

Alva's 'David' battles 'Goliath' from here to D.C. ... and wins!

Battle over \$19,000 goes to U.S. Supreme Court

04/09/11

By Helen Barrett

Woods County Assessor Monica Schmidt accepted the biblical role of David against the giant Goliath, members of the oil and gas industry. Like the bible story, Alva's David won. This battle began on the plains of Woods County, Oklahoma, instead of the hill country of Old Testament Judah. After 10 long, hard-fought years, it ended in the United States Supreme Court.

In the Beginning In the 1990s, Texaco sued the state of Oklahoma over their being centrally assessed by the Oklahoma Tax Commission (OTC) at a rate twice that available to the county assessors. Later, OTC informed Woods County that oil and gas companies owned gas in storage that had not been reported. "Overnight, property values dropped in half," Schmidt said. "The schools were affected. It was really devastating. We had no training or expertise in this area."

"It became apparent to us that a lot of these companies weren't being honest with us," Schmidt said. "They were not turning in all the property they should have, and some of the property they did report was way undervalued."

At this point, Schmidt and other assessors felt the need to hire a consulting company. Woods County, along with all the local school districts agreed to share the cost of hiring Visual Lease Services (VLS), a company from Holdenville with established credentials in similar cases now involving approximately 40 counties.

"What they did was come in and physically drive every inch of this county – every road and every cow path. They were looking for every well site. They would GPS that well site, every meter, every road crossing, every pumping station then put the information in their sophisticated computer system and connect the dots," Schmidt said. "That's how we discovered all this omitted property that wasn't being turned in."

Over the last 10 years, the VLS efforts resulted in the addition of 58 companies to the tax rolls that had never been assessed before. "That was \$127.8 million dollars of property that had escaped taxation," Schmidt said. "That amounts to about \$1.33 million we weren't collecting in taxes." VLS continues to find companies that are either not reporting their assets or undervaluing them, Schmidt said. She credits VLS and their specialized expertise for finding all of the unreported property.

"It's not been an easy task," Schmidt said. "It's resulted in a lot of lawsuits, and I'm lucky to say – tapping the wooden podium with her knuckles – we've won every single one."

The Battle Threat Panhandle Eastern Pipe Line Company created one of the Woods County underground natural gas storage areas, the West Hopeton facility, out of natural underground caverns in the late 1970s. From its opening, PEPL stored gas for other companies for transportation to eastern states during the cold winter months.

Since the Tax Commission told them that gas in storage was taxable, Ms. Schmidt a.k.a. David, armed with figures provided by VLS, sent a bill to the facility's owner. The facility owner (PEPL), not wanting to fork over the entire taxable amount out of their profits, told the assessor's office they did not own the gas, and agreed to present a list of all their customers, their contracts and how much gas each company owned in the facility on January 1.

In 1968 the Oklahoma Legislature passed a law stating specifically that gas in storage was taxable. The law did not specifically include the word "underground" as the state's assessors interpreted it.

'Goliath' disagreed.

Not only did he disagree, the collective 'he' filed a protest of their evaluation, represented by Oklahoma City gas and oil attorney Bill Elias.

"They claimed the state had passed an unconstitutional law," Schmidt said referring specifically to Missouri Gas Energy (MGE).

First came an informal hearing at which the assessor rejected Elias' arguments. Next came protests before the Woods County Equalization Board.

Goliath Roars At the equalization board hearings, Elias vehemently argued it was impossible to tell which molecules of gas belonged to which company since they were co-mingled in the storage facility.

This argument prompted the familiar – and somewhat humorous – question of "Whose gas is it?"

Occasionally, angry company representatives walked out of the hearings refusing to shake hands with either the assessor or the board members.

Battle Lines Drawn Unable to convince the Woods County Equalization Board that they shouldn't be taxed, MGE continued

protesting their liability by citing the Freeport Exemption, claiming not all of the gas in storage (which they alleged couldn't be proven as belonging to them in the first place) came from within Oklahoma's borders, therefore the Federal Interstate Commerce Clause controlled their tax status.

