



ORIGINAL

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See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

TRIBUTARY RESOURCES, LLC,)

Plaintiff/Appellee,)

vs.)

CITIZEN ENERGY, III, LLC;)

CITIZEN MINERAL, LLC; and)

BCE-MACH III LLC,)

Defendants/Appellants,)

MEP OKLAHOMA, LLC;)

CONTINENTAL RESOURCES, INC.;)

LONGREACH ENERGY)

INVESTMENTS, LLC; OGI, INC.;)

ORCHID AD3, LLC; SAFE-N-SOUND)

LAND COMPANY, LLC; SAMUEL J.)

COMBS, a/k/a SAMUEL JAY COMBS;)

SHARON ANN COMBS; ELIZABETH)

RENEE DECKER; WARREN E.)

DECKER, a/k/a WARREN EUGENE)

DECKER, Individually and as Trustee)

of THE ELIZABETH RENEE DECKER)

2013 REVOCABLE LIVING TRUST)

DATED AUGUST 23, 2013; ANNE S.)

DECKER, a/k/a ANNE SHERYL)

DECKER, Individually and as Trustee of)

THE ELIZABETH RENEE DECKER)

2013 REVOCABLE LIVING TRUST)

DATED AUGUST 23, 2013; EDDIE)

DALE DOTSON, Individually and as)

Trustee of THE PEGGY JO LASH)

Case No. 122,162

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

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LIVING TRUST and as Trustee of)
 THE PEGGY JO LASH FAMILY)
 TRUST; RONNA JO DOTSON,)
 Individually and as Trustee of THE)
 PEGGY JO LASH LIVING TRUST and)
 as Trustee of THE PEGGY JO LASH)
 FAMILY TRUST; PEGGY JO LASH,)
 Individually and as Trustee of THE)
 PEGGY JO LASH LIVING TRUST;)
 and THE UNKNOWN HEIRS,)
 SUCCESSORS, ASSIGNS, DEVISEES,)
 LEGATEES, EXECUTORS,)
 ADMINISTRATORS,)
 BENEFICIARIES OR TRUSTEES,)
 IMMEDIATE OR REMOTE, OF ANY)
 OF THE FOREGOING PARTIES; AND)
 DOES 1-20,)
)
)
 Defendants.)

APPEAL FROM THE DISTRICT COURT OF
 CUSTER COUNTY, OKLAHOMA

HONORABLE JILL C. WEEDON, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION

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For Defendants/Appellants

OPINION BY JAMES R. HUBER, JUDGE:

Defendants, Citizen Energy, III, LLC; Citizen Mineral, LLC; and BCE-Mach III LLC, (collectively Defendants)¹ appeal the district court's Journal Entry of Judgment dated April 9, 2024, quieting title in the subject property in favor of plaintiff, Tributary Resources, LLC; finding the Tributary overriding royalty interest (Tributary ORRI) is in effect and binding on Defendants; finding that Tributary is entitled to payment of its share of the production revenue from the South Thomas Well under the Tributary ORRI from the date of first production and is entitled to an accounting of the revenue from the date of first production; and awarding Tributary a judgment for payment of revenue from the Tributary ORRI. Defendants raise numerous issues regarding the court's reformation of certain oil and gas leases after finding the leases violated the Rule Against

¹ On August 13, 2020, Tributary dismissed with prejudice Continental Resources, Inc. and later dismissed with prejudice the mineral owners that initially entered into the Tributary Leases with Tributary. Tributary dismissed Longreach Energy Investments, LLC with prejudice on May 12, 2022. Tributary dismissed MEP Oklahoma, LLC with prejudice on September 1, 2023. In response to an Order of this Court, Tributary dismissed without prejudice OGI, Inc.; Orchid AD3, LLC; Safe-N-Sound Land Company, LLC; and Sharon Ann Combs.

Perpetuities. Defendants also question the application of the leases against Defendants.

