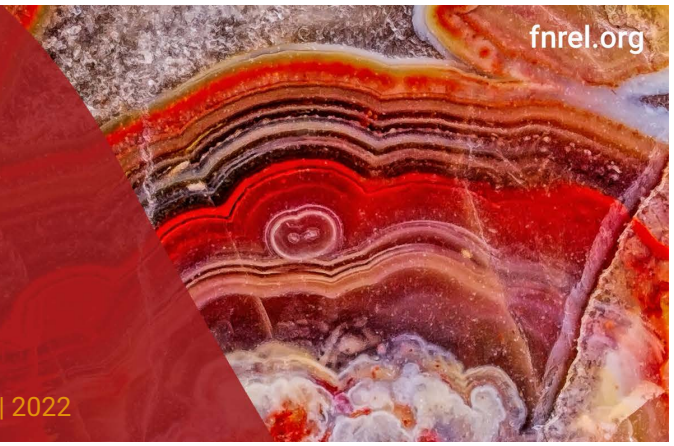
The Foundation
FOR NATURAL RESOURCES AND ENERGY LAW
FORMERLY ROCKY MOUNTAIN MINERAL LAW FOUNDATION

fnrel.org

MINERAL AND ENERGY LAW Newsletter

Volume 39 | No. 4 | 2022



In this issue

FEDERAL — MINING

Wells Parker, Benjamin Machlis & Kayla Weiser-Burton, Reporters

Federal Court Reinstates Moratorium on Federal Coal Leasing Program

On August 12, 2022, the U.S. District Court for the District of Montana overturned the U.S. Department of the Interior's (Interior) decision to restart the federal coal leasing program, based on an inadequate environmental review. *Citizens for Clean Energy v. U.S. Dep't of the Interior*, Nos. 4:17-cv-00030, 4:17-cv-00042, 2022 WL 3346373 (D. Mont. Aug. 12, 2022), *appeals docketed*, Nos. 22-35789, 22-35790 (9th Cir. Oct. 11, 2022). The ruling requires Interior to complete a new review in accordance with the National Environmental Policy Act (NEPA). Until that review is completed, the nationwide Obama-era ban on new coal leasing on federal lands, which had been reversed during the Trump administration, will be reinstated.

page 2

FEDERAL — OIL & GAS

Kathleen C. Schroder, Reporter

District Court Restores Rescinded Lease and Vacated APD in Latest Chapter of *Solenex* Litigation

In *Solenex LLC v. Haaland*, No. 1:13-cv-00993, 2022 WL 4119776 (D.D.C. Sept. 9, 2022), *appeal docketed*, No. 22-5291 (D.C. Cir. Nov. 4, 2022), the U.S. District Court for the District of Columbia lodged another chapter in the long-running dispute over a federal oil and gas lease in the Badger-Two Medicine area of the Lewis and Clark National Forest in Montana. In a decision aimed at ending an "interminable, and insufferable, bureaucratic chess match," the district court held that the Secretary of the Interior lacked authority to rescind the lease and acted arbitrarily and capriciously by disapproving a previously approved application for permit to drill (APD) on the lease. *Id.* at *14.

page 3

RENEWABLE ENERGY

Mark D. Detsky & K.C. Cunilio, Reporters

Inflation Reduction Act to Accelerate Renewable Energy Development

In August 2022, the Biden administration passed the Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, 136 Stat. 1818. The IRA is a large-scale tax and budget spending bill that encompasses not only the energy industry, but also addresses water infrastructure, healthcare, the federal spending deficit, and inflation. The IRA modifies and expands a wide array of federal tax laws, including clean energy tax credit programs that support the development of renewable energy in terms of manufacturing and production. Featuring an estimated $369 billion in new investment, the IRA has been called the largest investment in climate change mitigation strategies in U.S. history. *See, e.g.*, White House, "Remarks by President Biden on the Inflation Reduction Act of 2022" (July 28, 2022). This report highlights some of the notable renewable energy and electric vehicle-related provisions contained in the IRA.

page 6

FEDERAL — MINING

(continued from page 1)

In 2019, the District of Montana had found that any lifting of the coal leasing ban required a new NEPA review. *Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264 (D. Mont. 2019). In April 2021, Secretary of the Interior Deb Haaland overturned the Trump administration's reversal, but did not reinstate the ban itself. Secretarial Order No. 3398 (Apr. 16, 2021); *see* Vol. XXXVIII, No. 2 (2021) of this *Newsletter*. Environmental groups then asked the District of Montana to weigh in, and the court agreed with the environmental groups that Secretary Haaland's order "maintains the potential environmental harm that could result from lifting the coal leasing moratorium . . . that the [c]ourt determined required NEPA review in its earlier order." *Citizens for Clean Energy*, 2022 WL 3346373, at *4.

