State of Wyoming
County of Campbell

In the District Court
Sixth Judicial District

KENNETH B. GEER,

Plaintiff,

vs.

LANCE OIL & GAS COMPANY, INC., a Delaware corporation,

Defendant.

Civil Action No. 32940

FILED NO. ____
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DEPUTY CLERK OF DISTRICT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

THIS MATTER came before the Court for hearing on *Plaintiff's Motion for Class Certification* ("Motion for Certification") on December 7, 2012. Ms. Kate M. Fox and Mr. John C. McKinley of Davis & Cannon, LLP, appeared on behalf of the Plaintiff. Mr. Mark R. Ruppert of Holland & Hart appeared on behalf of the Defendant.

The Court having reviewed the parties' memoranda, affidavits and other exhibits presented and filed with the Court as well as other matters of record, having heard counsel's oral argument, and being fully advised in the matter, the Court makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

I. STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

1. This case involves allegations of underpayment of royalties in violation of the Wyoming Royalty Payment Act (W.S. §§ 30-5-301, *et seq.*) ("WRPA"). Plaintiff seeks injunctive and declaratory relief as well as monetary damages and statutory interest for alleged violations of the WRPA by Lance Oil and Gas Company, Inc. ("Lance" or "Defendant") on behalf of himself and all other similarly situated royalty owners

2. Plaintiff filed his *Complaint for Damages, Declaratory Judgment and Injunctive Relief* on February 2, 2012. Lance filed *Defendant Lance Oil & Gas Company's Answer to Plaintiff's Complaint for Damages, Declaratory Judgment and Injunctive Relief* on March 27, 2012.

3. Plaintiff specifically alleges that Lance over-deducts conservation, ad valorem, and severance taxes (Production taxes or taxes) from royalty payments such that Lance systemically underpays all royalty owners. Plaintiff also alleges that Lance "failed to accurately report the required tax information" regarding royalty payments in violation of the WRPA. Pl.'s Compl. ¶ 31.

4. Plaintiff seeks payment of unpaid royalty, 18% penalty interest, and $100 per check stub for reporting penalties. Plaintiff also seeks declaratory and injunctive relief regarding Lance's royalty payment and tax calculation methodologies.

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5. On August 31, 2012, Plaintiff moved to certify a class comprising "himself and all similarly situated royalty interest owners and overriding royalty interest owners (collectively Royalty Owners) pursuant to which Lance is obligated to pay royalties on gas produced in Campbell County, Wyoming[]" pursuant to W.R.C.P. 23. Pl.'s Br. in Support of Pl.'s Mot. for Class Certification (Pl.'s Mot.), at 2. The parties fully briefed Plaintiff's motion and on December 7, 2012, the Court heard oral arguments.

II. THE WYOMING ROYALTY PAYMENT ACT

6. The WRPA was originally passed in 1982 and codified at W.S. §§ 30-5-301 to 303. The original legislation set forth requirements for timely payment to owners legally entitled to proceeds, the ability to escrow funds if the party responsible for payment could not determine the owners, jurisdiction and statutory interest for late payments.

7. The WRPA requires payment for existing wells to be made "not later than sixty (60) days after the end of the calendar month within which subsequent production is sold, unless other periods or arrangements for the first and subsequent payments are provided for in a valid contract with the person or persons entitled to such proceeds." W.S. § 30-5-301(a). For new wells, payments must be made within six (6) months. *Id.* If payments are not timely made, interest accrues on the unpaid amount at the rate of 18% per annum. W.S. § 30-5-303(a). Principal and interest are computed by use of the United States Rule. *Moncrief v. Harvey*, 816 P.2d 97, 107 (Wyo. 1991).

8. The Legislature further established district courts would have jurisdiction over suits arising under the WRPA and further provided for reasonable attorneys' fees and costs to the prevailing party for any proceeding brought pursuant to the WRPA. W.S. § 30-5-303(b). Finally, the Legislature created a good faith exception to timely payment if moneys were properly escrowed in compliance with W.S. § 30-5-302.

9. 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.

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10. The above statutory lease definitions apply to all Wyoming oil and gas production absent express and specific language to the contrary:

> Unless otherwise expressly provided for by specific language in an executed written agreement, 'royalty', 'overriding royalty', 'other nonworking interests' and 'working interests' shall be interpreted as defined in Wyo. Stat. § 30-5-304.

W.S. § 30-5-305(a).

11. Throughout its existence, the Wyoming Supreme Court has repeatedly stated the WRPA is a remedial statute "to be liberally construed to achieve its remedial purpose." *Cabot Oil & Gas Corp. v. Followill*, 93 P.3d 238, 242 (Wyo. 2004) citing *Moncrief*, 816 P.2d at 105. "The Act was enacted in 1982 to stop oil producers from retaining other people's money for their own use." *Cabot Oil*, 93 P.3d at 242 citing *Independent Producers Marketing Corp. v. Cobb*, 721 P. 2d 1106, 1110 (Wyo. 1986).

12. 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.

III. JURISDICTION AND VENUE

A. Parties

13. Kenneth B. Geer is a resident of Campbell County. He is entitled to receive royalty payments from Defendant Lance for coalbed methane production in Campbell County, Wyoming. Plaintiff also asserts he is entitled to overriding royalty payments but this is disputed by the defendant.

14. The plaintiff brings this case not only on his own behalf but on behalf of all others similarly situated under the auspices of W.R.C.P. 23. The plaintiff has defined the proposed class as himself and all other similarly situated royalty interest owners pursuant to which Lance is obligated to pay royalties on gas production in Campbell County, Wyoming. The Royalty Owners meeting the above definition will be referred to as the "Proposed Class."

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15. Lance is a Delaware corporation engaged in the business of exploring for and producing coalbed methane in Wyoming. Lance owns working interests in coalbed methane wells located in Wyoming, including but not limited to Campbell County (collectively referred to as "Lance Wells"), only those located within Campbell County are subject to this case. Lance has paid and continues to pay royalties to Plaintiff and the Proposed Class for coalbed methane production from some or all of the Lance Wells.

B. Subject Matter Jurisdiction and Venue

16. W.S. § 30-5-303(b) provides "[t]he district court for the county in which a well producing oil, gas or related hydrocarbons is located has jurisdiction over all proceedings brought pursuant to this article..."

17. In *BP America Production Company v. Madsen, et al.*, 53 P.3d 1088, 1090 (Wyo. 2002), the Wyoming Supreme Court concluded "that the WRPA does not confer exclusive jurisdiction over claims brought under it in the district court for the county in which a particular well is located; rather, the intent of the WRPA is to allow such claims to be brought in the district court of any county in which a well is located." In making this ruling, the Court noted "[t]his reading of the statute is much more reasonable than the alternative—that multiple suits involving the same issues between the same parties must be brought in all the counties where a well is located." *Id.*, at 1092.

18. Plaintiff has alleged their royalty payments come from Lance Wells within Campbell County, Wyoming.

19. Plaintiff has asserted claims for declaratory judgment. Original jurisdiction for declaratory judgment is vested in the district courts. *Wyoming Constitution, Article 5, Section 10.* See also *Cotton v. Brow*, 903 P.2d 530, 532 (Wyo. 1995) and *Barber v. City of Douglas*, 931 P.2d 948, 951 (Wyo. 1997).

C. Conclusions of Law – Jurisdiction and Venue

20. This Court concludes it has personal jurisdiction over all parties to this suit.

21. This Court has subject matter jurisdiction to hear all the claims brought under the WRPA and for declaratory relief on behalf of the Plaintiff as well as on behalf of the Proposed Class.

