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Oil and Gas - The Burden of Proof in Implied Covenant to Develop Cases: Wyoming Rejects the Oklahoma Rule - Sonat Exploration Co. v. Superior Oil Co.

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CASE NOTE

OIL AND GAS—The Burden of Proof in Implied Covenant to Develop Cases: Wyoming Rejects the "Oklahoma Rule." *Sonat Exploration Co. v. Superior Oil Co.*, 710 P.2d 221 (Wyo. 1985).

Colorado National Bank of Denver (Bank) sold to Eason Oil Company (Eason)[1] six thousand net mineral acres in Wyoming's Powder River Basin in January, 1978. Part of these lands were subject to an oil and gas lease, dated December 8, 1957, between the Bank, as lessor, and Superior Oil Company (Superior), as lessee.[2] Superior held the lease by production obtained from a well drilled in 1960 and unitized in 1967.[3] The last drilling on the lease occured in 1964, when Continental Oil Company (Conoco) drilled a dry hole under a farmout[4] agreement with Superior.[5]

In 1977 the Bank demanded that Superior develop or surrender the lease.[6] Superior surrendered only the tract containing the Conoco dry hole.[7] When Eason purchased the land, it erroneously believed Superior had released all the lands subject to the lease. Upon discovering its mistake, Eason sued to compel Superior either to drill additional wells or, in the alternative, to cancel the lease for Superior's breach of the implied covenant to develop.[8] The trial court held for Superior, refusing to order additional drilling or to cancel the lease.[9]

The Wyoming Supreme Court affirmed, holding that Eason, as lessor, must prove a reasonable expectation of profit for both lessor and lessee from further drilling to establish breach of the implied covenant to

1. Sonat Exploration Co. succeeded to Eason Oil Company's interest and was substituted after briefs were filed in this appeal. Sonat Exploration Co. v. Superior Oil Co., 710 P.2d 221, 222 n.1 (Wyo. 1985).

2. *Id.* at 223.

3. *Id.* An oil and gas lease is said to be "held by production" when it is kept in force through production of oil and gas in paying quantities from a well. There is another method of holding a lease by production, outside the scope of this casenote. H. WILLIAMS & C. MEYERS, MANUAL OF OIL & GAS TERMS 393 (6th ed. 1984) ("held by production"). "Unitized" denominates the joint operation of all or some portion of a producing reservoir. Unitization is important where there is separate ownership of the rights in a common producing pool. Unitization enhances economical recovery and conserves the oil field. *Id.* at 938 ("unitization").

4. A farmout is a common form of agreement between operators, whereby a lease owner not desirous of drilling at the time agrees to assign the lease, or some portion of it, to another operator who is desirous of drilling the tract. WILLIAMS & MEYERS, *supra*, note 3, at 307 ("farmout agreement").

5. *Sonat*, 710 P.2d at 223, 226.

6. *Id.* at 223. Courts generally interpret oil and gas leases as requiring the lessor to give notice to the lessee that the lease has been breached and requiring the lessor to demand compliance from the lessee. Until these general demand and notice requirements are met, courts will not usually entertain suits for lease cancellation. Kuehne v Samedan Oil Corp., 626 P.2d 1035, 1037, 1039 (Wyo. 1981). *See generally* 4 E. KUNTZ, A TREATISE ON THE LAW OF OIL & GAS § 53.4 (1972).

7. *Sonat*, 710 P.2d at 223.

8. *Id.* An implied covenant to develop is the duty implied in an oil and gas lease obligating the lessee to use due diligence in drilling wells on the leasehold after discovery of oil or gas in the area. WILLIAMS & MEYERS, *supra* note 3, at 727. ("reasonable development covenant").

9. *Sonat*, 710 P.2d at 224.

develop.[10] The Court rejected Eason's argument that a showing of an unreasonable passage of time since the last drilling should shift the burden of proof to the lessee, who must then prove it had not violated the implied covenant to develop.[11]

This casenote traces the development of the burden of proof rules in cases concerning the implied covenant to develop. The merits of these rules and the reasons for the Wyoming Supreme Court's actions in the principle case will be examined.