American Battery Materials Initiative

On October 19, 2022, President Biden announced the American Battery Materials Initiative (Initiative), a comprehensive effort to mobilize the federal government in securing a sustainable and reliable supply of critical minerals used for power and electric vehicles (EVs). *See* Press Release, White House, "FACT SHEET: Biden-Harris Administration Driving U.S. Battery Manufacturing and Good-Paying Jobs" (Oct. 19, 2022). The Initiative will work through the Partnership for Global Infrastructure and Investment to help strengthen critical mineral supply chains globally, and will maximize ongoing efforts throughout the United States to meet resource requirements and bolster energy security. *Id.* The Initiative will also coordinate White House and agency staff to implement President Biden's critical mineral strategy, align ongoing work with regards to critical mineral supply chains, and help guide research, grants, and loans supporting environmentally responsible critical minerals extraction, processing, and recycling. *Id.* The Initiative will be led by a White House steering committee, with coordination by the U.S. Department of Energy (DOE) and support from the U.S. Department of the Interior.

President Biden also announced that the DOE is awarding $2.8 billion in grants from the Bipartisan Infrastructure Law, also known as the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), to 20 manufacturing and processing companies for projects engaged in the manufacture of batteries for EVs and the electrical grid. *See* Press Release. The funding for the selected projects will support, among other things:

- development of enough battery-grade lithium to supply approximately two million EVs annually;
- development of enough battery-grade graphite to supply approximately 1.2 million EVs annually;
- production of enough battery-grade nickel to supply approximately 400,000 EVs annually;
- creation of the first commercial-scale domestic silicon oxide production facilities to supply anode materials for an estimated 600,000 EV batteries annually; and
- installing the first lithium iron phosphate cathode facility in the United States.

Id. Combined, all the projects will develop sufficient lithium to supply over two million EVs annually and establish significant domestic production of graphite and nickel. *Id.*

Tax Incentives for Critical Minerals Under the Inflation Reduction Act

President Biden signed the Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, 136 Stat. 1818, into law on August 16, 2022. The IRA includes several incentives to strengthen the U.S. supply chain for critical minerals.

The IRA provides an advanced manufacturing production tax credit for taxpayers that produce eligible components in the United States, including critical minerals. *See id.* § 13502. For critical minerals, the credit is equal to 10% of the costs incurred by the taxpayer with respect to the production of critical minerals and can be stacked, so a company can receive a credit for both mining and refining the minerals. The tax credit applicable to critical minerals expires after 2032.

In addition, the IRA creates new incentives for manufacturers to use domestically produced critical minerals in the manufacturing of new electric vehicles. *See id.* § 13401. The IRA provides that qualifying purchasers of electric vehicles can receive a tax credit of up to $7,500, but $3,750 of the credit is conditioned on at least 40% of the value of critical minerals used in the battery being extracted or processed in the United States or in a country that has a free trade agreement with the United States, or recycled in North America. The percentage threshold for critical minerals in a vehicle battery required to receive the tax credit increases to 80% in 2027. In addition, the IRA requires that, beginning in 2025, electric vehicle batteries may not contain critical minerals extracted, processed, or recycled by a "foreign entity of concern," as defined in the Infrastructure Investment and Jobs Act, 42 U.S.C. § 18741(a)(5) (a foreign entity of concern includes any foreign entity "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation," which currently includes North Korea, Russia, Iran, and China).

FEDERAL — OIL & GAS

(continued from page 1)

Because prior reports have chronicled the history of this case, only the essential facts are recited here. *See* Vol. XXXVII, No. 3 (2020); Vol. XXXV, No. 4 (2018); Vol. XXXII, No. 3 (2015) of this *Newsletter*. The United States issued the disputed lease in 1982. In 1985, the United States approved an APD on the lease, but the APD was repeatedly appealed and remanded to the United States for further environmental review. In 2002, the U.S. Forest Service (Forest Service) designated the area covered by the lease and neighboring areas as a traditional cultural district eligible for listing in the National Register of Historic Places. *Solenex*, 2022 WL 4119776, at *3–4.

