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STATE OF WYOMING	)	IN THE DISTRICT COURT
	) ss.	
COUNTY OF CAMPBELL	)	SIXTH JUDICIAL DISTRICT

KENNETH B. GEER,	)	
	)	
	)	
vs.	)	
	)	CIVIL ACTION NO. 32940
	)	
ANADARKO E & P ONSHORE, LLC,	)	
Successor to Lance Oil & Gas Company, Inc.,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Kenneth B. Geer, as representative of the class certified by this Court, submits this Brief in Support of Motion for Partial Summary Judgment pursuant to WRCP 56.

Background

The undisputed facts are stated in Plaintiff's Rule 56.1 statement filed on this date. The parties dispute no material facts. First, Lance[1] concedes that it has historically applied an estimated rate for purposes of deducting royalty owners' proportionate share of ad valorem taxes, which rate regularly exceeds the actual rate applied when Lance pays the ad valorem tax. Lance concedes that it does not reimburse royalty owners for the excess ad valorem taxes deducted from royalty payments. (Issue #1) Second, Lance admits that it deducts more than the royalty owners' proportionate share of taxes from royalty payments than Lance actually pays to the taxing authority. (Issue #2)

The only matters for resolution are purely legal questions, which can be resolved by application of Wyoming law.

Discussion

1. Standard of Review

> Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. W.R.C.P. 56(c); *Metz Beverage Co. v. Wyoming Beverages, Inc.*, 2002 WY 21, ¶ 9, 39 P.3d 1051, 1055 (Wyo.2002). "A genuine issue of material fact exists when a disputed fact, if it were proven, would establish or refute an essential element of a cause of action or a defense that the parties have asserted." *Id.*

Nobles v. Memorial Hospital of Laramie County, 2013 WY 66, ¶ 11, 301 P.3d 517, 520 (Wyo. 2013).

[1] Plaintiff will refer to Defendant as "Lance" throughout this brief. The Defendant at the time of filing the original Complaint was Lance Oil & Gas Company, Inc. On or about April 1, 2013, Lance merged into Anadarko E & P Onshore LLC, and the parties subsequently stipulated to a Substitution of Party.

2. The Wyoming Royalty Payment Act

The Wyoming Royalty Payment Act was enacted in 1982. Its intent was "to stop oil producers from retaining other people's money for their own use." *Ferguson v. Coronado Oil Co.*, 884 P.2d 971, 979, (Wyo. 1994), *citing Cities Serv. Oil & Gas Corp. v. State*, 838 P.2d 146, 156 (Wyo. 1992).

As the Court has previously ruled in this case:

> The WRPA was later amended in 1989 to include sections 303(c), 304 and 305. 1989 *Wyo. Sess. Laws* ch. 255, § 1. These additions to the WRPA set forth requirements regarding the payment and reporting for oil and gas production in Wyoming. Relevant to this case, the Legislature defined terms commonly used in instruments regarding payments for oil and gas production within the State of Wyoming. W.S. § 30-5-304(a). Specifically, the WRPA sets forth the following definitions that address the permissibility of deductions from royalty and overriding royalty owners:
>
> > 'Overriding royalty' means a share of production, free of the costs of production, carved out of the lessee's interest under an oil and gas lease; 'Royalty' means the mineral owner's share of production, free of the costs of production; 'Costs of production' means all costs incurred for exploration, development, primary or enhanced recovery and abandonment operations including, but not limited to lease acquisition, drilling and completion, pumping or lifting, recycling, gathering, compressing, pressurizing, heater treating, dehydrating, separating, storing or transporting the oil to the storage tanks or the gas into the market pipeline. 'Costs of production; does not include the reasonable and actual direct costs associated with transporting the oil from the storage tanks to market or the gas from the point of entry into the market pipeline or the processing of gas in a processing plant;
>
> W.S. § 30-5-304(a)(v), (a)(vii) and (a)(vi), respectively.

Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Class Certification, ¶9.

Lance is authorized to pay royalty owners' share of Production taxes to the taxing entities, and it "may deduct the taxes paid from any amounts due or to become due to the interest owners of such production in proportion to the interest ownership." W.S. § 39-14-203(c)(iii).

