IN THE DISTRICT COURT FOR THE SIXTH JUDICIAL DISTRICT
FOR THE STATE OF WYOMING, CAMPBELL COUNTY

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

FILED NO.
CIVIL ☐ PROBATE ☐ CRIMINAL ☐
ADOPT ☐ DEL ☐
APR 03 2014
DEPUTY CLERK OF DISTRICT COURT

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S IMPROPER TAX CALCULATION CLAIM, AND DENYING DEFENDANT'S MOTION TO DECERTIFY THE CLASS AS TO DAMAGES

THIS MATTER having come before the court for hearing on September 27, 2013, and Plaintiff, having appeared through his counsel, Kate M. Fox[1] and John C. McKinley; and Defendant, having appeared through its counsel, Mark R. Ruppert, and all matters having been duly considered, the court will hereby find and order as follows:

INTRODUCTION

Plaintiff (herein "Plaintiff" or "Geer") seeks declaratory, injunctive, and monetary relief. In essence, Plaintiff alleges that Defendant (herein "Defendant" or "Anadarko") breached its obligations under Wyoming law in two ways with regard to withholding certain taxes. First, Geer alleges that Anadarko did not properly withhold *ad valorem* taxes. (Compl. ¶ 19(a)). Second, Geer alleges that Anadarko improperly calculated, and consequently improperly withheld, severance taxes from Plaintiff's royalty checks.

Plaintiff claims these errors entitle him, and the other class members, to declaratory relief in the form of the court declaring that Anadarko incorrectly withheld *ad valorem* and severance taxes. He further claims that he is entitled to injunctive relief in the form of an order directing

[1] Justice Fox withdrew from the case following her appointment to the Wyoming Supreme Court.

Anadarko as to how to fix the problems moving forward. Finally, Plaintiff alleges that he is entitled to money damages for the amount he was underpaid in royalties due under the leases.

FINDINGS OF FACT

There are few material facts in this case and they are not in dispute. The dispute is over the legal import of those facts. For purposes of the pending cross motions for summary judgment, the court will find the following undisputed facts. Additional undisputed facts will be included in the court's analysis as necessary.

1. From 2002 until Lance merged with Anadarko, Anadarko estimated the *ad valorem* tax rate when it calculated the amount of taxes to be deducted from Royalty payments because *ad valorem* taxes are paid the year following the production year. Therefore, the exact *ad valorem* tax rates are unknown at the time of production. (Pl.'s Summ J. Ex. 3 at 101-102).

2. Each year, Anadarko reported a single certified value for each property for purposes of *ad valorem* taxes. (*Id.* at 42).

3. From 2002 through 2011, there are five different taxing districts applicable to the wells in which Geer, and other class members, own interests. (Pl.'s Summ. J. Ex. 1 at Ex. B).

4. In production years 2002 and 2003, Anadarko applied estimated tax rates that exceeded what turned out to be the actual tax rates for all taxing districts. (*Id.*).

5. In production year 2004, Anadarko applied estimated tax rates that exceeded the actual tax rate for three the tax districts (100, 125, and 140). However, from March to December 2004, Anadarko applied an estimated tax rate that was less than the actual tax rate for tax district 146. (*Id.*).

6. In production years 2005 and 2006, Anadarko applied estimated tax rates that were less that the actual tax rate for all five applicable taxing districts. (*Id.*).

7. In January of production year 2007, Anadarko applied estimated tax rates that were less than the actual tax rates for all districts. For the remainder of production year 2007, Anadarko applied estimated tax rates that exceeded the actual tax rates for all districts.

8. In production years 2008 and 2009, Anadarko applied estimated tax rates that exceeded the actual tax rates for all districts.

9. In production year 2010, Anadarko applied estimated tax rates that exceeded the actual tax rates for all districts except district 150 for which Anadarko applied an estimated tax rate that was less than the actual tax rate.

10. In production year 2011, Anadarko applied estimated tax rates that exceeded the actual tax rates for all districts.

11. Anadarko did not make an adjustment for the amount of taxes withheld once the actual tax rate became known. (Pl.'s Summ J. Ex. 3 at 103). From this, the court concludes that Anadarko never reimbursed royalty owners for months when the estimated taxes withheld exceeded the amount of actual taxes due once the actual tax rate was provided.

12. Anadarko did not request reimbursement from royalty owners for months when the amount withheld under estimated tax rate was less than the amount that should have been withheld under the actual tax rate. (*Id.* at 103).

13. For severance tax purposes, Anadarko submits one taxable value per month, per year for each property. (Pl.'s Summ J. Ex. 3 at 42). Anadarko paid all severance taxes due on the properties at issue on behalf of the Plaintiff. (Def. Summ. J. Ex. 1 (Aff. of J. Wallner) ¶ 5).

14. For the relevant time period, Anadarko calculated taxable value to report to the State of Wyoming by subtracting from the gross wellhead value:

(1) downstream transportation charges;

(2) charges and fuel associated with carbon dioxide removal at three processing plants, and;

(3) exempt royalty payments (i.e., State and Federal royalties).

(*Id.* ¶ 7).

15. Anadarko reported this amount to the State of Wyoming for purposes of severance tax remittance. (Pl.'s Summ J. Ex. 3 at 53). Thus, in mathematical terms, Anadarko's tax formula for taxes reported, and paid, to the State of Wyoming looks like this:

Taxes Paid = (gross prod. – transp. costs – process. costs – exempt royalties) * tax rate

16. Anadarko paid royalties to Geer by subtracting the owner's fractional share of transportation costs from the owner's fractional share of gross production value. (Pl. Summ. J. Ex. 3 at 49-50). In mathematical terms, Anadarko computes royalties as follows:

Royalty amount = (production * dec. interest) – (transp. costs * dec. interest)

17. Thus, from around 2000 through 2010, Anadarko "has not deducted from [its royalty calculation] the costs for the fuel, compression, dehydration, and treating/processing for carbon dioxide removal services incurred by [Anadarko] . . . even if individual leases would otherwise permit the deduction of those costs. . . .Although [Anadarko] does not currently deduct other fees allowed by certain leases, [Anadarko] has the functional capability in its revenue accounting system to do so. . . ." (Def. Summ. J. Ex. 1, ¶ 4).

18. When computing taxes to withhold from royalty owners, Anadarko applies the royalty owner's proportionate share (the decimal amount the owner is entitled to receive of gross production), multiplies that number by the proportionate share in gross wellhead value, then multiplies transportation costs by the owner's fractional interest, and subtracts that amount from the royalty owner's gross value. Then, Anadarko multiplies that result by the applicable tax rate to determine the amount of severance taxes that will be deducted from the royalty owner's royalty check. (Pl. Summ J. Ex. 2 at Resp. to Interrog. No. 2; Pl. Summ. J. Ex. 5 at 19; Def. Summ. J. Ex. 1 (Janis Wallner Aff.) ¶ 6). In mathematical terms, the formula looks like this:

Tax Withheld = ((production * dec. interest) – (transp. costs * dec. interest)) * tax rate

19. Anadarko does not deduct all costs from the gross value before computing the taxes to be withheld from each royalty owner because Anadarko has not passed the processing costs on to the royalty owners. (Pl. Summ. J. Ex. 5 at 24-25). "Anadarko actually pays 100 percent of that processing fee deduction and chooses – for business reasons or whatever reason - not to pass that expense through to the royalty interest owners." (*Id.* at 24). Since the royalty owners did not actually pay the processing costs, Anadarko does not deduct this cost when computing taxable value in determining how much in severance taxes to withhold from each individual royalty owner. (*Id.*).