22. This Court has venue to hear this case as Lance Wells are located within Campbell County, Wyoming, for not only the Plaintiff but also the Proposed Class.

IV. CLASS CERTIFICATION

A. The Proposed Class

23. Plaintiff asks the Court to certify the Proposed Class under Rule 23(b)(2) for declaratory and injunctive relief. Plaintiff individually, and for the Proposed Class, seeks to have the court enter a declaratory judgment that Lance's Production Tax deduction methodology and reporting practices violates the WRPA and enjoin Lance from continuing to employ the Production Tax methodology and reporting practices that violate the WRPA.

Plaintiff, under Rule 23(b)(3), further seek monetary damages for Defendant's alleged underpayment of Royalties, interest at a rate of 18% on all underpaid Royalties, and $100 per month per Royalty owner that complete reporting as required by W.S. § 30-5-305(b) was not provided to a Royalty owner.

24. The Proposed Class is, by definition, to include all non-governmental Royalty Owners to whom Lance was obligated to pay royalties for production of oil and gas from wells in Campbell County, Wyoming, and excludes Lance, its affiliates and predecessors, employees, officers and directors.

25. The injunctive and declaratory relief sought by the Plaintiff for himsef and the Proposed Class is available under Rule 23(b)(2) when "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

26. Plaintiff's Proposed Class is likewise requested under the provisions of Rule 23(b)(3) and will involve the application of the declarations and interpretations to determine if damages are due and the distribution of those damages, if any, arising from the alleged violations of the WRPA. The standard for Rule 23(b)(2) certification differs, however, from that under Rule 23(b)(3).

B. Standard for Class Certification

27. Rule 23(c) of the Wyoming Rules of Civil Procedure provides "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

28. While not binding, given the similarities between the Wyoming Rules of Civil Procedure and the Federal Rules of Civil Procedure, it is appropriate to look to federal precedent for guidance in interpreting and applying Wyoming's rules.

29. The determination of class certification is procedurally based and, while the burden is upon the Plaintiffs, they are "not required to carry a civil burden of proof in the preliminary stages of such a class determination." *Deutschamn v. Beneficial Corporation*, 132 F.R.D. 359, 365 (D.Del. 1990) quoting *Piel v. National Semiconductor Corp.*, 86 F.R.D. 357, 368 (E.D. Pa. 1980) (citation omitted). A leading treatise for class actions has similarly discussed this burden of proof:

> Rule 23 class actions represent a procedural device, which is invoked in the first instance by the plaintiff's complaint and is maintainable, if at all, by a court order which applies the Rule 23 criteria. Accordingly, in most cases a class action properly arises prima facie from a well-pleaded complaint, immediately shifting to the party opposing the class the burden to prove otherwise, and leaving the court in any event the duty not to reach an adverse class determination except if justified 'after a proper appraisal of all the factors enumerated on the face of the Rule itself.' Burden of proof concepts are generally more applicable to proof of facts or evidence and do not comfortably fit in determinations respecting whether a particular procedural device has been properly invoked or should be permitted to be maintained.

1 Herbert Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS, § 7.17 at 7-61-2 (3d ed. 2000).

30. To satisfy its burden for injunctive or declaratory relief under Rule 23(b)(2) or for monetary damages under Rule 23(b)(3), the Plaintiff must first satisfy all four elements of Rule 23(a). These elements are often referred to as "numerosity," "commonality," "typicality" and "adequacy." In addition to satisfying the elements of Rule 23(a), Plaintiff seeking declaratory or injunctive relief must further demonstrate that Rule 23(b)(2) is satisfied whereas for monetary damages that Rule 23(b)(3) is satisfied. *See Adamson v. Bowens*, 855 F.2d 668, 675 (10th Cir. 1998).

31. In this case, Plaintiff seeks certification under both Rule 23(b)(2) and 23(b)(3). When brought in isolation, Rule 23(b)(2) classes are referred to as "mandatory," class members are not even told about the matter, nor are they given the right to choose whether or not to participate. Classes under Rule 23(b)(3), however, are permitted under a "much wider set of circumstances but with greater procedural protections. Its only prerequisites are that 'the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2558 (2011) (quoting FED. R. CIV. P. 23(b)(3)).

32. The procedural protections given under a Rule 23(b)(3) case are to satisfy due process requirements particularly when the request for money damages will predominate. *Wal-Mart*, 131 S.Ct. at 2559. Under Rule 23(b)(3), potential class members are sent a notice that gives them the choice to participate or opt-out.

33. Courts have recognized the appropriateness of certifying classes under both (b)(2) and (b)(3) when the case involved both monetary damages as well as injunctive and declaratory relief:

> The district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages. This avoids the due process problems of certifying the entire case under Rule 23(b)(2) by introducing the Rule 23(b)(3) protections of personal notice and opportunity to opt out for the damages claims.

Lemon v. International Union of Operating Engineers, 216 F.3d 577, 581 (7th Cir. 2000).

34. In this case, Plaintiff seeks declaratory and injunctive relief on a class basis. In addition, Plaintiff then seeks application of any declarations this Court makes to the issue of monetary damages, if any, to Plaintiff and the Proposed Class. Plaintiff asks for money damages in the context of underpaid royalty and interest.

35. In his Complaint, Plaintiff alleges that Lance has failed to report "the total amount of state severance, ad valorem and other production taxes" on check stubs for all relevant periods. Pl.'s Compl., ¶¶ 30-32. Plaintiff's Motion for Class Certification avers that "Lance is liable to Geer and the class of Campbell County Royalty Owners for failure to accurately reports [sic] its deductions for taxes, as required by W.S. 30-5-305(b)(v)." Pl.'s Mot. at 6.

36. In 2009, Plaintiff participated in a class action settlement agreement with Lance in the case styled *Sandra K. Lange Trust dated June 28, 1994 by and through Trustee Sandra K. Lange, et al v. Lance Oil & Gas Company, Inc.*, Civil Action No. 29635, State of Wyoming County of Campbell, Sixth Judicial District that (1) released all reporting claims under the WRPA, known or unknown, prior to 2009; and (2) identified a negotiated reporting format that participating class members agreed was compliant with the WRPA.

37. In relevant part, the settlement agreement resolved:

> All claims including Attorney's Fee claims, whether in tort or contract or under statutes, regulations or other authority and whether equitable or arising under common law, and whether known or unknown, held by Settlement Class members and associated with Lance's reporting of royalties or overriding royalties on coalbed methane production prior to November 1, 2009, that were or could have been alleged for violations of the reporting requirements of the Wyoming Royalty Payment Act, including those specifically provided in Wyo. Stat. § 30-5-305(b).

Ex. 6 to Lance's Opposition Brief, at LOG000135KBG (*Notice of Pendency of Class Action Proposed Settlement with Def. Lance Oil & Gas Company, Inc.*).

38. The 2009 settlement agreement also provided that "[s]o long as Lance reports all taxes with a single adjustment code, Lance will define the adjustment code used on the check stub to indicate the code denotes 'Severance Taxes (may include other similar taxes).'" *Id.* at LOG000136-137KBG.