The two legal questions for decision by the Court are:

#1. May Lance take a setoff or recoupment for amounts it overdeducted from royalty payments based on its assertion that it is entitled to credit for permissible deductions it has voluntarily not taken?

#2. Does the language of W.S. § 39-14-203(c)(iii) permit Lance to deduct from royalty payments more than the royalty owner's proportionate share of taxes Lance paid?

Both questions arise from the fact that a producer may take certain deductions for one purpose, but not for other purposes. For the purpose of reporting to the Wyoming Department of Revenue the number from which Production Taxes are calculated and assessed, the operator may exclude certain costs, such as for gathering and separating. W.S. 39-14-203(b)(iv); *Williams Production RMT Co. v. Wyoming Dept. of Revenue*, 2005 WY 28, ¶¶9-12, 107 P.3d 179, 183-84. This is "Taxable Value." In contrast, "Royalty Value" is the value Lance uses to calculate an individual royalty owner's royalty. Wyoming law prohibits the operator from deducting "costs of production" from royalty payments (including, for example, costs of production such as gathering and separating). W.S. § 30-5-304(a);[2] *Cabot Oil & Gas Corp v. Followill*, 2004 WY 80, ¶11, 93 P.3d 238, 242 (Wyo. 2004). Because there are fewer allowable deductions from

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[2] W.S. § 30-5-304(a) contains the following definitions:

(vi) "Costs of production" means all costs incurred for exploration, development, primary or enhanced recovery and abandonment operations including, but not limited to lease acquisition, drilling and completion, pumping or lifting, recycling, gathering, compressing, pressurizing, heater treating, dehydrating, separating, storing or transporting the oil to the storage tanks or the gas into the market pipeline. "Costs of production" does not include the reasonable and actual direct costs associated with transporting the oil from the storage tanks to market or the gas from the point of entry into the market pipeline or the processing of gas in a processing plant;

(vii) "Royalty" means the mineral owner's share of production, free of the costs of production;

Royalty Value than from Taxable Value, Royalty Value exceeds Taxable Value. *See* example in Plaintiff's Rule 56.1, ¶¶ 16-17.

As this Court has recognized:

> The United States District Court for the District of Wyoming construed the WRPA noting "[t]he organization and subject matter of the RPA reflects a clear legislative purpose of simplifying the computation of royalties and providing a mechanism by which the royalty owner is able to determine if royalties are paid correctly." *Wold v. Hunt Oil Co.,* 52 F.Supp.2d 1330, 1336 (Wyo. 1999). The Wyoming Supreme Court, in answering a certified question as to the meaning of "gathering" as used in 304(a)(vi), agreed:
>
> > ... [O]ur resolution must rely on the precise statutory language demarcating production from postproduction by entry to the market pipeline and the definition of market pipeline must be gleaned from the statutory language. We find that subjecting royalties to deductions based upon [Defendant's] determination that postproduction costs have begun at an offsite point would inject the arbitrariness that the legislature intended to defeat by enactment of the Act. We agree with *Wold v. Hunt* that the Wyoming legislature has departed from the methodologies employed by other jurisdictions and specifically excluded all charges between the wellhead and the market pipeline except those specifically excluded from the definition. *[Wold],* 52 F .Supp.2d at 1336. We hold that 'gathering' means to collect gas and move it to a point where it can be processed or transported to the user. All costs associated with that activity are nondeductible under § 30-5 304(a)(vi) and nondeductible from royalties.
>
> *Cabot Oil & Gas Corp.,* 93 P. 3d at 242.

Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Class Certification, ¶12.

Although Lance now contends some of its leases contained language which allowed it to take deductions for costs such as gathering, Lance has applied its business judgment and never deducted any costs other than transportation costs from royalty payments. *See* Plaintiff's Rule 56.1, ¶¶23-24. Lance argues that, even if it has overdeducted taxes, it has not underpaid royalties because it should have a credit for those permissible deductions not taken.

