



Court: Grant County District Court
Case Number: 2016-CV-000039
Case Title: Cooper Clark Foundation vs. OXY USA Inc.
Type: Order Granting Preliminary Approval of Class Action Settlement

SO ORDERED.

A handwritten signature in blue ink, which appears to read "Bradley Ambrosier". The signature is written in a cursive style and is positioned above the printed name of the judge.

/s/ Honorable Bradley Ambrosier, District Court
Judge

IN THE DISTRICT COURT OF GRANT COUNTY, KANSAS

COOPER CLARK FOUNDATION and
PHILLIP FINK,
on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

Oxy USA Inc.,

Defendant.

Case No. 2016-CV-39
LEAD CASE

Consolidated with:
Case No. 2016-CV-17
(Haskell County)
and
Case No. 2016-CV-13
(Morton County)
and
Case No. 2017-CV-3
(Grant County)

**ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT, CERTIFYING THE CLASS FOR SETTLEMENT PURPOSES,
APPROVING FORM AND MANNER OF NOTICE,
AND SETTING DATE FOR SETTLEMENT FAIRNESS HEARING**

This is a proposed class action involving four lawsuits (the “Class Action Litigation”) brought by Plaintiffs, Cooper Clark Foundation and Phillip Fink (“Plaintiffs”), on behalf of themselves and as the proposed representatives of a Class of royalty owners (defined below), against Oxy USA Inc. (“Defendant”), for, among other claims, the alleged underpayment of royalties on gas and its constituents (including helium, residue gas, natural gas liquids, nitrogen, condensate, and drip condensate) produced from wells in Kansas where Defendant was the operator (or as a non-operator, Defendant separately marketed its gas). On September 23, 2021, the Parties executed the Settlement Agreement finalizing the terms of the proposed class action Settlement.¹ The Settlement Agreement (including the exhibits thereto) sets forth the terms and conditions for the proposed Settlement of the Class Action Litigation. In accordance with the terms

¹ Capitalized terms not otherwise defined in this Order shall have the meaning ascribed to them in the Settlement Agreement.

of the proposed Settlement Agreement, Plaintiffs now present the Settlement Agreement to the Court for preliminary approval.

After reviewing Plaintiffs' Motion to Preliminarily Approve Class Action Settlement, Certify the Class for Settlement Purposes. Approve Form and Manner of Notice, and Set Date for Settlement Fairness Hearing and Opening Brief in Support ("Motion for Preliminary Approval"), the Court has preliminarily considered the Settlement Agreement and the resulting Settlement to determine, among other things, whether the Settlement Agreement warrants the issuance of notice to the Settlement Class. Upon reviewing the Settlement Agreement and the Motion for Preliminary Approval, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. **Settlement Class Certification.** The Court finds the Settlement Class should be certified for the purposes of proceeding forward with the Settlement. The certified Settlement Class is defined as follows:

All royalty owners in Kansas wells: (a) where Oxy USA, Inc. was the operator (or as a non-operator, separately marketed gas); (b) who were paid royalties for production of Gas, NGLs, or Helium from July 1, 2007 to April 30, 2014; and (c) whose gas was marketed under (i) the Gas Processing Agreement for the Amoco Hugoton Jayhawk Plant, between Amoco Production Company and OXY USA, Inc., dated June 15, 1998, as amended, (ii) the Gathering and Processing Agreement between Oxy USA, Inc. and Regency Midcon Gas, LLC dated December 1, 2004, as amended, (iii) the Gathering and Processing Agreement between Oxy USA Inc. and Regency Midcon Gas, LLC dated September 1, 2003, as amended, and (iv) the Processing Agreement between Oxy USA, Inc. and Duke Energy Field Services, LP dated as of August 1, 2005, as amended.

Excluded from the Class are: (1) the Office of Natural Resources Revenue, formerly known as the Mineral Management Service (Indian tribes and the United States); (2) all presiding judge(s) together with their immediate family members; (3) OXY USA Inc., its affiliates, its predecessors-in-interest, and their respective employees, officers, and directors; and (4) any publicly traded

company or its affiliated entity that produces, gathers, processes, or markets gas.