39. Last, the 2009 settlement agreement stated that:

> Upon final Court approval, all members of the Lance Settlement Class who choose not to timely exclude themselves from the Lance Settlement Class . . . will receive the benefits of the Settlement and will be bound by the resulting Order in the Lance Lawsuit, barring them from bringing any claim for Reporting Claims. If a member of the Lance Settlement Class does not opt out, that member will receive payment of a portion of the Settlement Amount and may not bring claims for the Settled Claims against Lance which are covered by this Settlement. Additionally, a member who does not opt out agrees that Lance may report royalties in the future according to that set forth in the Lance Settlement Agreement and that said reporting shall satisfy Lance's contractual and statutory payment and reporting obligations to each member who does not opt out.

Id. at 137.

40. This Court approved the 2009 Lance settlement and certified the settlement class. Ex. 5 to Lance's Opposition Brief, at LOG000168KBG (*Order Certifying Class and Approving Class-wide Settlement Agreement*). Plaintiff was a member of the certified settlement class and received settlement payment. *Id.* at LOG000246KBG.

C. Conclusions of Law – Standard for Class Certification

41. This court concludes it is appropriate to consider class certification under both (b)(2) and (b)(3) under the circumstances of this case and the right to apply those declarations to Plaintiffs and the Proposed Class as concerning the alleged overdeduction of taxes and underpayment of Royalties.

42. The court also concludes that it is not appropriate to consider class certification under either (b)(2) or (b)(3) in regards to any reporting claim made by Plaintiff. This is in consideration of the *Lang* settlement agreement that Plaintiff was party to.

V. Rule 23(a) Requirements

A. Rule 23(a)(1) – "Numerosity"

43. The Rule 23(a)(1) numerosity test mandates that the "class is so numerous that joinder of all members is impracticable." As a general rule there is no "bright line" test for numerosity. *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002). However,

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by way of example, it has been said "a class of forty is generally sufficient to satisfy Rule 23(a)(1)." *Id.* On the other hand, 3 HERBERT B. NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.05 (3rd ed. 1992) advises the numerosity test is satisfied by numbers alone when the size of the class is in the hundreds. The name and address of each and every potential member of the class does not have to be identified by the class proponent at the time the class is certified as long as the description of the class is sufficient for the court to ascertain whether a particular individual is a member. *Glassell v. Ellis*, 956 S.W.2d 676, 686-687 (Tex. App. 1997).

44. Practicality of joinder should be determined by an analysis of such factors as judicial economy, the nature of the action, geographical locations of class members, the likelihood class members will be unable to prosecute individual lawsuits, and whether joinder of all members is practicable in view of the size of the class. *Union Pacific Resources Co. v. Chilek*, 966 S.W.2d 117, 121 (Tex. App. 1998), rejected on other grounds by *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000). Impracticable, however, does not mean impossible. *Chevron U.S.A. Inc. v. Kennedy*, 808 S.W.2d 159, 161 (Tex. App. 1991). It only needs to be shown it is extremely difficult or inconvenient to join all members of the class as parties. *Id.*

45. In this case, Plaintiff provided evidence the Proposed Class in this matter would number 1,178 Royalty owners in Campbell County, Wyoming affected by Lance's incorrect tax calculations in 2011 alone. Defendant Lance essentially does not contest the numerosity requirement.

a. Findings of Fact – Numerosity

i. The evidence presented supports the fact there may be at least 1,178 owners in the Proposed Class with the possibility of more.

ii. Judicial economy would not be served by any effort to join 1,178 or more owners.

iii. If joined, some Proposed Class members might have small interests and, therefore, it is likely many of the Proposed Class members would not be able to prosecute their individual lawsuits due to economic and other barriers.

b. Conclusions of Law – Numerosity

i. Due to the large number of members in the Proposed Class, it is not practicable to join them into this lawsuit under either a (b)(2) or (b)(3) class.

ii. The "numerosity" requirement of Rule 23(a)(1) is satisfied for both (b)(2) and (b)(3) classes.

B. Rule 23(a)(2) – "Commonality"

46. Rule 23(a)(2) requires there be "questions of law or fact common to the class." W.R.C.P. 23(a)(2). To satisfy this test, it has often been recognized "for purposes of Rule 23(a)(2) even a single common question will do." *Wal-Mart*, 131 S.Ct. at 2556 (internal quotation marks and citations omitted).

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47. Federal precedent holds courts in considering commonality under Rule 23(a)(2) should certify a class after a "rigorous analysis" to determine the requirements are met. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 131 S. Ct. at 2551. In conducting such analysis, "sometimes it may be necessary for the court to probe behind the pleadings." *Id.* The analysis does not involve prejudging the merits or conducting a mini-trial in that regard, however. Rather, it is a pragmatic analysis of how the claims and defenses would be presented at trial in conjunction to determining whether the requirements of Rule 23 are satisfied.

48. Defendant Lance argues, as it has in the case titled *Sandra K. Lange Trust et al v. Lance Oil & Gas Company, Inc.*, Case No. 32513, State of Wyoming, County of Campbell, Sixth Judicial District, that Plaintiff cannot satisfy the commonality element because it will be necessary to examine different lease terms in order to determine whether its company-wide practice of improper tax deduction resulted in royalty underpayment. The argument is that by alleging underpayment of royalties owed, Plaintiff is necessarily suing for breach of the royalty clauses contained in thousands of separate lease contracts, many of which have their own unique royalty payment provisions that must be examined to determine whether, in any individual case, Lance failed to pay royalties properly. Analysis of Plaintiff's claims requires a lease-by-lease evaluation to determine whether Lance's royalty payments to thousands of different royalty owners comply with the specific royalty clauses of their individual leases. Improper tax accounting methodology does not automatically result in an underpayment of royalties on every contract with Plaintiff and royalty owners in the putative class. A common practice of deducting taxes, even if it results in an over-deduction of taxes, would have to be compared to the royalty payment obligation in a lease. Because of that, not every royalty owner in the putative class has a breach of contract claim.

49. The cases cited by Lance in its opposition brief to class certification demonstrate how variations in specific lease terms can defeat the commonality element, if they govern the resolution of plaintiff's claims. In contrast, Plaintiff in this case has met his burden, for class certification purposes, of establishing his claim that Lance employs a company-wide practice of overdeducting taxes and inaccurately reporting the taxes it pays, and that this practice applies uniformly to the class. The lease violation alleged by Geer is the obligation to make royalty payments, which is a lease term common to every single Royalty Owner in the class. The core claims of improper Production Tax deductions arise from the WRPA, and are also applicable to every single Royalty Owner in the class.

50. In this case, the obligation Lance has to Geer, and to every Royalty Owner in the class, is to pay Royalties in accordance with the WRPA. If, as Lance seems to concede, (for class certification purposes) Geer is correct in his contention that Lance over-deducts production taxes from Royalty payments, then Lance has violated the WRPA in the same way for every Royalty Owner in the class. Furthermore, there is a common answer for every Royalty Owner, which is in no way dependent upon the individual lease terms – that is to recalculate Royalty payments using the correct tax value and tax rate.

51. Lance refers frequently to "*Wal-Mart's* heightened commonality standard." (Lance Brief, pp. 20-22). Whether heightened or not, the standard set forth in *Wal-Mart* is met here. In *Wal-Mart*, the Court held that plaintiffs had presented no "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'" *Id.* at 2554; they failed to

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identify "a common mode of exercising discretion that pervades the entire company," *Id.* at 2554-55; they "identified no 'specific employment practice,'" *Id.*; and they provided "no convincing proof of a companywide discriminatory pay and promotion policy. . ." *Id.* at 2556. In contrast, Geer has presented proof, essentially uncontested by Lance for class certification purposes, of a company-wide practice, applied consistently to all members of the class, which results in overdeduction. Plaintiff has met the *Wal-Mart* standard by identifying and providing proof of a specific companywide practice employed by Lance which results in underpayment of Royalties to all class members.