20. The terms of the leases between the royalty interest owners (like Geer) and Anadarko vary considerably. (Def. Summ J. Ex. 5 at 7; Ex. 5 at Ex. C). However, there is no evidence that the leases vary in how taxes (severance and *ad valorem*) can be deducted. That is, the parties apparently agree that all leases allow for taxes to be deducted according to Wyoming statute.

CONCLUSIONS OF LAW AND ANALYSIS

Because of the interplay of various rules of law, this case presents as "a riddle, wrapped in a mystery, inside an enigma."[2] For his part, Plaintiff claims the way Anadarko computed and withheld *ad valorem* taxes caused overwithholding, which he can recover. He also claims that Anadarko's method for computing severance tax does not comply with the applicable statutes. Anadarko responds that Plaintiff's damages claim fails because it properly computed the taxes. In the alternative, Anadarko submits that Plaintiff's claim for damages is a breach of contract claim which fails *ab initio* because Plaintiff cannot show he was damaged because even if they did not compute the severance taxes correctly, the amount of "deductions-allowed-but-not-taken"[3] far exceed the amount of any tax overwithholding.

It is important to apply the right order of operations. The court cannot determine whether class decertification is warranted until the underlying legal issues regarding the proper calculation of taxes have been resolved. The decertification question also depends on how Anadarko's "deductions-allowed-but-not-taken" issue is resolved. Once those questions are answered, the issue of class certification can be addressed because the certification issues require a practical analysis in light of the material facts and issues of the particular case. *See Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S.Ct. 2541, 2551 (2011).

Therefore, the court will answer the riddle of how taxes should be calculated and withheld under Wyoming law. Then, the court will solve the mystery of how Anadarko's decision not to take certain deductions should be treated. Finally, the court will unravel the enigma of how *Comcast v. Behrend* and the Tenth Circuit's decision in *Roderick v. XTO* impact the issues under the facts presented in this case.

Ad Valorem Taxes

1. The parties generally do not dispute the *ad valorem* tax issues. The underlying leases are Wyoming contracts that must be interpreted under Wyoming law. Consequently, all

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[2] Winston Churchill commenting on Russia's plans shortly before entering World War II.

[3] The court will refer to this as the "deduction-allowed-but-not taken" theory, argument, claim, or defense. Mr. Deeb described these as "Additional Allowable Deductions[.]" (Decertification Mem. Ex. 4 at 3). These are generally deductions for "treating, dehydration, Compression, processing or gathering[,]" which Anadarko voluntarily has not taken despite language in most leases allowing some, or all, such deductions. (*See* Decertification Mem. at 5).

applicable terms of Wyoming law, including applicable tax statutes, are incorporated into the underlying lease agreements. *See Union Pacific Resources Co. v. Texaco, Inc.*, 882 P.2d 212, 222 (Wyo. 1994) (holding that state statutes regulating oil and gas development are incorporated into oil and gas agreements).

2. Under Wyo. Stat. Ann. § 39-14-203(c)(i), Geer is liable for property taxes on the "lease condensate or natural gas production removed only to the extent of [Geer's] retained interest under the lease, whether royalty or otherwise." Anadarko remains liable for the remaining applicable *ad valorem* taxes. *Id.*

3. As conceded by the parties, property taxes are paid in arrears in Wyoming due to the nature of how those taxes are assessed. Consequently, as outlined in the facts above, there are months and years where Anadarko overestimated the anticipated property tax rate. In those months and years, Anadarko overwithheld taxes from Geer. Likewise, there are months and years where Anadarko underestimated the anticipated property tax rate, and consequently, underwithheld property taxes from Geer.

4. As the parties argued, the issue is whether Geer is entitled to declaratory and injunctive relief requiring Anadarko to "true up" the *ad valorem* taxes. Under Wyo. Stat. Ann. § 39-14-203(c)(i), Anadarko is only entitled to withhold "payment" made to the taxing authority. Since the facts presented only deal with past actions, Geer is entitled to a declaration that Anadarko overwithheld taxes for certain months.

5. Unknown facts make summary judgment on Plaintiff's claim for injunctive relief, inappropriate. As the parties concede, *ad valorem* taxes can only be withheld by guesstimating the tax rate.[4] There were some years in which Anadarko underestimated *ad valorem* taxes. Thus, the court cannot infer that Anadarko's methodology for estimating *ad valorem* taxes in inherently biased against the royalty owners. Moreover, there is little (if any) evidence in the record as to how Anadarko creates its estimated *ad valorem* tax rates. Therefore, the court will deny Plaintiff's motion for summary judgment insofar as seeks "injunctive relief ordering [Anadarko] to correct" its *ad valorem* tax methodology moving forward.

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[4] Although the court was unable to locate a printed dictionary containing a definition, Merriam-Webster's online dictionary defines "guesstimate" as "an estimate usually made without adequate information." *See www.merriam-webster.com.*

6. As to Plaintiff's request that the court find Anadarko liable to the class for royalty underpayments and interest (i.e., legal relief in the form of damages), that issue will be addressed below under "Damages."

Severance Taxes

7. The issue regarding the alleged overwithholding of severance taxes by Anadarko is primarily a question statutory construction. In particular, the court must construe Wyo. Stat. Ann. § 39-14-203(c)(iii). That provision states:

> Any taxpayer paying severance taxes on any crude oil, lease condensate or natural gas production 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.

Wyo. Stat. Ann. § 39-14-203(c)(iii) (West 2013) (emphasis added).[5]

8. The primary concern in interpreting statutes is to determine the Legislature's intent. *Rock v. Lankford*, 2013 WY 61, ¶ 19, 301 P.3d 1075, 1080–81 (Wyo.2013). All statutes regarding the same subject or having the same general purpose must be construed *in pari materia* in an attempt to harmonize the entire statutory scheme. *Id.* To determine the Legislature's intent of a statutory scheme, a court must "begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection." *Id.* quoting *Redco Const. v. Profile Props., LLC*, 2012 WY 24, ¶ 26, 271 P.3d 408, 415–16 (Wyo.2012). The statute must be construed "as a whole, giving effect to every word, clause, and sentence. . . . When a statute is sufficiently clear and unambiguous, [the court will] give effect to the plain and ordinary meaning of the words and [will] not resort to the rules of statutory construction." *Id.* "Whether a statute is ambiguous is a question of law. A statute is unambiguous if reasonable persons are able to agree as to its meaning with consistency and predictability, while a statute is ambiguous if it is vague or uncertain and subject to varying interpretations." *Id.* A court must not give a statute "a meaning that will nullify its operation if it is susceptible of another interpretation." *Id.* Additionally, a court must "not enlarge, stretch, expand, or extend a statute to matters that do not fall within its express provisions." *Id.*

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[5] Although Wyo. Stat. Ann. § 39-14-203 was amended during the time period at issue (*see* Wyo. Sess. Laws 2008 Ch. 10), those amendments do not appear to be at issue in this matter nor have the parties indicated that the amendments are relevant to the court's analysis.

9. Wyo. Stat. Ann. § 39-14-203(c)(iii) is not ambiguous. The beginning of this section is clear. The plain language of the statute only allows a taxpayer to withhold from an interest owner taxes "paid[.]" Likewise, the phrase "amounts due or to become due" clearly refers to "such production" since those words immediately follow that phrase.