Elias, sometimes visibly angry, presented several arguments for his clients at repeated hearings – first, that they should be totally exempt: zero taxes with no room for negotiation. When that failed, they added other arguments which eventually challenged not only Oklahoma Statutes but the U.S. Constitution's control over interstate transportation.

Since Woods County's assessment was smaller than other counties fighting similar battles, 'Goliath' chose to challenge 'David' – not on hills in Israel separated by meadows, but in the oak paneled courtrooms at facing tables before the District Judge.

"They actually picked this one Woods County case (to challenge)," Schmidt said. "I think it was because it was one of the smallest values of all the cases, and they thought nobody would fight it."

Believing the law was on the assessor's side, 'David' accepted the challenge.

Schmidt, along with officials of Grant and Beckham counties agreed to fight. "It was too big a risk," Schmidt said. "We had to go through with it. We had nothing to lose."

The local District Attorneys Ray Don Jackson and Hollis Thorp realized they lacked adequate knowledge or resources needed to battle the complex issues involving federal constitutional law. The three counties along with the involved school districts agreed to hire Attorney Mart Tisdal, from Clinton.

"That proved to be the best decision the group made, Schmidt said. "We projected it would take four to five years to settle. We never dreamed that 10 years later we would still be dealing with this."

'Goliath' offered the option of receiving no taxes – losing all that value and that tax base – not just on that one company, but all the companies in the facility for the three years in question and all future years.

Launching the First Stone From the beginning, Schmidt made sure to document everything connected to the disputed cases.

"We had every 'I' dotted and every 'T' crossed," she said. "We had everything in a row, all the spreadsheets, everything."

With her trusted 'slingshot' (Tisdal) by her side, they entered the Woods County District Court with confidence. Depositions were taken in several courts.

"I even had to fly to out of state with my lawyer to face a representative," she said. "There was a lot of uneasiness, a lot of stress."

At the Woods County District Court, the issues were divided into two separate cases. At this level, they won all of the issues except one – the question involving Interstate Commerce and the U.S. Constitution.

Judge Linder ruled against the county on that one issue, explaining that the Interstate Commerce Clause of the U.S. Constitution needed to be decided by a higher court ultimately forcing the county to appeal.

Schmidt a.k.a. David pulled out another stone, and sent the case sailing to the Oklahoma Supreme Court. Several years passed before the Oklahoma Court decided to put the case on the fast track which meant skipping several appellate levels.

The Oklahoma Supreme Court ruled 8-1 that MGE did own the gas and taxing that gas did not violate the Interstate Commerce clause of the U.S. Constitution, and that the assessed value was very reasonable.

"When we started assessing, the value of natural gas stood at \$1.98. By this time, it was over \$10 or \$11 dollars," Schmidt said, "So it was really hard for them to argue the gas was over valued at this time."

Schmidt and her partners waited for MGE's next move. MGE appealed and five months later in March 2009 the Appeals Court denied their case. Elias shot back by filing an appeal directly to the U.S. Supreme Court.

"The reason they could appeal directly to the U.S. Supreme Court instead of going through all the regional courts was because it dealt with one issue – the Interstate Commerce clause.

During all this time, 'David' discovered a secondary battle brewing. Oil and gas lobbyists pressed the Oklahoma Legislature to exempt all underground storage from taxation.

About three days before the bill faced its final vote, language appeared in the bill exempting all oil and gas related items in all 77 counties. Schools, the Oklahoma County Assessors' Association, county government officials and nearly every entity involved in receiving revenues from ad valorem taxes descended

on the Legislature in full force to defeat the bill.

In the meantime, 'Goliath' and his host of 'Philistines' started rumors accusing the counties of hiring VLS on a contingency fee.