52. The Court is not persuaded by Lance's argument this case raises issues of its freedom to contract. The issue in this case is the legality of Lance's deductions for Production Taxes from royalty payments. This case is not about whether, under various lease terms, Lance might be able to take deductions for gathering, processing and fuel.

53. At its core, *Wal-Mart* held as Plaintiffs could not provide proof "of a companywide discriminatory pay and promotion policy," the existence of a common question under a (b)(2) class could not be satisfied. *Wal-Mart*, 131 S.Ct. at 2556-2557. That is not the case here as Plaintiff has shown, and Defendant has essentially conceded, Defendant employed a company-wide policy on how it deducts taxes and pays Royalties. That policy is not disputed at this point and it results in Lance underpaying owners regardless of alleged differences in underlying lease language.

54. Other Courts, including those examining oil and gas class actions using the *Wal-Mart* test, have agreed such a common policy is sufficient to satisfy commonality inquiries in the context of class certification:

> The court finds that the arguments presented by XTO present no substantial basis for denying certification. The Supreme Court found that commonality did not exist in *Wal-Mart* because plaintiffs had supplied "no convincing proof of a company-wide discriminatory pay and promotion policy."
>
> ***
>
> In the present case, by contrast, XTO has conceded the existence of a generalized, uniform policy of charging royalty owners deductions for rendering the gas marketable. And the evidence suggests that this uniform policy was not adopted in a discriminating fashion, based on a careful examination of the language in each lease, but was imposed on as a blanket policy against all royalty interest owners.
>
> XTO suggests that *Wal-Mart v. Dukes* worked some sea change in class action jurisprudence. This is not so. The decision simply reflects the application of the long-standing rule that class members suffer a common injury, 131 S. Ct. at 2551 citing *Falcon* 457 U.S. at 157, to facts which clearly established that defendant had *not* adopted any uniform policy, but in fact had done precisely the opposite: granting thousands of individual managers discretion to make employment decisions. That is not the case here.

Roderick v. XTO Energy, Inc., 281 F.R.D. 477, 482 (Kansas 2012). See also *Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 908-910 (7th Cir. 2012); *In re Heartland Payment Sys.* 851 F.Supp.2d 1040, 1052-1054, (S.D. Texas 2012); *Jeremyn v. Best Buy Stores* 276 F.R.D. 167, 172-173 (S.D.N.Y. 2011); and *Chen-Oster v. Goldman, Sachs & Co.*, 2012 U.S. Dist. Lexis 99270.

a. Findings of Fact – Commonality

i. The core issue of this case is whether Lance has an internal policy which results in the improper deduction of taxes, which in turn results in underpayment of royalties.

ii. Defendant's actual policy, despite its present arguments concerning individual lease language, treated the vast majority of owners exactly the same. This will be discussed further, in more detail, under (a)(3) and (b)(3) considerations.

b. Conclusions of Law – Commonality

i. Common questions of law and fact are presented by the facts, evidence and pleadings in this case.

ii. The "commonality" requirement of Rule 23(a)(2) is satisfied for both (b)(2) and (b)(3) classes.

C. Rule 23(a)(3) – "Typicality"

55. "Typicality" requires the "claims or defenses of the representative parties are typical of the claims or defenses of the class." WYO. R. CIV. P. 23(a)(3). Unlike the numerosity, and commonality elements, which relate to the characteristics of the class, the "typicality" element focuses on the desired characteristics of the class representative. *Chieftain Royalty Co. v. QEP Energy Co.* 281 F.R.D. 499, 505 (W.D. Oklahoma 2012). "The burden of showing typicality is not an onerous one." *Roderick v. XTO Energy, Inc.*, 281 F.R.D. 477, 484 quoting *Paxton v. Union Nat. Bank*, 688 F.2d 551, 561 (8th Cir. 1982). The court in determining whether typicality exists "focuses on the similarity of the legal and remedial theories behind the class members' claims." *Lobo Exploration Co. v. Amoco Prod. Co.*, 991 P.2d 1048, 1055 (Ok. Civ. App. 1999). The claims or defenses need not be identical or perfectly coextensive, only substantially similar. *Union Pacific Resources Company v. Chilek*, 966 S.W.2d 117 (Tex. App. 1998); *Wiggins v. Enserch Exploration, Inc.*, 743 S.W.2d 334-35 (Tex. App. 1987).

56. In order to establish the claim, "[t]he representative must show a nexus with the claims or defenses of non-representatives ..." *Roderick*, 447 F.R.D. at 484. "Claims may be typical without being identical such that 'typicality may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is disparity in the damages claimed by the representative parties and other members of the class.'" *Chieftain Royalty Co.* 281 F.R.D. at 505 quoting *In re Four Seasons Securities Laws Litigation*, 59 F.R.D. 667, 681 (W.D. Okla. 1973). Put another way, "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Lobo Exploration*, 991 P.2d at 1055 quoting *Alpern v. UtiliCorp United Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996).

57. Lance asserts that Plaintiff is subject to a unique defense and therefore cannot satisfy the typicality requirement. Lance cites *Rolex Emps Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 664 (D.Or.1991) for the proposition that "The certification of a class is questionable where it is predictable that a major focus of the litigation will be on an arguable defense unique to the plaintiff or to a subclass." Lance cites to one of Geer's leases, the

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2005 lease, which required Geer to provide 30 days' notice as a prerequisite to filing suit. Geer responds that the 2005 lease is one of nine leases with Lance, representing one of 44 wells, and he states that the notice issue can easily be cured. The Court finds that the issue of notice under the 2005 lease is not significant and would not be "a major focus of the litigation."

58. In this case, Defendant's course of conduct in implementing its internal business policy of treating its owners the same for deducting taxes from Royalty payments, regardless of lease language, demonstrates the "typicality" requirement is satisfied.

59. Strategies to defeat typicality by arguing defenses or counterclaims are not favored:

> Santa Fe briefs several possible defenses that can be raised at trial, including different types of expenses related to post production, such as, gathering fees, transportation costs, compression costs, dehydration costs and other marketing expenses. Some post production costs are incurred at the wellhead, while other costs are incurred downstream. Whether these post production expenses are reasonable is not the issue to be resolved in this action, rather, whether any deductions for this type of expense are authorized under the clause in question. The fact that individual lessors may have different defenses to any counterclaims by Santa Fe does not prevent Handley from representing the class.

Handley v. Santa Fe Minerals, Inc., 849 P.2d 433, 436-437 (Ok. App. 1992).

60. Defendant Lance raises differences in lease language as an argument against typicality. This same argument was raised by Lance before Judge Deegan in the *Lange Trust* Case No. 32513, this court finds his analysis appropriate to this case.