Plaintiff, Tributary Resources, LLC (Tributary), counter-appeals the district court's April 9, 2024, Journal Entry of Judgment; the August 16, 2023, Minute Order; and the October 11, 2022, Order of the Court. Tributary claims the district court erred in determining the Tributary Leases violated the Rule Against Perpetuities and in reforming the leases. Tributary also alleges the district court erred in finding Tributary was not entitled to interest on its share of the production proceeds from the South Thomas Well under its overriding royalty interest from the date of first production.

FACTS AND PROCEDURAL HISTORY²

In the present litigation, Tributary sought to quiet title to an overriding royalty interest covering approximately 625 acres of oil and gas leasehold in Custer County, Oklahoma, and to recover unpaid production proceeds attributable to the override. In defense, Defendants argued the leases through which Tributary claimed the overriding royalty interest violated the Rule Against Perpetuities (Rule) and were either void or should be reformed such that the primary terms

² The facts and procedural history of this litigation are extensive and well known by the parties and will not be detailed in this Opinion.

expired prior to the date operations commenced to drill the producing South Thomas Well.

In February and March 2016, Tributary acquired the subject leasehold via eleven oil and gas top leases (Tributary Leases) for oil and gas interests in Custer County, Oklahoma (Leased Premises). At the time Tributary entered these leases, there existed base leases for the oil and gas interest. There also existed an oil and gas well on the property, the Rymer #1 Well (Rymer Well), that was not producing at the time of the Tributary Leases.

Concurrently with executing the Tributary Leases, Tributary and the lessors (Tributary Lessors) each executed an Agreement (Tributary Agreements) and Memorandum of Oil and Gas Lease (Tributary Memoranda).³ The Tributary Agreements addressed the payment of the lease bonus payments by Tributary and the actions Tributary would take to clear title on the subject property, such as plugging the Rymer Well or obtaining releases of the older base leases on the property. The Tributary Agreements also provided Tributary would terminate the Tributary Leases if Tributary was unable to timely accomplish these tasks and would not be required to pay the full bonus. The Tributary Memoranda set forth

³ The Tributary Leases, the Tributary Agreements, and the Tributary Memoranda shall be collectively referred to as the Tributary Contracts.

the basic terms of the Tributary Leases and noted the purpose of the memoranda was to evidence the existence of the leases.

Each of the Tributary Leases contained the following habendum clause:

1. Subject to paragraph 17 below, it is agreed that this lease shall remain in force for a term of three (3) years (herein called primary term), and as long thereafter as oil and gas, or either of them, is produced from the leased premises by the lessee, . . .

. . .

17. [T]he parties agree, acknowledge, and stipulate that the primary term of this lease shall be and is extended such that the primary term of this lease shall be deemed to commence on the date (1) that the prior oil and gas lease or leases shall become released of record, or (2) judicially determined to be invalid, or (3) any and all oil or gas wells asserted to be maintaining such lease or leases shall have been plugged, or (4) the bonus consideration for the granting of this lease shall have become paid in full, whichever of (1), (2), (3), or (4) occurs first. The parties further acknowledge their rights in this lease and in the leased premises is, are, or may be subject to that certain executed but unrecorded Agreement dated February 8, 2016 by and between the parties, and that in the event of a conflict in the terms of this lease and the aforesaid Agreement, it is deemed that the conflicting term or terms in this lease shall control.

Tributary paid the Tributary Lessors a portion of the bonus consideration upon execution of the Tributary Contracts. Tributary paid the remaining 90% of the bonus to the Tributary Lessors on September 20, 2017.

On September 15, 2017, Tributary assigned the Tributary Leases to Paloma Partners IV, LLC, (Paloma Assignment) and reserved an overriding royalty interest in the leasehold estate. The Paloma Assignment provided that the Tributary ORRI

“shall run with the Leases and any and all extensions, renewals, revivers and assignments of the Leases taken within six months after expiration of any of the Leases.” Paloma assigned its interest in the Tributary Leases to MEP Oklahoma, LLC on October 1, 2017. On November 22, 2017, the Rymer Well, the well holding the underlying base leases, was plugged.

Beginning in September 2018, Citizen Mineral, LLC acquired mineral interests in the Leased Premises from various Tributary Lessors who previously executed a Tributary Lease.