2. The Court finds the above-defined Settlement Class satisfies, for purposes of the Settlement, all prerequisites of the Kansas Rules of Civil Procedure (K.S.A. 60-223) for certification of a settlement class:

a. Numerosity. Plaintiffs have demonstrated “[t]he class is so numerous that joinder of all members is impracticable.” K.S.A. 60-223(a)(1). “No specific number” exists, but generally fewer than 20 members is too few and more than 40 members suffices. NEWBERG ON CLASS ACTIONS § 3:11 (5th ed.); *see also Schupbach v. Continental Oil Co.*, 193 Kan. 401, 405, 394 P.2d 1, 5 (1964) (allegation of 23 class members sufficient); *Sternberger v. Marathon Oil Co.*, 257 Kan. 315, 344, 894 P.2d 778, 807 (1995) (38 subclass members). Here, the Settlement Class consists of thousands of royalty owners. Therefore, the Court finds the numerosity prerequisite is met.

b. Commonality and Predominance. Plaintiffs have also demonstrated “[t]here are questions of law or fact common to the class” in relation to the proposed Settlement Class. K.S.A. 60-223(a)(2). This factor is satisfied by a finding of only “a single question of law *or* fact common to the entire class.” *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 914 (10th Cir. 2018) (emphasis added).² Given the relationship of commonality to predominance, the Supreme Court has reasoned that “Rule 23(a)(2)’s ‘commonality’ requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class ‘predominate over’ other

² K.S.A. 60-223 is patterned after Rule 23 of the Federal Rules of Civil Procedure. *Back–Wenzel v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194, 1196 (2005). Kansas courts traditionally follow federal court interpretation and application of Rule 23 in applying K.S.A. 60-223. *See Dragon v. Vanguard Indus., Inc.*, 277 Kan. 776, 778, 89 P.3d 908, 911 (2004).

questions.” NEWBERG ON CLASS ACTIONS § 3:27 (5th ed.) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997)).

Plaintiffs have likewise shown, for purposes of the Settlement and the proposed Settlement Class, “questions of law or fact common to the members of the [Settlement] Class predominate over any questions affecting only individual members.” K.S.A. 60-223(b)(3). Predominance “depends on ‘how the class intends to answer factual and legal questions to prove its claim – and the extent to which the evidence needed to do so is common or individual.’” *Menocal*, 882 F.3d at 926 n.17 (quoting *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014)). The “how to prove” inquiry begins with the elements of the underlying claim. *CGC Holding Co., LLC*, 773 F.3d at 1088 (“[C]onsidering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.”) (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)).

As this Court found in previously certifying Case No. 2017-CV-3, the Court finds here, solely for the purposes of settlement, there are at least three common questions that predominate. First, legal duty is a common question of law based on the implied duty to market law applied to the Class Leases. Second, breach is a common fact question based on the intended market for the Class Gas. Third, damages can be calculated classwide by aggregating the deductions taken for monetary and in-kind costs incurred to make the Class Gas acceptable for the intended market. *See Cooper Clark Foundation v. Oxy USA Inc.*, 58 Kan. App. 2d 335, 356, 469 P.3d. 1266, 1281 (2020), *review denied*, Kan. Sup. Ct. No. 120,371 (Nov. 24, 2020) (“*Oxy I*”). If the breach of lease claims were tried, the questions that would drive their resolution, factually and legally, would be common and predominate

over any individual questions. Commonality and predominance are therefore met.

c. Typicality. Plaintiffs have also shown “[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class” in relation to the Settlement Class proposed under the Settlement Agreement. K.S.A. 60-223(a)(3).

d. Adequacy. Plaintiffs and Plaintiffs’ Counsel have demonstrated “[t]he representative parties will fairly and adequately protect the interests of the class” for the purposes of the proposed Settlement Class, in accordance with K.S.A. 60-223(a)(4). In addition, because the Court finds Plaintiffs, Cooper Clark Foundation and Phillip Fink, to be adequate representatives of the Settlement Class and Plaintiffs’ Counsel, Rex A. Sharp and Scott B. Goodger, to be adequate Class Counsel for the Settlement Class, the Court hereby appoints Plaintiffs as Class Representatives and Plaintiffs’ Counsel, Rex A. Sharp and Scott B. Goodger, as Class Counsel.

f. Superiority. Plaintiffs have also established the resolution of the Class Action Litigation pursuant to the Settlement Agreement and resulting Settlement “is superior to other available methods for the fair and efficient adjudication of the controversy.” K.S.A. 60-223(b)(3)

In sum, the Court finds the Settlement Class should be certified solely for the purposes of this proposed class settlement.