> Lance points to differing lease language, including language in the leases held by the Lange Trust and the Moore Trust. For purposes of class certification, Lance asks this court to deny class certification due to these differences. However, the Court notes other Wyoming District Courts have addressed differences in lease language when examining typicality. For example, Judge Ryckman twice rejected differences in lease language as a basis to defeat the "typicality" requirement. The first was in *Scott v. Abraxas* in which Judge Ryckman noted the uniformity of the claims under the *Wyoming Royalty Payment Act*. In so doing, Judge Ryckman distinguished that case from another involving oil and gas properties in 15 states and the differing laws of those 15 states:
>
> > Defendant challenges that [plaintiff's] claims are not typical of the class because of differences in lease language. 'Some [class members] will claim additional royalty under the language contained in the Scott Assignments, some under the literal language of W.S. Section 30-5-304, and some under entirely different royalty clauses.' * * *
> >
> > The *Stirman* case is distinguishable from the current case. First, the implied covenant to market was not identically recognized in each of the fifteen states in which claims arose. The current case presents only Wyoming law for consideration. Second, the implied covenant to market was applicable only in those leases lacking an express covenant. The current case considers statutory interpretation and statutory application to the leases rather than solely the interpretation of leases. As litigation progresses, varying lease provisions may become an overwhelming obstacle in uniformly applying the Royalty Payment Act. If that were to occur, this Court could subdivide the class accordingly. Until then, differing lease provisions do not destroy typicality.
>
> *Abraxas Decision Letter* at pp. 4-5, attached as Exhibit 20 to Plaintiffs' Memorandum Supporting Class Certification. The same argument was again presented to Judge Ryckman in the *Samson* case—and it was again rejected:

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> Here, the Plaintiff and the potential class members have the same remedial and legal theory. They are both seeking for an interpretation and application of the Wyoming Royalties Payment. *See Abraxas Opinion Letter* at 5 (finding the typicality element met, because '[t]he current case considers statutory interpretation and statutory application to the leases rather than solely the interpretation of leases.').

Samson Decision Letter at p. 5, attached as Exhibit 21 to Plaintiffs' Memorandum Supporting Class Certification. In the *BP America* case, Judge Sanderson adopted the reasoning and rationale of Special Master Ford Bussart. Like Judge Ryckman, Judge Sanderson rejected differences in lease language as a basis to deny certification. See *Sanderson Order* attached as Exhibit 23 to Plaintiffs' Memorandum Supporting Class Certification and *Special Master Ford Bussart Findings and Conclusions* attached as Exhibit 22 to Plaintiffs' Memorandum Supporting Class Certification.

Lange Trust v. Lance, 32513 (*Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Class Certification*, ¶ 67).

a. *Findings of Fact – Typicality*

i. The claims all arise from the same course of conduct.

ii. While there may be different lease language, as to the issues before this Court, Defendant Lance treats the Plaintiff and the Proposed Class the same regardless of any differences in lease language.

b. *Conclusions of Law – Typicality*

i. Typicality does not require the factual circumstances of the Proposed Class and the named representative be identical.

ii. The typicality requirement is satisfied because the named representative's claims arise from Lance's course of conduct in treating all owners the same and their recoveries are premised on the same remedial theories.

iii. Typicality is satisfied because there is a nexus between the claims of the named representative and those of the Proposed Class.

iv. The "typicality" requirement of Rule 23(a)(3) is satisfied for both (b)(2) and (b)(3) classes.

D. Rule 23(a)(4) – "Adequacy"

61. Rule 23(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." The well-recognized test of adequacy principally centers on two factors: A.) Do the named representatives have interests that conflict with or are antagonistic to those of the class? and B.) Is class counsel competent and qualified to prosecution the action? See e.g. *Sonsa v. Iowa*, 419 U.S. 393, 403 (1975) (holding representation is adequate where "it is unlikely that segments of the class... would have interests conflicting... and where the interests of that class have been competently urged..."); *Eisen v. Carlisle and Jacquelin*, 391 F.2d 555, 562 (2nd Cir. 1968) (for adequacy it is essential a "party's attorney be qualified, experienced and generally able to conduct the proposed litigation... [and that] litigants are [not] involved in a collusive suit or [have] interests antagonistic to those of the ... class"); *In re Schering Plough Corporation Erisa Litigation*, 589 F.3d 585, 601-602 (3rd Cir. 2009) (holding adequacy tested by examining "the qualifications of the counsel" and

examining potential "conflicts of interest between named parties and the class..."); *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977) (court should consider "the experience and ability of counsel ... and whether there is any antagonism between the interests of the plaintiffs and other members of the class..."); *Pellman v. Cinerama, Inc.*, 89 F.R.D. 386, 390 (S.D. N.Y. 1981) (holding representatives to be adequate if "named plaintiff's interests are not antagonistic to other members ... and plaintiff's attorneys are qualified, experienced and generally able to conduct the litigation."). A minority of courts rephrase the test: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

62. The foregoing aside, Lance urges this court to go outside of the traditional two part test and to find the Plaintiff inadequate because he does not have detailed legal knowledge, is unfamiliar with his lease terms, and "has never read the WRPA..." (Lance Brief, p. 27).

63. Mr. Geer has a basic understanding of the claims asserted in this case. He testified:

> A: I don't need to see anybody else's leases.
>
> Q: Why not?
>
> A: Because each and every one of them would be different.. Maybe somebody has 18 percent. Maybe somebody only had 15 percent overrides, or whatever you want to call it. It all boils down to the same thing. You have overtaxation on the ad valorem tax. That means I'm underpaid, and everybody else is that's got the same Lance lease that's set up like that.

Kenneth Geer Deposition, 73:1-9.

64. Some courts have expressly rejected invitations to examine the personal characteristics of class representatives and instead relied solely on the two part test analyzed above. *See e.g. Peil v. National Semiconductor Corp.*, 86 F.R.D. 357, 366 (E. D. Penn. 1980); *Sharp v. Reybold Homes, Inc.*, 24 Fed.R.Serv.2d 1111, 4-5 (E.D. Penn. 1977). This Court need not decide whether to adopt a standard that is broader than the two part test discussed above. This is because it is clear even if it did, the broader standard would be met in this case.

65. In *In re Goldchip Funding Company v. 20th Century Corp.* the Federal District Court for the Middle District of Pennsylvania recognized if a court deems it relevant to examine the personal qualities and knowledge of the proposed representatives in order to determine adequacy, "[e]ven unknowledgeable and inexperienced Plaintiffs might meet the requirements of Rule 23 by demonstrating a keen interest in the progress and outcome of the litigation." 61 F.R.D. 592, 595 (M. D. Penn. 1974).

66. If a Plaintiff was required to have a particular level of knowledge about the class claims, such burden should be notably lower where the matter is particularly complex. See *Simon v. Westinghouse Electric Corp.*, 73 F.R.D. 480, 485-486 (E.D. Penn. 1977) ("...detailed knowledge on the part of non-lawyers of what acts might create liability under section 10b-5 cannot be expected and is not required..."); *Chevalier v. Baird Sav. Assoc.*, 72 F.R.D. 140,146 (Penn. 1976) ("... it strikes us at least partially unrealistic to expected the named plaintiffs to have any significant personal knowledge of the facts in a case like this involving an antitrust conspiracy"). The case at bar is particularly complex.

67. The case of *Harrington v. City of Albuquerque*, 222 F.R.D. 505, 514 (D. N.M. 2004), cited by Lance, stands for the proposition adequacy cannot be satisfied unless Plaintiff establishes adequate knowledge and involvement (i.e. class representatives must have knowledge of and involvement in the suit to protect the interests of absent class members as well as the ability to assist class counsel). In *Harrington*, the argument was made the plaintiffs did not have a sufficient understanding of the case and abdicated too many responsibilities to their attorneys. However, in rejecting defendant's argument, the Court noted the defendant had failed to give information to the plaintiffs and the defendant had unclean hands. *Harrington*, 222 F.R.D. at 515.