On January 29, 2019, MEP entered into four oil and gas top leases covering the Leased Premises with four of the Tributary Lessors (MEP Top Leases). BCE-Mach III, LLC later acquired this interest from MEP.

The South Thomas Well was spud on April 9, 2019. After drilling the South Thomas Well, Citizen Energy refused to pay Tributary its override based on the belief the Tributary Leases had expired prior to commencement of the well.

In September 2019, the Oklahoma Corporation Commission (OCC) entered its pooling order, upon Citizen Energy’s application, pooling the Mississippian common source of supply underlying the Leased Premises. The OCC named Citizen Energy as operator. MEP elected not to participate thereby relinquishing its working interest in the pooled formation to Citizen Energy.

Tributary filed this quiet title action based on Citizen Energy's refusal to pay the override to Tributary.⁴ Tributary also claimed its title was superior to that of Defendants. Tributary claimed the South Thomas Well was commenced within the primary term of the Tributary Leases and, therefore, Tributary was entitled to revenue from production of the South Thomas Well. However, Defendants argued the Tributary Leases violated the Rule Against Perpetuities (Rule) and were either void from inception or were subject to reformation pursuant to 60 O.S.2021 §§ 75-77.

After summary judgment briefing and hearing argument, the district court determined the Tributary Leases violated the Rule and should be reformed to give effect to the parties' intent pursuant to 60 O.S.2021 § 75. The court subsequently reformed paragraph 17 of the Tributary Leases. Rather than striking the offending language, the court added a sentence to the end of the paragraph so as to conform to the Rule. The reformed paragraph 17 language stated:

"The primary term must commence within the term of the Agreement."

After receiving argument on Tributary's motion to settle the journal entry regarding memorializing the court's reformation decision, the district court entered

⁴ Tributary originally filed this action in Oklahoma County, Oklahoma. Venue was subsequently transferred from Oklahoma County to Custer County, Oklahoma.

a Journal Entry, filed on January 8, 2024, finding that the Tributary Lease shall be reformed as follows:

The Tributary Leases . . . shall be reformed to add the following language to the end of Paragraph 17 of each respective lease: “The primary term must commence within the two-year term of the Agreement, or the Lease will terminate.”

Defendants later argued the reformed leases were inapplicable to them.

Defendants claimed they purchased their interests in the Leased Premises before the Tributary Leases were reformed and, therefore, the leases were invalid at the time they acquired their interests. Defendants also argued they were bona fide purchasers or innocent third parties and the leases did not apply to Defendants. However, the district court found Defendants had actual knowledge of the Tributary Leases and the Tributary ORRI and, therefore, the reformed Tributary Leases were valid and effective as to Defendants.

The district court ultimately entered a Journal Entry of Judgment, filed on April 9, 2024, denying Defendants’ latest Motion for Summary Judgment and granting Plaintiff’s latest Motion for Summary Judgment. The court awarded judgment to Tributary on its claims as follows:

- a. The three-year primary term of the Tributary Leases (as defined in Plaintiff’s Petition) commenced on September 21, 2017, and the South Thomas Well was drilled and completed within the primary term of the Tributary Leases. The Tributary Leases remain in force and effect and are binding on the Defendants.

- b. The Tributary ORRI . . . is a valid and subsisting overriding royalty interest, and is binding on the Defendants.
- c. Tributary is entitled to payment of the Tributary ORRI back to the date of first production from the South Thomas Well.
- d. Tributary's claim for quiet title is granted, and title to the Tributary ORRI is quieted in Tributary.
- e. Tributary is entitled to an accounting of revenues from the South Thomas Well from the date of first production, with interest accruing as of January 8, 2024. The Court FINDS that Tributary is not entitled to interest prior to January 8, 2024.
- f. Tributary is awarded judgment in the amount of \$293,295.57 payment for the Tributary ORRI on account of production from the South Thomas Well from the date of first production through December 31, 2023, plus interest accruing as of January 8, 2024, against Defendant Citizen Energy III, LLC.
- g. Tributary is further entitled to payment of the Tributary ORRI on all production since January 1, 2024 and all future production occurring under the Tributary Leases.