3. Lance Cannot Assert a Setoff or Recoupment

Although Lance has never sought to assert setoff or recoupment as a counterclaim in this case, it has argued repeatedly that it is entitled to a setoff or recoupment for permissible deductions it has not taken. What Lance is attempting to do with its setoff or recoupment argument is to defeat the classes' underpaid royalty claims by raising the shield of a setoff or recoupment claim that it has never asserted in this case.[3]

There are four sound bases for this Court to reject Lance's setoff or recoupment argument:

A. Lance's Setoff or Recoupment Claim is a Compulsory Counterclaim

Lance's argument it is entitled to "credit" for permissible-deductions-not-taken is a setoff or recoupment claim, and as such could only have been brought as a compulsory counterclaim. Lance made no counterclaim asserting the setoff or recoupment right. Its strategy, if accepted by the Court, could be used over and over again by Lance to defeat almost any royalty underpayment class action, without ever stating a claim or proving its case. That is one reason that W.R.C.P. 13 requires that setoff or recoupment claims be brought as a compulsory counterclaim. "The philosophy that parties who are given the capacity to present their entire controversies should in fact do so is embodied in the Wyoming Rules of Civil Procedure, Rules

[3] This is similar to the attempt by Amoco to setoff or recoupment claims that Amoco had overpaid royalties on Brady Deep production by seizing payments from the royalty payees' other properties. In *Amoco Production Co. v. EM Nominee Partnership Co.*, 2 P.3d 534 (Wyo. 2000), the Court held that Amoco had no right to such setoff or recoupment and it affirmed the district court's grant of summary judgment on EM's claim for conversion. *Id.* at 542-43.

7, 8 and 13. . ." *Lane Co. v. Busch Development, Inc.*, 662 P.2d 419, 423 (Wyo. 1983). WRCP 13 (a) provides:

> *Compulsory counterclaims.* – A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arise out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for adjudication the presence of third parties of whom the court cannot acquire jurisdiction, but the pleader need not state the claim if: (1) at the time the action was commenced the claim was the subject of another pending action; or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction. . .

Plaintiff claims Lance has underpaid royalties it is obligated to pay under its leases with the class members as a result of overdeducting taxes from royalty payments. Lance would like to claim that there is no underpayment because it has underdeducted from royalty payments. This position clearly fits the definition of a claim arising out of the same transaction or occurrence. In *Ruppenthal v. Wyoming Economic Development and Stabilization Bd*, 849 P.2d 1316, (Wyo. 1993), the State sued Ruppenthal to recover on notes he guaranteed. "Ruppenthal counterclaimed for damages allegedly resulting from the State's misrepresentations relating to its ability to support new business and from the State's disclosure of confidential information gathering in the loan-making process." *Id.* at 1320. The Court held "[t]his counterclaim arises out of and is related to the loan-making transaction which lies at the heart of the State's claim to recover on Mr. Ruppenthal's guaranty. As such, it constitutes a compulsory counterclaim under W.R.C.P. 13(a)" *Id.* Similarly, Lance's setoff or recoupment claim arises out of and is related to its obligation to pay royalties under its leases with the class members that underlies the royalty underpayment claims raised by Plaintiff. *See also, Pipeliners Local Union No. 798 v. Ellerd,* 503 F.2d 1193, 1198 (10th Cir.1974) ("The courts have given the terms ' transaction' and ' occurrence' ... flexible and realistic constructions in order to effect 'judicial economy', i.e., trial

in one action of all related controversies between the parties and, of course, the avoidance of multiplicity of suits."); *Oklahoma Gas & Elec. Co.,* 784 P.2d at 64 ("In view of the beneficent purposes served by this [compulsory counterclaim] statute, the court is not justified in hindering its use by an overly restrictive construction."); Wright & Miller, *Federal Practice and Procedure,* § 1410 ("Courts generally have agreed that these words [transaction or occurrence] should be interpreted liberally in order to further the general policies of the federal rules to carry out the philosophy of Rule 13(a)").