68. The *Harrington* case demonstrates Rule 23 adequacy does not require lay persons to have legal or factual knowledge not possessed by the Defendants or the attorneys in this action. Rather, the proposed class representative simply needs to "know something about the case" in order to be adequate:

> It is true that the named plaintiffs are not attorneys, but they are not required to be. It should come as no surprise that the Plaintiffs do not understand the complex constitutional issues involved in the collection of fair share fees from the Plaintiffs. Indeed, many members of the class likely have no idea that their constitutional rights are implicated by the collection of the fair share fees. The parties' counsel cannot agree on what the Constitution requires of the union with regard to the collection of fair share fees. The named Plaintiffs are not required to recite those requirements during their deposition in order to represent the class. *See Murray v. Sevier*, 156 F.R.D. 235, 249 (D. Kan. 1994); *In re Am. Dental Laser Sec. Litig.*, 151 F.R.D. 81, 82 (E.D. Mich. 1993).
>
> The Defendants seem to believe that the Plaintiffs themselves must decide how to phrase their complaint, what relief to seek, and how to draft pleadings and discovery responses in order to be adequate class representatives. That is not the law. The Defendants have not alleged that this litigation has been conducted differently than any other in terms of the level of involvement of the clients. 'Generally, as long as the plaintiffs, as class representatives, know something about the case, even though they are not knowledgeable of the complaint's specific allegations, the class should be certified.' *Lerner v. Haimsohn*, 126 F.R.D. 64, 67 (D. Colo. 1989).

Harrington, 222 F.R.D. at 514-515.

69. Similarly, in the case of *Hoffman Electric, Inc. v. Emerson Electric Company*, 754 F.Supp 1070 (W.D. Pa. 1991), the defendant there sought to defeat the adequacy test by arguing plaintiffs did not have enough familiarity or knowledge of the case to be adequate class representatives. The *Hoffman Electric* majority rejected that proposition, noting it is not fair to ask a lay person what are arguably legal questions:

> Again, we do not agree with the defendants. The Court of Appeals for the Third Circuit has rejected the argument that personal knowledge about the material facts in support of the plaintiff's claim is an element of adequacy of representation. *Lewis v. Curtis*, 671 F.2d at 789. Such a requirement does not make vigorous representation of the class any less likely. *Id.* The adequacy of representation test is not concerned with whether the plaintiff personally derived the information pleaded in the complaint or whether the plaintiff will personally be able to assist counsel. *Id.* In addition, it can be argued that the sorts of questions we have just quoted from the Musselman and Doerfler depositions are 'legal' questions which a layman might not be expected to be able to answer.
>
> We hold that plaintiffs' lack of knowledge of certain facts about the case, especially in a securities case such as this, is not a reason to deny certification of the class.

Id. at 1077.

70. When the issue of a plaintiff's knowledge has arisen, courts have come back to the well-recognized adequacy test:

> Both [Plaintiffs] believe in the legitimacy of their grievance, appear to be honest and responsible individuals, and are fully prepared to bear the costs of prosecuting this action. Their unfamiliarity with particular facts is trivial in light of these attributes particularly given the calibre of their counsel. As other courts in this District have observed, class certification cannot be defeated on the ground that plaintiff 'has a limited financial stake in the action and is not knowledgeable about the details of the claims made in her complaint.... The standards of Rule 23(a)(4) are met if it appears that the named plaintiff's interests are not antagonistic to other members of the class and plaintiff's attorney are qualified, experienced and generally able to conduct the litigation.'

Pellman v. Cinerama, Inc., 89 F.R.D. 386, 390 (S.D. N.Y. 1981) (internal citations omitted). See also *Mueller v. CBS, Inc.*, 200 F.R.D. 227, 238 (W.D. Pa. 2001) ("The legal knowledge of the putative class representatives is not an issue in determining their suitability to act on behalf of the other members, nor are they expected to be completely knowledgeable as to all the facts related to the class as a whole") (citation omitted).

71. Lance has not disputed the adequacy of class counsel, or their willingness to vigorously prosecute the claims presented for all class members. The Court, having viewed the submissions of Plaintiff's counsel as well as their handling of this case to date, is convinced Plaintiff's counsel are competent to represent the class in this matter.

72. Lance has inferred counsel may have too much control in this case. In cases where defendants question the integrity of the lawyers for bringing claims to the attention of their clients to deny class certification, courts have said:

> First, it is simply no surprise that Plaintiffs, not educated in substantive or procedural aspects of the law, would not know that they either had potential claims against Defendants. Second, it is not surprising that Plaintiffs would not comprehend that their potentially minuscule claims could be realistically aggregated with other similarly sized claims and prosecuted through the mechanism of a class action.

Jerry Enterprises of Gloucester County, 178 F.R.D. at 445.

73. The United States Supreme Court has recognized the rules of civil procedure are intended to administer justice such that bona fide complaints are adjudicated on the merits and not denied through procedural bars:

> We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23 (b), like the other civil rules, was written to further, not defeat the ends of justice.

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

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a. Findings of Fact – Adequacy

i. In this case, there are no conflicts or antagonistic interests that would prevent the Plaintiff from serving as class representative.

ii. Plaintiff's counsel is not only skilled and competent, but they collectively have extensive experience both in oil and gas royalty matters as well as class certification matters.

iii. Plaintiff has demonstrated sufficient knowledge, integrity and character to serve as a class representative.

b. Conclusions of Law – Adequacy

i. The requirements of W.R.C.P. 23(a)(4) are satisfied where (1) the named plaintiffs do not have interests which are conflict with or are antagonistic to those of the class and (2) when class counsel is competent and qualified to prosecute the action.

ii. The "adequacy" requirement of Rule 23(a)(4) is satisfied for both (b)(2) and (b)(3) classes.

VI. RULE 23(B)(2) REQUIREMENTS

74. In determining whether 23(b)(2) is satisfied, a court does not focus on the merits of plaintiff's claims but rather whether the harm alleged can be appropriately remedied by injunctive and declaratory relief. See *Shook v. Bd. Of County Comm'rs*, 543 F.3d 597, 612 (10th Cir. 2008); 2 HERBERT B. NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 7.09 (3rd ed 1992). Under Wyoming law, declaratory relief is proper where it will terminate an actual and justiciable controversy regarding the meaning or application of a statute. *Rocky Mountain Oil & Gas Assn. v. State of Wyoming*, 645 P.2d 1163, 1168 (Wyo. 1982). Injunctive relief is appropriate where it is necessary to enforce prospective relief. *Reno Livestock Corp. v. Sun Oil Co.*, 638 P.2d 147, 153 (Wyo. 1981).

75. Rule 23(b)(2) is satisfied where "'the party opposing the class ... acted or refused to act or failed to perform a legal duty ...on grounds generally applicable to all class members' and the final injunctive or declaratory relief 'will settle the legality of the behavior with respect to the class as a whole.'" *Davis*, 218 P.2d at 81 quoting 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* P. 4:11 at 55, 56 (4th ed. 2002).

76. In *Davis* this standard was satisfied based upon the uniform conduct of the defendants toward the class regardless of the individualized language of "royalty agreements" among the class members:

> Here, the district court found that Defendants acted on grounds generally applicable to all class members by deducting certain costs uniformly in all royalty agreements, regardless of the language of those instruments ...
>
> Given Defendant's standardized treatment of all class members in deducting certain costs, we agree with the district court that it would be in a position to declare the rights of the parties on a class wide basis with respect to the propriety of those deductions. For those agreements in which the marketable condition rule may be implied . . . the court would be in a position to adjudicate on a class-wide basis whether the costs uniformly deducted by

> Defendants were necessary to put the CBM gas in a marketable condition . . . . Therefore, Defendant's reliance on individualized inquiries is misplaced.

