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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gadeco, LLC, Appellant, v. Industrial Commission of the State of North Dakota and Slawson Exploration Company, Appellees.	Supreme Court No. 20120344 Mountrail County No. 31-10-C-143

Appeal from Judgment Affirming Decision of the
Industrial Commission of North Dakota

Dated September 13, 2012

District Court, Northwest Judicial District

Mountrail County, North Dakota

The Honorable Judge Richard L. Hagar, Presiding

GADECO, LLC'S PETITION FOR REHEARING

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STATEMENT OF ISSUES

[1] The issues for rehearing are as follows:

1. Whether the NDIC decision is supported by the law as announced by this Court;
2. Whether an insubstantial change in the surface location of a well invalidates an invitation to participate; and
3. Whether credible evidence in the record supports a finding that the change in the surface location of the Coyote well was insubstantial.

STATEMENT OF CASE

[2] The history of this case can be found in the prior briefs of the parties and the Court's opinions in Gadeco v. Industrial Commission, 2012 ND 33, 812 N.W.2d 405 (hereinafter "Gadeco I") and Gadeco v. Industrial Commission, 2013 ND 72, --- N.W.2d --- (hereinafter "Gadeco II"). This is a petition for rehearing submitted by Gadeco, LLC ("Gadeco"), which respectfully submits that the Court has overlooked or misapprehended the law and facts in the case and that the Court should reverse the case and remand with instructions to the NDIC to deny Slawson Exploration Company's ("Slawson") application for a risk penalty against Gadeco.

[3] Specifically, there are three issues that the Court's opinion in this case does not adequately address. First, the Court's opinion holds that the "location" to be applied under N.D.A.C. § 43-02-03-16.3(1)(a)(1) is the surface location, but the NDIC's decision is founded upon this term meaning the "completion location." Second, the NDIC's standard of decision announced in its order does not allow for insubstantial changes in the surface location of a well, but this Court affirmed the NDIC's order based upon the change being insubstantial. Third, neither the NDIC nor any reviewing court has identified which evidence in the record supports a finding that the changed surface location of the Coyote well was insubstantial.

STATEMENT OF FACTS

[4] The facts in this case are generally stated in this Court's prior opinions and do not require further discussion here. As they relate to this petition, the relevant facts are that the surface location of the Coyote well was not the same surface location that was described in the invitation to participate and that the change in the surface location of the Coyote well was not insubstantial.

LEGAL ARGUMENT

A. The NDIC decision is fundamentally based on a legal conclusion that this Court's opinion rejected

[5] The NDIC's legal conclusions must be sustained by the law. N.D.C.C. § 38-08-14(3). Statutory interpretation is always subject to de novo review by this Court. M.M. v. Fargo Pub. Sch. Dist. No. 1, 2010 ND 102, ¶ 12, 783 N.W.2d 806. The requirement of N.D.C.C. § 38-08-14(3) is that the NDIC order may only be affirmed if it was sustained both by the law and by the evidence. In this case, it was not. "The Commission must provide some indication that it is complying with the law before a reviewing court can afford any deference to its decisions." Gadeco I, 2012 ND 33, ¶ 21 (citing Hystad v. Industrial Commission, 389 N.W.2d 590, 598).

[6] The Court's opinion in this matter holds as a matter of law that the term "location," as used in N.D.A.C. § 43-02-03-16.3(1)(a)(1), means "the surface location of the well." Gadeco II, 2013 ND 72, ¶ 18. The NDIC's decision in this case is not based on a finding that the surface location did not substantially deviate from the invitation to participate. It is, quite to the contrary, premised on its finding that "the only change was the surface location …, therefore the completion location did not change." (NDIC Order No. 19700, p. 4 [A., p. 48]) (emphasis supplied). The NDIC expressly stated that it "believes the crucial well location is the 'completion location'…, not the surface location." Ibid. The NDIC's decision in this case is contrary to the law

that this Court has held applies to the case: the relevant "location" in N.D.A.C. § 43-02-03-16.3(1)(a)(1) is the surface location. Gadeco II, 2013 ND 72, ¶ 16.

[7] The Court stated in its opinion that "the Commission has discretion and administrative expertise to evaluate compliance with the requirements for an invitation to participate. Gadeco II, 2013 ND 72, ¶ 19. The NDIC's discretion does not extend to basing its decisions upon an incorrect reading of the law. N.D.C.C. § 38-08-14(3). Because the NDIC's decision to impose a risk penalty is fundamentally based upon an incorrect interpretation of the law which this Court explicitly rejected, the NDIC's decision must be reversed.