The district court found that the Journal Entry resolved all claims and was a final judgment.

Defendants appeal. Defendants contend the district court erred in reforming the Tributary Leases to comply with the Rule by adding language to paragraph 17 of the leases rather than striking the offending language and applying the nonoffensive language. Defendants also contend the court erred in finding they had notice of the Tributary Leases and the Tributary ORRI and were not bona fide purchasers, thereby finding the Tributary Leases were effective as to Defendants.

Tributary counter appeals. Tributary argues the court erred in finding the Tributary Leases violated the Rule. Tributary also alleges the court erred in determining Tributary was not entitled to interest on its share of the production proceeds from the South Thomas Well under its override from the date of first production.

STANDARD OF REVIEW

A trial court should grant summary judgment when there is no dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Marshall v. City of Tulsa*, 2024 OK 78, ¶ 8, 558 P.3d 1220, 1225. We review a grant of summary judgment *de novo*, in which we afford plenary, independent, and non-deferential authority to reexamine a district court's rulings. *Id.*

ANALYSIS

There are several district court decisions culminating in the court's April 9, 2024 Journal Entry of Judgment. Although raised in Tributary's Counter-Appeal, we will first address the court's initial decision that the Tributary Leases violate the Rule Against Perpetuities. We examine this issue first because it is the foundation for the court's remaining decisions.

In their initial summary judgment motion, Defendants⁵ argued that the Tributary Leases and the Tributary ORRI violated the Rule and were either void from inception or must be reformed. Defendants argued that the Tributary Leases and the Tributary ORRI failed to provide Tributary with any interest in or claim to the production of the South Thomas Well.

MEP asserted the following clause in the Tributary Leases offended the Rule:

1. Subject to paragraph 17 below, it is agreed that this lease shall remain in force for a term of three (3) years (herein called primary term), and as long thereafter as oil and gas, or either of them, is produced from the leased premises by the lessee, . . .
-
17. [T]he primary term of this lease shall be and is extended such that the primary term of this lease shall be deemed to commence on the date (1) that the prior oil and gas lease or leases shall become released of record, or (2) judicially determined to be invalid, or (3) any and all oil or gas wells asserted to be maintaining such lease or leases shall have been plugged, or (4) the bonus consideration for the granting of this lease shall have become paid in full, whichever of (1), (2), (3), or (4) occurs first.

MEP alleged that, under the quoted language, the Tributary Leases contained only one primary term, which was “a three-year primary term that begins to run *only upon* the happening of the earliest of the four events in Paragraph 17.” MEP argued that this primary term clause was indefinite and violated the Rule regardless

⁵ Defendant, MEP, filed the summary judgment motion, which was adopted by defendants, Citizen Energy III, LLC and Citizen Mineral, LLC.

of which of the four events occurred and triggered the commencement of the primary term.

In response, Tributary claimed the Tributary Leases did not violate the Rule. According to Tributary, Defendants failed to consider the Tributary Agreements in its Rule analysis, and the Tributary Leases must be read in conjunction with the Tributary Agreements and Tributary Memoranda. Tributary pointed out that Paragraph 4(h) of the Tributary Agreements provide: “the initial term of this Agreement will be set at two (2) years.” Tributary argued that “[i]n reading the Tributary Contracts together, it is clear that the primary term of the Tributary Leases was to commence on the occurrence of one of the four conditions outlined in Paragraph 17 of the Tributary Leases, *but in no event later than two (2) years from the execution of the Tributary Contracts.*” Tributary claimed that the two-year term provided for in the Tributary Agreements required Tributary to either commence the primary term or release the Tributary Leases during this two-year period. Tributary claimed that such interpretation was consistent with the Lessors’ intent.