Davis, 218 P. 2d at 81-82.

77. Plaintiff seeks to have the court construe his rights as a Royalty Owner under his leases with Lance, affected by the WRPA. His complaint, therefore, falls within the general scope of the Declaratory Judgment Act. Mr. Geer is an "interested" person who has raised a justiciable controversy. *Cox v. City of Cheyenne,* 2003 WY 146, ¶ ¶8,9, 79 P.3d 500, 505 (Wyo.2003).

78. Likewise, injunctive relief is available to the Plaintiff and the class pursuant to W.S. § 1-28-102 and WRCP 65. Injunctive relief, although authorized by statute, is "by nature, [a] request for equitable relief," and is granted at the Court's discretion. *Wilson v. Lucerne Canal and Power Co.*, 2003 WY 126, ¶¶9 & 14, 77 P.3d 412, 416 (Wyo. 2003). Injunctions may only issue "when the harm is irreparable and no adequate remedy at law exists." *Wilson* at ¶ 14. An injury is irreparable "where it is of a peculiar nature, so that compensation in money cannot atone for it." *Id.* In this case, the injury to Plaintiff and the class of Lance's continuing to employ its allegedly illegal methodology arises from the fact the only other remedy would be continued, periodic class action lawsuits, which are not an adequate remedy.

79. Plaintiff asks the court to: (1) enter a declaratory judgment that Lance's Production Tax deduction methodology violates the WRPA (Complaint, ¶36); and (2) enjoin Lance from continuing to employ the Production Tax deduction methodology that violate the WRPA (Complaint, ¶38).

80. Here, Lance argues, under *Wal-Mart*, individualized lease language is fatal to certification under 23(b)(2). Lance's argument, however, fails to recognize important distinctions. First, the *Wal-Mart* claims were exclusively under (b)(2) and Plaintiffs were unable to provide any evidence of a uniform company-wide policy that demonstrated discrimination on the basis of gender. This case seeks certification not only under (b)(2) but also under (b)(3). Rule (b)(3) is intended to handle the individualized inquiries that might be necessary and to provide procedural due process consideration by giving owners a notice and a choice of whether they wish to participate. *Wal-Mart*, 131 S.Ct. at 2558-59.

81. The Court rejects Lance's argument regarding permissible deductions not taken and the need to examine individual lease language, for the reasons discussed above in the context of commonality and typicality. Lance's setoff argument does not alter Plaintiff's case regarding Lance's course of conduct over the relevant period, and its uniform method of Production Tax overdeduction from all Royalty Owners.

82. Lance has refused to correct its practice of overdeducting Production Taxes. Lance's tax overdeduction and royalty underpayment injure every class member; likewise, the remedy sought through declaratory judgment and injunctive relief is a remedy applicable to all class members. This is the essence of the cohesiveness requirement at Rule 23(b)(2).

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a. Findings of Fact – Rule 23(b)(2) Class

i. Plaintiff alleges Lance has followed a tax deduction and payment protocol under the WRPA that pays all owners in the Proposed Class exactly the same regardless of differences in lease language.

ii. Lance has not made sufficient showing that the underlying leases prevent certification given its uniform policy of treating owners the same.

iii. Plaintiff has sought equitable relief in the form of declaratory judgment against Lance.

iv. Plaintiff has sought equitable relief in the form of injunctive relief against Defendant Lance.

b. Conclusions of Law – Rule 23(b)(2) Class

i. There is evidence indicating that Defendant Lance has acted or refused to act on grounds generally applicable to the class.

ii. In determining whether 23(b)(2) is satisfied, a court does not focus on the merits of plaintiff's claims, but rather whether the harm alleged can appropriately be remedied by injunctive and declaratory relief.

iii. Final injunctive and corresponding declaratory relief with respect to the class as a whole is requested by Plaintiff, rendering such action appropriate.

iv. Final injunctive and corresponding declaratory relief will provide common answers which can then be applied to Plaintiff and the Proposed Class.

v. A class will be certified pursuant to Rule 23(b)(2) to resolve declaratory and injunctive claims based upon Defendant's common conduct, which is generally applicable to all members of the Proposed Class as defined.

VII. RULE 23(B)(3) REQUIREMENTS

83. There is a two pronged test for whether a class action may be maintained pursuant to Rule 23(b)(3): the predominance test and the superiority test. Predominance exists where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." W.R.C.P. 23(b)(3). Superiority exists where a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.*

84. In examining these tests, it is appropriate for the court to consider the following factors outlined in Rule 23(b)(3):

a. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

b. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

c. The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

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d. The difficulties likely to be encountered in the management of a class action.

85. Professors Wright and Miller have described the predominance test as follows:

> [T]he predominance test involves an attempt to achieve a balance between the value of allowing separate actions to be instituted so that individuals can protect their own interests and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis.

FPP § 1777, Class Actions in Which Common Questions Predominate Over Individual Questions – In General, 7AA Fed. Prac. & Proc. Civ. § 1777 (3d ed).

86. Predominance is generally satisfied where the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Roderick*, 281 F.R.D. at 486 quoting *Achem Prods. V. Windsor*, 117 S. Ct. 2231, 2249 (1997). Analysis of the predominance requirement involves the identification of which substantive issues will control the outcome of the litigation, not whether or how many common or individual issues or facts exist. *Tana Oil and Gas Corporation v. Bates*, 978 S.W. 2d 735, 742 (Tex. App. 1998); *Greghol Ltd. Pshp. v. Oryx Energy Co.*, 959 P. 2d 596, 598-99 (Ok. Civ. App. 1998).

87. This judicial emphasis on the quality of the issues as opposed to the quantity of the issues is applicable to oil and gas disputes. In a number of oil and gas cases, courts certified classes despite the existence of individual lease language. *See e.g. Roderick v. XTO*, 281 F.R.D. 477 (D. Kansas 2012); *Chieftain Royalty Co. v. QEP Energy Co.*, 2012 U.S. Dist. Lexis 35842, 2012, WL 896412 (W.D. Okla. 2012); *Freebird, Inc. v. Merit Energy Co.*, 2011 U.S. Dist. Lexis 624, 2011 WL 13638 (D. Kan. 2011); *Fankhouser v. XTO Energy, Inc.* 2010 U.S. Dist Lexis 133345, 2010 WL 5256807 (W.D. Okla. 2010).

88. Lance argues individual lease language is a "fatal dissimilarity" which precludes predominance. *Lance's Opposition Memo* at p. 31. This same argument was used by Lance before Judge Deegan, the court finds his analysis appropriate to this case.

> The lease language has been discussed at length previously. In the context of predominance, Judge Ryckman also discussed this argument. The Court finds Judge Ryckman's analysis persuasive.
>
> > Here, Defendant argues that the individual issues created by different lease language predominates over any common issues of fact or law. However, it is hard to find that the individual leases preclude the common issue when there is evidence in the record that Defendant treated all royalty interest owners equally, regardless of the terms of their conveyances. *See Greghol*, 959 P.2d at 599. Therefore, individual issues created by the specific language of the conveyance instruments do not preclude the common issue, i.e. the proper application of the Act, from being predominant. *See id.*
>
> *Samson Decision Letter* at pp. 8-9, attached as Exhibit 21 to Plaintiffs' Memorandum Supporting Class Certification. (footnote omitted).

Lange Trust v. Lance, 32513 (*Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Class Certification*, ¶ 113).

