Supp.2003 §318.10, recodified as 52 O.S.Supp.2006 §320.1, provides:

A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:

1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.

B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

3. *YDF v. Schlumer Inc.*, 2006 OK 32, 136 P.3d 656

4. The "Surface Damages Act," 52 O.S.Supp.2001 and Supp.2008 §§318.2-318.9
5. The "Well Site Safety Zone Act," 52 O.S.Supp.2003 §318.10
6. YDF, 2006 OK 32, 136 P.3d 656
7. 52 O.S.Supp. 2003 §318.10 and 52 O.S.Supp.2006 §320.1
8. OK AG Opin. 09-5; it should be noted that the Well Site Safety Zone Act includes language in part B allowing the oil and gas operator and the owner of the residential construction site to modify this 125-foot rule, presumably to allow the reconfiguration of the circular area into a rectangular zone which better fits the topography, the equipment layout, and the access needs of the parties.
9. OK Const. Art. VI, §1; 74 O.S. §18b(A)(5) and (A)7, and 75 O.S. §26.1
10. 74 O.S. §18
11. *Hendrick v. Walters*, 1993 OK 162, ¶19, 865 P.2d 1232, 1243
12. *National Cowboy Hall of Fame and Western Heritage Center v. State of Oklahoma Ex Rel. The Oklahoma Human Rights Commission*, 1978 OK 76, ¶11, 579 P.2d 1276, 1279
13. *Hendrick v. Walters*, 1993 OK 162, ¶20, 865 P.2d 1232, 1244
14. *Rasure v. Sparks*, 1919 OK 231 ¶¶0, 7, 183 P. 495, 496 and 498
15. *Hendrick v. Walters*, 1993 OK 162, ¶20, 865 P.2d 1232, 1244
16. 52 O.S.Supp.2006 §321.0(A)
17. 52 O.S.Supp.2006 §321.0(B)

## ABOUT THE AUTHOR



Kraettli Q. Epperson graduated from OU (B.A., political science) and from OCU (J.D. in 1978). He is a partner with Mee, Mee, Hoge & Epperson in Oklahoma City focusing on real property and mineral litigation and acquisitions. He is chair of the OBA Title Examination Standards Committee, teaches "Oklahoma Land Titles" at the OCU School of Law, and publishes and lectures on real property law.

# INVESTIGATOR

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Applications are now being accepted for a position as an Investigator for the Office of the General Counsel, Oklahoma Bar Association. The investigators review allegations against members of the bar which may involve violations of The Rules of Professional Conduct. Duties include interviewing witnesses, reviewing legal documents and financial statements, preparing reports, and testifying at disciplinary and reinstatement hearings before the Professional Responsibility Tribunal. Applicants with a degree from an accredited university or professional experience preferred. Applicants must possess excellent writing skills, and be able to work independently. Some travel may be required. Prior law enforcement, accounting, legal or investigative experience strongly preferred. Salary negotiable, depending upon credentials and experience. Excellent benefits including retirement, health, and life insurance. Resumes and cover letters should be submitted by May 30, 2009 to Gina L. Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152 or electronically to [ginah@okbar.org](mailto:ginah@okbar.org).

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# 2009 Oklahoma School Law: Lessons Learned Along the Way

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**Program Planner/Moderator**  
**Karen L. Long**, Rosenstein, Fist & Ringold, Tulsa

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- 9:00**      **Cyber-bullying in Schools - When High-Tech Threats Equal Liability: Student Rights Versus School Safety**  
Karen L. Long
- 9:50**      **Break**
- 10:00**      **Title IX - The Changing Face of Title IX Liability for School Districts: Section 1983 Liability for Sex Discrimination in Schools**  
Phyllis Walta, Walta & Walta, Hennessey
- 10:50**      **Title IX and School Sports - A Decade of Change: Liability for Schools That Disregard Title IX**  
Doug Mann, Rosenstein, Fist & Ringold, Tulsa
- 11:40**      **Networking lunch** (included in registration)
- 12:10**      **E-Discovery in Schools - Avoiding the Land Mines: What Every Records Retention Policy Must Include** (ethics)  
Andy Fugitt, Center for Education Law, Inc., Oklahoma City
- 1:00**      **What Every Lawyer Should Understand About Employee Due Process and the School Administrator: Top Five Mistakes Schools Make When Administrators are Terminated**  
Julie Miller, Oklahoma State School Board Association, Oklahoma City



- 1:50      **Break**
- 2:00      **The Cutting Edge of Special Education and What it Means to Oklahoma Children: The Role of the Disability Law Center in School/Parent Disability Disputes**  
**Kayla Bower**, Oklahoma Disability Law Center, Oklahoma City
- 2:50      **Adjourn**

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# OBA Launches Oklahoma Bar Circle

## New Service Allows Oklahoma Lawyers to Connect Online

*By Jim Calloway, Director,  
OBA Management Assistance Program*

This month marks the launch of a new OBA member benefit called Oklahoma Bar Circle. It is a social networking site designed for use by Oklahoma lawyers. You may think you have no interest in online social networking. But, this new service is valuable to each and every Oklahoma Bar Association member as a marketing tool among your fellow lawyers.

One shorthand way of thinking of Oklahoma Bar Circle is that it is like Facebook for Oklahoma lawyers, but access is allowed only to other Oklahoma lawyers.

But if you have not participated on Facebook or other online social networking sites before, it may be helpful to think of Oklahoma Bar Circle as an online pictorial directory — just like you might have for a church or civic organization. As you see in the examples accompanying this article, searching for your information in our MyOkbar service yields basic information from our database. It is routine “name, rank and bar number” type of information. With Oklahoma

Bar Circle, you can complete an online profile with lots of content including personal photo, your job description, your work and education history and other items.

“Another use for the site is its mentoring potential,” OBA President Jon Parsley said. “Users can post a message seeking advice, and that message can be read by hundreds of other lawyers who can respond with the information you need.”

Signing up for Oklahoma Bar Circle is easy. You use the same login information as you use for MyOkbar. You can find a link to the new service at our Oklahoma bar Web site at [www.okbar.org](http://www.okbar.org) or the direct link is [www.okbar.org/elemental/barcircle.htm](http://www.okbar.org/elemental/barcircle.htm).

Eventually, you will be able to log onto this service directly from our primary Web site like you do with Fastcase, but because many of you have security set very high in your browser, we want you to be



able to read some information on allowing cookies to make sure that you can log in. This only needs to be done one time.

As we have noted, Oklahoma Bar Circle is a secure, closed community accessible only to Oklahoma lawyers. You shouldn't have the experience that many have had on Facebook of old friends posting your high school pictures online for your current professional colleagues to see. (Of course, if you went to high school with another Oklahoma lawyer, you will just have to rely on their discretion.)

You may note that some of the information isn't really customized for the legal profession yet. We're trailblazers

in this area, with Texas Bar Circle having launched the first online social network for lawyers and California in the process of launching a similar service. So, please understand there will be improvements in the future.

Some of you will use Bar Circle as a marketing platform to make other Oklahoma lawyers aware of the services you provide and obtain referrals from other lawyers.

Many of you have jobs outside of private law practice, and while you will want to have your current employment information online, you may use Oklahoma Bar Circle to show off photos of your family, make a public online journal or join groups relating to hobbies or other non-business interests. Oklahoma Bar Circle need not be just about business. You can join (or create) groups based on your location, interests or hobbies. Oklahoma Bar Circle could be used to talk about first-time parenting, golf or other sports, to discuss and recommend restaurants or to organize a gathering.

In fact, we understand one of the more popular activities in Texas Bar Circle is lawyers who are amateur photographers sharing their photos online.

You can form and join public groups on Oklahoma Bar Circle, but invitation-only private groups are also allowed. We hope that OBA committees and sections will make good use of this resource to increase their member interaction.

My hope is that Oklahoma Bar Circle will not be considered as advertising under the ethics rules since only other lawyers can access it, but we will have to wait for further guidance on that subject.

*When your fellow lawyers look for your information online in MyOkbar, they find this:*

The screenshot shows the Oklahoma Bar Association's MyOkBar interface. On the left is a navigation menu with links: My OkBar, Roster Info, CLE Courses, Publications, MCLE, List Servers, Member Lookup, Bar Journal Forms, FindALawyer Signup, Change Pin, and Logout. The main content area is titled "OBA MEMBERSHIP SEARCH" and includes a "Lookup Again" section with the following details for Jody Rae Nathan: 11685, PO Box 702860, Tulsa, OK 74170-2860. Contact information includes Phone: 918-592-7070, Fax: 918-592-7071, and Email: jodynathan@staufferlaw.com. Other details include Type: Active Member, Status: Good Standing, Admitted: 05/09/1986, By: Examination, and Sections: Insurance Law, Law Office Management and Technology. At the bottom, copyright information for 2008 is provided.

*When your fellow lawyers look for you in Oklahoma Bar Circle, they find:*

The screenshot displays a user profile on the OklahomaBarCircle website. The header includes the site name and navigation tabs: Home, People, Groups, Careers, and Discussions. A search bar is present with the text "Find People: enter name, company or hobby, etc." and a "Search" button. The profile for Jody Rae Nathan is shown, including a profile picture, a "View All" link, and tabs for "Current", "Past", "Education", and "Resume". The "Current" tab is active, showing her as "Attorney at Stauffer & Nathan" from July 2005 to Present. To the right, a "Contact Jody" section offers links for "Connect", "Internet", "Phone", and "Address", along with a "Send Message" button. Below this, a "Jody's Friends" section lists five friends with their profile pictures and names: Mark Robertson, Julie Bays, Cherie Woodward, and Melissa Handke. At the bottom, there is a "Journal" section with one entry titled "Interesting site" and a "Blog" section with one entry titled "Chutzpah -- Stealing money and trying to...".

Once you join Oklahoma Bar Circle, you will build your network by searching for and inviting friends and colleagues. Start with people you know (known as “friends” in Oklahoma Bar Circle) and then connect with their friends and colleagues (“friends-of-friends”). Think of the concept of “six degrees of separation.” You know Sarah, Sarah knows Mike, and Mike knows Kevin Bacon. The same concept works within Oklahoma Bar Circle. You know your law school classmate, your classmate knows Martha, and Martha may know the general counsel of a potential client or the managing partner of a firm you want to work for. Oklahoma Bar Circle shows you these connections and lets you visualize your existing extended network. By building your network and inviting your friends to do the same, your reach throughout the community will grow over time.

Don’t worry that you might end up with friends you don’t want. Oklahoma Bar Circle is permission-based, which means you choose who you network with and add as friends. If needed, you can even block users you don’t want to communicate with.