3. **Preliminary Finding of Settlement Fairness.** The Court preliminarily finds: (i) the proposed Settlement Agreement resulted from extensive arm’s-length negotiations; (ii) the proposed Settlement Agreement was agreed to only after Class Counsel had conducted legal research, extensive discovery, and expert analysis regarding the strengths and weaknesses of Class Representatives’ and the Settlement Class’ claims; (iii) Class Representatives and Class Counsel

have concluded that the proposed Settlement Agreement is fair, reasonable, and adequate; and (iv) the proposed Settlement is sufficiently fair, reasonable, and adequate to warrant sending notice of the proposed Settlement Agreement and resulting Settlement to the Settlement Class.

4. Having considered the essential terms of the Settlement Agreement under the recognized standards for preliminary approval of a proposed settlement class, subject to the right of any member of the Settlement Class to challenge the fairness, reasonableness, and adequacy of the Settlement, Settlement Agreement, proposed Initial Plan of Allocation and Distribution (or any other Plan of Allocation and Distribution), and to show cause, if any exists, why a Judgment dismissing the Class Action Litigation based on the Settlement Agreement should not be ordered after adequate notice to the members of the Settlement Class has been given in conformity with this Order, the Court finds that those Class Members whose claims would be settled, compromised, dismissed, and released pursuant to the Settlement Agreement should be given notice and an opportunity to be heard regarding final approval of the Settlement Agreement and other matters.

5. **Class Notice Approval of Form and Process.** The Court further preliminarily approves the form and content of the proposed Notice of Proposed Class Action Settlement, attached to the Settlement Agreement as Exhibits C and D, respectively. The Court finds Exhibit C, the notice to be mailed, and Exhibit D, the notice to be published, are the best notice practicable under the circumstances, constitute due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfy the requirements of applicable laws, including due process and Kansas Rules of Civil Procedure (K.S.A. 60-223). The Court finds the form and content of the Notice of Proposed Class Action Settlement fairly and adequately, among other matters: (i) summarizes the terms and effect of the Settlement Agreement and resulting Settlement; (ii) notifies the Settlement Class that Plaintiffs and Class Counsel will seek Class Counsel's Fees and

Expenses; (iii) notifies the Settlement Class of the time and place of the Settlement Fairness Hearing as initially set by the Court; (iv) describes the procedure for requesting exclusion from the Settlement; and (v) describes the procedure for objecting to the Settlement or any part thereof.

Having preliminarily approved the form and content of the proposed Notice of Proposed Class Action Settlement, the Court orders:

a. Within 30 days after entry of the Preliminary Approval Order, or as otherwise ordered by the Court, the Settlement Administrator will mail (or cause to be mailed) the Notice of Proposed Class Action Settlement, Exhibit C, by first class mail to all Class Members who have been identified after reasonable efforts to do so. The Notice of Proposed Class Action Settlement will be mailed to Class Members using the royalty paydeck data and any updated addresses found by the Settlement Administrator.

b. Within 10 days after mailing of the first Notice of Proposed Class Action Settlement, the Settlement Administrator also shall publish (or cause to be published) the Notice of Settlement, Exhibit D, once in each of the following newspapers: (1) *The Garden City Telegram*, a paper of local circulation in western Kansas and (2) *The Southwest Daily Times*, a paper of local circulation in southwest Kansas.

c. Within 10 days after mailing the first Notice of Proposed Class Action Settlement, Exhibit C, and through the Settlement Fairness Hearing, the Settlement Administrator will also display (or cause to be displayed) on an Internet website dedicated to this Settlement the following documents, among other documents the Settlement Administrator may determine to post on the site: (1) the Notice of Proposed Class Action Settlement, (2) the last amended Complaint and Answer, (3) the Settlement Agreement, and (4) the Preliminary Approval Order.

6. **Appointment of Settlement Administrator.** The Court appoints JND Legal Administration to act as Settlement Administrator and perform the associated responsibilities set forth in the Settlement Agreement. The Settlement Administrator will receive and process any Requests for Exclusion and, if the Settlement Agreement and resulting Settlement are finally approved by the Court, will supervise and administer the Settlement in accordance with the Settlement Agreement, the Judgment, and the Court's Plan of Allocation and Distribution order(s) authorizing distribution of the Net Common Fund Amount to Class Members. The Parties and their counsel shall not be liable for any act or omission of the Settlement Administrator.