10. The only possible area of ambiguity is what the phrase "in proportion to the interest ownership" means. The parties could argue that the phrase "in proportion to interest ownership" is ambiguous insofar as it begs the question since there are no words following it. However, when reading this section as a whole, and giving meaning to every word, the only possible antecedent in subsection (c)(iii) is "such production." Anadarko points out in its Memorandum in Support of Summary Judgment, "[r]oyalty owners pay taxes on, and only to the extent of, what they own." (Def. Summ. J. Mem. at 11). From their, Anadarko argues that Geer does not own a "taxable value[,]" but instead owns a royalty interest. (*Id.).* The only thing that the royalty owners "own" in this case is a portion of the production from the wells. Moreover, reading Wyo. Stat. Ann. § 39-14-203(c)(i) (dealing with *ad valorem* taxes) *in pari material* with subsection (c)(iii), the reasonable reading is that "in proportion to the interest ownership" must refer to the taxpayer (or royalty interest holder's) interest ownership in the "production" (the thing being taxed). Thus, the proper formula for determining taxes withheld is as follows:

$$\textbf{Taxes Withheld } (T_W) = \frac{\textbf{Royalty Paid } (R_P) \text{ ("amounts due or to become due")}}{\textbf{Royalty Value of All Owners } (R_V) \text{ ("such production")}} * \textbf{Total Taxes } (T_P) \text{ ("taxes paid")}$$

11. Anadarko asks the court to treat the severance tax as an income tax by applying the tax rate to the amount received by the royalty owner. (See Def. Summ J. Ex. 7 at, 1, 5 (Debbie Liller's report stating that "[t]he Royalty Owners in this Case [sic] are subject to taxes based upon their share of the oil and gas **revenues** received less tax deductible costs they actually paid" and in her "opinion the proper use of the term Taxable Value should be defined as Gross Taxable **Income** reduced by Tax Deductions") (emphasis added). In fact, that is exactly what Anadarko's method for computing individual royalty owner's severance taxes does – it treats Wyoming severance tax like an income tax. Rather than taxing production "in proportion

to each royalty owner's retained royalty interest, Anadarko treats the severance tax like an income tax by applying the full tax rate (12.06%) to all of the income received by the royalty owner rather than "in proportion to the interest ownership" each taxpayer has in the total production, or in the words of the statute "such production." Wyo. Stat. Ann. § 39-14-203(c)(iii). Anadarko's income tax approach is incorrect.

12. Wyo. Stat. Ann. § 39-14-203(a)(i) imposes a tax "on the value of the gross product" not the amount of royalty paid or income received. Anadarko's argument that "[a]pplying tax rates to royalty values ensures that both parties are taxed equally on what they actually get" misconstrues the nature of Wyoming's severance tax and the plain language of Wyo. Stat. Ann. § 39-14-203(c)(iii). The severance tax is a tax on production, not a tax on income. (*See* Def. Mem. at 12). The "proportion" at issue is the ratio between each royalty interest holder's interest, as compared to "such production" or the whole. That is what the statute says.

13. Anadarko's attempt at reading Wyo. Stat. Ann. § 39-14-203(c)(iii) as an income tax and claiming that it should receive all the benefits of deductions taken downstream from the point of royalty value is neither supported by the plain language of Wyo. Stat. Ann. § 39-14-203(c)(iii) nor is it consistent with the undisputed facts of this case. First, under the plain language, Anadarko's reading of the statute ignores the "in proportion" language of the statute and instead applies the full tax rate to all the income received by Geer and similarly situated royalty interest holders. As explained above, the plain language of the statute says that taxes withheld should bear the same ratio, or be in proportion to, the royalty holder's interest in the production. In mathematical terms, the statute calls for taxes withheld as follows:

$$\frac{\text{Taxes Withheld from Royalty Owners}}{\text{"Taxes Paid" to State of Wyoming}} = \frac{\text{"Any Amounts Due or to Become Due"}}{\text{"Such Production"}}$$

14. The Wyoming Supreme Court's decision in *Miller v. Buck Creek Oil Co.*, 269 P. 43 (Wyo. 1928) supports the court's construction of Wyo. Stat. Ann. § 39-14-203(c)(iii) and is contrary to Anadarko's argument. In that case, construing a predecessor statute, the Wyoming Supreme Court stated:

> It would seem no more than just that, in the absence of contract, the tax ought ultimately to be borne by the parties in proportion to their respective interests **in the production that is the basis of the tax**. If a mining lease provides that the lessor shall have as royalty a certain share (which might in some cases be a very large share) of the minerals taken from the land, it might well be considered, **for the purpose, at least, of taxation,** that the lessor was the owner of the oil which he received as royalty, and assumed that, in the absence of an agreement in regard to the payment of a property tax based on production, **each party to the lease intended that he should be liable for the tax on his share of the production.**

Miller, 269 P. at 45 (emphasis added).

15. As noted in the *Miller* decision, royalty owners are taxed on "their respective interests in production" or "his share of the production" (or "in proportion" to their ownership interest in the production), not on all their income. In *Ashland Oil Company v. Jaeger,* the Wyoming Supreme Court confirmed that the Legislature had adopted the basic principles of the *Miller* decision in adopting the predecessor statute to Wyo. Stat. Ann. § 39-14-20. *Ashland Oil Co. v. Jaeger,* 650 P.2d 265, 267 (Wyo. 1982).

16. Although the leases vary greatly as to how royalty value may be computed, Anadarko points to nothing in any lease language that indicates any of the leases contained any agreement regarding property taxes that varied from the statutory language. (*See* Def. Summ. J. Ex. 5 (Kris Terry Report) at Ex. C (outlining royalty clause language)). In other words, Anadarko has not argued that it entered into agreements changing the way taxes are allocated as the Supreme Court suggested could be done in the *Miller* decision. (*See also* Def. Summ. J. Ex. 12 (settlement agreements wherein the parties changed how taxes on royalties would be computed in the future)). Thus, the principles expounded in *Miller,* and adopted by the Legislature in Wyo. Stat. Ann. § 39-14-203(c)(iii) and its predecessor statute, still apply.

17. Additionally, the undisputed facts in this case demonstrate that Anadarko's reading of the statute is incorrect. Generally speaking, Anadarko is correct in its proposition that how a given royalty amount is determined will impact the royalty interest owner's proportion of the taxes. If an owner pays processing costs under the terms of her lease, her royalty amount will go down causing his proportional interest in the production to decrease thereby causing a corresponding reduction in taxes. For example, if Anadarko had taken the 10% or so of processing costs from the 80% of the leases it claims allow for it (*see* Def. Summ. J. Ex. 5), those

royalty owners' interest in the production (royalty value) would have been reduced by $10.00. Consequently, their proportional interest in the production would be reduced and they would pay less in taxes, which seems consistent with the clear intent of the tax statutes. *See* Wyo. Stat. Ann. §§ 39-14-203(c)(ii) (holding producers liable for taxes to the extent of their ownership) and -203(c)(iii) (allowing deductions for proportion of taxes).

18. However, under the undisputed facts of this case, that is not what happened. Anadarko unilaterally decided not to apply the lease terms, but instead, for ease of accounting, decided to treat all leases as if they did not allow any processing costs to be deducted from the royalty calculation. (*See* Def. Summ. J. Mem. at 10 (Anadarko's payment practices, not the lease terms, place "the point of taxable value upstream from the point of royalty value"). By doing so, Anadarko set Geer's interest in the production (his royalty value) artificially higher such that he was already subject to additional taxes than what he may have been under the terms of the lease. Under those facts, Anadarko cannot claim that it can recoup some of those losses caused by its accounting principles by reading "in proportion to the interest ownership" out of the statute and instead creating an income tax where none exists.