*We hope to see you participate in  
Oklahoma Bar Circle,  
the Oklahoma Bar Association’s  
latest new member benefit.*

## TIPS FOR OKLAHOMA BAR CIRCLE

- MyProfile is the part of your Oklahoma Bar Circle information that is displayed to other bar members. Your home page is for you to customize and use.
- Only enter the information you want displayed to all other Oklahoma lawyers. You may not want to include your home phone number.
- By default, Oklahoma Bar Circle sends out a lot of e-mail reminders when items are posted by others. On your first visit, you will likely want to go to MyAccount and uncheck several of the boxes under “Send me an E-mail when” and “Opportunity Settings.”
- If you have a blog, you absolutely must enter its feed into My Blog so that everyone can see your latest posts as you make them.

OklahomaBar  
Circle

## FROM THE PRESIDENT

*cont'd from page 1012*

### SEARCH PROCESS

The position of general counsel is an extremely important one within the state's legal community and much effort was devoted to finding the right individual.

I had every confidence in former OBA President Gary C. Clark of Stillwater, who served as Search Committee chair, and his committee members, who included several past presidents as well as current bar leaders. They conducted a nationwide search that involved both print and online resources and were very thorough in their process of considering many qualified candidates. They volunteered many hours of their time, and they deserve a great deal of thanks for their hard work.

Other Search Committee members were Molly Bircher, Tulsa; Luke Gaither, Henryetta; Bill Grimm, Tulsa; Linda Samuel-Jaha, Oklahoma City; Jon K. Parsley, Guymon; David Petty, Guymon; Allen M. Smallwood, Tulsa; Linda S. Thomas, Bartlesville; Harry Woods, Oklahoma City and Michael E. Smith, Oklahoma City.

The Search Committee selected candidates to be interviewed, conducted interviews and recommended three final candidates. The Board of Governors, together with PRC members, conducted additional interviews before deciding upon a final selection.

Of course with Gina assuming the responsibilities of general counsel, it creates a vacancy in the OBA ethics counsel position. A search for that individual is currently underway.

It makes me feel good to have accomplished my #1 goal as OBA president, and I have every confidence that in Gina Hendryx we indeed found the right person for the job.

## ETHICS COUNSEL NEEDED

Applications are being accepted for a full-time Ethics Counsel for the Oklahoma Bar Association. Responsibilities of the Ethics Counsel shall include:

- Answering ethics questions from members of the Oklahoma Bar Association, memorializing advice given and reporting as directed,
- Working with the Legal Ethics Advisory Panel to produce practical written advice or opinions.
- Monitoring attendance and compliance of diversion program attendees,
- Creating, supervising and administering classes to include:
  - (a) Trust account classes, and
  - (b) Ethics classes,
- Coordinating with Management Assistance Program and Lawyers Helping Lawyers Assistance Program regarding participants referred to those programs,
- Teaching ethics, Continuing Legal Education classes, and
- Researching and writing ethics material for the Oklahoma Bar Association Web site and the *Oklahoma Bar Journal*.

The Ethics Counsel shall be a member in good standing of the Oklahoma Bar Association or eligible for such membership and shall have been licensed for at least five (5) years prior to retention. Applicants should have excellent research and writing skills. Private practice experience is strongly preferred. Salary negotiable, depending upon experience. Excellent benefits include retirement, health and life insurance.

Resumes, together with a cover letter and references, should be submitted no later than June 23, 2009, to Ethics Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152 or [ethicscounsel@okbar.org](mailto:ethicscounsel@okbar.org).

**An equal opportunity employer**

# And the 2009 OBA Award Goes to...

*By Renée Hildebrant*



*President Jon Parsley could be presenting an award to someone you respect enough to nominate.*



Don't like forms? Okay. Me neither. So, follow these rules:

- The entire nomination cannot exceed five 8 1/2" x 11" pages. (This includes exhibits.)
- Make sure the name of the person being nominated and the person (or organization) making the nomination is on the nomination.
- If you think someone could receive awards for more than one category, only do one nomination. The OBA Awards Committee may consider the nominee for an award in the category other than one in which you nominated the person.
- You can mail, fax or e-mail your nomination. E-mails should be sent to [jeffk@okbar.org](mailto:jeffk@okbar.org).

The winners of the 2009 OBA awards will be honored in November at the OBA Annual Meeting. The winners will be determined by the OBA Board of Governors upon recommendation of the OBA Awards Committee from nominations received on or before Aug. 14, 2009.

Anyone can submit an award nomination. Anyone nominated can win. So, don't just sit there; start writing your short, concise nomination today. Not sure how to write the nomination? Use the form provided online at [www.okbar.org](http://www.okbar.org).

Winning is exciting! See how happy Pontotoc County Bar Association members were when they received the Outstanding County Bar Association Award. So, be sure and nominate a colleague, or two, today.



*Pontotoc County Bar Association members receive the outstanding county bar award from 2008 OBA Vice President Mike Mordy.*



Here is the list of award categories along with the names of last year's winners:

**Outstanding County Bar Association Award**

for meritorious efforts and activities  
2008 Winners: *Cleveland County Bar Association & Pontotoc County Bar Association*

**Hicks Epton Law Day Award**

for individuals or organizations for noteworthy Law Day activities  
2008 Winners: *Bryan County Bar Association and Tulsa County Bar Association*

**Golden Gavel Award**

for OBA Committees and Sections performing with a high degree of excellence  
2008 Winner: *Work/Life Balance Committee*

**Liberty Bell Award**

for nonlawyers or lay organizations for promoting or publicizing matters regarding the legal system  
2008 Winner: *Central Oklahoma Association of Legal Assistants, Oklahoma City*

**Outstanding Young Lawyer Award**

for a member of the OBA Young Lawyers Division for service to the profession  
2008 Winner: *Christopher L. Camp, Tulsa*

**Earl Sneed Award**

for outstanding continuing legal education contributions  
2008 Winner: *Julie Simmons Rivers, Oklahoma City*

**Award of Judicial Excellence**

for excellence of character, job performance or achievement while a judge and service to the bench, bar and community  
2008 Winners: *Judge Doyle Argo, Oklahoma City & Judge Vicki Robertson, Oklahoma City*

**"Receiving an OBA award meant a lot to me because it was recognition from my peers, which was especially meaningful and gratifying."**

**...Ron Main**

**Fern Holland Courageous Lawyer Award**  
to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession  
*2008 Winner: Robert J. McCarthy, El Paso, Texas*

**Outstanding Service to the Public Award**  
for significant community service by an OBA member  
*2008 Winner: S. Douglas Dodd, Tulsa*

**Award for Outstanding Pro Bono Service**  
by an OBA member  
*2008 Winner: Jim Webb, Oklahoma City*

**Joe Stamper Distinguished Service Award**  
to an OBA member for long-term service to the bar association or contributions to the legal profession  
*2008 Winner: Bob E. Bennett, Ada*

**Neil E. Bogan Professionalism Award**  
to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession  
*2008 Winner: Judy Hamilton Morse, Oklahoma City*

**John E. Shipp Award for Ethics**  
to an OBA member who has truly exemplified the ethics of the legal profession either by 1) acting in accordance with the highest standards in the face of pressure to do otherwise or 2) by serving as a role model for ethics to the other members of the profession  
*2008 Winner: Ronald Main, Tulsa*



*2008 OBA Vice President Mike Mordy presents Tulsa attorney Ron Main with the John E. Shipp Award for Ethics.*

**Alma Wilson Award**  
to an OBA member who has made a significant contribution to improving the lives of Oklahoma children  
*2008 Winners: Renée DeMoss, Tulsa & Judge Richard A. Woolery, Sapulpa*

**Trailblazer Award**  
to an OBA member or members who by their significant, unique visionary efforts have had a profound impact upon our profession and/or community and in doing so have blazed a trail for others to follow  
*2008 Winner: Judge Thomas S. Landrith, Ada*

*Ms. Hildebrant, who serves as OBA Awards Committee chairperson, is trial court administrator for Oklahoma County District Court.*



# The Judicial Nominating Commission Elections

## COUNTIES

**District No. 5  
Oklahoma (Part) \***

**District No. 6**

**Alfalfa  
Beaver  
Beckham  
Blaine  
Canadian  
Cimarron  
Custer  
Dewey  
Ellis  
Garfield  
Grant  
Harper  
Kay  
Kingfisher  
Lincoln  
Logan  
Major  
Noble  
Payne  
Roger Mills  
Texas  
Woods  
Woodward**

The selection of qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 13 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and one at large member elected by the other 12 members. All serve six-year terms, except the member at large who serves a two-year term. Members may not succeed themselves on the commission.

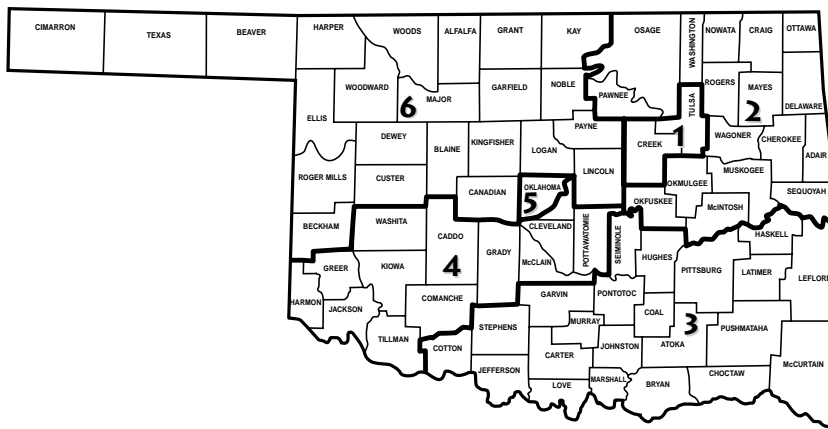
The lawyers of this state play a very important role in the selection of judges since six of the members of the commission are lawyers elected by lawyers. The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2002.) Elections are held each odd numbered year for members from two districts.

## 2009 ELECTIONS

This year there will be elections for members in Districts 5 and 6. District 5 is composed of a part of Oklahoma County. District 6 is composed of counties in the western and north-western part of the state.

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 15, 2009, at 5 p.m. to submit their Nominating Petitions. Forms are available at [www.okbar.org](http://www.okbar.org). Ballots will be mailed on June 5, 2009, and must be returned by June 19, 2009, at 5 p.m.