BACKGROUND

The Wyoming Supreme court last considered the implication of this covenant in an oil and gas lease in *Phillips v. Hamilton*,[12] decided in 1908. The court in *Phillips* did not consider the long standing Wyoming statute which provided that "no covenant shall be implied in any conveyance of real estate."[13] The Wyoming Legislature reenacted the statute in subsequent revisions of the Wyoming Statutes.[14] In 1957, the statute was amended to its present form to allow an exception for "conveyance of oil, gas, or other minerals."[15] *Sonat* is the first modern case clarifying Wyoming's adoption of implied covenants in oil and gas leases generally, and the implied covenant to develop in particular.

Suits seeking lease cancellation have long been brought. Courts have applied different legal theories to these suits. Around 1920, courts regularly applied the classic theory of abandonment.[16] Abandonment requires the plaintiff-lessor to show that the lessee intended to abandon the lease coupled with some outward act evidencing that intent.[17] Though there may have been no intent to abandon, courts have held that a lessee's statement that it did not intend to drill was evidence of an intent to abandon the lease.[18] In such cases, the courts implied an intent to abandon the lease. This fiction was conveniently employed to justify lease cancellation. Contesting the case was evidence that there was no intent to abandon the lease by the lessee.[19] This contradiction led to disuse of abandonment theory.

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10. *Id.* at 232-33.
11. *Id.* at 229. This burden-shifting argument is also known as the "Oklahoma rule" or the "modified *Brewster* test."
12. 17 Wyo. 41, 95 P. 846 (1908). The *Phillips* court followed the seminal decision of *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905), where the Eighth Circuit first recognized the implied covenant to develop.
13. The Wyoming Territorial Legislature early enacted a non-implication statute. 1882 WYO. TERRITORIAL SESS. LAWS ch.1 § 5 (codified at REV. STAT. § 5 (1887)).
14. This section survived decades of meetings of the Wyoming legislature. *See* WYO. COMP. STAT. § 66-105 (1945); *see also* Note, *A Possible Bar to Implied Covenants in Wyoming Oil and Gas Leases*, 11 WYO. L.J. 57 (1956).
15. 1957 WYO. SESS. LAWS ch. 41, § 1 (codified at WYO. STAT. § 34-36 (1957)); *see also* WYO. STAT. § 34-1-135 (1977).
16. MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES 28-35 (2d ed. 1940).
17. *Id.* at 29-32.
18. Doss Oil Royalty Co. v. The Texas Co. 192 Okla. 359, 137 P.2d 934, at 937 (1943).
19. Boatman v. Andre, 44 Wyo. 352, 12 P.2d 370 (1932). MERRILL, *supra* note 16, at 32-35.

In response to their growing discomfort in implying abandonment,[20] and as academics condemned the lax use of abandonment theory,[21] courts began using the theory of the implied covenant to develop.[22] This changed the lessor's burden of proof considerably. In contrast to abandonment theory, the implied covenant to develop theory requires the lessor to show that the lessee has not developed the lease in a reasonable, diligent manner.[23] Most authorities agree that the burden of proof lies on the lessor.[24] Disagreements emerge over what a lessor must initially prove and the respective burdens of the lessor and lessee thereafter. Courts use several approaches in deciding the burdens each party must bear.

One approach was developed by the Oklahoma Supreme Court when it rejected the abandonment theory where the lessee did not intentionally abandon the lease.[25] The Oklahoma rule requires the lessor to show an unreasonable passage of time since lessee's last drilling activity. This showing shifts the burden of proof of reasonable development to the lessee. In *Doss v. The Texas Co.,*[26] the lessee had not drilled on the lease in fourteen years. The court held that in the absence of lessee's rebuttal, fourteen years without drilling constituted a prima facie case of breach of the implied covenant to develop.[27] The court did not explicitly rule that the burden of proof had shifted to the lessee.

Within two months the Oklahoma court extended the *Doss* holding to say that the burden of proof shifts to the lessee on lessor's showing that an unreasonable period of time passed since the lessee last drilled.[28] Lessor made a prima facie case sufficient to shift the burden to the lessee on a simple showing of passage of time.[29] The decision empowered Oklahoma's courts to decide what delays are unreasonable. The court did not explain this expansive reading of *Doss.* No examination of the burden-shifting rule's benefits or drawbacks exists in the Oklahoma cases, though the rule survives today.[30] Certain policy concerns are stated in some cases. These include discouraging lessees from holding leases for speculation,[31] by promoting development of whatever oil and gas a lease may provide.[32] This concern underlies the policy of implying covenants in mineral leases.[33]