19. In conclusion, the parties are free to contract as they please with regard to how royalties and deductions will be allocated. *See Ashland Oil,* 650 P.2d at 267-68. In this case, Anadarko chose to increase "royalty value" by ignoring varying lease terms and then sought to recover a portion of that decision by withholding severance taxes in an amount that exceeded each royalty owner's proportionate share of the production. Should Anadarko choose to apply the strict terms of the leases in the future (*see* Def. Summ J. Ex. 5, Ex C, Lease 3), the amount of taxes withheld may be decreased even further because the amount of royalty will decrease. Nevertheless, the total amount of taxes paid on that property will remain the same and it is the interest owner's proportion of the production, as found in *Miller* and *Ashland,* which will dictate what portion of the taxes are withheld. For these reasons, Plaintiff is entitled to a declaration that Anadarko's current tax methodology for deducting taxes "paid" from royalty owner's check is improper and does not comply with Wyoming statutes.[6]

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[6] Because Wyoming law is incorporated into every contract at issue, the conduct, whereby a party fails to perform a condition of a contract is a "breach" of the contract. Thus, overwithholding severance taxes due to an incorrect methodology constitutes a "breach" of the contract. However, to have an actionable Breach of Contract claim, a

20. Here, it is important to address Anadarko's arguments in their cross-motion for summary judgment on the severance tax calculation claim. First, Anadarko argues that Plaintiff did not actually pay the deductions. (Def. Br. At 9). The obvious problem with this argument is found in the second sentence of the argument : "In the interest of administering its varying leases efficiently . . ., [Anadarko] pays the costs to process the gas but does not pass that expense along to royalty owners because some leases do not permit processing." (*Id.*). The reason royalty owners did not pay the "costs to process the gas" is because that was how Anadarko decided to make payments citing nothing more than a business decision. Other than income tax theory, Anadarko provides no reason why Wyoming tax statutes should be interpreted to conform to its business and accounting practices as opposed to being construed in accordance with the plain meaning of the words used by the Legislature. Anadarko's business decision to pay higher royalties means that Plaintiff pays more in taxes, but how much more still must be determined in light of the plain language of Wyo. Stat. Ann. § 39-14-203(c)(iii).

21. Next, Anadarko's reliance on the *In re Hearing No. 11,660*, 1982 WL 12798 (Tex. Cptr. Pub. Acct. June 23, 1982) decision is misplaced. The issue in that case was "the correct method of calculating the natural gas tax liability of the owner of the working interest where an exempt entity (the State) holds the royalty interest and the working interest bears all the costs of transportation and processing, etc." *Id.* at *2. In this case, the parties do not dispute how the severance tax is computed. Instead, the parties dispute what portion of that tax can be deducted from Plaintiff's royalty checks.

22. Second, the facts of that case are different. In *Hearing No. 11,660,* the producer was contractually obligated to pay all transportation and processing costs up to the point of sale (i.e., all deductible costs allowed under Texas law). *Id.* at * 1. To the contrary, in this case, Anadarko is not obligated to pay deductible costs, but instead has made a conscious business decision not to deduct costs from Plaintiff's proceeds. (*See* Def. Summ. J. Ex. 9, ¶ 4).

23. Finally, the tax laws in Texas at issue in *Hearing No. 11,660* are different. As noted above, the Legislature determined that taxes should be paid in the same proportion as the taxpayer's retained "interest ownership" in "such production." Conversely, the Texas legislature

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party must also prove damages. The conduct is a breach, but a breach may not give rise to a cause of action for Breach of Contract if no damage occurs. The damages/Breach of Contract issue will be discussed below.

concluded that its occupation tax at issue should be "ratably" so that "the **proportionate tax due**" would be withheld without any reference to taxes being borne in proportion to the interest ownership retained. *In re Hearing No. 11,660* at *3 (citing Tex. Tax. Code Ann. § 3.03(5) (Vernon. 1969)). The Wyoming Legislature chose to use language that defined the "proportionate tax due" as being the same ratio as the taxpayer's interest has to the overall production. *See* Wyo. Stat. Ann.

24. To be sure, Wyoming's severance tax is not an income tax. Wyoming does not have income taxes. Severance tax is not imposed on income as suggested by Ms. Liller. The severance tax is a gross products tax imposed on the privilege of taking gas from the ground in Wyoming. *See* Wyo. Stat. Ann. § 39-14-203(a)(i). Any person with an interest in the gas is subject to the tax. Unlike income tax where there is a single taxpayer, the producer and the person holding any interest in the gas are liable for the severance tax. Wyo. Stat. Ann. § 39-14-203(c)(ii). Thus, as explained above, Wyo. Stat. Ann. § 39-14-203(c)(iii) requires that taxes only be withheld in proportion to ownership interest in the production, not income received. Absent an agreement to the contrary, as suggested in *Miller,* each interest owner pays 12.06% taxes on their portion of the production as it relates to (or is in proportion to) the total production which is a rational method for allocating tax burdens. *See Basin Elec. Power Co-op., Inc. v. Wyo. Dep't of Revenue,* 970 P.2d 841, 857 (Wyo. 1998) (applying rational basis standard for review of constitutionality of tax assessment, albeit in context of *ad valorem* taxes).

25. For these reasons, Anadarko's arguments that taxpayers paying different effective tax rates violates Articles I and XV of the Wyoming Constitution, as well as Anadarko's claims under the equal protection and due process clauses of the Fourteenth and Fifth Amendments of the United States Constitution, also fail. Taxation of the gas is uniform. Neither the statute, nor the court's interpretation of the statute creates subclasses of property that are taxed in a non-uniform manner nor does it tax the similarly situated property unequally. *See Amoco Production Co. v. Wyoming State Bd. of Equalization*, 899 P.2d 855, 860 (Wyo. 1995).

26. Instead, what makes each taxpayer potentially subject to a different effective tax rates is how good of a job the taxpayer did in negotiating her leases (i.e., whether the lessee bears the burden of processing) or in this case, how Anadarko unilaterally decided to treat all leases the same regardless of the terms of the lease. In the leases cited by Anadarko, Lessee No. 11 will

pay more in taxes because she gets a larger proportion of the production under the terms of her lease. Conversely, Lessee No. 3 will pay less in tax because her lease calls for her to receive a smaller proportion of the production. (*See* Def. Summ. J. Ex. 5 at Ex. C). Under the court's interpretation of the statute, lease owners receive the same treatment. Owners of the same type of property are treated the same. The difference in effective tax rates applicable to each taxpayer is a result of the terms of the lease agreement, not the plain language of Wyo. Stat. Ann. § 39-14-203(c)(iii) as interpreted by this court.

Damages

27. The rubber meets the road when it comes to damages. In its response to Plaintiff's motion for summary judgment, Anadarko argues that Plaintiff cannot prove a Breach of Contract claim because they cannot show damages.[7] (Def. Resp. in Opp. To Summ. J. at 5-9). Anadarko's motion to decertify the class as to damages is inextricably intertwined with its argument against summary judgment that Plaintiff has not proven a breach of contract.

28. In its motion to decertify the class as to damages, Anadarko relies on *Comcast Corp. v. Behrend,* __ U.S. __, 133 S.Ct. 1426 (2013) in arguing that damages in this case cannot be determined on a class-wide basis. Anadarko asserts that Plaintiff is not entitled to damages because they have not shown a breach of contract. In support of this argument, Anadarko presents several experts who have analyzed whether Geer, and other class members, can establish damages such that they can proceed with what amounts to a Breach of Contract claim. (*See* Decertification Mem. at Exs. 4 & 5 (M. Zeeb and K. Terry reports, respectively).