A compulsory counterclaim is distinguished from a permissive counterclaim, which is a counterclaim "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." W.R.C.P. 13(b). Although Lance does not describe its permissible-deductions-not-taken as a setoff or recoupment claim, that is exactly what it is. Black's Law Dictionary's definition of setoff and recoupment accurately describe Lance's contentions:

> **setoff,** n. (18c) **1.** A defendant's counterdemand against the plaintiff, arising out of a transaction independent of the plaintiff's claim **2.** A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor. — Also written set-off. — Also termed (in civil law) compensation; stoppage. See COUNTERCLAIM; OFFSET. Cf. RECOUPMENT (3). **3.** The balancing of mutual liabilities with respect to a pledge relationship. — **setoff,**vb."Set-off signifies the subtraction or taking away of one demand from another opposite or cross demand, so as to distinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish both. It was also, formerly, sometimes called stoppage, because the amount to be set-off was stopped or deducted from the cross demand." Thomas W. Waterman, A Treatise on the Law of Set–Off, Recoupment, and Counter Claim§1,at1(2ded.1872). . . .
>
> **recoupment** (ri-**koop**-m<<schwa>>nt), *n.* (17c) **1.** The recovery or regaining of something, esp. expenses. **2.** The withholding, for equitable reasons, of all or part of something that is due. See EQUITABLE RECOUPMENT (1), (2). **3.** Reduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction. See EQUITABLE RECOUPMENT (3). Cf. SETOFF (2). **4.** The right of a defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction. **5.** An affirmative defense alleging such a breach. **6.** *Archaic.* A counterclaim arising out

> of the same transaction or occurrence as the one on which the original action is based. • In modern practice, the recoupment has been replaced by the compulsory counterclaim. — **recoup,** *vb.*

Black's Law Dictionary (9th ed. 2009).

"Under Rule 13, there is no general difference for purposes of pleading between setoff, recoupment, or independent claims in the sense they all constitute counterclaims." *Hawkeye-Security Ins. Co. v. Apodaca*, 524 P.2d 874, 879 (Wyo. 1974). "The law is consistent and well established that the right of setoff or a counterclaim is a required pleading." *Mad River Boat Trips, Inc. v. Jackson Hole Whitewater, Inc.*, 818 P.2d 1137, 1140 (Wyo. 1991). Lance, for whatever reason, elected not to bring a setoff or recoupment counterclaim and take on the burden of proving its theory that it has not taken certain permissible deductions. It cannot now use the unasserted claim to overcome its overdeduction of taxes and underpayment of royalties.[4]

Lance clearly recognizes the correct procedure for asserting setoff and recoupment, as it did so in the *Lange Trust* case. *See Answer and Counterclaim of Defendant Lance Oil & Gas Company to Plaintiff's First Amended Complaint,* filed October 20, 2011.

B. Lance Cannot Raise the Same Counterclaim it Asserted and Settled in Lange Trust

Lance would like to cash in on its alleged "credit" for deductions-not-taken over and over. This strategy is, however, barred not only by the requirement to make a counterclaim, it is also barred by collateral estoppel. Lance has settled these claims in *Sandra K. Lange Trust et al*

[4] It is too late to assert that counterclaim, as there is no excuse for the delay, and amendment at this point would prejudice Plaintiff and the class. A claim which is a compulsory counterclaim under "W.R.C.P. 13(a) but is not brought, is forever barred." *Lane Co.*, 662 P.2d at 423-24. *See also,* Wright & Miller, *Federal Practice and Procedure*, Civil § 1417.

v. Lance Oil & Gas Company, Inc., Case No. 32513, Sixth Judicial District Court (*"Lange Trust"*).

The Wyoming Supreme Court has explained:

> The doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) incorporate a universal legal principle of common-law jurisprudence to the effect that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies."
>
> Collateral estoppel and res judicata are analogous, but not synonymous. Although they share a common interest in finality, the doctrines themselves are different. We recently reiterated their differences:
>
> In *Eklund v. PRI Environmental, Inc.*, 2001 WY 55, ¶¶ 15–20, 25 P.3d 511, [517–18] (Wyo.2001), we extensively recognized that res judicata and collateral estoppel are related but distinct concepts.
>
> Res judicata bars the relitigation of previously litigated claims or causes of action. Four factors are examined to determine whether the doctrine of res judicata applies: (1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them. Collateral estoppel bars relitigation of previously litigated issues and involves an analysis of four similar factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Goodman v. Voss, 2011 WY 33, ¶23, 248 P.3d 1120, 1126, citing *Polo Ranch Co. v. City of Cheyenne,* 2003 WY 15, ¶ 12, 61 P.3d 1255, [1259] (Wyo.2003)(other citations omitted).