It is important to the administration of justice that the OBA members in the Fifth and Sixth Congressional Districts become informed on the candidates for the Judicial Nominating Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission. Hopefully, the lawyers in the Fifth and Sixth Congressional Districts will fulfill their responsibility by voting in the election for members of the Judicial Nominating Commission.



**The Congressional  
Districts are those existing  
at the date of the adoption of  
Article 7-B of the  
Oklahoma Constitution.**

## PROCEDURES OF THE OKLAHOMA BAR ASSOCIATION GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).
2. Ten (10) active members of the association, within the Congressional District from which a member of the commission is to be elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more county bar associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.
3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.
4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.
5. If no candidates are nominated for any Congressional District, the Board of Governors shall select at least two candidates to stand for election to such office.
6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association in the respective Congressional District on the first Friday in June, and all ballots must be received at the Bar Center by 5 p.m. on the third Friday in June.
7. Under the supervision of the Executive Director, or his designee, the ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday of June.
8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.

9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.
10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.
11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.
12. The Executive Director, or his designee, shall take possession of and destroy any ballots printed and unused.
13. The election procedures, with the specific dates included, shall be published in the *Oklahoma Bar Journal* in the three issues immediately preceding the date for filing nominating resolutions.

## **NOTICE**

### **JUDICIAL NOMINATING COMMISSION ELECTIONS CONGRESSIONAL DISTRICTS 5 AND 6**

Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 5 and 6 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 15, 2009. Ballots will be mailed on June 5, 2009, and must be returned by 5 p.m. on June 19, 2009.

## **ASSISTANT GENERAL COUNSEL POSITION**

OFFICE OF THE GENERAL COUNSEL  
OKLAHOMA BAR ASSOCIATION

Applications are now being accepted for a position as an Assistant General Counsel for the Oklahoma Bar Association. The Assistant General Counsel assists the Office of the General Counsel in screening, investigating, and prosecuting allegations of unethical conduct by lawyers. Applicants must be admitted to practice law in Oklahoma, have excellent research, writing and litigating skills, as well as extensive trial experience. Private practice experience strongly preferred. Salary negotiable, depending upon credentials and experience. Excellent benefits including retirement, health, and life insurance. Resumes, together with a cover letter and writing sample should be submitted no later than May 30, 2009 to Gina L. Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152 or electronically to [ginah@okbar.org](mailto:ginah@okbar.org).

THE OKLAHOMA BAR ASSOCIATION IS AN EQUAL OPPORTUNITY EMPLOYER

# 2010 OBA Board of Governors Vacancies

**Nominating Petition Deadline: 5 p.m. Friday, Sept. 4, 2009**

## OFFICERS

### President-Elect

Current: Allen M. Smallwood, Tulsa  
Mr. Smallwood automatically becomes OBA president Jan. 1, 2010  
(One-year term: 2010)

### Vice President

Current: Linda S. Thomas, Bartlesville  
(One-year term: 2010)

## BOARD OF GOVERNORS

### Supreme Court Judicial District Three

Current: Cathy M. Christensen, Oklahoma City  
Oklahoma County  
(Three-year term: 2010-2012)

### Supreme Court Judicial District Four

Current: Donna Dirickson, Weatherford  
Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties  
(Three-year term: 2010-2012)

### Supreme Court Judicial District Five

Current: Peggy Stockwell, Norman  
Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties  
(Three-year term: 2010-2012)

### Member-At-Large

Current: Deborah A. Reheard, Eufaula  
(Three-year term: 2010-2012)

## Summary of Nominations Rules

Not less than 60 days prior to the Annual Meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the Executive Director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such Judicial District, or one or more County Bar Associations within the Judicial District may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the Annual Meeting, 50 or more voting members of the OBA from any or all Judicial Districts shall file with the Executive Director, a signed petition nominating a candidate to the office of Member-At-Large on the Board of Governors, or three or more County Bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the Annual Meeting, 50 or more voting members of the Association may file with the Executive Director a signed petition nominating a candidate for the office of President-Elect or Vice President or three or more County Bar Associations may file appropriate resolutions nominating a candidate for the office.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Vacant positions will be filled at the OBA Annual Meeting Nov. 4-6. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2009. Nomination and resolution forms can be found at [www.okbar.org](http://www.okbar.org).

# Volunteers Create Successful Law Day



Tulsa Municipal Judge Dan Crawford (left) is recognized for reaching his goal of taking 1,000 calls during the Ask A Lawyer program. He reached that number the mid-afternoon April 30, then stayed on the rest of the day, closing at 1,072 calls. Judge Crawford reached his mark by staying at the telephone for 12 hours each time the program was scheduled, a total of 96 hours over eight years. He received special permission to continue when he accepted the municipal judge post in 2008. Marvin Lizama, Tulsa County Bar Association Law Week Chair, congratulated Judge Crawford on his achievement.

Lawyers across Oklahoma held many Law Day celebrations over the last few weeks. County bars sponsored events that included luncheons, award ceremonies, fundraisers, presentations at local schools and answering phone calls for free legal advice. Take a look at a few ways Oklahoma lawyers celebrated Law Day 2009.



Tom Hosty answers a call for free legal advice at the Oklahoma City phone bank. More than 2,300 calls statewide were made to this year's Ask A Lawyer.



Bryan County Bar President Chris Jones presents a plaque to Corey St. John, who won second place in the 10th grade statewide Law Day contest. Corey, a student at Bennington Public School, won for his video on Abraham Lincoln.



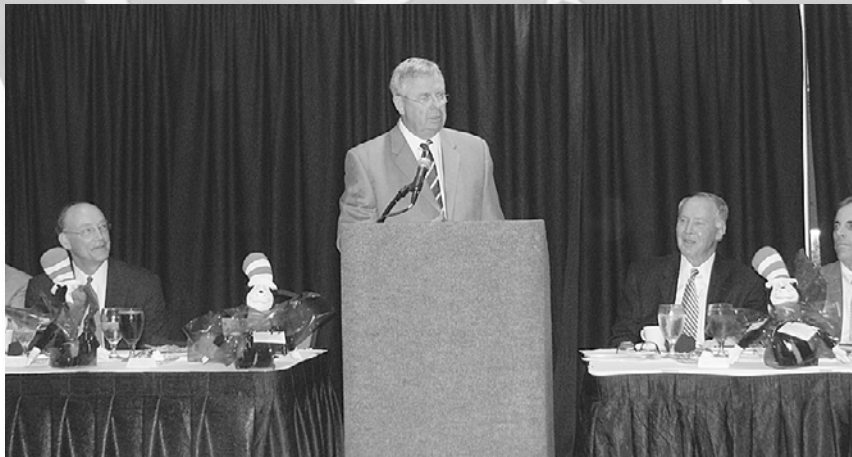
At the Lincoln County Bar Association annual Law Day Picnic, Richard James (right) was honored and presented with his 60-year OBA pin by Pat Gilmore.



*Brant Elmore fields calls for free legal advice at the Cleveland County Ask A Lawyer location.*



*Georgenia Van Tuyl answers a call at the Tulsa County Ask A Lawyer phone bank.*



*Oklahoma Supreme Court Justice James Winchester was the keynote speaker at the Oklahoma County Law Day Luncheon. The Cat in the Hat centerpieces were donated to the Oklahoma County Sheriff's Office for use in dealing with situations with small children.*

*Cindy Goble, Teresa Rendon, Emily Nash and Heather Roberts take part in the Oklahoma City Ask A Lawyer. Ms. Rendon and Ms. Roberts were two of the Spanish-speaking attorneys who volunteered this year.*





*Cleveland County Law Day Chair Don Pope prepares for the Cleveland County Symposium/Open Forum, which compared and contrasted Abraham Lincoln's suspension of the writ of habeas corpus with the recent cases dealing with the Guantanamo Bay detainees. This was held at the City Council Chamber for the City of Norman and was televised on the Norman city local access channel.*



*Lt. Gov. Jari Askins, Justice Ruldoph Hargrave and Madelyn Hargrave at the Seminole County Bar Association Law Day luncheon in Wevoka, where the tradition for celebrating Law Day began.*



*Tulsa County bar members gather for their annual Law Day luncheon.*



*Jahni Tapley, Laura Ross Wallis and David DeBerry at the Tri-County (McCurtain, Pushmataha and Choctaw) Bar Association Law Day Banquet.*



# LAW DAY



# 2009

# THANK YOU

to these individuals and  
groups who made  
Law Day 2009  
a success!



A special thank you to



for providing public service air time and for producing Ask A Lawyer.

## Ask A Lawyer TV Program

Chief Justice James Edmondson

Jon Parsley, OBA President

Moderator: Dick Pryor

Panelists: Julie Bays, Melvin Hall, Kindy Jones,  
Michelle Robertson, Michael Rose, Luke Wallace

Bill Thrash, Price Wooldridge, Earle  
Connors, Mickie Smith and all the  
production staff and crew at OETA

Bruce Fisher

Alana Haynes House

Cheryl Wattlely

## Ask A Lawyer Free Legal Information Statewide Project

All Oklahoma attorneys who volunteered to answer phones

OBA Law Day Committee Chairperson Tina Izadi

Vice Chairperson Giovanni Perry  
and Law Day Committee members

County Law Day Chairpersons

County Bar Association Presidents

## Printing Services

Printing Inc.

## Caterers

Oklahoma County Bar Auxiliary

Tulsa County Bar Auxiliary

Janie Morgan

Trina Burks



# Swine Flew

By John Morris Williams

Okay, I know that pigs do not fly. I just could not help myself from borrowing from the headlines. Of course, it's no longer swine flu — now it's N1B2 or something like that. They had to change the name because it was offensive to someone. I bet the pigs are happy. It may be too late for the Egyptian hogs. News reports state that all swine in that country are to be eradicated. Even though there is evidence there's no danger in eating pork. I wonder if the pork producers will now offer to sponsor something for us with that positive plug.

## WOMEN IN LAW CONFERENCE

Speaking of sponsors. The Women in Law Committee is seeking sponsors for its fall event. On Sept. 22, 2009, they are having Cherie Blair, wife of the former British prime minister, as their keynote speaker. She is a lawyer accomplished in her own right as a barrister and law school professor. This should be a great event. Hats off to the Women in Law Committee for this excellent programming. They have several events planned around this visit, and there are some special sponsorship opportunities that are worthy of notice.



“ I have to admit short of seeing pigs fly there is nothing better than attending these events. ”

## TECHNOLOGY FAIR

On Sept. 24, 2009, we are having a Technology Fair here at the bar center. The event will be much more than a lecture on hardware and software. While we do hope for some great vendors to be present to showcase hardware and software, there will be CLE-quality presentations on practice tips and ethical considerations involving the use of technology. You can count on Management Assistance Program

Director Jim Calloway to put together a first-class event. In addition to the great programming, we want to create a casual environment with free food and refreshments throughout the day. The agenda will be such that OBA members can come for an hour or stay for the day and leave with valuable information on the newest and best uses of technology in their practice.

