

witnesses, designated by Lance²: Robert M. Enick, Ph.D., Kris L. Terry, Christopher L. Wilson, and portions of Michael A. Zeeb.

BACKGROUND

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

Lance seeks to introduce testimony by and through expert witnesses arguing they are entitled to setoff or recoupment for deductions they may have been permitted to, but through their business judgment, voluntarily decided not to take. As discussed more thoroughly in *Plaintiff's Brief in Support of Motion For Partial Summary Judgment*, pp. 6-13, Lance is barred from asserting this setoff or recoupment claim. Therefore, the testimony of these experts which pertain to Lance's setoff or recoupment argument has no relevance to an issue actually in dispute and should not be allowed by the Court.

progeny. The Wyoming Supreme Court "expressly adopt[ed] the analysis provided by *Daubert* and its progeny..."¹ *Bunting v. Jamieson*, 984 P.2d 467, 471 (Wyo. 1999).

² Plaintiff will refer to Defendant as "Lance" throughout this Motion. The Defendant at the time of filing of the original Complaint was Lance Oil & Gas Company, Inc. On or about April 1, 2013, Lance merged into Anadarko E & P Onshore LLC, and the parties subsequently stipulated to a Substitution of Party.

DISCUSSION

A. The Daubert Rule

Wyoming Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Wyo. R. Evid. 702 (Lexis 2013).

The function of W.R.E. 702 is to enable the Court's work as a gatekeeper in order "to ensure the reliability and relevancy of expert testimony." *Hoy v. DRM*, 2005 WY 76, ¶ 13, 114 P.3d 1268, 1276, quoting *Bunting* at 471 (citations omitted). Under the first prong of the *Daubert* standard, this Court must first "determine whether the reasoning or methodology underlying the testimony is scientifically valid." *Dean v. State*, 2008 WY 124, ¶ 14, 194 P.3d 299, 303-304; *See also Bunting*, 984 P.2d at 472. Plaintiff does not challenge these experts based on the first prong of the *Daubert* standard.

The second prong of the *Daubert* test is for this Court to determine whether the testimony "fits." *Dean v. State*, 2008 WY 124, ¶ 14, 194 P.3d 299, 303. The Wyoming Supreme Court concluded in *Bunting* that this is a question of relevance which incorporates the concept of "helpfulness" found in W.R.E. 702: "the expert's opinion must relate to an issue that is actually in dispute and must provide a valid scientific connection to the pertinent inquiry." *Hoy* at ¶ 13, quoting *Bunting* at 472. Testimony is not helpful if it provides no "valid scientific connection to the pertinent inquiry." *Hoy* at ¶ 23, quoting *Bunting* at 472.

The *Daubert* rule does not overrule previous Wyoming caselaw. Prior to the adoption of *Daubert*, the standard for trial court judges was to make a threshold determination of “whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Springfield v. State*, 860 P.2d 435, 443 (Wyo. 1993). The determination “whether the evidence assists the trier of fact is premised on the reliability of that evidence. In turn, this determination will be based on whether the underlying theory is scientifically valid and pertains to the facts of the case.” *Id.* (citations omitted).

The fundamental requirement is that “an expert opinion must be based on reliable methodology and must reliably flow from that methodology and the facts at issue.” *Hoy* at ¶ 11.

B. The Expert Report of Robert Enick, Ph.D. is Irrelevant and Should be Stricken.

Dr. Robert Enick submitted his Expert Report, entitled “Processing of Gas in a Processing Plant” and marked as Exhibit C, as part of the Defendant’s Designation of Expert Witnesses; filed with the Court and served on Plaintiff’s counsel on June 21, 2013. Dr. Enick’s Report is not relevant to the facts at issue in this case, and therefore fails to meet the second prong of the *Daubert* standard stated above.

Dr. Enick’s report deals solely with defining the facilities located at the Medicine Bow, Little Thunder, and Bison treating facilities as gas processing plants. The only possible purpose for Dr. Enick’s Report is for Lance to show it is permitted to take a deduction from the royalty payments for processing of the gas, and therefore entitled to setoff or recoupment for their underpayment of royalties based on their overvaluation of ad valorem taxes paid to the State.