Lance either asserted or could have asserted its setoff or recoupment claims as a counterclaim in *Lange Trust.* Lance's alleged setoff or recoupment is a Settled Claim,[5] and is

[5] "Settled Claims" shall mean and include any and all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, including interest, attorney fees,

not a Reserved Claim under the *Lange Trust* Settlement Agreement. Settled Claims are released. *Settlement Agreement*, ¶2.12. Lance's own 30(b)(6) witness testified that she believed Lance's claim for deductions not taken "are resolved in the Lange settlement methodology." *See* Plaintiff's Rule 56.1, ¶¶ 28-31. Lance cannot now assert those claims in this case.

C. *The Law of the Case Bars Lance from Raising this Argument Again*

> The "law of the case" doctrine stands for the proposition that a court's decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. This doctrine is designed to avoid repetitious litigation and to promote consistent decision making; thus, it is related to res judicata, collateral estoppel and stare decisis. Usually, the "law of the case" doctrine requires a district court to adhere to its prior rulings, adhere to the rulings of an appellate court, or adhere to another judge's rulings in the same case or a closely related case.

Goodman, 2011 WY, ¶25, 248 P.3d at 1127.

This Court has twice ruled on Lance's setoff or recoupment argument; once in certifying the class, and once in ruling on Lance's attempt to add setoff or recoupment language to the Class Notice. *See* Plaintiff's Rule 56.1, ¶¶ 32-36. The Court's latest decision on this issue is clear:

> The possible additional deductions that defendant *might* have been able to take under a certain lease are a complication that is unnecessary to bring within this case. If there are any such deductions and if this is not a compulsory counterclaim, the defendant could assert those outside of this class action proceeding in a court of competent jurisdiction as to the amount of the claim and deal with the claim on an individualized basis.

May 10, 2013 Decision Letter. It is a binding precedent to which the district court must adhere.

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and penalties, **whether known or unknown, asserted or unasserted**, and whether in contract, or tort, or based on statute, or any other legal or equitable ground or theory including but not limited to the *Act,* or duties arising under implied covenants, if any, or any other duties arising under the law, that are held by Lance **that constitute or in any way relate to or arise from or arise out of Over Payment Claims that Lance has or could assert, including those for recoupment or as counterclaims. ...** *See* Plaintiff's Rule 56.1, ¶ 31

D. Voluntary Payment Rule

Lance has voluntarily made royalty payments without taking the deductions it now claims it could have taken, without any necessity to do so. In her 30(b)(6) deposition, Lance's Janis Wallner testified that the only reason she knew of that Lance had not taken these deductions was that it was "taking a conservative approach," which had nothing to do with "the manageability of paying what amounts to thousands of royalty owners." *See* Plaintiff's 56.1, ¶26.

> [I]t is a well-settled general rule that a person cannot, either by way of set-off or counter-claim, or by direct action, recover back money which he has voluntarily paid with a full knowledge of all the facts, and without any fraud, duress or extortion, although no obligation to make such payment existed.

Commercial Union Ins. Co. v. Postin, 610 P.2d 984, 989 (Wyo. 1980), quoting *Fulton v. Des Jardins*, 67 Wyo. 517, 227 P.2d 240, 245 (Wyo. 1951). In *Fulton,* a contractor sued two subcontractors to recover money that he had overpaid them. The Court found that Plaintiff was not ignorant of the facts when he made the overpayment, which consequently "cannot be considered a payment made by mistake but must be considered a payment voluntarily made." The Court then applied the rule stated above, and restated in *Commercial Union*, that a person who makes voluntary payment may not, by way of setoff or counterclaim, recover money which he has voluntarily paid. *Fulton*, 227 P.2d 245.