## OBA ANNUAL MEETING

Serious work has begun on the Annual Meeting. You will be seeing more on that later. So far I can tell you that it will be an incredible — and fun — event. The luncheon speaker is sensational. Also, the information I have seen on the plenary session is pretty exciting. Mark your calendar right now for Nov. 4, 5 and 6 for the Annual Meeting in Oklahoma City.

My apologies for the cheap shot on the headline. However, I really did want to get your attention to the exciting events we have planned for this fall. I have to admit short of seeing pigs fly there is nothing better than attending these events. I am personally excited about all three of them. When you work on this side of the

curtain, you get an idea pretty early about how an event will turn out. Believe me these are first-rate events that are worthy of attending. Be watching the *Oklahoma Bar Journal* and our Web site for more information.

### CONGRATULATIONS

Lastly, I want to congratulate our new General Counsel Gina Hendryx. I have enjoyed working with her as our ethics counsel, and I expect the same high quality work from her as our general counsel. With her moving to the General Counsel's office, we now are searching for a new ethics counsel. There is an ad in this issue of the bar journal and on the Web site to fill this position. If you have an interest in the position, please feel free to contact me with any questions you may have beyond what is contained in our ad.



To contact Executive  
Director Williams,  
e-mail him at [johnw@okbar.org](mailto:johnw@okbar.org)

## Oklahoma Bar Journal Editorial Calendar

### 2009

- August  
**Bankruptcy**  
Editor: Judge Lori Walkley  
[lori.walkley@oscn.net](mailto:lori.walkley@oscn.net)  
Deadline: May 1, 2009
- September  
**Bar Convention**  
Editor: Carol Manning
- October  
**Criminal Law**  
Editor: Pandee Ramirez  
[pandee@sbcglobal.net](mailto:pandee@sbcglobal.net)  
Deadline: May 1, 2009
- November  
**Family Law**  
Editor: Leslie Taylor  
[leslietaylorjd@gmail.com](mailto:leslietaylorjd@gmail.com)  
Deadline: Aug. 1, 2009
- December  
**Ethics & Professional Responsibility**  
Editor: Jim Stuart  
[jtstuart@swbell.net](mailto:jtstuart@swbell.net)  
Deadline: Aug. 1, 2009



*If you would like  
to write an article  
on these topics,  
contact the editor.*

### 2010

- January  
**Meet Your OBA**  
Editor: Carol Manning
- February  
**Indian Law**  
Editor: Leslie Taylor  
[leslietaylorjd@gmail.com](mailto:leslietaylorjd@gmail.com)  
Deadline: Oct. 1, 2009
- March  
**Workers' Compensation**  
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[emily.duensing@oscn.net](mailto:emily.duensing@oscn.net)  
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- April  
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- September  
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- October  
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Deadline: May 1, 2010
- November  
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Deadline: Aug. 1, 2010
- December  
**Ethics & Professional Responsibility**  
Editor: Pandee Ramirez  
[pandee@sbcglobal.net](mailto:pandee@sbcglobal.net)  
Deadline: Aug. 1, 2010

# A Few Web Sites to Visit in 2009

By Jim Calloway, Director, OBA Management Assistance Program

Since I have been devoting a good deal of time to Oklahoma Bar Circle for this issue of the *Oklahoma Bar Journal*, Law Practice Tips will be rather brief.

The last presentation of ABA TECHSHOW 2009 was 60 Sites in 60 Minutes, a program that is likely the longest running tradition of ABA TECHSHOW. I was honored to be asked to be one of the four panelists on that presentation this year. I thought I'd pass along a few sites to you this month.

NICB's VINCheck at <http://tinyurl.com/cavpop> is a service provided to the public to assist in determining if a vehicle has been reported as stolen, but not recovered, or has been reported as a salvage vehicle by cooperating NICB mem-

bers. To perform a search a Vehicle Identification Number (VIN) is required. A maximum of five VINCheck searches can be conducted within a 24-hour period.

iPhone J.D. is a site for lawyers using iPhones. [www.iphonejd.com](http://www.iphonejd.com)

The Association of Corporate Counsel has many downloadable documents and resources that could benefit corporate counsel. [www.acc.com/legal/resources/quickreferences](http://www.acc.com/legal/resources/quickreferences)

DimDim is an interesting Web conferencing service that is free. [www.dimdim.com](http://www.dimdim.com)

Babelfish from Alta Vista translates languages. Just paste in the text. A large number of languages are included in the

database. [www.babelfish.altavista.com](http://www.babelfish.altavista.com)

PC Hell: You've been there before and you likely will be going back again. The site features trouble shooting tips to get you out of the frying pan and back into productivity. [www.pchell.com](http://www.pchell.com)

Apple Small Business – Legal – Even though this site appears to be a marketing site "above the fold," scroll down and you will find that it is really a comprehensive site for all things lawyer and Mac. It has lists with links to all legal-specific Mac software, downloads and links to other resources like Randy Singer's MacAttorney Newsletter. [www.apple.com/business/solutions/legal.html](http://www.apple.com/business/solutions/legal.html)

And, finally, if you want to see all of the sites profiled at ABA TECHSHOW's 60 Sites in 60 Minutes, you can see them all at: <http://tinyurl.com/dll6cm>. Most are very useful, but it was the end of a long conference, so we tossed in several that were just for fun.



# April Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, April 24, 2009.*

## REPORT OF THE PRESIDENT

President Parsley reported he attended the Federal Bar Association reception, dinner honoring ABA President H. Thomas Wells Jr., breakfast reception honoring ABA President Wells, OBA luncheon honoring ABA President Wells, Board of Bar Examiners reception honoring new examiner Scott Williams and swearing-in ceremony of new admittees. He met with OBF President Richard Riggs and conducted interviews with the General Counsel Search Committee.

## REPORT OF THE VICE PRESIDENT

Vice President Thomas reported she attended the Thursday night board dinner at Musashi's Restaurant, March meeting of Board of Governors, OBA lunch for ABA President H. Thomas Wells and participated in the General Counsel Search Committee interviews of selected applicants.

## REPORT OF THE PRESIDENT-ELECT

President-Elect Smallwood reported he attended the March board meeting, worked with the OBA Administration of Justice Task Force, conducted initial interviews with the

General Counsel Search Committee, scheduled a Long-Range Planning/Budget Committee meeting for May 2009 and prepared for the April Board of Governors meeting.

## REPORT OF THE PAST PRESIDENT

Past President Conger reported he attended the Bar Center Facilities Committee meeting, OCU reception honoring ABA President Wells and dinner honoring President Wells.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Women's Hall of Fame induction ceremony, swearing-in ceremony of new admittees, Bar Center Facilities Committee meeting, Leadership Academy meeting, weekly Web editorial meetings, monthly staff celebration, directors' meeting, Federal Bar Association reception, 50-year pin presentation and reception for Fenton Ramey in Canadian County, dinner honoring ABA President H. Thomas Wells, OBA luncheon for ABA President Wells, Board of Bar Examiners reception honoring new examiner Scott Williams and East Central Judicial District Judicial Conference in McAlester.

He also met with OBF President Richard Riggs.

## BOARD MEMBER REPORTS

**Governor Brown** reported he attended the OBA Bench and Bar Committee meeting, OBA luncheon for ABA President H. Thomas Wells, ABA Summit on Racial and Ethnic Bias in the Courtroom in Dallas and the OBA Board of Governors meeting and luncheon. **Governor Carter** reported she attended the March board meeting, an American Inns of Court CLE program and conducted a settlement conference in U.S. District Court, Northern District of Oklahoma as a volunteer adjunct settlement judge. **Governor Chesnut** reported he attended the March board meeting, the Thursday night board dinner and the meeting of the Ottawa County Bar Association. **Governor Christensen** reported she attended the reception at Justice Kauger's home for the OCU Legal Affair donors and award recipients, OBA March Board of Governors meeting, OBA Bar Center Facilities Committee meeting, OBA Women in Law Conference (which she reports was outstanding), OBA Women in Law Committee planning meetings, OBA Bench and Bar

Committee meeting, Oklahoma County Bar Association luncheon reception honoring ABA President Wells and monthly meeting. **Governor Dirickson** reported she attended the March board meeting and Thursday night gathering, Custer County Bar Association meeting, Clients' Security Fund meeting, Women in Law Committee meeting, CLE sponsored by Women in Law and OBA lunch for ABA President H. Thomas Wells. **Governor Dobbs** reported he attended the March board meeting, Professionalism Committee meeting, Civil Procedure Committee meeting, luncheon for ABA President H. Thomas Wells, and he delivered a program on settlement for Judge Swinton's class. **Governor Hixson** reported he attended the Board of Governors Thursday night dinner, March board meeting, Canadian County Bar Association presentation of OBA 50-year pin and reception honoring Fenton Ramey and Canadian County Community Sentencing Planning Council. **Governor McCombs** reported he attended the Thursday night social function with the board, Friday Board of Governors meeting and McCurtain County Bar luncheon. He was also the emcee for retired Judge Gail Craytor's 77th birthday party. **Governor Moudy** reported she attended the March Board of Governors dinner and meeting in Oklahoma City, Women in Law CLE in Oklahoma City and the Okmulgee County Bar meeting where she presented District Judge John Maley with his 50-year pin. **Governor Reheard** reported she

attended the March Board of Governors meeting, Women in Law spring CLE "Law Practice Stimulus Package," reception at Justice Kauger's home for the OCU award winners, *i.e.*, Cathy Christensen and other recipients and McIntosh County Semi-Annual Bar meeting. She also finalized plans for the spring CLE and fall banquet as the Women in Law Committee chair. **Governor Stockwell** reported she attended the March Board of Governors meeting, Cleveland County Executive Committee meeting, Cleveland County Bar Association monthly meeting and CLE, swearing-in ceremony for new Cleveland County Judge Michael Tupper and OBA lunch for ABA President H. Thomas Wells. **Governor Stuart** reported he attended the March Board of Governors dinner and meeting, Pottawatomie County Bar Association meeting and a luncheon for ABA President Wells. He also received and monitored Administration of Justice Task Force updates.

#### **REPORT OF THE YOUNG LAWYERS DIVISION**

Governor Rose reported he attended the Federal Bar Association meeting, YLD board meeting, Leadership Academy meeting, OBA lunch for ABA President H. Thomas Wells, swearing-in ceremony of new admittees, and he met with OU Dean Andy Coats.