29. Essentially, Ms. Terry analyzed the various royalty clauses contained in the leases held by Class Members. (Decertification Mem. Ex. 5, ¶¶ 22-33; Ex. 5 at Ex. C). Ms. Terry concluded that there are a vast array of royalty clauses contained in the various leases owned by Class Members. (Ex. 5, ¶¶ 44(a)-(g); Ex. 5 at Ex. C). From there, Mr. Zeeb analyzed how the overwithholding of taxes would impact the royalty payments actually made under certain leases. (Ex. 4, *passim*). For example, Mr. Zeeb demonstrated that the "deductions-allowed-but-not-taken" applicable to the First Presbyterian Church lease (Property No. 307558) would have allowed Anadarko to withhold an additional $70.23, which would exceed the amount of taxes allegedly, improperly withheld by Anadarko, by $67.19. (Ex. 4 at 3). From his analysis of some

[7] The parties agreed that Plaintiffs are not making a reporting claim under the WRPA.

of the leases, Mr. Zeeb concludes "that a substantial number of Class Members, perhaps most, have not been damaged by [Anadarko's] challenged tax withholding practices. . . ." (Ex. 4 at 4). This is the essence of Anadarko's argument regarding decertification, but it also explains the "deductions-allowed-but-not-taken" theory of defense in this matter.

30. For his part, Plaintiff makes four arguments as to why the "deductions-allowed-but-not-taken" argument fails. First, Plaintiff claims that Anadarko cannot raise the "deductions-allowed-but-not-taken argument" because it is a counterclaim that Anadarko did not properly plead. (Pl.'s Br. in Support of Mot. for Partial Summ. J. at 6). Next, Plaintiff argues that Anadarko is precluded from raising the "deductions-allowed-but-not-taken argument" because the issue was decided in *Lange Trust* settlement. (*Id.* at 9). Third, Plaintiff asserts that the law of the case bars Anadarko from raising the "deductions-allowed-but-not-taken" issue in this matter. (*Id.* at 11). Finally, Plaintiff argues that the voluntary payment rule bars the court from considering the "deductions-allowed-but-not-taken argument" in determining if Plaintiff has suffered damages. (*Id.* at 12).

31. Anadarko is correct that damages cannot be awarded in this matter without a showing by the Plaintiff that Anadarko breached the underlying agreement. The WRPA does not create a cause of action, but instead provides remedies and penalties for the breach of an underlying agreement. *Ultra Resources, Inc. v. Hartman,* 2010 WY 36, ¶154, 226 P.2d 889, 936 (Wyo. 2010) ("[t]he right to bring an action under the [WRPA] is contingent upon the existence of a pre-existing contractual obligation. In other words, the only way to bring a WRPA claim is in the course of bringing an action on the document which creates the right to the mineral royalty"). Therefore, Plaintiff must show a breach of contract, including damages, before the court can consider damages.

32. "A breach of contract is a failure without legal excuse to perform any promise which forms a whole or a part of a contract. It is a non-performance of any contractual duty of immediate performance." *Sagebrush Development, Inc. v. Moehrke*, 604 P.2d 198, 201 (Wyo. 1979) (internal citations, quotation marks, and ellipsis omitted). Thus, since the court has determined that some taxes were not properly calculated, and therefore, improperly withheld, Plaintiff has established the breach element since all the leases incorporate Wyoming law.

33. Likewise, the Plaintiff has made a *prima facie* showing of damages on a class-wide basis. Since the court has concluded that the methodology used to determine severance taxes was incorrect and resulted in an overwithholding, Plaintiff has established a *prima facie* breach of contract claim. Likewise, as outlined above, the undisputed facts establish that Anadarko overwithheld *ad valorem* tax in a limited number of months for a limited number of taxing districts. Therefore, Plaintiff has carried their burden to show that they were damaged by Anadarko's tax accounting practices insofar as Plaintiff has shown that Defendants over-withheld taxes from Plaintiff's royalty checks.

34. The crux of damages is how to treat the "deductions-allowed-but-not-taken" argument/claim/defense. To address this issue, the court will analyze all of Plaintiff and Anadarko's theories.

35. Anadarko is not barred from raising the "deductions-allowed-but-not-taken" defense/claim for failing to plead it. Although Anadarko strenuously argues that the "deductions-allowed-but-not-taken" theory is not a counterclaim (whether called "setoff" or "recoupment"), its own pleadings belie such a claim. (*See* Answer, Affirmative Defense No. 9). *See Crosby v. Smith*, 475 P.2d 728, 731 n. 1 (Ariz. App. 1970) ("a defensive claim which is merely in diminution of an opposing party's claim may properly be pleaded as an affirmative defense" *citing Lukens v. Goit*, 430 P.2d 607, 610 (Wyo. 1967)).

36. Regardless, "[u]nder Rule 13, there is no general difference for purposes of pleading between setoff, recoupment, or independent claims in the sense that they all constitute counterclaims." *Hawkeye–Security Insurance Co. v. Apodaca*, 524 P.2d 874, 879 (Wyo. 1974). To this end, Wyo. R. Civ. P. 8(c) provides that "[w]hen a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

37. In discussing Fed. R. Civ. P 8(c), which is identical to Wyo. R. Civ. P. 8(c), Professors Wright and Miller state:

> Inasmuch as it is not clear whether set-offs and recoupments should be viewed as defenses or counterclaims, the courts, by invoking the misdesignation provision in Rule 8(c), should treat matter of this type as if it had been properly designated by defendant, and should not penalize improper labeling.

5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1275 at 459–60 (1990); *see also Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664, 673 (Wyo. 1993).

38. Since Anadarko raised the defense(s) of "recoupment" and "setoff" in its Answer, it is not barred from raising the issue because of a failure to plead its "deductions-allowed-but-not-taken" theory of defense.

39. Second, Anadarko is not barred by the settlement in the *Lange Trust* case from raising the "deductions-allowed-but-not-taken" issue.

40. Under the *Lange Trust* settlement agreement, "Settled Claims" as to Defendants includes:

> any and all claims, demands, rights, liabilities, and causes of action of every nature and description whatsoever, including interest, attorney's fees, 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 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, against Class Representatives and/or Settlement Class Members, **excepting only reserved Reserved Claims**.

(*Lange Trust* Settlement Agreement, ¶1.45.2 (emphasis added)).

41. The settlement agreement defines "Reserved Claims" to include "Claims made in that certain litigation entitled *Kenneth B. Geer v. Lance Oil & Gas Company, Inc.* filed in the Sixth Judicial District as Civil Action No. 32940 as of the Effective Date." (*Lange Trust* Settlement Agreement ¶1.40.4).

42. Therefore, the plain language of the settlement agreement indicates that the parties intended to be able to litigate their respective claims in this matter irrespective of the settlement in the *Lange Trust* matter. That is, although the parties specifically agreed to settle any claims of "recoupment" in the *Lange Trust* matter, the broad definition of "Reserved Claims" specifically reserved the right to litigate any claim raised in this litigation.

43. Although Plaintiff may argue that a "defense" is not a "claim" because Anadarko has specifically disavowed any attempt to recover the "deductions-allowed-but-not-taken" amounts, the court disagrees. "A settlement agreement is a contract and, therefore, subject to the same legal principles that apply to any contract." *In re Estate of Maycock*, 2001 WY 103, ¶ 10, 33 P.3d 1114, 1117 (Wyo. 2001). According to Wyoming precedent,

> the words used in the contract are afforded the plain meaning that a reasonable person would give to them. When the provisions in the contract are clear and unambiguous, the court looks only to the four corners of the document in arriving at the intent of the parties. In the absence of any ambiguity, the contract will be enforced according to its terms because no construction is appropriate.. . .
>
> The determination of the parties' intent is [the court's] prime focus in interpreting or construing a contract. If an agreement is in writing and its language is clear and unambiguous, the parties' intention is to be secured from the words of the agreement. When the agreement's language is clear and unambiguous, [the court] consider[s] the writing as a whole, taking into account relationships between various parts. In interpreting unambiguous contracts . . . [courts] have consistently looked to surrounding circumstances, facts showing the relations of the parties, the subject matter of the contract, and the apparent purpose of making the contract.