7. **Settlement Fairness Hearing.** A Settlement Fairness Hearing shall be held on December 8, 2021, at 1:30 P.M. in the District Court of Grant County, Kansas, the Honorable Bradley Ambrosier presiding, to, among other related matters, determine whether:

a. the Settlement Agreement should be approved by the Court as fair, reasonable, and adequate and in the best interests of the Class;

b. the notice method utilized: (i) constituted the best practicable notice under the circumstances and applicable legal standards; (ii) constituted notice reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Class Action Litigation, the proposed Settlement Agreement and the Settlement contemplated therein, their right to exclude themselves from the Settlement, their right to object to the Settlement, and their right to appear at the Settlement Fairness Hearing; (iii) was reasonable and constituted due, adequate, and sufficient notice to all persons and entities entitled to such notice; and (iv) met applicable Constitutional standards and any other applicable law;

c. the Judgment should be entered pursuant to the Settlement Agreement dismissing the Class Action Litigation against Defendant with prejudice and extinguishing,

releasing, and barring all Released Claims against all Released Parties, and making the other findings and rulings provided therein, all in accordance with the Settlement Agreement;

d. the proper method of allocation and distribution of the Net Common Fund Amount among Class Members who are part of the Settlement Class should be approved as fair and adequate;

e. the applications for Class Counsel's Fees and Expenses are fair and reasonable and should be approved; and

f. rule on such other matters as the Court may deem appropriate.

10. **Rescheduling If Necessary.** The Court reserves the right to adjourn, continue to a future date, and/or reconvene the Settlement Fairness Hearing, or any aspect thereof (including the consideration of the application for Class Counsel's Fees and Expenses), without further notice to the Settlement Class of the revised hearing date. The Court may also approve the Settlement Agreement at or after the Settlement Fairness Hearing without notice to the Settlement Class of any revised hearing date. The Settlement Administrator will update the settlement website to reflect the current information about the date and time for the Settlement Fairness Hearing, so that those persons interested in attending the Settlement Fairness Hearing may check the settlement website for updated information regarding the date of the Settlement Fairness Hearing.

11. **Opt-Outs.** Class Members wishing to exclude themselves from the Settlement Class must submit to the Settlement Administrator a valid and timely Request for Exclusion. Requests for Exclusion must include: (i) the Class Member's name, address, email address, telephone number, and notarized signature; (ii) a statement that the Class Member wishes to be excluded from the Settlement Class in *Cooper Clark Foundation v. Oxy USA Inc.*, Case No. 2016-

CV-39 (Grant County, Kansas); and (iii) a description of the Class Member's interest in any Kansas wells where Defendant was the operator or, as a non-operator, Defendant separately marketed gas, including the name, well number, county in which the well is located, and the owner identification number. All Requests for Exclusion must be mailed to the Settlement Administrator by United States Certified Mail, return receipt requested, using the address for the Settlement Administrator shown in the Notice of Proposed Class Action Settlement. Each Request for Exclusion must be mailed in sufficient time that it is *received* by the Settlement Administrator by November 23, 2021, unless such deadline is changed or altered by order of this Court. The Settlement Administrator is directed to promptly email each Request for Exclusion it receives to Plaintiffs' Counsel and Defendant's Counsel, using email addresses each set of counsel will provide to the Settlement Administrator. The Settlement Administrator or Class Counsel is directed to file the Requests for Exclusion with the Court prior to the date of the Settlement Fairness Hearing. Requests for Exclusion may not be submitted through the website or by phone, facsimile, or email. A Request for Exclusion shall be effective after the Court approves its sufficiency in connection with its final approval order and Judgment. Any member of the Settlement Class that has not timely and properly filed a Request for Exclusion shall be a Class Member and shall be bound by the terms of the Settlement Agreement and the resulting Settlement if the Court finally approves the Settlement Agreement.

12. **Objections.** Any Class Member who wishes to object to the fairness, reasonableness, or adequacy of the Settlement Agreement, any term of the Settlement Agreement, the Allocation Methodology, the Initial Plan of Allocation and Distribution, or the request for Class Counsel's Fees and Expenses may file an objection. An objector must *file* with the Court a written objection containing the following: (i) a heading referring to *Cooper Clark Foundation v. Oxy*