In 2013, Solenex LLC (Solenex) brought suit against the United States to compel a decision on the APD and, in 2016, the United States canceled the lease and disapproved the APD. *Id.* at *4. The district court vacated the lease cancellation and APD disapproval, but the U.S. Court of Appeals for the D.C. Circuit reversed and remanded the case back to the district court. *Solenex LLC v. Jewell*, 334 F. Supp. 3d 174 (D.D.C. 2018), *vacated*, 962 F.3d 520 (D.C. Cir. 2020).

On remand, the district court vacated the Secretary's decision to rescind the lease. *Solenex*, 2022 WL 4119776, at *4. In doing so, the court made broad pronouncements of the Secretary's authority to administratively cancel leases and obligations to comply with the National Historic Preservation Act (NHPA). First, the court found that a legal defect in the form of a "statutory, regulatory, or contractual violation" is "a necessary precondition" to the Secretary's ability to cancel a lease. *Id.* at *5. The court rejected the notion that the Secretary possessed authority to cancel a validly issued lease. *Id.* at *5–6. Furthermore, the court questioned whether the Secretary has authority to cancel a lease for violations of procedural statutes such as the National Environmental Policy Act (NEPA) or the NHPA, observing that neither NEPA nor the NHPA "requires that the [United States] elevate the preservation of environmental or historical resources above other priorities." *Id.* at *6. The court observed that although courts have suggested the Secretary has authority to cancel leases for violations of the Mineral Leasing Act, no court has found that violation of another statute such as NEPA or the NHPA creates a basis for the Secretary to cancel a lease. *Id.*

Second, the court held that the United States did not violate the NHPA when issuing the lease because the NHPA did not apply to its issuance. *Id.* at *8. The court observed that prior to 1992 section 106 of the NHPA defined an "undertaking" as an expenditure of federal funds or issuance of a federal license, and reasoned that issuance of a lease was neither. *Id.* (citing 16 U.S.C. § 470f (1981); *Sheridan Kalorama Hist. Ass'n v. Christopher*, 49 F.3d 750, 755–56 (D.C. Cir. 1995)). Additionally, the court found that, even today, agencies must complete the procedural requirements to comply with the NHPA only before authorizing surface-disturbing activities and not before issuing a lease. *Id.* (citing 36 C.F.R. § 800.1(c); *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 228 (10th Cir. 1981)). Alternatively, however, the court held that even if the NHPA required the United States to complete compliance with section 106 before issuing the lease, it did so. *Id.* at *9.

Third, the court held that the United States complied with NEPA prior to issuing the lease. The court found that the United States adequately considered a no-action alternative prior to leasing. *Id.* at *7. Further, the court found that NEPA did not require preparation of an environmental impact statement (EIS) prior to leasing. *Id.* Although the court recognized that agencies must prepare an EIS when issuing a lease that does not preclude surface-disturbing activities, the court found that, with respect to the lease at issue, the United States retained the authority to preclude all activities until the lessee submitted proposals for site-specific development and to ensure these proposed activities would not result in "unacceptable" environmental consequences. *Id.* (citing *Sierra Club v. Petersen*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)).

Finally, the court held that, even if the lease was voidable at issuance, the United States "subsequently ratified the lease and thereby waived any right to rescind it." *Id.* at *9. The court concluded that the United States reaffirmed the validity of the lease repeatedly after its issuance was first challenged in 1985, including by completing an EIS and conducting additional activities to comply with the NHPA. *Id.* at *10–11.

Having determined that the Secretary improperly rescinded the lease, the court then set aside the Secretary's revocation of the APD. Particularly, the court rejected the Secretary's determi-

EDITOR'S NOTE ON UNPUBLISHED OPINIONS: This *Newsletter* sometimes contains reports on unpublished court opinions that we think may be of interest to our readers. Readers are cautioned that many jurisdictions prohibit the citation of unpublished opinions. Readers are advised to consult the rules of all pertinent jurisdictions regarding this matter.

nation that the APD must be revoked because impacts to tribal cultural resources could not be fully mitigated. *Id.* at *11. The court reasoned that this determination was predicated on two errors.