#### **COMMITTEE LIAISON REPORTS**

Governor Reheard reported she attended a very successful Women in Law CLE on Friday. She also reported

that a Women in Law banquet will be held on Sept. 22, 2009, and thanks to Director Douglas' ability to skillfully negotiate, they have obtained Cherie Blair at a substantially reduced rate as the speaker for this event. Governor Moudy reported that the OETA Ask A Lawyer is April 30 and Law Day is May 1. She encouraged everyone to sign up and participate with their local county bar or at the OETA studio.

#### **GENERAL COUNSEL REPORT**

A written status report of the Professional Responsibility Commission and OBA disciplinary matters for March 2009 was submitted for the board's review.

#### **APPOINTMENT TO COUNCIL ON JUDICIAL COMPLAINTS**

The board approved President Parsley's reappointment of Gary C. Clark, Stillwater, to a second five-year term expiring June 30, 2014.

#### **DOMESTIC VIOLENCE FATALITY REVIEW BOARD**

The board approved President Parsley's recommendation to send the resumes of Gail Stricklin, Oklahoma City, Cindee Pichot, Noble, and Stasha Martin McBride, Oklahoma City, to the attorney general for appointment to the position now held by Gail Stricklin, for a two-year term expiring June 30, 2011.

#### **NEW POLICY FOR SUBMITTING RULE CHANGES**

President Parsley reported that the proposed policy change was prompted by the recent submission of a rule change to the Supreme

Court, which was subsequently denied. The board approved the new policy on submitting rule changes.

### **SALE OF GENERAL COUNSEL VEHICLE**

Executive Director Williams reported that the vehicle driven by past General Counsel Murdock has been sold.

### **OBA AWARDS**

Governor Stuart reported that the Awards Committee met, and recommends no changes in the awards to be handed out this year. He encouraged the board members to talk to their local county bar leaders and to the local district judges to help in obtaining names to be submitted for each award. The board approved the list of awards to be presented this year.

### **LEADERSHIP ACADEMY REPORT**

Director Douglas reported that they just completed their fourth series of two half-day sessions with the Leadership Academy. She said there is going to be a reception for the Leadership Academy on May 21, 2009, at 5 p.m. prior to the board dinner. President Parsley

asked that each board member attend the reception.

Governor Thomas and Past President Conger praised Director Douglas for her tireless efforts in working with the Leadership Academy. Past President Conger commended Donita Douglas, Linda Thomas and Laura McConnell-Corbyn for their efforts in putting the Leadership Academy program together and for its success. He reports that he has received nothing but positive feedback from the members and thanked Donita for "what she always does so well."

### **OKLAHOMA BAR CIRCLE**

Director Calloway reported that the OBA will be announcing a new member benefit called Oklahoma Bar Circle in the very near future. He explained that the circle is an online social network site much like "Facebook," but for Oklahoma lawyers only. The link for the circle will be put on the Web site front page once there is substantial content at the site. He states that the message to our members is that it is an online pictorial directory which takes literally five minutes to set up.

### **EXECUTIVE SESSION**

The board voted to go into executive session, met in executive session in which Professional Responsibility Commission members were invited to attend and voted to come out of executive session.

### **GENERAL COUNSEL VACANCY**

The board voted unanimously that Gina Hendryx be hired as the new general counsel for the Oklahoma Bar Association. The board then spoke with Michael Smith, the duly appointed representative of the Professional Responsibility Commission, who gave the concurrence of the PRC as to the hiring of Gina Hendryx as the new OBA general counsel. (The PRC previously voted in its meeting with a quorum to give their concurrence to the hiring of Gina Hendryx.)

### **NEXT MEETING**

The Board of Governors will meet at the Oklahoma Bar Center in Oklahoma City on Friday, May 22, 2009.

*For summaries of previous meetings, go to [www.okbar.org/obj/boardactions](http://www.okbar.org/obj/boardactions)*

# A Challenge to Oklahoma Lawyers

By Richard A. Riggs

The trustees of the Oklahoma Bar Foundation would like to issue a challenge to all Oklahoma lawyers. No, that challenge is not to get out your checkbook and make a contribution to the foundation. This challenge will take a little more effort. **Our challenge is that each Oklahoma lawyer take time to familiarize himself or herself with the Oklahoma Bar Foundation – how it is funded, how it operates, and, most importantly, how it distributes its money.** If you take us up on that challenge, you will appreciate how the foundation strives to fulfill its purpose — *Lawyers Transforming Lives through the Advancement of Education, Citizenship and Justice for All*. Further, you will have armed yourself with a cogent argument to counter those negative perceptions about lawyers. Finally, you may even be moved to write a check.

You will get a good idea of the foundation's activities by reviewing the grants it awarded in 2008. In its normal, annual grant cycle, the foundation awarded 19 grants, totaling over \$800,000. In a separate grant cycle, the foundation awarded six grants, totaling over \$42,000, to Oklahoma counties for needed courthouse improvements,

made possible by an award received by the foundation. Those courthouse grants were described in the foundation's March bar journal article. These grants are in addition to several annual scholarships awarded by OBF and in total, \$912,000 were granted by the foundation in 2008.

In previous bar journal articles, I have attempted to describe the valuable public service provided by several of the foundation's worthy grant recipients. This month I would like to focus on several recipients of 2008 grants that respond to the problems of domestic violence and neglect in Oklahoma.

One such organization is the Family Shelter of Southern Oklahoma, located in Ardmore. This organization offers 24-hour emergency shelter, crisis intervention, violence education, court advocacy, life skills training, and specialized children's trauma counseling, all directed toward victims of domestic violence and sexual assault and their children. The foundation's grant enabled the shelter to establish a Love County satellite office in Marietta. Historically, many victims in Love County, faced with the prospect of having to drive 45 miles to Ardmore to avail

themselves of the shelter's services, chose not to seek help. That problem was alleviated by the establishment of the satellite office in Love County.

The foundation also awarded a grant to Oklahoma CASA Association Inc. Most Oklahoma lawyers are familiar with the activities of CASA and its efforts on behalf of abused and neglected children. The foundation's grant provided funding for the statewide CASA Association's "Pathways to Permanency" conference in March of this year. At that conference, 254 child advocates, in addition to recognizing outstanding contributions to CASA, participated in training sessions covering areas such as forensic interviewing, trials for termination of parental rights, the Indian Child Welfare Act, impacts of domestic violence, and understanding the developing brains of children. In 2008, 3,770 children were represented by over 1,300 CASA volunteers.

One of the foundation's 2008 grants funded the divorce visitation arbitration program sponsored by the Cleveland County Center for Children and Families Inc. This program is specifically designed to address the fear and anxiety experienced by

children during times of intense parental conflict. The program provides educational support for parents and children, supervised visits, counseling and mediation services, all of which are designed to improve communication and facilitate decision making focused on the long-term interests of the children. The Center for Children and Families is the only agency offering free supervised visitation services in Cleveland County. Most of its services are provided to clients who are directed by court order to obtain such assistance. This program served 630 clients in 2008.

As you familiarize yourself with the foundation, you should be aware that the foundation actively monitors grant recipients and their use of OBF funds. Grant recipients are required to submit quarterly reports detailing expenditures to be funded with OBF grants and to provide detailed information regarding the recipient's activities. Through such efforts, OBF seeks to assure not only that grants

are properly spent but that they are spent in a manner to assure the greatest positive effect.

Are lawyers really "Transforming Lives" through these programs? Let me cite one example — a client served by the Family Shelter for Southern Oklahoma. The Love County Sheriff's Department sought the assistance of the shelter's Love County victim advocate to assist a 29-year-old woman suffering abuse from her husband of seven years. The abusive husband was suffering from mental illness but had recently ceased taking his medication. Through the assistance of the shelter's victim advocate, a protective order was issued and the abusive husband was placed in a facility that could manage his illness. Further, the victim advocate worked with the abused woman to help her obtain employment; the advocate worked with the children's school to arrange a safety plan for use if, by chance, the abusive father appeared on the scene; and legal assistance in

obtaining a divorce was provided to the victim. This victim may easily have been one who would have been hesitant to seek the shelter's services in Ardmore and for whom the Love County satellite office provided critically needed help.

I have described only three of the 19 deserving agencies receiving OBF grants in 2008. All of the foundation's grant recipients have success stories to tell that are as touching as the Love County story above. Once you have accepted our challenge, I hope you will be moved to consider how you, as an Oklahoma lawyer, may participate in the foundation's efforts in 2009 and future years. If those efforts include financial support, I encourage you to become an OBF Fellow, thereby becoming a part of the constructive, and perhaps even life saving, transformation of Oklahoma lives.

*Richard Riggs is president of the Oklahoma Bar Foundation. He may be reached at [richard.riggs@mcafeetaft.com](mailto:richard.riggs@mcafeetaft.com).*







# FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

Name: \_\_\_\_\_  
(name, as it should appear on your OBF Fellow Plaque) County

Firm or other affiliation: \_\_\_\_\_

Mailing & Delivery Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-Mail Address: \_\_\_\_\_

☐ I want to be an OBF Fellow **now** – Bill Me Later!

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

☐ NewLawyer 1st Year, \$25 enclosed  
& bill as stated

☐ NewLawyer within 3 Years, \$50 enclosed  
& bill as stated

☐ I want to be recognized as a *Sustaining Fellow* & will continue my annual gift of  
**at least \$100** – (initial pledge should be complete)

☐ I want to be recognized at the leadership level of *Benefactor Fellow* & will annually  
contribute **at least \$300** – (initial pledge should be complete)

*Lawyers Transforming  
Lives through educa-  
tion, citizenship and  
justice for all. Join the  
OBF Fellows today!*

Signature & Date: \_\_\_\_\_ OBA Bar #: \_\_\_\_\_

Make checks payable to:  
Oklahoma Bar Foundation • P O Box 53036 • Oklahoma City OK 73152-3036 • (405) 416-7070

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☐ *If we wish to arrange a time to discuss possible cy pres  
distribution to the Oklahoma Bar Foundation and my  
contact information is listed above.*

***Many thanks for your support & generosity!***

# Utility Assistance Programs in Oklahoma

By Karl Rysted

One of the major factors affecting people living at the poverty level is utility costs. At Legal Aid, we often hear stories from potential clients that include a mishmash of problems which may or may not have a solution in the legal system. Sound familiar? The following resources provide solutions for people having trouble paying their utility bills:

## 2-1-1 ASSISTANCE PROGRAMS

The number of public and private agencies which provide assistance, not only for utilities but all types of assistance, is greater than you might expect. In fact, it would be impossible to list just the ones dealing with utility assistance in such a short article. So it is very helpful to know that there is a "one-stop shop" statewide by just calling 2-1-1. Seven agencies around the state provide information and referrals for assistance through the 2-1-1 programs. In case of a problem connecting, many also have alternative numbers:

**2-1-1 OF SOUTHEASTERN  
OKLAHOMA  
(580) 332-0558**

**2-1-1 TULSA HELPLINE  
(918) 836-4357**

**FIRST CALL 2-1-1  
NORTHEASTERN  
(918) 336-2255**

**NORTH CENTRAL 2-1-1  
(580) 237-4357**

**NORTHWESTERN  
OKLAHOMA 2-1-1  
(580) 256-6819**

**SOUTHWESTERN  
OKLAHOMA 2-1-1  
(580) 355-7575**

Members of a tribe may need to contact their tribal office.