B. Changes in the surface location of a well invalidate the invitation to participate

[8] The Court ordered the NDIC on remand to explain the standard it was using. Gadeco I, 2012 ND 33, ¶ 19. The NDIC at no point referred to its standard being that insubstantial changes in the location of a well would not invalidate an invitation to participate. Rather, its announced standard was that the surface location is irrelevant and the completion location is the one to be specified in the invitation to participate. (NDIC Order No. 19700, p. 4 [A., p. 48].) The NDIC has given no indication that any change in the location would be tolerated, only that the surface location does not matter. Its standard is therefore that changes in the location will invalidate the invitation to participate.

[9] The Court has now held that the surface location does matter. The NDIC has not stated that its decisions allow for insubstantial changes in a well location. Nor has the NDIC explained how such a standard, if applied, is supported by the law and by its administrative expertise. Because the NDIC, in its exercise of discretion and application of administrative expertise has not suggested such a standard, this Court should not apply it now.

C. The change in the surface location of the Coyote well was substantial

[10] If the Court nevertheless holds that an insubstantial change in the surface location of a well does not invalidate the invitation to participate, this case must still be reversed.

[11] The Court stated that "[e]vidence in this record establishes that a reasonable mind might accept as adequate the Commission's findings that the actual well did not substantially deviate from Slawson's invitation to participate." Gadeco II, 2013 ND 72, ¶ 20. The finding referred to was never made by the NDIC. The NDIC actually found that the surface location was changed. (App, p. 4.) The NDIC did not find that the change was insubstantial.

[12] At no time has the NDIC or a reviewing court identified which specific evidence in the record supports a finding that the change in the location of the well was insubstantial. The NDIC's factual findings should only be sustained when supported by substantial evidence. N.D.C.C. § 38-08-

14(3); Hanson v. Industrial Commission, 466 N.W.2d 587, 590 (N.D. 1991). In this case, there is no specific evidence actually supporting a finding that the changed surface location is insubstantial.

[13] In fact, the NDIC has expressly stated in this case that the change in the surface location of the Coyote well was substantial. As the NDIC pointed out, "it is becoming commonplace for multi-well sites to be drilled in the Bakken play and there is a considerable amount of cost savings when such operations are utilized versus drilling each well from its own single-well site." (NDIC Order No. 19700, p. 4 [A., p. 48].) These considerable savings in the cost of drilling a well from the actual surface location of the Coyote well instead of from the location stated in the invitation to participate are clearly substantial, and therefore so is the change in the well's location. Any finding that the change was insubstantial is not supported by credible evidence and is clearly erroneous.

[14] Because the NDIC never made a finding of fact that the change in the Coyote well's surface location was insubstantial, the Court should not assume it to have been made. However, if such a finding can be found between the lines in the NDIC's decision, the Court must at the very least remand this matter to the NDIC to explain how the specific evidence in this

case supports the finding in light of the considerable cost savings of moving the well.[1]

D. Standard on remand

[15] The NDIC should not be permitted to change its standard of decision. The history of this case is that the NDIC ruled against Gadeco without giving a clear reason for doing so that would enable this Court to decide if the NDIC erred. Gadeco I, 2012 ND 33, ¶ 19. Then, on remand, the NDIC held no additional hearings but announced its standard for decision, which is based entirely on what the Court has now clearly held is an incorrect reading of the law. (NDIC Order No. 19700, p. 4 [A., p. 48].) Cf. Gadeco II, 2013 ND 72, ¶ 16.

[16] The NDIC's standard of decision in this case is that the well's location cannot be moved, even insubstantially, under the original invitation to participate. The Court has filled in the blank in that standard by holding that the surface location is the one that matters under the law as written. Therefore, the proper rule as announced by the NDIC and corrected by this Court is that any change in the surface location of the well invalidates the invitation to participate.

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[1] The parties have not previously briefed this issue, but they could not have done so because the NDIC had not announced this standard of decision or finding of fact. To the extent that "[i]ssues not raised in the trial court cannot be raised for the first time on appeal," Gadeco II, 2013 ND 72, ¶ 13 (quoting Ruud v. Frandson, 2005 ND 174, ¶ 10, 704 N.W.2d 852), the Court effectively created this issue, which was not before the NDIC or the district court, and therefore should not prohibit the parties from discussing it now.

[17] Under that standard, Slawson is not entitled to a risk penalty in this case. The Court should reverse with instructions to deny Slawson's application for a risk penalty.

CONCLUSION

[18] The Court has announced the law, and the NDIC's decision is contrary to the law. It must be reversed. On remand, the NDIC should be given instructions to deny Slawson's application for a risk penalty because the changed surface location invalidated the invitation to participate.

[19] In the alternative, even if an insubstantial change in the surface location of a well is acceptable, there is no evidence in the record to support a finding that the change in this case was insubstantial. In either event, the NDIC's decision must be reversed.

Dated this 20th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on today's date, I served the foregoing document on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

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Dated this 20th day of May, 2013.

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