Oklahoma recognizes the Rule Against Perpetuities. The Rule is embedded in the Oklahoma Constitution, Okla. Const. art. 2, § 32.⁶ The Oklahoma Supreme

⁶ Section 32 provides:

Court adopted the “most universally accepted short definition” of the common law Rule: “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” *Melcher v. Camp*, 1967 OK 239, ¶ 18, 435 P.2d 107, 111 (quoting Jon Chipman Gray, *The Rule Against Perpetuities* 191 (4th ed. 1942)). Stated differently, any property interest must vest within twenty-one years after the death of someone who was alive when the arrangement was created. If the conveyance could possibly violate the Rule at the time it is made, the conveyance is not good – “it cannot be made good by subsequent events.” *McLaughlin v. Yingling*, 1923 OK 99, ¶ 42, 213 P. 552, 563-64. “In other words, the validity of the future estates under the rule against perpetuities depends, not on what actually happens after the time at which the rights of the parties are fixed, but on what may happen as viewed at the time when the [conveyance] creating them takes effect.” *Id.* ¶ 42, 213 P. at 564. “The Rule is violated when there is a possibility of vesting beyond the perpetuity period.” *Stoltz, Wagner & Brown v. Duncan*, 417 F.Supp. 552, 556 (W.D. Okla. 1976). The Courts look at what may possibly occur, not what actually happens.

The Rule applies to conveyances of property interests, including oil and gas leases. *American Nat. Res., LLC v. Eagle Rock Energy Partners, L.P.*, 2016 OK

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, . . .

67, ¶ 8, 374 P.3d 766, 769. “[A] contract for an ordinary oil and gas lease to vest in futuro creates such an interest in real property as is sufficient to invoke the rule against perpetuities as a rule of property.” *Melcher*, 1967 OK 239, ¶ 36, 435 P.2d at 114.

Tributary and each of the Tributary Lessors simultaneously executed a Tributary Lease, a Tributary Agreement, and a Tributary Memorandum. The Tributary Contracts addressed the development of oil, gas, and other minerals in Section 35-14N-15W, Custer County, Oklahoma. These Tributary Contracts were executed at the same time, reference each other, and were part of the same transaction. “[S]eparate documents executed as part of the same transaction may be read together as a single agreement.” *Sunrizon Homes, Inc. v. American Guar. Inv. Corp.*, 1988 OK 145, ¶ 9, 782 P.2d 103, 107 (footnote omitted). *See also* 15 O.S.2021 § 158 (“Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.”)

In *McFadden v. Paulson*, 1924 OK 447, ¶ 17, 225 P. 528, 531, the Oklahoma Supreme Court held that an oil and gas lease and a written contract executed simultaneously and relating to the same mineral interest must be construed together. The contract provided that the lease would not take effect until the release of an existing base lease and that the lease was extended for two years

from the time lessee procured the release of the base lease. In affirming the jury's decision that the lessor/defendant was bound by the terms of the lease and the contract, the court held that "under the very terms of the written contract, the lease was not to become effective until the cancellation or release of the [base] lease." *Id.* ¶ 19, 225 P. at 532. In response to the lessor/defendant's argument that the "time when the extension should be made was too indefinite," the court held the argument was not tenable because the contract fixed the time the lease became effective to be when the base lease became inoperative. *Id.* ¶ 20, 225 P. at 532. The *McFadden* Court construed the lease and the contract together in reaching its decision.

In line with this authority, we will consider the Tributary Contracts together in determining whether the Rule is violated.

At first blush, the Tributary Leases seemingly violate the Rule because they provide that the primary term of the lease does not commence until the occurrence at an indeterminate time of one of the four events set forth in Paragraph 17. Reading the Tributary Leases alone, the interest does not vest within a life in being plus twenty-one years. However, as previously discussed, the Tributary Leases, Tributary Agreements, and the Tributary Memoranda were signed concurrently and, therefore, should be read together.

The Tributary Agreements provide an Initial Term of two years to allow Tributary the opportunity to obtain a release of the base lease(s) or to plug the Rymer Well, both of which are options under Paragraph 17 of the Tributary Lease. Upon the occurrence of one of these two events – a release of the base lease or plugging of the Rymer Well, whichever occurs first – Tributary has thirty (30) days to pay the 90% balance of the lease bonus, although Tributary may pay the balance of the lease bonus at any time and for any reason (which occurred in this case). If Tributary is unsuccessful in accomplishing either of these tasks within two years, the Tributary Agreement provides that Tributary shall release the Tributary Lease.