Lance voluntarily made the royalty payments, and it may not now claim a setoff or recoupment to recover the money.

4. Lance Cannot Charge Royalty Owners More than it Pays in Taxes

Wyoming law is clear. Lance "may deduct the taxes paid from any amounts due or to become due to the interest owners of such production in proportion to the interest ownership." W.S. § 39-14-203(c)(iii). It may not deduct more than the interest owners' proportionate share of the taxes paid.

Lance designated Debra Liller as its expert to support its theory that it is legitimate to deduct more than the interest owners' proportionate share of taxes actually paid. Her explanation is:

> A: The royalty interest owners are not entitled to a 5 percent share of the $1,000 processing fee deduction because they did not pay for the processing fee deduction, nor did Lance deduct the processing fee from their royalty payment."
>
> Q: So because the royalty owners did not contribute to these costs essentially, they shouldn't get the benefit of the tax deduction. Is that what you're saying?
>
> A: Well, they -- the royalty owners are going to benefit by not paying the processing fee. So it's going to be whatever the processing fee would have been times one minus the tax rate. That's the benefit to the royalty owners.
>
> Q: I understand what you're saying the benefit is. My question is: Because they're getting this benefit, that's the basis for your position that they then should not be entitled to the tax deductions that Lance is getting because of paying those costs?
>
> A: That's correct.

See Paintiff's Rule 56.1, ¶18.

When asked repeatedly for the basis for her opinion, Ms. Liller could only point to "years and years and years" of experience, "basic taxation theory", and W.S. § 39-14-203(c)(iii). *See* Paintiff's Rule 56.1, ¶19 . Ms. Liller's years of experience and her unsupported position on basic taxation theory are insufficient to sustain Lance's interpretation of the statute. The question

which remains is for the Court to decide:[6] Does W.S. § 39-14-203(c)(iii) permit Lance to deduct more than the interest owners' proportionate share of taxes actually paid?

To answer that question, the Court looks to the well-established rules of statutory construction:

> In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is de novo. We endeavor to interpret statutes in accordance with the legislature's intent. We begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute *in pari materia.* When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

In re Guardianship of Lankford, 2013 WY 65, ¶18, 301 P.3d 1092, 1098-99, quoting *Redco Constr. v. Profile Properties, LLC,* 2012 WY 24, ¶ 26, 271 P.3d 408, 415–416.

The answer lies in the clear language of section 203(c). The statute's language is unambiguous. (Although Lance will urge the Court to interpret the statute differently, "divergent opinions among parties as to the meaning of a statute may be evidence of ambiguity. However, the fact that opinions may differ as to a statute's meaning is not conclusive of ambiguity. Ultimately, whether a statute is ambiguous is a matter of law to be determined by the court." *Merrill v. Jansma*, 2004 WY 26, ¶ 28, 86 P.3d 270, 285, quoting *McClean v. State,* 2003 WY 17, ¶ 6, 62 P.3d 595, ¶ 6 (Wyo. 2003).) A "statute is unambiguous if its wording is such that reasonable persons are able to agree as to its meaning with consistency and predictability."

[6] "[S]tatutory construction is a matter of law," *Adelizzi v. Stratton*, 2010 WY 148, ¶11, 243 P.3d 563, 566.

Taylor v. State ex rel. Wyo. Workers' Safety & Comp. Div., 2003 WY 83, ¶ 10, 72 P.3d 799, 802 (Wyo. 2003), quoting *Allied–Signal, Inc. v. Wyo. State Bd. of Equalization,* 813 P.2d 214, 220 (Wyo. 1991).

W.S. § 39-14-203(c)(iii) permits the producer to "deduct the taxes paid. . . ." It does not allow the producer to "deduct the taxes *that would have been* paid *but for deductions for costs to which the interest owner did not contribute* from any amounts due or to become due to the interest owners of such production in proportion to the interest ownership." "A basic tenet of statutory construction is that omission of words from a statute is considered to be an intentional act by the legislature, and this court will not read words into a statute when the legislature has chosen not to include them." *Adelizzi v. Stratton*, 2010 WY, ¶11, 243 P.3d at 566, quoting *Merrill v. Jansma,* 2004 WY, ¶ 29, 86 P.3d at 285. Reasonable persons would agree: "taxes paid" means "taxes paid," not some other number that Lance seeks to rationalize by resort to unsupported "tax theory."