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20. *Doss,* 137 P.2d at 938.
21. MERRILL, *supra* note 16, at 28, 29.
22. Wyoming recognized this distinction between abandonment and breach of the implied covenant to develop very early. Phillips v. Hamilton, 17 Wyo. 41, 51, 95 P. 846, 848 (1908). The facts of *Phillips* raise some question whether Wyoming recognized an implied covenant of exploration. *See generally* WILLIAMS & MEYERS, *supra* note 3, at 408. ("implied covenants").
23. 3 SUMMERS, THE LAW OF OIL AND GAS § 463, at 256 n.25 (2d ed. 1958); Clifton v. Koontz, 160 Tex. 82, 325 S.W.2d 684, 695 (1959).
24. *Sonat,* 710 P.2d at 228.
25. Doss Oil Royalty Co. v. The Texas Co., 192 Okla. 359, 137 P.2d. 934 (1943).
26. *Id.,* 137 P.2d at 936.
27. *Id.,* 137 P.2d at 939.
28. Magnolia Petroleum Co. v. Rockhold, 192 Okla. 628, 138 P.2d 809, 810 (1943).
29. *Id.,* 138 P.2d at 811.
30. *See, e.g.,* Dixon v. Anadarko Prod. Co., 505 P.2d 1394, 1396 (Okla. 1973).
31. *Doss,* 137 P.2d at 936, 937.
32. *Id.*
33. Superior Oil Co. v. Devon Corp., 604 F.2d 1063, 1069 (1979) (quoting Sander v. Mid-Continent Petroleum Corp., 292 U.S. 272 (1934)); MERRILL, *supra* note 16, at 474.

Another approach is the Illinois rule. It shifts the burden of proof of reasonable development to the lessee when the lessor proves a prima facie case.[34] In *Elliot v. Pure Oil Co.*,[35] the Illinois Supreme Court shifted the burden of proof to the lessee after the lessor established a prima facie case of breach of the implied covenant to develop by showing production from adjacent tracts.[36] The Illinois Supreme Court upheld the trial court's actions on the theory that the lessee was an expert. The lessee possessed facts enabling it to better show whether oil could be profitably developed.[37]

Still another approach was developed by the Texas Supreme Court, which decided the burden of proof issue in *Clifton v. Koontz.*[38] The court asserted that the burden of proof is on lessors to show that additional drilling would be profitable in order to prove lessee's breach of the implied covenant to develop.[39] Under this rule, the burden of proof never shifts, but remains with the lessor throughout trial. The court gave no explanation for this rule, but it has been applied in several modern Texas cases.[40]

In *Felmont Oil Corp. v. Pan American Oil Corp.*,[41] the Texas Court of Civil Appeals applied the Texas rule, relying on *Clifton.* The court required lessor to prove that additional drilling would be profitable in order to establish breach of the implied covenant to develop.[42] Again, this court gave no explanation of the reasoning behind this rule.

THE PRINCIPAL CASE

Sonat is the Wyoming Supreme Court's modern recognition of the implied covenant to develop. One question before the Wyoming Supreme Court was whether lessors have the burden of proving profitability of additional drilling in establishing breach of the implied covenant to develop. The court in *Sonat* addressed this issue for the first time in Wyoming. Before *Sonat* it was unknown how the implied covenant would be defined, and whether the burden of proof would ever shift.

The court declined to follow the Oklahoma rule, stating that "attempting to decide which factual circumstances operate to shift the burden under differing periods of delay would seem to be a difficult if not impossible task" and "would unduly impede the determination of the ultimate question, i.e., whether the lessee has acted as a prudent operator."[43] The court stated that time is important in these cases, but it is not necessarily the controlling factor.[44]

34. Elliot v. Pure Oil Co., 101 Ill.2d 146, 139 N.E.2d 295, 298, 299 (1957).
35. *Id.*
36. *Id.*
37. *Id.*, 139 N.E.2d at 298.
38. 160 Tex. 82, 325 S.W.2d 684 (1959).
39. *Id.*, 325 S.W.2d at 695.
40. Felmont Oil Corp. v. Pan American Oil Corp., 334 S.W.2d 449 (Tex. Civ. App. 1960); Superior Oil Corp. v. Devon Corp., 604 F.2d 1063 (8th Cir. 1979).
41. 334 S.W.2d 449 (Tex. Civ. App. 1960).
42. *Id.* at 455.
43. *Sonat*, 710 P.2d at 223.
44. *Id.*

The Wyoming Supreme Court adopted the Texas rule as stated in *Felmont.*[45] The court failed, however, to examine or to establish a basis for applying the Texas rule. The court adopted the rule without any explanation for its choice.