Under the Tributary Leases, the three-year primary term is triggered upon the happening of the first of these events to occur, which must occur within two years pursuant to the Tributary Agreements. Thus, the uncertainty of when one of the four conditions of Paragraph 17 must occur is removed, and the Tributary Leases do not violate the Rule.

In summary, by reading the Tributary Contracts together, which we must do, Tributary had two years to clear the title to Section 35 by either obtaining a release of the base lease(s) or plugging the Rymer Well. If Tributary was unsuccessful in obtaining these results, Tributary was required to release the Tributary Leases with the Lessors. Once Tributary was successful in satisfying this requirement within

two years, the primary term of the Tributary Leases commenced for a period of three years. Here, Tributary paid the remaining 90% of the lease bonus prior to the plugging of the Rymer Well or the release of the base lease(s).⁷ Thus, payment of the balance of the lease bonus on September 20, 2017, commenced the primary term of the Tributary Leases and allowed the interests to vest within the Rule's limits. The contingencies listed in Paragraph 17 no longer provided an uncertainty as to when these options would occur, thereby violating the Rule.

This interpretation of the Tributary Contracts is consistent with Oklahoma's statutory commitment to construe the instrument so that it does not offend the Rule. *In re Est. of Cowl*, 1987 OK 13, ¶ 1, 737 P.2d 911, 914 (Supp. Opinion on Rehearing)(Where an instrument is susceptible to a reading which violates the Rule and a reading which does not, there is a "statutory commitment to constructional preference for validity[.]"); 60 O.S.2021 §§ 75 and 77. In short, the Tributary Leases do not offend the Rule. "The interest conferred by its terms was both *exercisable and extinguishable within the limits of the Oklahoma rule, i.e., 'during the continuance of the lives of persons in being at the creation of the limitation or condition plus twenty-one (21) years.'*" *In re Est. of Cowl*, 1987 OK 13, ¶ 2, 737 P.2d at 915 (Supp. Opinion on Rehearing) (footnotes omitted).

⁷ The Tributary Agreement provides that Tributary had the right to pay "the balance of the lease bonus amount at any time for any reason."

Based on the foregoing, we find the Tributary Leases do not violate the Rule and the district court erred in holding otherwise and in reforming the leases. We also find Defendants' remaining allegations of error are rendered moot by our conclusion that the Tributary Leases do not violate the Rule.

In its counter-appeal, Tributary also questioned whether the district court erred in determining Tributary was not entitled to interest on its share of the production proceeds from the South Thomas Well under the ORRI from the date of first production of the South Thomas Well. Based on this Court's determination that the Tributary Leases do not violate the Rule and reformation was not needed, on remand, we instruct the district court to determine the proper amount of interest to award that is consistent with this Court's decision.

Based upon our determination that the Tributary Leases do not violate the Rule, we must reverse the district court's orders of April 9, 2024, August 16, 2023, and October 11, 2022, because these orders were dependent upon the district court's erroneous conclusion that the Tributary Leases violated the Rule. We remand this case to the district court to reconsider these decisions in light of our decision today. The district court will also need to reconsider its decision on the interest owed to Tributary based on our decision.

CONCLUSION

Based on the foregoing, we find the Tributary Leases do not violate the Rule Against Perpetuities. We reverse the district court's decision that the Tributary Leases violate the Rule. We must also reverse the district court's April 9, 2024, August 16, 2023, and October 11, 2022, orders because these orders were dependent upon the district court's erroneous application of the Rule. We remand this matter for further proceedings consistent with this Opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

HIXON, V.C.J., concurs, and BLACKWELL, J. (sitting by designation), dissents.