## LIHEAP

Congress has enacted LIHEAP (Low-Income Home Energy Assistance Program), which has been providing assistance since 1982. LIHEAP provides formula grants to states and tribes to help low-income families pay their heating and cooling bills. LIHEAP applications have reached record levels and are projected to increase by about 1.5 million or 25 percent over last year's levels. According to the National Energy Assistance Directors' Association, the number served this year is

expected to reach about 7.3 million households, 800,000 more than the record set in 1985.

LIHEAP is a federal program that recently hit record levels with the downturn in the economy. The state Department of Human Services and 30 tribes administer the LIHEAP program in Oklahoma. LIHEAP provides seasonal assistance to low-income households to assist with winter heating bills and provides help for some families who have received utility cut-off notices. DHS contracts with the Oklahoma Department of Commerce to provide weatherization services for eligible families. To find out where to apply in your area, contact 2-1-1.

## OTHER TYPES OF UTILITY ASSISTANCE

Individual utility companies also have programs for payment arrangements pursuant to rules of the state Corporation Commission, and charitable organizations such as churches also provide assistance. For example, the Salvation Army has a "Share The Warmth" program designed to help people over age 62, individuals

with disabilities and those whose immediate cash resources simply cannot cover their home heating expenses. If a household is part of the LIHEAP program, they cannot apply for the Salvation Army's "Share The Warmth" funds, but if LIHEAP funds have been exhausted, they may apply.

#### **WATER ASSISTANCE**

The home energy utilities discussed above are regulated by the state Corporation Commission, but municipal utilities such as water and rural water districts are not. Unfortunately, assistance programs outside of Oklahoma City are virtually non-existent. Consumers who need help paying their Oklahoma City water bill should call 2-1-1 for referral to the Salvation Army.

#### **TELEPHONE ASSISTANCE**

In Oklahoma, the Lifeline Program provides a \$7.85 monthly discount for local telephone service. Customers thus pay between \$7 and \$11 a month for basic service,

depending on where they live. Fifty percent of the standard installation fee is also waived. The program is for low-income consumers and those receiving assistance from Vocational Rehabilitation, including, but not limited to, aid to the deaf and hard of hearing. The enhanced Lifeline Service program provides \$1 a month basic telephone service and the 50 percent waiver of the installation fee.

Qualifying individuals must live on current or former tribal land (64 of Oklahoma's 77 counties include former tribal land). The consumer must also be participating in one of the following programs to be eligible: Food Stamps, Medicaid, Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), Vocational Rehabilitation, Oklahoma Sales Tax Relief, Bureau of

**“ LIHEAP provides seasonal assistance to low-income households to assist with winter heating bills and provides help for some families who have received utility cut-off notices. ”**

Indian Affairs general assistance, tribally administered TANF, Head Start or the Free School Lunch Program. To apply, the consumer should call 2-1-1 for a referral to their DHS office or call their tribal office.

*Karl Rysted is a staff attorney with Legal Aid Services in Oklahoma City. He wrote this article with research assistance from volunteers Ashland Viscosi & Eric Durham.*





*Celeste Johnson*

## COMMUNITY OUTREACH OPPORTUNITIES IN OKLAHOMA COUNTY

This month, our focus is on the Oklahoma County Bar Association's Young Lawyers Division's efforts to make a difference in their community.

The OCBA Young Lawyers Division Community Outreach Committee chair is Celeste Johnson of Phillips Murrah. The committee has three community service projects scheduled over the summer. The first is Saturday, May 30 from 10 a.m.-1 p.m. Volunteers will be counting donations from the Walk to Cure Diabetes held by the Juvenile Diabetes Research Foundation. This project is taking place at the OSU-Oklahoma City campus, 900 N. Portland Ave. Volunteers are needed and lunch will be provided.

On Saturday, June 27 from 9 a.m.-12 p.m., the YLD is volunteering at the Regional Food Bank of Oklahoma located at 3355 S. Purdue in Oklahoma City. Volunteers will be sorting food, filling

program bags and stuffing mail. On Thursday, July 23 from 6-7:30 p.m., the OCBA/YLD is volunteering at the Children's Hospital located at 1200 Everett Drive. Volunteers will be making crafts, playing games with kids and spending time with families.

If you would like to get involved with the OCBA/YLD Community Outreach Committee, please contact Celeste Johnson at (405) 606-4759, [ctjohnson@phillipsmurrah.com](mailto:ctjohnson@phillipsmurrah.com). Membership in the OCBA/YLD is open to attorneys of all ages practicing 10 years or less and who are members of the OCBA. The OCBA/YLD would like to thank the following firms and companies for their ongoing support of YLD projects: Phillips Murrah, Chesapeake Energy, Crowe & Dunlevy, Burton & Associates, McAfee & Taft, Oklahoma Legal Copies, Beale Professional Services and Mahaffey & Gore.

## YLD MENTOR BRIANA ROSS

Briana Ross is a YLD board member and mentor to TU law students. She said the time commitment was minimal and the rewards were great for the students and mentors.

"I have enjoyed acting as a mentor to TU law students this past academic year," she said. "In fact, I was able to help one TU law student obtain summer employment after meeting with the student to discuss his interest in real estate law."

The Mentoring Program does not obligate mentors to help students find employ-



*Briana Ross*

ment but, as it turned out, Briana's employer decided shortly thereafter that it needed a law clerk.

"Since I had met and discussed with this student his interest in real estate law and I knew he would be a good match with our company, he was the first person we contacted," she said.

Mentoring law students is a great way for attorneys to give back to the profession. Briana Ross is the vice president of commercial underwriting for American Eagle Title Insurance Co.

The OBA/YLD wants to hear from those individuals or groups who are really making a difference in their community, their city or the state. Likewise, we want to hear about any ideas you may have, or projects about which you have heard, that are not yet in practice but which could be of great benefit to the people of Oklahoma. Our committee will take these ideas and projects and put them together with lawyers looking for ways to volunteer.

*Please e-mail your stories and ideas to [rrose@mahaffeygore.com](mailto:rrose@mahaffeygore.com).*

# May

- 11 OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819  
**OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 12 OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Deborah Reheard (918) 689-9281
- 13 OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 14 OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 15 OBA Lawyers Helping Lawyers Assistance Program Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom Riesen (405) 843-8444
- 16 OBA Title Examination Standards Committee Meeting;** Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100
- 19 OBA Civil Procedure Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229  
**OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark Jr. (405) 232-4271
- 21 OBA Leadership Academy Reception;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 22 OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 23 OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478
- 25 OBA Closed – Memorial Day Observed**
- 27 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Julie Rivers (405) 232-6357  
**OBA Member Services Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Keri Williams Foster (405) 385-5148

# Calendar



- 28 OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675  
**OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- 29 Oklahoma Bar Foundation Trustee Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

# June

- 4 OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 5 Oklahoma Trial Judges Association Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: A.J. Henshaw (918) 775-4613
- 9 OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Deborah Reheard (918) 689-9281
- 11-13 Solo and Small Firm Conference;** Tanglewood Resort at Lake Texoma; Contact: OBA Management Assistance Program (405) 416-7008
- 12 OBA Board of Governors Meeting;** Tanglewood Resort at Lake Texoma; Contact: John Morris Williams (405) 416-7000

- 15 OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
- OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 16 OBA Law-related Education Foundations of Democracy Institute;** Tulsa; Contact: Jane McConnell (405) 416-7024
- OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 17 OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 19 OBA Board of Editors Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Melissa DeLacerda (405) 624-8383
- 20 OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100
- 25 OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675
- 18 OBA Title Examination Standards Committee Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kraettli Epperson (405) 848-9100
- 20 OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
- OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 20-22 OBA Law-related Education PACE Institute;** Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 23 OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675
- OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- 24 OBA Board of Governors Meeting;** Stillwater; Contact: John Morris Williams (405) 416-7000
- 25 OBA Young Lawyers Division Committee Meeting;** Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478
- 28-31 OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Board of Bar Examiners (405) 416-7075

## July

- 3 OBA Closed – Independence Day Observed**
- 8 OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 10 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 14 OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Deborah Reheard (918) 689-9281
- 17 Oklahoma Bar Foundation Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Nancy Norsworthy (405) 416-7070



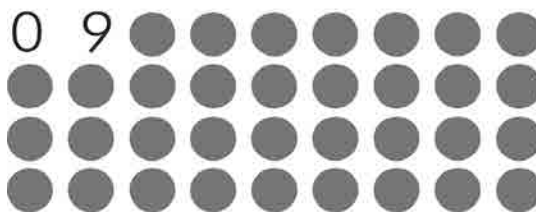
*This master calendar of events has been prepared by the Office of the Chief Justice in cooperation with the Oklahoma Bar Association to advise the judiciary and the bar of events of special importance. The calendar is readily accessible at [www.oscn.net](http://www.oscn.net) or [www.okbar.org](http://www.okbar.org).*

## Inaugural OBA Leadership Academy Class Set to Graduate

The first OBA Leadership Academy class has met all the requirements for graduation, and a ceremony is set for May 21 at the Oklahoma Bar Center.