89. As discussed above in the context of the commonality and typicality elements, the core issues of this case are consistent across the class. The evidence necessary to make out a prima facie case for every class member is the same formula as applied to the Geer wells. The ad valorem tax rate used by Lance and the actual ad valorem tax rate imposed in

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Campbell County are the same for each class member. Lance's methodology for deducting Production Taxes from Royalty Value instead of Taxable Value is the same for each class member.

90. There is an expectation that (b)(3) classes will include some individualized inquiries and particularly when it comes to the computation of monetary damages, if any. *Wal-Mart*, 131 S.Ct. at 2558-59.

91. The superiority test merges with the predominance test when the resolution of common issues in a single proceeding will be more efficient than determining each class member's claims individually. The efficiencies which will be realized by proceeding on a class basis will accrue to the Plaintiff, Lance and the judiciary alike since predominating questions of law or fact will be decided for all without the need for individualized treatment. *SEECO, Inc. v. Hales*, 954 S.W.2d 234 (Ark. 1997).

92. Once the Court's rulings are made, the incremental cost to apply those rulings to all Class members, as opposed to applying them only to Plaintiff, will be minimal. The superiority test was described in *Tana Oil and Gas Corporation v. Bates*, 978 S.W.2d 735, 743 (Tex. App. 1998) as follows:

> A class action is the superior method of adjudication when the benefits of class-wide resolution of common issues outweigh any difficulties that may arise in the management of the class. [citation omitted]. The trial court should consider alternative procedures for disposing of the dispute and compare these to the judicial resources and potential prejudice to absent class members involved in pursuing the class action. [citation omitted]. The trial court may consider whether: (1) class members have an interest in resolving the common issues by class action; (2) class members will benefit from discovery already commenced; and (3) the court has invested time and effort in familiarizing itself with the issues in dispute. Clearly class members have an interest in recovering allegedly underpaid gas royalties. Furthermore, to the extent that individual claims may be too small to justify the expense of litigation, the class action mechanism allows for an efficient means to resolve these disputes. Additionally, counsel for plaintiff has already conducted extensive discovery which would equally benefit all absent class members. And, the trial court has familiarized itself with the nine volumes of discovery already produced. Therefore, a single trial to adjudicate these disputes is an efficient alternative.

93. Because of this, class certification will spare the Court repetitious analyses of each individual claim, and the repetitious motion practice, that would be required if each Royalty Owner were to bring his or her case separately. *Dresser Industries, Inc. v. Snell*, 847 S.W.2d 367 (Tex. App. 1993).

94. In this case, the damages for each class member are relatively small, and the interest in individually controlling the prosecution is commensurately low. Further, the costs and expenses of resolving the plaintiff's claims through hundreds of lawsuits would be prohibitive for both the class members and the courts.

95. The Court recognizes many Proposed Class member may not have the resources, knowledge or ability to pursue their own litigation. Because of this reality, requiring separate lawsuits would, as a practical matter, preclude most Proposed Class members from obtaining any relief due to the cost, time, and expertise required to effectively present their claims; claims which Plaintiffs are seeking to have resolved on a countywide basis. See *In Re Lease Oil Antitrust Litigation (No. II)*, 186 F.R.D. 403, 429 (S.D. Tex. 1999) ("Since the cost of complex commercial litigation against one or more oil companies is extremely high and the

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individual returns comparatively low, the class action appears to be the only feasible manner of bringing posted price claims.").

96. The parties have brought no WRPA litigation addressing the issues of Production Tax deductions to the Court's attention. As discussed above, the Court is aware of the *Lange Trust* litigation, in which the parties have raised the permissibility of certain deductions, such as for gathering and processing. The issue before this Court in the present action, Lance's alleged overdeduction of Production Taxes, is not raised in that case.

97. The Court concludes that the Sixth Judicial District, Campbell County is the best forum in which to concentrate this litigation, as the issue relates to production in Campbell County and to the correct Production Tax rates for Campbell County production.

98. The Court finds that there are no particular difficulties in managing this class action. The identity and contact information of each class member is easily ascertained in Lance's records. The class is not too large to be managed, and the issues are so cohesive as to simplify that management.

> [D]ismissal for management reasons is never favored. The vehicle of class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. A contrary rule would "essentially preclude class treatment whenever separate issues had to be tried.

In re Workers' Compensation, 130 F.R.D. 99, 110 (D.Minn.,1990)(citations omitted).

a. Findings of Fact – Rule 23(b)(3) Class

i. The Court is not aware of any other litigations pertaining to the issues presented in this case as alleged against Defendant Lance.

ii. It would be time consuming, costly, burdensome and potentially prohibitive for Proposed Class members to individually pursue these claims and obtain discovery.

iii. The Lance system for payment of royalty employs a common protocol for all members of the Proposed Class.

iv. The issues to be heard in this case are manageable though it is recognized it will require some hard work and diligence.

v. The core issues of this case predominate over individual issues and will drive the resolution of this litigation.

vi. A class action is a superior method to resolve the issues. It avoids other courts or litigants having the same issues heard over and over.

b. Conclusions of Law – Rule 23(b)(3) Class

i. The requirements of W.R.C.P. 23(b)(3) are satisfied where (1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and (2) where a "class action is superior to other available methods for the fair and efficient adjudication of the controversy."

ii. The members of the class do not have a substantial interest in individually controlling the prosecution of separate action under the WRPA. A certification under

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Rule 23(b)(3) allows Proposed Class members to opt-out if they wish to pursue a separate action.

iii. Due to what will be a relatively small amount of money involved for each individual class member, the high cost of royalty litigation, the large numbers of potential claimants and the potential impact on judicial resources if separate actions were maintained, the class action is the superior method of adjudication. No prejudice to absent class members is foreseen.

iv. A class will be certified pursuant to Rule 23(b)(3) to resolve the claims for monetary damages based upon Defendant's common conduct that is generally applicable to all members of the Proposed Class as defined.

VIII. ORDER

Having considered all of the pleadings, exhibits, testimony and arguments presented by the parties, and having conducted a rigorous analysis, the Court finds that certifying a class under W.R.C.P. 23(b)(2) and (b)(3) is proper and appropriate for all claims in this case except the reporting claim which is barred.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that *Plaintiffs' Motion for Class Certification* is hereby **GRANTED** for all claims except the reporting claim which is barred from this case.

IT IS FURTHER ORDERED that Plaintiff is as an adequate representative of the class and Plaintiff's counsel are appointed as Class Counsel.

IT IS FURTHER ORDERED Defendant shall disclose to Plaintiff the names and addresses of all Royalty Owners along with other information reasonably requested by Class Counsel within thirty (30) days.

IT IS FURTHER ORDERED Class Counsel shall present a proposed class notice for approval within thirty (30) days.

IT IS FURTHER ORDERED reasonable and adequate Class Notice be provided to all potential class members by Class Counsel, who shall mail the Class Notice via U.S. Mail, First-Class or Priority Mail to each potential class member at the member's last known address recorded in Defendant's records.

IT IS FINALLY ORDERED, pursuant to W.R.C.P. 23(c) and (d), potential class members will be provided the opportunity to request exclusion from the Class by delivering to Class Counsel the potential Member's election of exclusion. Class members who do not elect exclusion from the Class shall be included in the Class.

(#353, 669-691

BY THE COURT this 29 day of January, 2013.

Dan R. Price II

Dan R. Price, II
DISTRICT JUDGE

DISTRIBUTION: Kate M. Fox, *Esq.* Mark R. Ruppert, *Esq.* Cathleen D. Parker, *Esq.*

(Date) *(Clerk/Judicial Assistant)*

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