The Court will apply rules of statutory construction only when the language is not clear or is ambiguous. Then, "we look to the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conclusions of law, and other prior and contemporaneous facts and circumstances." *Stutzman v. Office of Wyoming State Engineer*, 2006 WY 30, ¶15, 130 P.3d 470, 475. Application of these rules, although not called for where, as here, the statutory language is unambiguous, would also support the conclusion that the statute allows a producer to deduct from royalties only the royalty owner's proportionate share of taxes actually paid.

The Wyoming Royalty Payment Act ("WRPA"), W.S. §§ 30-5-301 et seq., "is a remedial statute and, as such, is to be liberally construed to achieve its remedial purpose." *Cabot Oil &*

Gas, 2004 WY 80, ¶11, 93 P.3d at 242. Lance's unilateral calculation of deductions for taxes that exceed royalty owners' proportionate share of taxes Lance actually paid "would inject the arbitrariness that the legislature intended to defeat by enactment of the Act." *Id.* The intent of the statute is "to stop oil producers from retaining other people's money for their own use." *Ferguson v. Coronado Oil Co.*, 884 P.2d 971, 979, (Wyo. 1994), *citing Cities Serv. Oil & Gas Corp. v. State*, 838 P.2d 146, 156 (Wyo. 1992).

Lance is authorized to deduct the interest owners' proportionate share of the taxes paid, not a greater amount. To allow Lance to deduct a greater amount for taxes is contrary to the plain language of Section 203(c),[7] and would allow it to keep royalty owners' money for Lance's own use.

Lance is liable to the class for the amounts it has overdeducted in the period 2002 through 2011, and it must correct its improper method going forward. Further, "[u]nder the WRPA, a party obligated to make a payment is liable for 18% interest on payments not made in accordance with the act. Section 30-5-303(a)." *Ultra Resources, Inc. v. Hartman,* 2010 WY 36, ¶71, 226 P.3d 889, 916. Principal and interest are computed by use of the United States Rule. *Moncrief v. Harvey*, 816 P.2d 97, 107 (Wyo. 1991). The prevailing party is entitled to recover attorney's fees and costs. W.S. § 30-5-303(b).

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[7] Lance has contended that its calculations must be within the law because such calculations have been approved by the Court in settlement agreements between other parties. *See e.g., Defendant Lance Oil & Gas Company's Memorandum in Opposition to Plaintiff's Motion for Class Certification*, p. 3, n. 2, and Exhibit 11. This argument ignores the fact the WRPA permits parties to agree to terms other than those contained in the Act. "Unless otherwise expressly provided for by specific language in an executed written agreement. . ." W.S. § 30-5-305(a). Lance has presented no such express written agreement between it and its royalty owners.

Conclusion

There are no disputed issues of material fact; there are only two legal issues:

#1. May Lance take a setoff or recoupment for amounts it overdeducted from royalty payments based on its assertion that it is entitled to credit for permissible deductions it has voluntarily not taken?

#2. Does the language of W.S. § 39-14-203(c)(iii) permit Lance to deduct from royalty payments more than the royalty owner's proportionate share of taxes Lance paid?

As discussed above, the law requires the Court to answer both these questions "No." This Court should enter judgment in favor of the class on all claims, specifically:

1. Declare that the two methods for deducting taxes from royalties identified by Plaintiff violate Lance's obligation to pay royalties found in each royalty owner's contract, and result in royalty underpayment in violation of the Wyoming Royalty Payment Act;

2. Grant injunctive relief ordering Lance to correct these methodologies going forward;

3. Find that Lance is liable to the class of Campbell County royalty owners for such royalty underpayments, plus interest at the rate of eighteen percent (18%); and

4. Find that Lance is liable to the class for payment of attorneys fees and costs of this action.

5. Only the quantification of damages is left for determination at trial.

DATED this 31st day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2013, the foregoing was served via U.S. Postal Mail to the following:

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