Boley v. Greenough, 2001 WY 47, ¶¶ 10–11, 22 P.3d 854, 858-59 (Wyo. 2001) (internal quotation marks and citations omitted).

44. "Settled Claims" defines all of the possible defenses that Anadarko may have had in the *Lange Trust* litigation. In turn, the word "Reserved" is used in conjunction with "Claims" to define all the matters raised in the *Geer* litigation. Therefore, interpreting the plain language of the settlement agreement, and giving meaning an effect to all the words, while considering the purpose of the contract (namely to settle one class action while permitting litigation of issues in another class action), the term "claim" as used in the settlement agreement in the *Lange Trust* matter is broad enough to encompass a reservation of Anadarko's "deductions-allowed-but-not-taken" claim/argument/defense such that it is a "Reserved Claim.".

45. Next, Plaintiff argues that the law of the case doctrine prohibits Anadarko from raising the "deductions-allowed-but-not-taken" defense/counterclaim/argument. Under the law of the case doctrine, a court's decision on an issue of law at one stage of a proceeding is binding in successive stages of the litigation. *Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664, 667 (Wyo.1993). However, "[t]he law of the case doctrine is a discretionary rule which does not constitute a limitation on the court's power but merely expresses the practice of courts generally to refuse to reopen what has been decided." *Lieberman v. Mossbrook*, 2009 WY 65, ¶ 28, 208 P.3d 1296, 1305 (Wyo. 2009). Additionally, "the law of the case doctrine applies only to issues actually decided, not to issues left open." *Lieberman,* ¶ 29, 208 P.3d at 1306. Moreover, the law of the case doctrine does not apply when there has been a change in controlling legal authority.

Clark v. State Farm Mut. Auto. Ins. Co., 590 F.3d 1134, 1140 (10th Cir. 2009). Finally, the "law of the case" doctrine must also be harmonized with Wyo. R. Civ. P. 23(c)(1) which states that an order certifying a class "may be altered or amended before the decision on the merits." *See also Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 n. 11 (1978).

46. First, the law of the case doctrine does not apply. The prior decisions of the court referenced by the Plaintiff are decisions regarding class certification and class notice. They are not decisions on the merits of Anadarko's "deductions-allowed-but-not-taken" defense/counterclaim/argument. *Lieberman,* ¶ 29, 208 P.3d at 1306. Therefore, the law of the case doctrine does not apply.

47. Even if the doctrine applied, application of the law of the case doctrine is not appropriate in this matter. First, Rule 23(c)(1) anticipates that such decisions can be revisited any time prior to a decision on the merits. Therefore, it is expressly within the court's discretion to revisit those determinations under the Wyoming Rules of Civil Procedure.

48. Second, there has been a change in controlling law. *See Clark,* 590 F.3d at 1140. The *Comcast* decision issued subsequent to this court's decision affects the class certification issue and whether the damages claim can be handled in the class action setting. Additionally, one of the decisions relied upon by the court regarding commonality, *Roderick v. XTO Energy, Inc.,* 281 F.R.D. 477 (Kan. 2012), has been vacated and remanded for further consideration. *See Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013). In fact, the Tenth Circuit specifically stated that "the district court should consider the extent to which material differences in damages determinations will require individualized inquiries." *XTO Energy, Inc.,* 725 F.3d at 1220. Therefore, application of the "law of the case" doctrine is not appropriate under the facts of this case.

49. Finally, Plaintiff argues that the voluntary payment rule prohibits Anadarko from raising its "deductions-allowed-but-not-taken" defense/counterclaim/argument. Here, the court agrees with Plaintiff that Anadarko may not inject the "deductions-allowed-but-not-taken" issue into this litigation. As the Wyoming Supreme Court has explained:

> It is a universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance. . . . Except where otherwise

> provided by statute, it 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. A voluntary payment, within the meaning of the rule that such a payment cannot be recovered, means a payment made by a person of his own motion, without compulsion; a payment made without a mistake of fact or fraud, duress, coercion, or extortion, on a demand which is not enforceable against the payor, instead of invoking any remedy or defense which the law affords against such demand; and whether in a given case a payment is voluntary depends on the facts of the particular case, as indicating an intention on the part of the payor to waive his legal rights.

Commercial Union Ins. Co. v. Postin, 610 P.2d 984, 989 (Wyo. 1980) (internal quotation marks, citations, and alterations omitted).

50. There is no dispute that Anadarko knew that it was eligible to take the very deductions it now seeks to use as a "recoupment" theory to avoid liability. Anadarko knew the facts and consciously made the business decision to forego such deductions. Thus, the undisputed facts of this case establish that the voluntary payment rule applies. As noted in *Commercial Union Insurance,* as well as nearly every authority citing the voluntary payment rule, the rule applies whether the voluntary payor is asserting a setoff, a counterclaim, or direct action to recover money back.

51. To avoid the voluntary payment rule, Anadarko argues that it is asserting a contract language defense. This is distinction without a difference. Although Anadarko strenuously argues that the "deductions-allowed-but-not-taken" issue is not a counterclaim (whether called "setoff" or "recoupment"), its own pleadings belie such a claim. (*See* Answer, Affirmative Defense No. 9). Moreover, whatever you want to call it, a defense that seeks to diminish, or deny, the value of an opposing party's claim for damages under a breach of contract claim is really an affirmative defense. *See Crosby*, 475 P.2d at 731 n. 1; *Lukens*, 430 P.2d at 610. Consequently, Anadarko's attempt at semantics (it is a contract language defense) is unpersuasive.

52. Take the following example: Seller agrees to sell Buyer 1,000 widgets at $1.00 per widget per year. Seller is to pay for shipping. The parties go on for years performing this contract. Every year, Seller delivers 1,000 widgets and Buyer pays Seller $1,100: $1,000 for the

widgets and an extra $100 for shipping. Buyer knows he does not have to pay for shipping (under the terms of the contract), but it is easier for Buyer just to pay the shipping when the widgets arrive. Each year, Buyer sends Seller a notice stating that Seller owes Buyer for the shipping costs. Seller ignores the demand for payment. In year 10, Seller delivers 1000 widgets and Buyer pays only $100 claiming most of the widgets are defective. Seller sues Buyer for breach of contract claiming $900 in damages. Buyer moves to dismiss claiming there is no breach of contract because Buyer points out that in the last nine years he has paid $900 in shipping costs, which he was not required to pay. Consequently, Seller cannot prove damages from the alleged breach, and therefore, cannot sustain a breach of contract claim. Does Seller have a breach of contract claim?

53. Of course he does. The Seller was damaged (i.e., did not get paid) when Buyer refused to pay for the widgets in year 10. The amount of damages that Buyer may recover could be diminished by the earlier overpayments. If Buyer establishes that the shipping payments were a voluntary payment, Buyer wins his breach of contract claim. Such is the case at bar. Plaintiff has made his *prima facie* showing of a breach of contract claim by showing overwithholding of taxes (i.e., underpayment of royalties). As Anadarko eventually conceded during the hearing on this matter, Anadarko's bears the burden of proving that there really was not an actionable breach of contract because of the "deductions-allowed-but-not-taken." Since Anadarko bears the burden of proof, the "deductions-allowed-but-not-taken" issue is either a claim for recoupment or an affirmative defense, either of which fall under the scope of the voluntary payment rule.

54. In interpreting Mississippi's nearly identical voluntary payment rule, the Fifth Circuit concluded that an operator was not entitled to setoff for royalty amounts it had paid because of the voluntary payment rule. *Burnsed Oil Co., Inc. v. Grynberg*, 320 F.App'x. 222 (5th Cir. 25, 2009). "If the Plaintiffs voluntarily paid for something they did not owe, the voluntary payments cannot be recovered. The general principle is that, where the party with full knowledge, actual or imputed, of the facts, there being no duress, fraud or extortion, voluntarily pays money on a demand, although not enforceable against him, he cannot recover it back." *Grynberg,* 320 F.App'x. at 231.