First, the court rejected the Forest Service's determination that the APD had the potential to affect the entire 165,000-acre traditional cultural district. *Id.* at *11–13. The court reasoned that the Forest Service did not establish a relationship between this large area (known as the "area of potential effect") and the physical impacts that would result from the proposed oil and gas development. *Id.* at *12. Moreover, the court found that the Forest Service "adopted wholesale" the Tribe's position that the APD could "adversely affect the power and spirituality" of the entire traditional cultural district "without explaining what those effects were or how they flowed from" the proposed oil and gas development. *Id.*

Second, the court rejected the Forest Service's determination that effects to the "power and spirituality" of a region constituted "adverse effects" within the meaning of the NHPA, reasoning that such a broad definition of "adverse effects" was "unmoored from both the language of the [NHPA] regulations and its conceptual underpinnings." *Id.* at *14. The court construed the NHPA regulations to find that they only contemplate adverse effects that will result in a "physical effect." *Id.* at *13. The court further found that, when evaluating adverse effects from a proposed action, agencies may not consider "factors that are impossible to physically observe or measure." *Id.*

For these reasons, the court held that the Secretary lacked authority to rescind the lease and acted arbitrarily and capriciously in revoking the APD. Not surprisingly, the decision has been appealed.

Fifth Circuit Vacates Preliminary Injunction on the Biden Administration's "Pause" on Oil and Gas Lease Sales; Western District of Louisiana Permanently Enjoins the Pause While District of Wyoming Upholds the Pause

In *Louisiana v. Biden*, 45 F.4th 841 (5th Cir. 2022), *vacating* 543 F. Supp. 3d 388 (W.D. La. 2021), the U.S. Court of Appeals for the Fifth Circuit vacated a preliminary injunction issued by the U.S. District Court for the Western District of Louisiana that enjoined President Biden and the U.S. Department of the Interior (Interior) from pausing oil and gas lease sales on federal lands and waters.

In Executive Order No. 14,008, "Tackling the Climate Crisis at Home and Abroad," 86 Fed. Reg. 7619 (Jan. 27, 2021), President Biden had directed Interior to "pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices . . . ." *Id.* § 208; *see* Vol. XXXVIII, No. 1 (2021) of this *Newsletter*. Thirteen states sued Interior, alleging that its pause on oil and gas lease sales violated the Administrative Procedure Act (APA). On the States' motion, the district court issued a preliminary injunction that prevented Interior "from implementing the Pause of new oil and natural gas leases . . . as set forth in [the executive order]." *Louisiana v. Biden*, 543 F. Supp. 3d at 419; *see also* Vol. XXXVIII, No. 3 (2021) of this *Newsletter*. Interior appealed the preliminary injunction to the Fifth Circuit.

The Fifth Circuit vacated the preliminary injunction after finding that it failed to meet the requirements of Fed. R. Civ. P. 65(d), which governs the contents and scope of preliminary injunctions. *Louisiana v. Biden*, 45 F.4th at 846. This rule requires that a preliminary injunction "state its terms specifically and describe in reasonable detail the conduct restrained or required." *Id.* The court concluded that the preliminary injunction did not meet the rule's requirements because the court could not ascertain what conduct was enjoined. *Id.*

The court's uncertainty stemmed from the language of the district court's order enjoining Interior "from implementing the Pause of new oil and natural gas leases." *Id.* at 845. The Fifth Circuit observed that the injunction did not define the term "pause" and, further, that the States and Interior disagreed on the pause's breadth. *Id.* Because the court could not determine what conduct was enjoined, it vacated the preliminary injunction. *Id.* at 846.

Western District of Louisiana Permanently Enjoins the Pause

One day after the Fifth Circuit's order, however, the Western District of Louisiana permanently enjoined the President and Interior "from implementing a Stop, referred to in [the executive order] as a Pause." *Louisiana v. Biden*, No. 2:21-cv-00778, 2022 WL 3570933, at *20 (W.D. La. Aug. 18, 2022).