USA Inc., Case No. 2016-CV-39, in the District Court of Grant County, Kansas; (ii) a statement as to whether the objector intends to appear at the Settlement Fairness Hearing, either in person or through counsel, and, if through counsel, counsel must be identified by name, address, email address, and telephone number; (iii) a detailed statement of the specific legal and factual basis for each objection, including a list of any witnesses the objector may call at the Settlement Fairness Hearing, a brief summary of each witness's expected testimony, copies of any exhibits the objector may seek to use at the Settlement Fairness Hearing, and a list of any legal authority the objector may present at the Settlement Fairness Hearing; (iv) the objector's name, address, telephone number, email address, and all royalty owner identification numbers with Defendant, (v) the objector's signature executed before a Notary Public; (vi) identification of the objector's interest in wells where Defendant was the operator or, as a non-operator, where Defendant separately marketed gas (by well name, well number, county in which the well is located, and owner identification number); and (vii) if the objector is objecting to any portion of Class Counsel's Fees and Expenses, the objector must specifically state the portion of Class Counsel's Fees and Expenses that he/she believes is fair and reasonable and the portion that is not. Such written objections must be *filed* with the Court in the Class Action Litigation no later than November 23, 2021, at 5:00 p.m. Central time. Any Class Member who does not timely object in the manner described herein will be deemed to have waived any objection and shall be forever foreclosed from making any objection to the Settlement (or any part thereof) and will not be allowed to present any objections at the Settlement Fairness Hearing. All presentations of objections will be further limited by the information listed. Either or both Parties' Counsel may file a reply or response to any objections no later than December 1, 2021.

13. **If Settlement Not Finally Approved.** If the Settlement is not granted final approval by the Court, is terminated in accordance with the terms of the Settlement Agreement, or a Judgment approving it is entered that does not become Final and Unappealable for any reason whatsoever, the Settlement Agreement, Settlement, and any actions taken or to be taken by the Court or the Parties in connection therewith (including this Order and any Judgment entered herein), shall be terminated and become void and of no further force and effect as described in the Settlement Agreement. Any obligations or provisions relating to the termination of the Settlement or events to occur after the termination, shall survive termination of the Settlement Agreement and resulting Settlement.

14. **Proceedings Stayed Other Than Settlement.** All proceedings in the Class Action Litigation, other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement Agreement, are hereby stayed and suspended until further order of this Court. Pending final approval of the Settlement Agreement, the Court hereby enjoins and restrains all members of the Settlement Class from continuing, maintaining, filing, commencing, prosecuting, supporting, intervening in, or participating as plaintiffs, claimants, or class members in any other action or proceeding in any jurisdiction against the Released Parties, or any of them, that is based on, relating to, or arising out of the claims and causes of action, or the facts and circumstances at issue, in the Class Action Litigation and/or the Released Claims, unless and until (i) the Court enters a final order herein approving the proposed Settlement and entering the Judgment, (ii) the Court enters a final order herein denying approval of the proposed Settlement, or (iii) the Settlement Agreement is otherwise terminated.

15. **No Admission of Liability.** Neither this Order nor the Settlement Agreement shall be construed or used as an admission, concession, or declaration by or against Defendant or any

other Released Party of any fault, wrongdoing, breach, or liability, or the propriety of maintaining the Class Action Litigation as a contested class action. Defendant specifically denies any such fault, wrongdoing, breach, liability, and allegations regarding certification for litigation (as opposed to settlement) purposes. This Order shall not be construed or used as an admission, concession, declaration, or waiver by any party of any arguments, defenses, or claims he, she, or it may have with respect to the Class Action Litigation in the event the Settlement is terminated. Moreover, the Settlement Agreement and any proceedings taken pursuant thereto are for settlement purposes only.

16. The Court may, for good cause shown, extend any of the deadlines set forth in this Order without further written notice to the Class Members.

IT IS SO ORDERED this ____ day of September, 2021.

HONORABLE BRADLEY AMBROSIER
DISTRICT COURT JUDGE

APPROVED:

CLASS COUNSEL:

/s Rex Sharp

Rex A. Sharp, KS# 12350
Scott B. Goodger, KS# 26480
SHARP LAW, LLP
4820 W. 75th Street
Prairie Village, KS 66208
(913) 901-0505
(913) 901-0419 fax
rsharp@midwest-law.com
sgoodger@midwest-law.com

COUNSEL FOR DEFENDANT:

/s Mark Rodriguez

Mark Rodriguez
Beck Redden LLP
1221 McKinney Street, Suite 4500
Houston, TX 77010
Phone: (713) 951-6212
Fax: (713) 951-3720
mrodriguez@beckredde.com

James M. Armstrong
Foulston Siefkin LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206
Tel: 316-291-9576
Fax: 866-346-1936
jarmstrong@foulston.com