Over the last 10 months, the 28 participants took part in training activities to build teamwork, success and leadership while teaching them how to keep their newly acquired skills. Graduates are **Melinda L. Alizadeh-Fard**, Law Office of Melinda L. Alizadeh-Fard, Edmond; **Lauren Allison**, Law Office of Lauren Lester Allison, Bristow; **Lindsey Andrews**, Echols & Associates, Oklahoma City; **Todd W. Blasdel**, Rowland & Blasdel PLLC, Oklahoma City; **Anthony L. Bonner Jr.**, Cathcart & Dooley, Oklahoma City; **Christine Cave**, Meyer Cave PLLC, Oklahoma City; **Robert Faulk**, Faulk Law Firm PLLC, Enid; **Diane A. Hammons**, Cherokee Nation, Tahlequah; **Kimberly Hays**, Kimberly K. Hays PLLC, Tulsa; **Cory Hicks**, Field & Hicks PLLC, Guymon; **Carrie E. Hixon**, Mordy & Mordy PC, Ardmore; **Tanayia Hubler**, Hubler & Reynolds Law Office, Bartlesville; **Tina**

## Oklahoma Bar Association 2009 Leadership Academy



*Interested in applying for the 2009-2010 class?  
Details on the process will soon be posted on  
[www.okbar.org](http://www.okbar.org) and in the OBA E-News.*

**Izadi**, Oklahoma Attorney General's Office, Oklahoma City; **Annette Jacobi**, Oklahoma State Department of Health, Oklahoma City; **Lindsay McDowell**, Rhodes, Hieronymus, Jones, Tucker & Gable, Tulsa; **LeAnne McGill**, Cathy Christensen PC, Oklahoma City; **Sharisse**

**O'Carroll**, O'Carroll &

O'Carroll, Tulsa; **D. Scott Pappas**, D. Scott Pappas, Attorney at Law, Stillwater; **Amber Peckio-Garrett**, Garrett Law Office PC, Tulsa; **Richard Rose**, Mahaffey & Gore PC, Oklahoma City; **Briana Ross**, American Eagle Title Insurance Co., Tulsa; **Megan Simpson**, Washita County District Attorney's Office, Cordell; **Robert Raymond Snow**, Snow Law Firm PLLC, Tulsa; **Justin Stout**, Wright, Stout & Wilburn, Muskogee; **Christian Szlichta**, Oklahoma Corporation Commission, Oklahoma City; **Jeff Trevillion**, City of Oklahoma City; **Judge Russell Vaclaw**, Associate District Judge, Washington County, Bartlesville; and **Jennifer White**, Eldridge Cooper Steichen & Leach PLLC, Tulsa.



*Law-related Education Committee member David Hopper and LRE Committee Chair Chip Clark judge entries in the Project Citizen Program, sponsored by the OBA. Student portfolios were on display at the Oklahoma Bar Center on May 6. Students work in teams to identify a public policy problem in their community. They research the problem, evaluate alternative solutions, develop their own solution in the form of a public policy, and create a political action plan to enlist local or state authorities to adopt their proposed policy. The final step is the development of a portfolio to showcase their work.*

## SAVE THE DATE

The OBA is hosting several big events in the coming months, so mark your calendars now.

### ■ Solo and Small Firm Conference

June 11-13, Tanglewood Resort, Lake Texoma

A great lineup of CLE programming focused on the solo or small firm lawyer — and also focused on these economic times. Register at [www.okbar.org](http://www.okbar.org).

### ■ Women in Law Conference

September 22, Oklahoma City

Keynote speaker is Cherie Blair, lawyer and wife of the former British prime minister. Watch your bar journal and [www.okbar.org](http://www.okbar.org) for more information.

### ■ Technology Fair

September 24, Oklahoma Bar Center

Featuring programming and vendors who will present valuable information on the newest and best uses of technology in your practice.

### ■ OBA Annual Meeting

November 4-6, Sheraton Hotel, Oklahoma City

Final details on events and speakers are still being worked out, but you can plan on a phenomenal CLE selection and exciting social events.

## OBA Member Resignation

The following OBA member has resigned as a member of the association and notice is hereby given of such resignation:

Melissa Anne Wakefield Estes  
OBA No. 20199  
406 George Ave.  
St. Louis, MO 63122

## Changing Firms?

If you've recently moved, don't forget to change your address in the OBA roster. You can update this yourself by logging on to my okbar. First, go to [www.okbar.org](http://www.okbar.org) and click on the tab for "my okbar." Log in to my okbar using your bar number as the username and your PIN number as the password. Click on "roster info." Once you've changed your information, click "submit." If you see the red "your roster has been updated," you were successful. Also, don't forget to change your e-mail address and phone number!

## Calling All Writers

We need you on the "Back Page." Share your story or poetry that conveys humor, intrigue or inspiration to others. Submissions should be short, a maximum of two double-spaced pages or one and 1/4 single-spaced pages, and preferably related to the practice of law. E-mail Carol Manning with submissions or questions at [carolm@okbar.org](mailto:carolm@okbar.org).



## Holiday Hours

The Oklahoma Bar Center will be closed Monday, May 25 for Memorial Day and Friday, July 3 to observe Independence Day.



## Bar Journals Take Summer Vacation

Look for the next bar news edition of the Oklahoma Bar Journal (with color cover) to be published Aug. 8. You'll still be receiving court material in June and July. Deadline for submissions for the next news issue is July 20.



# Kudos

**Justice Steven Taylor and Bob Burke** will be presented University of Oklahoma Regents' Alumni Awards on May 15. The two are among 10 OU alumni receiving the honor this year.

Several attorneys received awards at the Oklahoma County Law Day Luncheon on May 1. **L.E. Dean Stringer** was presented the Journal Record Law Day Award for his reputation as a passionate mentor in the legal profession. Thirty-two attorneys were recognized as 2009 Leadership in Law Honorees by the Journal Record. Legal Aid Services of Oklahoma Executive Director **Gary Taylor** received the Howard K. Berry Sr. Award from the Oklahoma Bar Foundation. Additionally, the Liberty Bell Award was presented to Oklahoma County Sheriff John Whetsel.

**Jonathan Forman** has been selected the 2009-2010 IRS Professor in Residence. This position reports directly to the IRS chief counsel and provides advice and assistance on a wide array of legal issues. Mr. Forman will serve a nine-month term starting Sept. 1.

**Jan Singelmann** has been appointed vice chair of the American Bar Association Minorities in the Profession Committee for the Young

Leaders Division. Mr. Singelmann will sit on the committee during the 2009-2010 bar year. The MIPC addresses issues facing minority lawyers in the ABA Young Leaders Division and lawyers throughout the country. The committee also promotes equal access for minority lawyers to the ABA and encourages diversity within the organization.

**Gary Payne**, chief administrative law judge for the Oklahoma State Department of Health, has been named to the faculty of the National Association of Hearing Officials annual training conference, which will be held in September in Boise, Idaho. He will be teaching docket management and decision writing.

**Brad West** was recently inducted as an Oklahoma Fellow into the American Bar Foundation. The organization is dedicated to advancing justice through rigorous research on the law, legal practices and the laws impact on our society.

**Patrice Dills Douglas** was recently elected mayor of Edmond. She was sworn in on May 4 in Edmond City Council Chambers, for a two-year term. She serves as the executive vice president of the commercial team for First Fidelity Bank in Edmond.

The American Law Institute has elected **Leonard Court** and **John N. Hermes** for membership. Elected membership is currently lim-

ited to 3,000 federal and state judges, lawyers and law professors, and members are selected on the basis of professional achievement and demonstrated interest in the improvement of the law.

**D. Mike McBride III** was recently presented the Award for Distinguished Service by the Federal Bar Association at the 34th Annual Indian Law Conference in Santa Fe, N.M. The award is given annually to an FBA member who has exhibited outstanding achievement, distinguished leadership and participation in the Indian Law Section activities throughout the nation.

# On The Move

**Hartzog Conger Cason & Neville** announces that **Ronald L. Ripley** has joined the firm as of counsel. Previously, he was senior vice president and general counsel of Dobson Communications Corp. and a private practice attorney in Oklahoma City and Norman. He graduated from the OU College of Law. His practice will include business, securities and commercial law, corporate governance and litigation.

**Fellers Snider** announces that **Stephen J. Moriarty** has joined the firm as a

shareholder and director. Mr. Moriarty received his B.A. from the State University of New York at Stony Brook and his J.D. from TU. His practice areas include bankruptcy reorganization, business finance and restructuring, real estate bankruptcy, mortgage bankruptcy litigation, creditor's rights, receivership and insolvency law.

**McAfee & Taft** announces that **Richard P. Hix** and **Giannina Marin** have joined the firm. Mr. Hix's practice includes commercial litigation, including disputes involving breach of contract, Uniform Commercial Code issues, business torts, oil and gas, environmental, tax, class actions, banking, antitrust, insurance, intellectual Property, employment, and securities. He earned his J.D. from Duke University in 1977. Ms. Marin is a transactional lawyer whose practice is concentrated in the areas of family wealth planning and general business transactions. She received her J.D. from the University of Florida College of Law in 2008. She served as an intern for Judge Juan R. Torruella of the U.S. Court of Appeals for the 1st Circuit. Additionally, she is fluent in Spanish and Italian.

**GableGotwals** announces that **Laura Hill** has joined the firm as an associate in the Tulsa office. Ms. Hill recently served as the assistant dean of institutional assessment at the TU College of Law. She received her B.A. with academic distinction in political science from OU and received her J.D. with highest honors from TU. While a student at TU, she was the notes and comment

editor of the *Tulsa Law Review*. Her practice includes environmental law, regulatory law, complex litigation, federal practice and appellate practice.

**Doerner, Saunders, Daniel & Anderson LLP** announces that **Jeffrey C. Rambach** will join the firm. He received his B.S. from Boston University, his law degree from Tulane University Law School, and an L.L.M. in taxation from Georgetown University Law School. He served as law clerk for Judge D. Irvin Couvillion, United States Tax Court, Washington, D.C., from 1987 to 1989. He then entered private practice. His practice includes all areas of federal and state taxation, trust and estates, mergers and acquisitions, business formations, tax litigation and tax-exempt organizations.

**Barrow & Grimm PC** announces that **Thomas D. Robertson** has joined the firm on an of counsel basis. Mr. Robertson has represented employers in labor and employment law matters for more than 30 years. He counsels employers on labor and employment issues, represents companies before administrative agencies and defends against claims asserting discrimination, wrongful discharge, or wage and hour violations. He is a past chairman of the OBA Labor and Employment Law Section. He received his B.A. from Austin College and his J.D. from Emory University.

**Debra Lumpkins** has become an assistant attorney general for Missouri in the consumer protection division. Previously, she was the managing attorney of the

consumer unit at Gateway Legal Services.

**Crowe & Dunlevy** announces the addition of **Walter R. Echo-Hawk Jr.** to serve as of counsel to the firm's Indian law and gaming practice group. Mr. Echo-Hawk has previously served as a tribal judge, scholar, activist and lawyer practicing in cases involving Native American religious freedom, prisoner rights, water rights, treaty rights and reburial/repatriation rights. He has worked as a lawyer for the Native American Rights Fund for more than 35 years. He earned his law degree from the University of New Mexico.