At the outset, the district court defined what constitutes the challenged "pause." The court found that, "[b]ased upon the previous campaign promise and the lack of lease sales on federal lands" since the executive order was issued 19 months ago, "there was an unwritten policy to 'stop' the onshore and offshore leasing process by calling the stopping a 'pause.'" *Id.* at *7. The court then characterized the "stop" as "the cessation of the leasing process of eligible federal lands." *Id.*

Next, the court held that, by implementing the executive order, Interior violated the Outer Continental Shelf Lands Act (OCSLA) and Mineral Leasing Act (MLA). The court held that the stop made a "significant change" to the current five-year offshore leasing program, but Interior did not adhere to the statutory procedures to effectuate such a change. *Id.* at *11. Similarly, the court held that the MLA does not grant the executive branch any authority to completely stop the federal leasing process because "[t]he power to pause and/or stop the federal leasing process lies solely with Congress." *Id.* at *12. Accordingly, the court found the executive order to be ultra vires and in violation of OCSLA and the MLA. *Id.*

Finally, the court held that Interior violated the APA by implementing the stop. After determining that the stop was a final agency action reviewable under the APA, *id.* at *15, the court found that the stop was contrary to law, for similar reasons that the court found the executive order was ultra vires, *id.* at *16. Additionally, the court held the stop to be arbitrary and capricious because neither the executive order nor the Bureau of Land Management decisions implementing the stop gave any reasons or explanations for stopping the oil and gas leasing process. *Id.* at *16–17. Finally, the court held that the stop constituted a substantive rule under the APA that was not subject to notice and public comment. *Id.* at *18.

After reaching these findings, the court permanently enjoined Interior from implementing the stop, also known as the pause. *Id.* at *20. The court limited the geographic scope of the injunction to the 13 states. *Id.*

District of Wyoming Upholds the Pause

Adding to the drama created by the competing decisions from the Fifth Circuit and the Western District of Louisiana, the U.S. District Court for the District of Wyoming in *Western Energy Alliance v. Biden*, Nos. 2:21-cv-00013, 2:21-cv-00056 (D. Wyo. Sept. 2, 2022), upheld Interior's pause of onshore oil and gas leasing during the first and second quarters of 2021.

This decision was the product of two consolidated cases, one brought by Western Energy Alliance and the Petroleum As-

sociation of Wyoming (collectively, Industry Petitioners) and the other brought by the State of Wyoming (collectively, Petitioners). The Petitioners alleged that Interior's postponement and cancellation of onshore lease sales in multiple western states during the first and second quarters of 2021 violated federal law and were arbitrary, capricious, and an abuse of discretion. The court disagreed.

Initially, the court significantly limited the scope of the lawsuit. The court found that the Industry Petitioners lacked standing to challenge any lease sales because they filed their petition for review on January 27, 2021—before Interior postponed any lease sales in response to the executive order. *W. Energy All.*, Nos. 2:21-cv-00013, 2:21-cv-00056, slip. op. at 14. Furthermore, the court found that Wyoming only had standing to challenge Interior's postponement of lease sales during the first quarter of 2021. *Id.* at 11–14.

Then, the court rejected Wyoming's contentions that postponement of first quarter lease sales violated the MLA, the Federal Land Policy and Management Act (FLPMA), and the National Environmental Policy Act (NEPA). Most significantly, the court held that Interior's postponement of quarterly sales did not contradict the language of the MLA. *Id.* at 20–21. The court accepted Interior's position that lands were not "available" for leasing under the MLA "because additional analysis was needed to ensure compliance with NEPA due to no less than three then-recent federal court decisions having found similar [NEPA analyses] inadequate." *Id.* at 20. The court also found that the postponement of lease sales was not an abuse of discretion because the Secretary "enjoys wide discretion when it comes to determining which federal lands will be offered for oil and gas development." *Id.*

The court also rejected Wyoming's arguments that the postponed lease sales violated FLPMA because Interior "unlawfully withdrew federal land from sale and entry and unlawfully amended existing Resource Management Plans." *Id.* at 21. The court found that the lease sale postponements did not meet the definition of a "withdrawal" under FLPMA "because they were not done 'for the purpose of limiting activities under [general land] laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program.'" *Id.* at 23 (alteration in original) (quoting 43 U.S.C. § 1702(j)). Moreover, the court observed that the postponements "were done to allow additional consideration of the [NEPA analyses] in light of the federal caselaw finding many similar [NEPA analyses] inadequate . . . ." *Id.*