ANALYSIS

Sonat was the Wyoming Supreme Court's first opportunity to consider the merits of the Oklahoma and Texas rules regarding the burden of proof. The ultimate question in *Sonat* was whether the lessee breached the implied covenant to develop. The court properly rejected the Oklahoma rule. The court concluded that the Oklahoma rule unduly impeded the answer to the ultimate question of breach of the implied covenant to develop.[46] The court apparently viewed as surplusage any attempt to determine whether the burden should shift on lessor's showing of significant passage of time since the last drilling of a well. While this objection may be accurate in a procedural sense, it fails to analyze the substantive question of which party should prove whether the covenant has been breached.

The Oklahoma legal community has been the harshest critic of the Oklahoma rule. One commentator[47] explains the difficulty of the rule in preparing for trial.

> The lessor must guess as to whether an unreasonable length of time has elapsed foregoing the necessity of proving that drilling would be profitable and if the lessee chooses to rely solely on nonprofitability, he does so at the peril of having the court determine the period of delay to be unconscionable. In either event, to guess wrong is catastrophic and whether the guess is correct must abide the event.

This position supports the Wyoming Supreme Court's objection that the Oklahoma rule impedes the ultimate question of whether the lessor has breached the covenant. It also describes the substantive dilemma both parties face while preparing their cases for trial without a predictable set of rules. Under the Oklahoma rule parties remain uncertain about their burden.

The Oklahoma rule promotes litigation by lowering the plaintiffs' burden of proof. Lessors may submit any delay for the court's unconscionability determination.[48] Consequently, lessees must prove, even when their actions are beyond reproach, that they have not breached the implied covenant to develop. If all wells attempted in an area were dry, and there were no apparent geological deviations between those sites and the lease in ques-

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45. *Id.* at 228, 229.

46. *Id.* at 229.

47. Conn, *Trends in the Application of the Implied Covenant of Further Development,* 12 OKLA. L. REV. 470, 478 (1959).

48. *See, e.g.,* Nolan v. Thomas, 228 Ark. 572, 309 S.W.2d 727 (1958) (two years held unreasonable); *cf.* Trawick v. Castleberry, 275 P.2d 292 (1954) (thirty-seven years held reasonable delay).

tion, the lessor would still have a cause of action under the Oklahoma rule. In a time of expanding dockets and clogged courts, this is the wrong incentive.

Another Oklahoma commentator has suggested that the generous interpretation that courts have given to implied covenants generally promotes short term development of oil and gas to the detriment of the nation's long term interests.[49] If this is accurate, it compounds the Oklahoma rule's error. Anytime there is a delay in drilling, the lessor can sue. The low threshold of lessor's prima facie case provides ready access to courts operating under this rule. This encourages litigation and increases opportunities for courts to cancel leases. Cancelling leases provides lessors with additional opportunities for leasing their land. More leasing activity usually means more drilling, and more production. If the judiciary should discourage overproduction, as the commentator suggested, rejecting the Oklahoma rule would be the first step.

Furthermore, the Oklahoma Court has repeatedly held that mere passage of time will not justify lease cancellation.[50] This is inconsistent with *Doss*, which ruled that lessors could obtain lease cancellation on a showing of an unreasonable passage of time, in the absence of any proof to the contrary. The two rules are incompatible. Passage of time alone will not, under the modern interpretation of *Doss*, justify lease cancellation, yet this is precisely the holding in *Doss*. The Oklahoma decisions are inconsistent.[51]

The need of additional facts is inconsistent with the rule that a mere showing of delay will shift the burden of proof. It is incongruous to make the lessor rely on the lessee to produce facts necessary for the lessor to obtain his relief. Rather, it should be acknowledged that more is necessary to the lessor's case. Such a standard is more predictable since parties will know what their claim requires, thereby easing case preparation. Furthermore, this standard would raise the lessor's burden to establishing more than a mere complaint of inactivity.

Finally, the Oklahoma rule is underinclusive. Some cases that involve breach of the implied covenant to develop do not involve an unreasonable passage of time. The Oklahoma rule shifts the burden only in cases involving unreasonable passage of time. The rule risks precluding meritorious cases not involving unreasonable passage of time by overemphasizing this single factor. This is exemplified by the Illinois decision, *Elliot*.[52] The *Elliot* court found that the lessor demonstrated a prima facie case

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49. Martin, *A Modern Look at Implied Covenants to Explore, Develop, and Market Under Mineral Leases*, 27 INST. ON OIL & GAS L. & TAX'N 177, 178 (1976).