55. However, this does not end the inquiry on how damages can, or will, be computed in this matter. As noted above, the undisputed facts establish that Anadarko overwithheld and

underwithheld *ad valorem* taxes in certain months and years. In the months (or years) that Anadarko underwithheld *ad valorem* taxes (i.e., overpaid royalties), those amounts can be used by Anadarko to offset overwithholding of severance taxes such that Anadarko can (a) show that there was no actionable breach of contract, or (b) reduce the amount of damages owed to the Plaintiff. The underwithholding of *ad valorem* taxes (and hence payment of too much money to the Plaintiff) does not fall within the rubric of the voluntary payment rule.

56. To invoke the benefits of the voluntary payment rule, Plaintiff must prove that Anadarko had "knowledge of the facts" sufficient to make the payment voluntary. Plaintiff bears the burden of proving that Anadarko "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.*, 610 P.2d at 989. Plaintiff must show that the payment was made "without a mistake of fact" and free of "compulsion[.]" *Id.*

57. Plaintiff cannot meet this burden of proof under the undisputed facts of this case. The parties agree that no one knows the actual *ad valorem* tax rate when the taxes are withheld and remitted. As such, Anadarko's poor guesstimate as to a fact which was unknown, and could not be known through reasonable inquiry, when Anadarko was required to remit *ad valorem* taxes, means that Anadarko's underwithholding of taxes, and consequent overpayment to the Plaintiff, was not a voluntary payment. Therefore, Anadarko may use those amounts to offset damages claimed by the Plaintiff or even defeat a breach of contract claim should the amount of *ad valorem* taxes underwithheld exceed the amount of severance taxes overwithheld.

Decertification of the Class

58. Anadarko claims that "[w]hether individual Class Members have suffered a breach of their disparate Contracts depends on the royalty payment they received **compared to** the Royalty Payment Obligation agreed to in their Contracts" (Def. Mot. to Decertify Class as To Damages at 4). According to Anadarko, that inquiry cannot be answered "without consideration of thousands of separate contracts." (*Id.*). Consequently, "[t]here is no common formula capable of calculating the difference between the various contractual Royalty Payment Obligations . . .and what was paid." (*Id.*). Relying on *Comcast v. Behrends,* __ U.S. __, 133 S.Ct. 1426 (2013) and *Roderick v. XTO Energy, Inc.*,725 F.3d 1213 (10th Cir. 2013), Anadarko argues "[t]he individualized inquiry necessary to determine Class Members' damages, if any, is

fatal to certifying the Damages Class." (*Id.* at 11-12). In support of this argument, Anadarko submitted reports from Michael Zeeb and Kris Terry. (*See* Decertification Mem. at Exs. 4 & 5). For an outline of Anadarko's decertification/no breach of contract argument, *see* Paragraph 33, *supra.*

59. The Tenth Circuit's decision is distinguishable from the facts in this case. In *Roderick,* plaintiffs alleged that producers systematically withheld costs associated with making gas marketable. Under Kansas law, the lessees (XTO Energy) had to bear the costs of making gas marketable (gathering, compression, dehydration, transportation, and processing ("GCDTP")), unless the lease said otherwise. As in this case, the lessee/producers' accounting software did not necessarily calculate royalty payments under the terms of each lease. Producers argued that many of the leases negated the implied duty of marketability such that they could properly charge the deductions they had been taking against the Plaintiff's royalty payments.

60. In its decision, the Tenth Circuit remanded the case to the district court for consideration of whether "the extent to which material differences in damage determinations will require individualized inquiries." *Roderick*, 725 F.3d at 1220. Essentially, the Tenth Circuit concluded that the district court had not properly considered whether the individual lease-by-lease inquiry into damages destroyed the predominance requirement under Fed. R. Civ. P. 23(b). *See Roderick,* 725 F.3d at 1218 n.4 (criticizing district court's reliance on *Farrar v. Mobile Oil Co.* in light of the Supreme Court's decisions in *Wal-Mart* and *Comcast*).

61. Anadarko makes similar arguments based upon its theory concerning "deductions-allowed-but-not-taken." (*See* Paragraph 29, *supra*). However, there are fundamental factual differences between this case and *Roderick,* which make *Roderick's* analysis inapplicable to class certification in this case.

62. *Roderick* involved allegations that producers (lessees) over-deducted by taking GCDTP deductions in violation of Kansas' implied duty of marketability. Hence, there was an underpayment of royalties. In this case, Anadarko admits that it under-deducted various costs that it could have, but did not, apply to class members' royalty payments. Thus, Anadarko is essentially arguing it overpaid royalties in an amount specific to each lease such that the court must consider when it comes to certifying a damage class.

63. However, as determined above, the applicability of the voluntary payment rule means that Anadarko cannot claim these monies should not have been paid for purposes of this lawsuit. *See Grynberg*, 320 F.App'x. at 231. Although Anadarko may have made overpayments, the voluntary nature of that payment prohibits it from raising that issue in this lawsuit. To paraphrase Anadarko's words "individual royalty contract terms **do not** matter to whether a breach of contract occurred" because the voluntary payment rule says those overpayments, if any, were essentially a gift. (*See* Def. Mem. in Opp. to Partial Summ. J. at 6).

64. Consequently, with regard to the "deductions-allowed-but-not-taken" issue, this case is different from *Roderick*. *Roderick* required the district court to look at each lease because nothing in XTO Energy's payment practice indicated that it had concluded the implied duty of marketability applied to all of its leases. To the contrary, XTO Energy assumed that the implied duty of marketability did not apply to any of its leases and applied deductions for GCDTP costs, albeit at a standard rate based upon third-party contracts rather than lease terms. Anadarko, on the other hand, voluntarily parted with the money. As a result, Anadarko cannot claim an offset, recoupment, or any other method to recover or receive credit for monies voluntarily paid with full knowledge of the facts. In short, the voluntary payment rule means Anadarko does not get a "do over" such that it can now enforce the terms of the various leases which it voluntarily chose not to enforce the first time around.

65. The same is not true of the years in which Anadarko underwithheld *ad valorem* taxes. As explained above, for the years and taxing districts for which Anadarko underwithheld *ad valorem* taxes, Anadarko is permitted to assert an offset, recoupment, or whatever else it is called, against the alleged overwithholding of severance taxes to reduce damages or even demonstrate that there has not been an actionable breach of the contract. That is because Anadarko's underwithholding of *ad valorem* taxes is not a voluntary payment since Anadarko had no way of knowing the applicable facts (i.e., the actual tax rates) at the time payment was made.

66. Since Anadarko can offset any amounts underwithheld in *ad valorem* taxes against any potential liability for overwithholding of severance taxes, normally, the court would need to look at the individual lease language to determine if damages can be calculated through application of a class-wide methodology. Based upon the evidence provided by Anadarko, the

court concludes that examination of each lease is not necessary to determine if a class-wide methodology can be applied to determine damages. It can.

67. In its decertification materials, Anadarko points out that leases generally include language that allow it to deduct severance, *ad valorem,* and conservation taxes. In fact, there has been no argument to the contrary and neither party has submitted any evidence that some of the class members' leases permit withholding of taxes in something other than "proportion to the [class member's] ownership interest." *See* Wyo. Stat. Ann. § 39-14-203(c)(iii). To the contrary, the briefing by the parties and the evidence relied upon in support of their briefing presumes that all leases contain a provision allowing Anadarko to withhold each royalty owner's *ad valorem* in an amount equal to their retained interest in the property. As the court determined above, Anadarko did that incorrectly to the detriment of class members in most years by applying an excessive estimated rate. Since it is the royalty clauses, and not the tax withholding provisions, of the leases that vary, the court does not need to do an individual inquiry of every lease.