BLACKWELL, J., dissenting:

In my view, the first question we should address in this case is whether the language of Tributary's top leases standing alone violates the rule against perpetuities. This is how the trial court proceeded, and the parties, the trial bench, and the oil and gas bar generally, would all benefit from an answer to this fundamental question.¹ Further, if the answer to this question is "no," the trial

¹ The Court declines to answer this question—though going as far to say that "[a]t first blush, the Tributary Leases *seemingly* violate the Rule"—by reading the agreement and leases together. *Opinion*, 15 (emphasis supplied). As noted above and further explored below, we should address first whether the language of the leases violates the rule irrespective of any private agreement between the parties.

court's judgment must be reversed, at least in part. Only if the answer is "yes" need we analyze how the intent of the parties as manifested in their private agreements affects the real-property analysis, if at all, and other questions presented.

The Tributary leases violate the rule against perpetuities, and this Court should so hold. The rule in Oklahoma is unchanged from the common law: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Melcher v. Camp*, 1967 OK 239, ¶ 18, 435 P.2d 107, 111 (quoting, Gray, *The Rule Against Perpetuities* (4th ed.) 191). The rule does not apply to typical oil and gas leases, as such instruments do not create unvested interests. Rather, after the secondary term is reached, the grantee holds a determinable fee and the grantor maintains a possibility of reverter, each of which are vested interests not subject to the rule. A lessor may alienate all or part of this possibility of reverter, but in doing so must not violate the rule by creating a future interest based on a contingency that itself runs afoul the rule. *See, generally*, 2 Tiffany Real Prop. § 404 (3d ed.).

Here, Tributary's leases do just that. It is undisputed that the base leases are typical oil and gas leases that automatically expire upon a lack of production in paying quantities. However, Tributary's top leases do not vest at that time, and are not *certain* to vest at any time. Rather, they vest only when one of the four contingencies set forth in the leases occur. None of these contingencies are certain

to have occurred within the period required by the rule. Thus, the top leases create contingent future interests that violate the rule against perpetuities.

The majority holds that the interests do not violate the rule because the agreements and leases should be read together. I cannot agree. The leases create interests in real property that violate the rule, as outlined above. The agreements create private contractual rights that inform each party of its rights as against the other party. Such rights are not subject to the rule. *Producers Oil Co. v. Gore*, 1980 OK 62, ¶ 8, 610 P.2d 772, 774 (“Th[e] rule concerns rights of property only, and does not affect the making of contracts.”). Indeed, the primary function of the agreements appears to have been to serve as powers of attorney, allowing Tributary to assume rights that would otherwise belong to each lessor, in an effort to obtain *evidence* that the base leases had terminated. The agreements do not purport to limit the leases in any way and they do not change the fact that the leases *themselves* create property interests that are not certain to vest within twenty-one years of some life in being. They simply tell each party what their rights are in the event the other party violates the agreement.²

² The majority cites *McFadden v. Paulson*, 1924 OK 447, 225 P. 528, in support of its decision. However, that case is distinguishable on every relevant front. First, the top lease at issue in that case (to the extent it was at issue at all) unarguably *did not* violate the rule against perpetuities. It was “a regular form of lease,” “on general form No. 88,” that (as explained above) created only vested rights. *See id.* ¶¶ 4, 12. Further, the matter had nothing to do with the rule against perpetuities, a phrase notably absent from the opinion. Rather, it concerned a *contractual dispute* between lessors and a lessee where the lessors had given the lessee a top lease, to be held in escrow, and a *contractual promise to grant an extension or renewal of that*

By way of example, as explained above, Tributary has potentially perpetual interests in the real estate at issue per the leases. If Tributary paid the remaining lease bonuses to the lessors thirty years after the leases were executed, the primary term of each lease would begin. This act would likely violate the agreements, but it would not be outside the terms of the leases. The lessors could each sue and attempt to have the Tributary leases released or nullified per the agreement, but none of that has anything to do with the real property interests created by the leases themselves. Dealing with those interests is the function of property law generally and the rule against perpetuities in particular. It can be no answer that the lessors