50. Union Oil Co. of Cal. v. Jackson, 489 P.2d 1073 (Okla. 1971).

51. Apparently, if the facts of *Doss* were again before the Oklahoma Supreme Court, the *Doss* decision would be overruled, if not explicitly, then sub silentio. The facts of *Doss* led to a decision establishing a rule which has not been followed. Bad facts make bad law.

52. 101 Ill.2d 146, 139 N.E.2d 295 (1957) The Tenth Circuit has so broadly read the Oklahoma rule that it resembles the Illinois rule. Trust Co. of Chicago v. Samedon Oil Corp., 192 F.2d 282 (10th Cir. 1951).

that lessee breached the implied covenant to develop.[53] The lessor showed only that recently drilled wells were producing on adjacent properties.[54] The Oklahoma rule would have no passage of time issue with which to shift the burden of proof under these facts. This may deprive a lessor of his remedy. The Oklahoma rule could require the lessor to await the passage of an unreasonable amount of time even though his case is sound without it.

While the Wyoming Supreme Court correctly rejected the Oklahoma rule, its adoption of the Texas rule is an extensive burden to place on lessors. This rule states that the burden of proof is entirely on the lessor to show that additional drilling would be profitable.[55] This burden is too high.

Meritorious suits may often go untried because many lessors feel that litigation is too risky, given the high cost of expert testimony and legal counsel. This may not be a problem where, as in the principal case, two oil companies are battling over the lease. For the typical lessor, however, litigation risks may not be justified even if the lessee's delays are grossly unreasonable. The new Wyoming rule may discourage suits by imposing a burden which lessors could not reasonably be expected to carry.

On the other hand, if the lease has a chance of producing significant oil and gas, the likelihood of profit would attract potential lessees willing to attempt to get the lease cancelled. If the lessor has a profitable but undeveloped lease, the lessor will have access to experts because of the potential profit. Theoretically, this argument is sound, but in practice it is unrealistic. There is little possibility of finding experts willing to invest resources in a lease where it has no certain interest.

Were someone confident of profitable production from the lease they would more likely solicit a farmout from the original lessee. The costs of litigation when contrasted to obtaining a farmout would almost always favor the farmout. A farmout is a contract securing rights to the satisfaction of both parties. Litigation is an expensive risk very uncertain in its outcome. Few, if any leases would justify such a gamble. The new Wyoming rule thus imposes an economic burden difficult for a lessor to overcome.

Another difficulty with the new Wyoming rule is access to information. In most private oil and gas leases, the lessee may have the exclusive right of entry onto the premises for exploration purposes.[56] This provision prohibits the lessor, or his expert, from gathering the information necessary to establish profitability. This places the lessor in a dilemma. To establish breach of the prudent operator rule, the lessor must establish that further drilling would be profitable. The lease, however, grants the

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53. *Elliot,* 101 Ill. 2d 146, 139 N.E.2d at 298.
54. *Id.,* 139 N.E.2d at 297.
55. *Clifton,* 160 Tex. 82, 325 S.W.2d 684.
56. 4 E. KUNTZ, *supra* note 6, at § 50.4; *see generally* R. HEMINGWAY, THE LAW OF OIL AND GAS § 8.1, at 411 (1983).

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lessee exclusive rights to gather such information, and the courts would presumably enforce this right. The lease prohibits the lessor gathering the information necessary to carry his burden of proof. Between the unduly heavy burden of proof and the lessee's exclusive control of the property, it is nearly impossible for the lessor to obtain a court ordered lease cancellation.

Discovery can ameliorate the dilemma. Through discovery, lessors can obtain raw, uninterpreted geological and other technical data. However, discovery is not adequate to provide enough access to the necessary data. First, the lessor must file suit to obtain the information. This barrier alone substantially deters what may otherwise be meritorious cases. Secondly, the lessor may discover that he has no case at the time and must take a voluntary dismissal to preserve his rights later. The dismissal would limit the lessor to one more future attempt at lease cancellation.[57] With technological advancements enhancing the likelihood of producing oil and gas from previously unprofitable areas, the lessor would be limited in his future capabilities to sue for development through those methods. This contradicts the general resource development policy of the implied covenants.[58] Finally, the court may be unwilling to compel discovery. One option open to a court so inclined is the proprietary information privilege. A lessee could successfully keep the informantion from the lessor by claiming it would harm his market position to reveal the contents of such files. Discovery is not a solution to the lessor's inability to obtain the information necessary to evaluate and try his case.