68. Consequently, the *Comcast* decision does not require decertification. In *Comcast,* the United States Supreme Court began its analysis with the "unremarkable premise" that class members would only be able to recover damages from the one theory of damage that applied to all class members, namely "overbuilder competition, since that [was] the only theory of antitrust impact accepted for class-action treatment . . ." *Comcast,* 133 S.Ct. at 1433. The criticism that led to the reversal of the lower courts' decisions in *Comcast* was that the only damage model proposed by plaintiffs calculated damages based upon four different anti-trust activities: clustering resulting in decreased market penetration; reduced competition due to overbuilding; reduced levels level of "benchmark" competition on which cable customers rely to compare prices; increased bargaining power arising from clustering. *Comcast,* 133 S.Ct. at 1430-31.

69. However, Dr. McClave, the model's designer, admitted that his damages model did not isolate which damages arose from any one of the four contributory factors. *Id.* at 1431. From there, the Supreme Court merely pointed out that class-wide damages could not be based upon a model which included damages caused by antitrust activity which did not affect all of the class members (i.e., the three theories of antitrust that the district court did not certify for class determination). *Id.* at 1433. The real criticism of the Third Circuit's decision in *Comcast* was the appellate court's failure to determine "whether the methodology [was] a just and reasonable

inference or speculative." *Id.* (internal quotation marks omitted). That is, there was a proposed class-wide method for determining damages, but on its face that method would assess damages caused by things that did not affect all the class members.

70. Under *Comcast,* the issue regarding decertification is will "[q]uestions of individual damage calculations [] overwhelm questions common to the class" in light of this court's determinations regarding proper tax calculation and the applicability of the voluntary payment rule? *See Comcast,* 133 S.Ct. at 1433. The answer is clearly "no." The court's declaration as to the under- and overpayments of *ad valorem* taxes apply uniformly to the class members. Likewise, the severance tax calculation method declared and ordered by the court applies uniformly to all class members because Anadarko's business decision (not to take deductions) and the application of the voluntary payment apply equally and the same to all class members. Therefore, the damage calculations in this matter can be done with a single stroke by:

(a) mathematically apply the proper *ad valorem* tax rate to all properties

(b) mathematically applying the proper method to determine severance taxes;

(c) allowing an offset for any *ad valorem* taxes underwithheld;

(d) subtract the amount of (a) plus (b) minus (c), above, from the amount of taxes withheld to determine if a royalty underpayment was made to each class member, and;

(e) if so, applying the proper statutory interest to the result for the length of time since the royalty underpayment.

71. The Supreme Court's decision in *Comcast* does not change the well-reasoned, prior decision of this court. In *Comcast,* the method for determining damages contained three out of four factors that did not apply across the class. In this case, all of the factors that go into calculating damages apply uniformly across the class. The only variance in class members would be the "deductions-allowed-but-not-taken" language in their individual leases. However, that language in the contract has been made a nullity for purposes of this litigation by Anadarko voluntarily paying those amounts.

72. In short, Anadarko is left arguing that there are varying contract terms which mandate individual damage determinations, but those contract terms have no bearing on this case

because they have essentially been waived.[8] Therefore, Anadarko's motion to decertify the class as to damages must be denied since the court's earlier determinations regarding numerosity, commonality, typicality, and adequacy remain correct, and Anadarko's challenge to the court's determinations under Wyo. R. Civ. P. 23(b)(2) and (3) are not supported by a change in the law occasioned by *Comcast* or the Tenth Circuit's decision in *Roderick* under the facts of this case.

IT IS THEREFORE ORDERED that Plaintiff's motion for partial summary judgment is hereby **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that Plaintiff's request that the court declare Anadarko's "two methods for deducting taxes for royalties identified by Plaintiff violate [Anadarko'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" is **GRANTED IN PART** and **DENIED IN PART.**

The court declares that Anadarko's method for (1) calculating severance taxes and (2) deducting those taxes from Plaintiff's royalty amounts are contrary to Wyo. Stat. Ann. § 39-14-203(c)(iii);

The court is without sufficient information to declare that Anadarko's methodology for computing *ad valorem* taxes is contrary to statute. However, the court does declare that Anadarko overwithheld *ad valorem* taxes contrary to Wyo. Stat. Ann. § 39-14-203(c)(iii) for the following periods of time:

(A) In production years 2002 and 2003, Anadarko overwithheld *ad valorem* taxes for all applicable taxing districts for all months;

(B) In production year 2004, Anadarko overwithheld *ad valorem* taxes for three of the tax districts (100, 125, and 140) and for January and February, 2004, Anadarko overwithheld *ad valorem* taxes for tax district 146;

(C) From February through December in production year 2007, Anadarko overwithheld *ad valorem* taxes for all applicable tax districts for all months;

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[8] Although Anadarko may be permitted to change its practice in the future (*see* Pl.'s Summ J. Ex. 4 at 22), for purposes of this litigation the voluntary payment rule, in this case, essentially acts as a waiver for past action. It is worthwhile to note that the First Presbyterian Church Lease (Decertification Mem. Ex. 6) does not appear to have an anti-waiver clause.

(D) In production years 2008 and 2009, Anadarko overwithheld *ad valorem* taxes for all applicable tax districts for all months;

(E) In production year 2010, Anadarko overwithheld *ad valorem* taxes for all tax districts for all months, except tax district 150, and;

(F) In production year 2011, Anadarko overwithheld *ad valorem* taxes for all tax districts for all months.

IT IS FURTHER ORDERED that Plaintiff's request that the court "[g]rant injunctive relief ordering [Anadarko] to correct these methodologies going forward" is **GRANTED IN PART** and **DENIED IN PART.**

The Court orders Anadarko to correct its methodology in calculating severance taxes for each individual royalty owner so that severance taxes actually paid to the Wyoming Department of Revenue are withheld and that such amount proportional to the royalty owner's interest in the total production as paragraphs nine through 26 of the court's Conclusions of Law;

The court does not make any order with regard to Anadarko's methodology with regard to computing *ad valorem* taxes but notes that since *ad valorem* taxes cannot be computed at the time royalties are likely due, Anadarko could avoid the application of penalty and interest provisions of the WRPA by utilizing the safe harbor provision;

IT IS FURTHER ORDERED that Plaintiff's motion that the court "find [Anadarko] liable to the class of Campbell County royalty owners for such royalty underpayments, plus interest at a rate of eighteen percent (18%)" is **DENIED.** Since there has been no reliable calculation of damages provided in the summary judgment materials, which incorporate the court's conclusions of law contained herein, a determination of liability for damages is premature since Anadarko's entitlement to "offset" or "recoup" amounts overpaid in *ad valorem* taxes will affect the calculations proposed by Steve Wilson. Likewise, the court's decision regarding the applicability of the voluntary payment rule will impact the proposed damage methodology of Michael Zeeb;

IT IS FURTHER ORDERED that Plaintiff's motion that the court "find [Anadarko] liable to the class for payment of attorney's fees and costs of this action" is **DENIED** for the same reasons as set forth above with regard to awarding damages, and;

IT IS FURTHER ORDERED that Defendant's motion for summary judgment on Plaintiff's tax computation claim is **DENIED,** and;

FINALLY, IT IS ORDERED that Defendant's motion to decertify the class for purposes of damages is **DENIED.**

DATED this 3rd day of April, 2014

Thomas W. Rumpke, Judge
Sixth Judicial District