**GlassWilkin PC** announces that **Courtney M. Wolin** has joined the firm as an associate. Ms. Wolin graduated from OU with a bachelor of business administration in accounting and a minor in economics. She received her J.D. from OU with distinction in 2003. Her practice includes business litigation, employment and labor law, real estate and banking law.

**Phillips Murrah PC** announces that **Jason Dunn** has joined the firm's litigation and trial practice department. Mr. Dunn is a litigator who practices commercial, business and product liability matters. He graduated from University of Missouri School of Law, where he served as associate editor-in-chief for the *University of Missouri Law Review*. Prior to joining the firm, he worked for a law firm in Missouri and for an international accounting firm.

Stevenson Law Firm PLLC announces that **Bill Baze** has joined the firm as an associate attorney. Mr. Baze graduated with honors from the OU College of Law in 2001. Prior to joining the firm, he worked as an appellate attorney for the Oklahoma Indigent Defense System. His practice includes criminal law, family law, and criminal and civil appellate practice.

Brewer, Worten, Robinett announces that **Jess M. Kane** has become an associate with the firm. Mr. Kane graduated from the OU College of Law in 2008. His practice includes general civil litigation, agriculture, oil and gas, real estate and commercial transactions.

## At The Podium

**Chief Judge Robert H. Henry**, U.S. Court of

Appeals for the 10th Circuit, was the featured speaker at the eighth annual James F. Howell "Country Lawyer" Lectureship at Rose State College in April. Judge Henry's lecture was given in recognition of National Law Day, a day set aside each year for people across the country to celebrate the law and the legal system.

**Judge David Lewis** of the Oklahoma Court of Criminal Appeals represented Oklahoma at the ABA national summit, "Justice is the Business of Government," this month. Participants will develop responses to the challenges facing all branches that relate to the justice system, including such issues as the costs of incarceration, unequal access to and inadequate representation in the legal system, substance abuse services and mental health intervention.

**David J. Hyman** was a presenter at the national teleconference, "Exclusionary Conduct: The Current Landscape of Provider vs.

Payor Litigation," in April. The teleconference was sponsored by the American Health Lawyers Association, and issues relating to anti-trust and the exclusion of physicians and hospitals from health insurance provider panels were discussed.

**Amir M. Farzaneh, Jason A. Reese, William Wells and Frank B. "Skip" Wolfe III** spoke at the "Immigration Law and Employer Compliance: A New Era for Employer Liability in Oklahoma" seminar in Oklahoma City this month. The attorneys spoke on topics ranging from "Newly Created Crimes under HB-1804" to "Immigration Compliance under Federal Law."

On April 24, **Garvin A. Issacs** presented a lecture, "On Being a Trial Lawyer in 2009," to the South Dakota Trial Lawyers Association in Sioux Falls, S.D.

**Articles for the Aug. 8 issue must be received by July 20.**

*Compiled by Rosie Sontheimer*

## IN MEMORIAM

**James Michael Bachman** of Oklahoma City died April 20. He was born Feb. 26, 1941, in Sherman, Texas, and grew up in Seminole. He received his J.D. from OCU School of Law and worked as an agent for the FBI before working with his father in the family business, Bachman Services, where he served as president and CEO. As a member of Westminster Presbyterian Church, he served as a

deacon and member of the session. Memorial donations may be made to The Westminster Foundation, 4400 N. Shartel, Oklahoma City, 73118.

**Darven L. Brown** of Tulsa died April 11. He was born May 22, 1925. **He served as a Marine Sergeant in World War II in the 2nd Marine Division and participated in the landings on the islands of Tarawa, Saipan,**

**Tinian and Okinawa and occupied Nagasaki, Japan. He was awarded the Silver Star for bravery on Tinian.** He went on to graduate from the University of Wichita and the University of Arkansas Law School. In 1956, he became city attorney for the City of Tulsa and also served as assistant to Mayor Jim Maxwell for three years. Additionally, he served as an attorney for the Tulsa

Development Authority for 45 years, the Tulsa County Home Finance Authority, and the Oklahoma Bar Association Ethics Trial Panel for seven years. Donations may be made to the Tulsa County Bar Foundation Benevolence Program.

**R**ichard Kane of Bartlesville died April 20. Mr. Kane was born on Oct. 15, 1917, in Bartlesville. He graduated from the University of Kansas in 1939. **He was commissioned as a Second Lieutenant after his ROTC involvement. In July 1941, he was called to active service. He ended his service with a rank of Major.** Upon his return, he finished his law degree at the University of Michigan Law School. He began his law practice in Bartlesville in 1946 and worked as an attorney until his retirement in 2000. In addition to his practice, he also owned and operated a cattle operation in Kiowa County, Kan., and Bartlesville. He also engaged in the oil and gas business as an operator and royalty owner. He was involved in numerous charitable organizations including Rotary, Chamber of Commerce, YMCA, Salvation Army, Boy Scouts and many other organizations. Due to his extensive community service, Richard Kane Elementary School was named after him in 1985.

**J**ack Ramsey Parr of Oklahoma City died April 14. Mr. Parr was born May 10, 1926, in Dallas, Texas, and

was raised in Edmond. **He enlisted in the U.S. Navy in 1944 serving in the Pacific Theatre in WWII and then aboard the U.S.S. Iowa during the Korean Conflict.**

After his initial service, he graduated from the OU College of Law. His career accomplishments include serving as assistant United States attorney under U.S. Attorney Paul Cress and being appointed Oklahoma County district judge by Gov. Henry Bellmon in 1965. **His Navy career led him to serve as a Captain in the Navy JAG Corps.** He was a 32nd Degree Mason for 55 years. Memorial contributions may be made to the HCR Manor-Care Foundation — Hospice Memorial Fund, P.O. Box 10086, Toledo, Ohio, 43699-0086.

**J**ohn R. Robertson Jr. of Oklahoma City died April 29. He was born March 24, 1932, in Houston, Texas. **He was a Commander of the Military Police and CID in Ft. Sam Houston 85th Division.** He was a University of Texas graduate and was also in the first graduating class of OCU Law School. He was a respected oil and gas attorney for many years.

**W**illiam "Bill" Rogers of Oklahoma City died March 23. He was born Sept. 18, 1930, in Carlsbad, N.M., and moved to Oklahoma to attend OU. **He was a member of the U.S. Air Force for 3 years, serving in the intelligence sector.** He then began his law career. He served as a

law clerk to Judge Alfred P. Murrah on the 10th U.S. Circuit. He served as general counsel and president of the ACLU and was a leader in the movement supporting gay, lesbian, bisexual and transgender rights. He received the OBA Courageous Advocacy Award in 1985.

**D**olorin Carl "D.C." Thomas of Oklahoma City died March 30. He was born on Oct. 29, 1928, in Shawnee. **He served in World War II as a Corporal in the US Army.** After his service, he went on to graduate with a B.A. from OU. He earned his law degree from OCU Law School in 1959. He was a member of the Oklahoma College of Trial Lawyers and the Oklahoma Criminal Defense Lawyers Association. Additionally, he served as the president of the Oklahoma County Bar Association. He was the recipient of The Clarence Darrow Award, The Lord Erskine Award and The Law and You Foundation Community Interest Award. During his free time, he enjoyed playing the banjo, piano, guitar, mandolin and trombone. He formed the band the Bar Flies in 1967, playing for nursing homes, children's hospitals, county bar events and just for fun. He loved the annual deer and elk hunts in Colorado and the camaraderie of the poker games at night. He also enjoyed fishing at Toledo Bend, in Canada, and the lakes and farm ponds across Oklahoma.

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OKLAHOMA CITY AV RATED INSURANCE DEFENSE FIRM seeks associate attorney with 0-3 years experience. Excellent research and writing skills required. All replies kept confidential. Resume and writing sample should be sent to "Box L," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, 73152.

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# Plaintiff's Motion to Amend Writing Style and Brief in Support

By Tom Hird

The time has come for change to certain legal-writing traditions. For example, plaintiff did not and will not "COME NOW." It does nothing, and the judge won't miss it. Spend your preamble making a dramatic statement or emphasizing the theme of your case.

Another example of obsolescence is the separate motion and brief. Courts throughout the state have allowed a motion and its brief to be combined into one document. Continuing to separate them is a waste. The waste is accentuated if you put much effort into the separate motion, as the court may view it like a vestigial organ that once had a purpose but now just takes up space.

## INTRODUCTION

Before plodding ahead with leaden numbered paragraphs, consider an introduction that tells the story of your case. You should usually assume the judge or law clerk reading your brief either knows nothing

about the case or perhaps knew something once but has since forgotten. Judges have more of a caseload than even you do, and your particular case is but one of many for them. An introductory or background section helps plant the story of your case in the judge's mind.

An introductory section has added purpose in the summary judgment briefs that by rule require numbered paragraphs. As well as presenting the theme of your case, you can present facts you want the judge to know that do not qualify for numbering (*e.g.*, immaterial facts, disputed/undisputed facts, uncategorized facts).

If not required, consider whether you even want to do any numbering of paragraphs. If stories were well told in numbered paragraphs, you would see it done more often.

## ARGUMENT

Shorter briefs are better. As are shorter sentences. And shorter

words. Eliminate all the lawyerly verbiage that helps make people hate lawyers. Is there boilerplate (*e.g.*, summary judgment standards) you routinely paste into your briefs without any thought? Don't. If a particular aspect of that law is especially helpful to your case, *apply* it in the text of your argument. Do not over emphasize. Or over Capitalize. Or over comma. Or over footnote.<sup>1</sup>

Vitriol is detested, and taking the bait leaves you indistinguishable from opposing counsel. Carefully organize your argument and employ headings and subheadings to provide helpful guideposts. Use modern technology. Be creative. Persuasively make your case and then stop.

## CONCLUSION

Not all traditions are bad. The trick in every context is to combine the best of the old and new. You may start a brief with a high-tech imbedded image of a crucial piece of evidence, but you should end it with the time-honored tradition of respectfully submitting the brief to the court. Judges deserve respect. They work hard and do their best to objectively decide their cases. It is something to remember the next time your lack of objectivity makes you want to complain about one.

Respectfully submitted.

*Mr. Hird practices in Tulsa.*

1. "Nothing paralyzes smooth writing as easily as a plague of footnotes.... All flow and coherence are lost." Robert B. Smith, *The Literate Lawyer* 28 (3d ed., Michie Law Publishers 1995).



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