"They said VLS was working for a percentage of what they found, which was absolutely false," Schmidt said. "Counties can only sign contracts for 'X' amount of dollars on an annual basis."

That ugly rumor still rears its head occasionally among legislators, she said.

Final Showdown Schmidt received official notification that "Missouri Gas Energy vs. Monica Schmidt, Woods County Assessor, September 3, 2009" had been filed with the U.S. Supreme Court. This battle seemed to be getting personal.

"The U.S. Supreme Court receives approximately 10,000 filings a year, but it only accepts about 100," Schmidt said.

During the 10-year period, Kansas, Texas and Arkansas offered assistance to the local cause because they were fighting similar issues in their states.

"National gas associations that I'd never heard of joined their side and began filing their briefs," Schmidt said. "I compared it to a David and Goliath situation. We didn't know what we were up against."

The word came that the U.S. Supreme Court had already rejected about 7,500 cases.

"Ours was never rejected or accepted, it was set aside," Schmidt said. "It was sent to the Solicitor General for an opinion."

The Solicitor General, a lawyer who looks at cases in behalf of the entire country, studies the issue to see how it would affect the public, Schmidt said. MGE argued this decision would affect 42 states.

"We were getting a little deeper in how far it could go," Schmidt said.

The Solicitor General at that time happened to be Elena Kagan, now Supreme Court Justice Kagan following her recent appointment by President Obama.

"On January 25, 2010, six lawyers including Kagan and a lawyer for the Federal Energy Regulatory Commission (FERC) recommended to the Supreme Court that this case be rejected," Schmidt said. "With FERC in our favor, we felt that we had a very

good shot.”

This recommendation immediately caused 'Goliath' to file yet another argument to which 'David' and company had to file a response. Since only Supreme Court Approved attorneys may argue before the high court, MGE hired a Washington, D.C. attorney to represent them. They hired Harriet Miers, former White House Counsel during the Bush Administration, and an unsuccessful nominee by President Bush to the Supreme Court.

The Oklahoma contingency held off on hiring a D.C. attorney, choosing instead to file for a petition to allow Tisdal to argue their case before the Court.

“We were able to get our lawyer, Mart Tisdal, admitted to argue before the Supreme Court,” Schmidt said. “For him that was probably the highest honor of his career. We were proud of that fact.”

Once the Solicitor General made her decision, she would then act as 'David's' lawyer for free – representing Schmidt on behalf of the entire United States of America.

On January 26, 2010, Schmidt received the Solicitor General's recommendation that the petition be denied.

Jubilation reigned in the Woods County Courthouse, the local school administrations' offices as well as at the VLS office.

March 3, 2010 the Supreme Court denied MGE's petition. They immediately appealed for a rehearing, then on April 22, 2010 the Supreme Court denied their rehearing for a petition.

Attorneys for both sides agreed this ruling was the final play, closing 41 cases.

On August 9, Woods County Treasurer David Manning was allowed to release the \$1.3 million held in escrow to the schools and the county.

Schmidt received notification on April 4, 2011, that the final release was back in the Woods County District Court to be signed Monday.

'Goliath' finally fell with a thud. \$19,000...? “By the way,” Schmidt said, “back in the 1998, 1999, 2000 cases (being protested), their liability was a mere sum of \$19,000! They never thought we would fight it. We were fighting over hundreds of thousands of dollars (in future revenues).”

The settlement allowed Beckham County to recover approximately

\$3.5 million, and almost \$5 million in Grant County. Not all of Grant County's issues have been resolved at this time.

"We had the maps of the pipelines to show all of this was in our county so all of it was ours," Schmidt said.

Not all of the paperwork has been signed on its way back through the courts, but those signatures could come at any moment.

Clearly, the elegant, tall, thin and tenacious 'David' a.k.a. Woods County Assessor Monica Schmidt, again prevailed over the modern day 'Goliath' disguised as Missouri Gas Energy.

That revenue stream for local schools will remain in place, thanks to the U.S. Supreme Court.