A compromise between the Oklahoma and Texas rules would alleviate these problems. A better result would have been for the court to adopt the middle ground as represented by the Illinois decision in *Elliot v. Pure Oil Co.*[59] In *Elliot*, the lessor proved that the lessee refused to drill despite production from wells on adjacent lands.[60] The Illinois Supreme Court held that shifting the burden onto the lessee was permissible since the lessor made a prima facie case with this evidence.[61] The court reasoned that the lessee possessed the technical facts, expertise, and control necessary to know whether further commercial development of the lease was practicable.[62]

The Illinois court left open the question of what establishes a prima facie case. By avoiding a strict definition of the circumstances that will shift the burden of proof, the court made the proper policy decision, forcing the lessor to evaluate more rigorously all the circumstances of his case. Lessors must consider more than merely the amount of time which has passed since the lessee's last drilling attempt. Expanding the constellation of circumstances which a court considers in deciding whether to shift

57. FED. R. CIV. P. 41(a)(1)(ii); WYO. R. CIV. P. 41(a)(1)(ii).
58. Superior Oil Co. v. Devon Corp., 604 F.2d 1063, 1069 (1979)(quoting Sander v. Mid-Continent Petroleum Corp., 292 U.S. 272 (1934)); MERRILL, *supra* note 16, at 474.
59. 101 Ill.2d 146, 139 N.E.2d 295 (1957).
60. *Id.*, at 139 N.E.2d at 297.
61. *Id.*
62. *Id.*

the burden of proof forces lessors to evaluate their cases in detail, rather than relying exclusively on the time element. This policy of leaving the prima facie case undefined improves on the Oklahoma rule by weeding out meretricious claims and discouraging frivolous litigation.

Elliot demonstrates that a lessor's prima facie case should not depend on passage of time. In *Elliot* the prima facia case was made out by a showing that producing wells had been drilled on adjacent lands.[63] This evidence would probably not sustain the burden of proving additional drilling profitable under the Texas rule, since the evidence of profitable drilling on an adjacent lease does not establish that a profitable well could be drilled on the lease in question. The lessor's burden under *Elliot* is more reasonable than a demonstration that additional drilling would be profitable. It does not shift the burden under the Oklahoma rule since time is not a critical factor in the case. Shifting the burden of proof to the lessee when the lessor makes a prima facie case, without overemphasizing any single element of that case, is the correct compromise between the Oklahoma and Wyoming/Texas rules.

Adopting this intermediate approach should solve some of the problems of the new the Wyoming rule. It would avoid duplication of effort because the lessor need not produce the technical information necessary to sustain the suit. The Illinois rule does not burden the lessor with establishing profitability, thus resolving the lessor's dilemma of lack of access to the profitability information. Finally, this rule sufficiently lowers the burden of proof to make the courts accessible to lessors with meritorious claims. These advantages make the Illinois rule more favorable than the rule adopted by the Wyoming court in *Sonat.*

Adopting this rule strikes the correct balance between predictability and the court's ability to fashion a remedy suitable to the facts of individual cases. While the Wyoming rule is quite predictable, it is so inflexible that it fails to recognize industry practices such as farmouts. The Oklahoma rule is unpredictable, and allows the trial court discretion to adapt the remedies as it thinks appropriate only under very limited circumstances. Neither approach is satisfactory. The correct balance is present in the Illinois rule. It allows lessors to present the facts and circumstances to which they have access. The lessee, on the other hand, need not guess whether any single element of the lessor's case will operate to shift the burden of proof to him. The Illinois rule resolves the lessee's dilemma in preparation for trial and thereby allows the correct amount of predictability.

CONCLUSION

The Wyoming rule on burden of proof in implied covenant to develop cases is too rigid. It does not give adequate recognition to the lessor's rights, such as development of oil and gas under the lease, and receipt

63. *Id.*

of royalties on those resources. The *Sonat* court correctly rejected the Oklahoma rule, but should have adopted a less stringent alternative than the Texas rule. If the opportunity arises again, the court should adopt the Illinois rule because it strikes the proper balance between the rights of lessors and lessees.

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