



Northern Natural Gas Co. v. L. D Drilling, Inc. et. al Case 08-CV-1405

Corey Neller

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### 3 Attachments



2017-07-11 OPINION.pdf 2017-08-23 Notice of Appeal.pdf 2017-09-28 proposed deadlines.pdf

Judge Gale,

Good afternoon. Pursuant to the parties' agreement and order of this court, the following summary of recent events and attached proposed schedule is submitted on behalf of Northern Natural Gas Company in the above-referenced matter.

In early 2016, this Court examined whether to lift a long-standing stay issued by Judge Bostwick in August of 2011. *See* Doc. 550, 561. Ultimately, on May 18, 2016, this Court lifted the stay. In doing so, this Court found: "[t]he pending state case and the Tenth Circuit appeal do not include claims for nuisance..., and they clearly will not 'resolve' these claims, as the court has already pointed out." *See* Doc. 561, p. 2 (citing Doc. 550, at p. 7 – 8). The Court relied upon its analysis in February 2016: "The court cannot accept defendants' premise that the above-described court decisions 'have effectively disposed of Northern's remaining claims.' The question of whether Northern had title to storage gas that was in the Expansion Area after June 2, 2010...may be a factor in whether a nuisance existed, but it is not necessarily *dispositive* of a claim for nuisance under Kansas law. Both the Tenth Circuit and the Kansas Supreme Court recognized as much." *See* Doc. 550, p. 7 (citing *L.D. Drilling, Inc.*, 697 F.3d at 1271-72 ("The state case addressed whether Northern still had title to the natural gas that migrated several miles away from the Field. Here, on the other hand, the issue is whether Defendants' production from their wells in the expansion area unreasonably interfered with Northern storing its natural gas in the Field. Therefore, the state court's decision...cannot make Defendants' interference with Northern's storage field reasonable.")) *ONEOK Field Svcs. Co.* 296 Kan. at 928 (noting same distinction).

Following this Court's May 2016 decision to lift the stay, nothing has occurred that should prevent this matter from moving toward resolution, or that should alters this court's analysis in Doc 550 or 561. The following is a brief timeline of recent events:

1. On July 11, 2017, in the Condemnation Case (*Northern v. Approx. 9,117.53 Acres, et. al.*, Case No. 10-CV-1232), the Tenth Circuit held:
  - a. Defendants did **not** own storage gas remaining in the ground on the date of the June 2, 2010 FERC Certificate; and
  - b. Defendants' arguments to the contrary rely upon a "fundamental misconception about the rule of

capture, which the Landowners and Producers suggest gives them vested property interests in all gas that has migrated, or will ever migrate, to their property. The rule of capture, however, confers only a right to *produce* the migrated gas. It confers no right to the gas itself. To capitalize on their opportunity to 'capture' the gas, the Landowners and Producers would have had to actually produce the gas and would then own the produced gas...Rather than yielding an unconstitutional taking, Kansas law merely prohibits the Landowners and Producers from recovering the value of storage gas that Northern both (1) originally owned and injected, and (2) acquired certificate authority over. .... Northern owned all of the gas within its certificated boundaries after the date of certification...The Producers only had a right to produce the gas until the date of certification.

See July 11, 2017 Opinion of the Tenth Circuit in the Condemnation Case, attached hereto.

2. On July 25, 2017, the Pratt County Court issued its Memorandum Opinion denying Northern's Motion to Reconsider the August 15, 2014 Memorandum Opinion. (By way of reminder, on August 15, 2014 the Pratt County Court issued a Memorandum Opinion granting summary judgment against Northern on issues relating to ownership of migrated storage gas in the Extension Area following the June 2, 2010 Certificate. Northern timely filed a motion for reconsideration and modification of the August 15, 2014 Memorandum Opinion.)
3. On July 31, 2017, before the Tenth Circuit, in the Condemnation Action, Producers filed a Petition for Rehearing. To support their request for rehearing, Producers argued that the case should be stayed pending a final resolution by the Kansas Appellate Courts of the issues relating to ownership of migrated storage gas in the Extension Area following issuance of the June 2, 2010 FERC Certificate.
4. On August 23, 2017, Northern timely appealed the Pratt County Court's Summary Judgment Memorandum Opinion. A copy of Northern's Notice of Appeal is attached.
5. On August 28, 2017, with knowledge of (a) the Pratt County Court's August 15, 2014 Memorandum Opinion and (b) Northern's appeal therefrom, the Tenth Circuit issued an Order denying Producers' Petition for rehearing in the Condemnation Case. *See Doc. 639*. By denying Producers request for rehearing, the Tenth Circuit implicitly found no ambiguity in Kansas law regarding ownership of migrated storage gas in the Extension Area following issuance of the June 2, 2010 FERC Certificate.
6. On August 31, 2017, Producers, in the Condemnation Case, filed a Motion to Stay Issuance of Mandate. Northern filed its Response to Producers Motion to Stay Issuance of Mandate on September 6, 2017. Producers filed their collective reply thereto on September 12, 2017.
7. On September 18, 2017, Producers' filed a motion to transfer the Pratt County appeal to the Kansas Supreme Court. Northern filed a response opposing that motion on September 21, 2017. Producers' filed a reply the following day. No order has issued on Producers' motion to transfer.

Based on communications with opposing counsel, Northern is informed that Producers will be requesting a stay of this case until the Pratt County case is decided by the Kansas Supreme Court. Yet another stay will push this matter well beyond ten years since its initial filing. *See Doc. 1*, filed December 23, 2008. By way of example, when Northern appealed the Pratt County court's first summary judgment order in June 2010, the case was transferred directly to the Kansas Supreme Court, promptly briefed and argued, and a decision did not issue until nearly three years later, in March 2013. "When a federal court has jurisdiction, it has a 'virtual unflagging obligation...to exercise' that authority." *See Doc. 561*. This Court should enter a scheduling order that places this case on a path toward prompt resolution.

That the Pratt County case is currently on appeal should not affect the Court's obligation to move this case forward. Indeed, once the mandate issues in the Condemnation Case, the Tenth Circuit's opinion will be binding. Though the Tenth Circuit opinion was issued in a separate case, it involved the same parties and should have the same effect in both cases. Known as the "mandate rule," the mandate informs the district court of what it must do to implement the appellate decision on remand and limits further proceedings to the scope of the mandate. The lower court "must comply strictly with the mandate rendered by the reviewing court" and "may not deviate" from the mandate. *Huffman v. Saul Holdings Ltd P'ship*, 262 F.3d 1128, 1132 (10th Cir. 2001); see also, e.g., *United States v. Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir. 1991) ("When a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it must be followed by the trial court on remand." (emphasis in original)). Thus, to the extent ownership of storage gas after issuance of the June 2010 FERC Certificate remains an issue with respect to Northern's nuisance claim or any counterclaim advanced by Producers, the Tenth Circuit's opinion provides the necessary guidance for this Court to follow.

Northern has attached a proposed scheduling order to move this case forward. Northern further informs the Court that Mark Coldiron and Corey Neller are set to participate in trial (for approximately 3 weeks) in United States District Court for the Western District of Oklahoma in case styled *Blocker, et. al. v. ConocoPhillips Company*, Case No. 17-CV-00246-D with a Trial Docket of September 3, 2018.

Thank you.

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