lease from two years from the time the lessor obtained a release of the base lease, in exchange for a \$5,000 bonus payable upon release of the base lease, also held in escrow. *Id.* ¶ 3 (quoting the parties' contract). The lessors obtained the necessary release but only after the primary term of the top lease expired. The lessors nevertheless demanded the bonus payment, but the lessee refused, noting that a dry hole had recently been drilled on the lands making them "worthless, and of no value whatever" for drilling. *Id.* ¶¶ 4-5. The lessors prevailed after a jury trial and the lessee appealed, arguing that it should not be held to its contract because consideration for the lessors' promise had failed with the expiration of the lease. *Id.* ¶ 14. The Supreme Court affirmed, holding that the lessors had lived up to their end of the *contract* in offering up a renewal or extension of the top leases (or a new lease altogether), but the lessee had not in failing to pay the promised consideration. *Id.* ¶ 17. It was for this reason the Court insisted on reading the contract and lease together. The lessee argued that the lessors needed to have *tendered* their extension or renewal to secure payment, but the Court disagreed, finding the lessors' promise to have been adequate consideration. *Id.* ¶ 18 ("[T]he plaintiffs in their petition and in their evidence offer and tender to the defendant an extension of two years, if the trial court found it necessary for them to do so, or, if the old lease and contract were not satisfactory to the defendant, they would execute a new lease, and thereby offered to do equity, which, in our opinion, was all that could be required, under the law and the facts in this case, before the plaintiffs were entitled to the consideration for which said lease and contract were given."). The lessee was stuck with the benefit of his bargain, which, per the contract, extended beyond the two-year primary term of the expired lease. The case stands for nothing more, and certainly does not stand for the proposition that an oil and gas lease that violates the rule against perpetuities on its face may be saved by an unrecorded, private contract that creates no interest in land.

have a private right of action to remove the offending interest at the time it vests. The law removes the interest before it ever comes into being. *See* 2 Tiffany Real Prop. § 393 (3d ed.) (“The rule is one of law, and not a rule of construction, and it is to be applied even if it renders the expressed intent of the testator impossible of accomplishment.... It is not a test to determine intention, but its object is to defeat intention.” (footnotes omitted)).³

So, what is the appropriate remedy? In my view, under the undisputed facts, Oklahoma law supports reformation of the leases by striking the problematic language. This is what is commanded by the relevant statute, *see* 60 O.S. § 77, and how similar leases have been reformed, *see e.g., Stoltz, Wagner & Brown v. Duncan*, 417 F. Supp. 552, 557 (W.D. Okla. 1976) (“[T]he top leases should be reformed by the separation and elimination of the second proviso which offends the Rule.”).⁴ For the same reasons I would not read the leases and agreements in

³ Additionally, each lease states that, in the event of a conflict between the agreement and the lease, the lease controls. There is a clear conflict between a lease that creates a perpetual future interest and an agreement with a duration of two years.

⁴ I must note, while I agree with the *Stoltz* court insofar as its remedy, I cannot agree with its prior holding that the top lease in that case violated the rule. The lease in *Stoltz* appeared to convey *all* of the lessor’s possibility of reverter, which would not be a violation of the rule. *See, e.g., BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476, 482 (Tex. 2017) (holding that a lease that “is intended to and does include and vest in Lessee any and all remainder and reversionary interest and after-acquired title of Lessor in the Leased Premises upon expiration of any prior oil, gas or mineral lease” does not violate the rule). I believe Oklahoma law to be in accord. Nothing in this opinion is meant to suggest that top leases *generally* violate the rule against perpetuities. If a lessor conveys all of her possibility of reverter, or a portion of that interest without creating a perpetuity, the rule is not violated.

conjunction to excuse the leases' violation of the rule, I would not do so to repair the damage caused by the violation of the rule. As such, I would strike paragraph seventeen from the lease, which would leave the leases with a three-year primary term from their respective dates of execution.

For these reasons, I respectfully dissent from the Court's opinion. I would hold that trial court did not err in finding that the top leases violate the rule against perpetuities but did err in its chosen remedy. I would thus reverse the trial court in so far as it held the Tributary top leases necessarily survived to their secondary term and evaluate the remaining questions not answered by the Court's opinion.⁵

November 24, 2025

⁵ Primarily these are: whether operations were commenced within three years of the date of execution, as required by paragraph two of the Tributary leases; and, if not, whether Tributary's overriding royalty interest survived despite the failure of its top leases via attachment to MEP's leases.