Because the law prevents Lance from asserting such setoff or recoupment, Dr. Enick's Report has no relevance to the matters at issue in this case, and the Court should prohibit his testimony.

C. The Expert Report of Kris L. Terry is Irrelevant and should be Stricken.

Kris L. Terry submitted her Expert Report, entitled "Expert Report of Kris L. Terry" and marked as Exhibit D, as part of the Defendant's Designation of Expert Witnesses; filed with the Court and served on Plaintiff's counsel on June 21, 2013. Kris Terry's Report is not relevant to the facts at issue in this case, and therefore fails to meet the second prong of the *Daubert* standard stated above.

Ms. Terry's Report states several times that Lance was entitled to deductions which they did not take, whether by the "otherwise expressly provided" language in the leases themselves or allowable through the Wyoming Royalty Payment Act. *See* Expert Report of Kris L. Terry, ¶ 5-7, 18, 29, 45, and 49. Ms. Terry's Report also states several times that Lance should be allowed a setoff for these allowable deductions. *Id.* at ¶¶ 12, 32, 33, 46, 47, and 48.

The purpose of Ms. Terry's testimony is to show that Lance is entitled to setoff or recoupment for deductions it voluntarily did not take. For the same reasons as stated in Section B, Ms. Terry's testimony has no relevance to the matters at issue in this case, and the Court should prohibit her testimony.

D. The Affidavit of Christopher L. Wilson is Irrelevant and should be Stricken.

Christopher Wilson has not been retained as an expert witness by Lance, but may be called to provide expert testimony on matters included in, but not limited to, those contained in his Affidavit dated October 4, 2012. *See* Defendant's Designation of Expert

Witnesses of June 21, 2013, page 3, no. 5. Christopher Wilson's Affidavit is not relevant to the facts at issue in this case, and therefore fails to meet the second prong of the *Daubert* standard stated above.

Mr. Wilson's Affidavit only further seeks to explain and define Lance's gas processing systems and processing costs. *See* Affidavit of Christopher L. Wilson, dated October 4, 2012, ¶¶ 3, 4, 10-13. The only purpose for Mr. Wilson's testimony would be to further Lance's claim of setoff or recoupment for deductions they voluntarily did not take. For the same reasons stated above in Section B, Mr. Wilson's testimony has no relevance to the facts at issue in this case, and therefore fails to meet the second prong of the *Daubert* standard.

E. A Portion of the Expert Report of Michael Z. Zeeb is Irrelevant and Should be Stricken.

Michael A. Zeeb submitted his Expert Report, entitled "Expert Report of Michael A. Zeeb" as part of the Defendant's Designation of Expert Witnesses; filed with the Court and served on Plaintiff's counsel on June 21, 2013. A portion of Mr. Zeeb's Report is not relevant to the facts at issue in this case, and therefore fails to meet the second prong of the *Daubert* standard stated above.


A portion of Mr. Zeeb's testimony pertains to Lance's setoff claim. *See* Expert Report of Michael A. Zeeb, dated June 21, 2013, pp. 2-4. In the section of his Report entitled *Lease Language and Analysis of Costs Deducted*, Mr. Zeeb discusses his theory that the additional deductions Lance was entitled to would exceed amounts claimed by Plaintiff. *Id.* at 2. He states that Lance was entitled to a deduction for production of gas, and that these additional deductions are in excess of the amounts claimed, therefore resulting in an overpayment of royalties so that the Class suffered no damages. *Id.* at 2,

3. The only purpose for this testimony would be to further Lance's claim of setoff or recoupment for deductions they voluntarily did not take. For the reasons stated above, this portion of Mr. Zeeb's testimony has no relevance to the facts at issue in this case, and therefore fails to meet the second prong of the *Daubert* standard.

CONCLUSION

WHEREFORE, Plaintiff, through his undersigned counsel, respectfully requests this Court enter an Order striking the testimony of Robert Enick, Ph.D, Kris L. Terry, Christopher L. Wilson, and the portions of Michael A. Zeeb that have no relevance to the issues in this case.

DATED this 31st day of July, 2013.


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CERTIFICATE OF SERVICE

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

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