

CROWLEY | FLECK PLLP ATTORNEYS



North Dakota Supreme Court Rejects Flared Gas Royalty Class Actions

In a split decision with important precedential value to the oil and gas industry, the North Dakota Supreme Court on May 31, 2016 affirmed the dismissal of a class action seeking the payment of royalties on flared gas in North Dakota. In *Sarah Vogel v. Marathon Oil Company*, 2016 ND 104, ___ NW2d ___ the plaintiff sought to represent a class of mineral owners seeking declaratory relief and money damages for failure to pay royalties on gas flared from the Elk USA 11-17H well, operated by Marathon Oil Company. Vogel asserted the royalties were due under Section 38-08-06.4 of the North Dakota Century Code (the “Flaring Statute”) which provides that gas may be flared for the first year of production and thereafter either wells must be connected to a gas gathering system, the gas put to some alternative beneficial use, or the well must be shut-in. The Flaring Statute authorizes the North Dakota Industrial Commission (“Commission”) to enforce the statute and provides that royalties and production taxes shall be paid on wells “operated in violation” of the statute. Vogel also sought to enforce the payment of royalties under the Environmental Law Enforcement Act (“ELEA”), codified as Chapter 32-40 of the North Dakota Century Code and sought damages for common law conversion and waste.

Vogel and a number of similar actions naming other producers were commenced in the fall of 2013. All of the other actions were removed to the United States District Court for the District of North Dakota and in May, 2014, the Federal District Court dismissed the other actions without prejudice on the grounds that the plaintiffs in those actions had failed to exhaust their administrative remedies. The plaintiffs in the federal actions filed notices of appeal to the Eighth Circuit Court of Appeals but voluntarily dismissed those appeals. In March, 2015 the Mountrail County District Court, Judge Todd Cresap presiding, similarly dismissed Vogel’s claim against Marathon and Vogel appealed the dismissal to the North Dakota Supreme Court (the “Court”).

In a three-judge majority opinion, the Court first addressed the Flaring Statute and held that the Flaring Statute did not include a private right of action for damages but may only be enforced by the Commission. Addressing the ELEA, the Court held that remedies under the ELEA are cumulative and do not replace other statutory or common law remedies, that the ELEA provides a remedy only if the Commission “fails or refuses to act,” and that Vogel is required to seek administrative remedies from the Commission before seeking relief under the ELEA. Finally the majority opinion affirmed that Vogel’s claims for damages under common law theories of waste and conversion were pre-empted by the Flaring Statute and that Vogel is required to exhaust her administrative remedies

before pursuing any of her claims in court.

In a concurring opinion, Chief Justice VandeWalle agreed that any claim for royalties arising under the Flaring Statute must be pursued before the Commission, but expressed concern that the majority opinion could be read to give the Commission exclusive jurisdiction over claims for royalties on flared gas which might arise under lease provisions. Justice Kapsner wrote a dissenting opinion in which she asserted that a proper claim had been asserted under the ELEA, citing decisions from Michigan and Minnesota under state environmental protection acts.

The majority opinion has important precedential impact for at least two reasons. First, the similar class actions removed to federal court were dismissed without prejudice, and undoubtedly would have been reinstated if the Court had disagreed with the federal court's decision dismissing the federal actions on similar grounds. Additionally, however, the decision will impact other claims which might be asserted under the ELEA, including actions for damages arising from oil and produced water spills.

Marathon in *Vogel* was represented by John Morrison and Uriah Price of Crowley Fleck PLLP.

For any questions, contact the following:

North Dakota:

John Morrison

(701) 224-7534

jmorrison@crowleyfleck.com

Montana:

Adam Olschlager

(406) 252-3441

aolschlager@crowleyfleck.com

Wyoming:

Lori McMullen

(307)673-3000

lmcmullen@crowleyfleck.com



To be added to the mailing list please contact Tiffani Swenson at tswenson@crowleyfleck.com

www.crowleyfleck.com | [Forward to a Friend](#) | [Web Version](#) | [Unsubscribe](#)

DISCLAIMER – Crowley Fleck prepared these materials for the reader's information, but these materials are not legal advice. We do not intend these materials to create, nor does the reader's receipt of them constitute, an attorney-client relationship. Online readers should not act upon this information without first obtaining direct professional counsel. Specifically, please do not send us any confidential information without first speaking with one of our attorneys and obtaining permission to send us information. Thank you.