Finally, the court rejected Wyoming's argument that Interior "suspended oil and gas leasing nationwide without first considering the environmental impacts as required by NEPA." *Id.* at 24. The court first found that Interior had not suspended oil and gas leasing nationwide. *Id.* Moreover, the court observed that, to remedy Wyoming's alleged deficiency, the court would have to order Interior to prepare an additional NEPA analysis—and the court expressed doubt that Wyoming "would be satisfied with this remedy." *Id.* at 25. Therefore, the court upheld Interior's postponement of the first quarter 2021 lease sales. *Id.* at 26.

D.C. Circuit Requires Additional NEPA Review for Two Offshore Oil and Gas Lease Sales, but Declines to Vacate Leases

In *Gulf Restoration Network v. Haaland*, 47 F.4th 795 (D.C. Cir. 2022), *aff'g in part, rev'g in part* 456 F. Supp. 3d 81 (D.D.C. 2020), a panel of the U.S. Court of Appeals for the D.C. Circuit held that an environmental impact statement (EIS) related to two offshore lease sales did not meet the requirements of the National Environmental Policy Act (NEPA), although the court declined to vacate the leases as a result. The court reversed the district court's decision, which had upheld the EIS.

The appeal concerned offshore Lease Sales 250 and 251, which the U.S. Department of the Interior (Interior) held in 2018 under the Outer Continental Shelf Lands Act. The two lease sales were among 11 sales proposed by Interior in its 2017–2022 five-year plan in the Gulf of Mexico. Environmental groups challenged the EIS prepared by the Bureau of Ocean Energy Management (BOEM) on three grounds: (1) BOEM failed to consider a true "no action" alternative, (2) BOEM unreasonably assumed that two rules issued by the Bureau of Safety and Environmental Enforcement (BSEE) would remain in effect, and (3) BOEM unreasonably assumed that BSEE would effectively enforce its own rules. *Id.* at 799.

The D.C. Circuit held that BOEM adequately considered the first two issues. First, the court agreed that BOEM met its obligation to consider a "no action" alternative in prior NEPA documents to which the EIS tiered and, further, also upheld BOEM's finding that cancellation of a single lease sale would have limited environmental impacts. *Id.* at 800–01. Second, in response to the appellants' assertion that the EIS should have considered the possibility that BOEM would change its rules designed to reduce the risk of spills, the court held that an agency is not required to consider regulatory changes that are "so inchoate as to be 'not meaningfully possible' to analyze." *Id.* at 802 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)). Nothing in the record showed that BOEM had any knowledge of rule changes at the time the EIS was finalized, even though it may have generally known changes were forthcoming.

With respect to the appellants' final argument, the court held that BOEM acted arbitrarily by not considering the possibility that BSEE would not enforce its own rules. *Id.* at 803. Particularly, the court found that BOEM erred by assuming that BSEE would enforce its regulations in light of a report by the Government Accountability Office (GAO) that "raised seemingly legitimate concerns about enforcement effectiveness" by BSEE. *Id.* The court held that "an agency may assume effective enforcement in the ordinary case," but that "it may not reach a conclusion that 'runs counter to the evidence.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In addition, BOEM acted arbitrarily when it promised commenters on prior NEPA documents that it would address the GAO report at the leasing stage then "reneged, telling commenters that the issues were outside the scope" of the leasing EIS. *Id.*

The court reversed and directed the district court to remand to the agency for consideration of the GAO report. Importantly, the court declined to vacate the EIS, records of decision announcing the lease sales, or the leases sold at the sales. The court recognized that although vacatur is a typical remedy, it "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequence of an interim change that may itself be changed." *Id.* at 804 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The court found that, in this case, vacatur would be highly disruptive because the lessees paid millions of dollars and acted in reliance on the leases for four years. *Id.* at 805. Further, agency attorneys made a "colorable case" that consideration of the GAO report would not change the result. *Id.* Thus, the court found the deficient EIS redeemable and did not cancel the leases. *Id.*

Court of Federal Claims Defines Fiduciary Duties That the United States Owes Tribal Oil and Gas Lessors

In *Birdbear v. United States*, 162 Fed. Cl. 225 (2022), the U.S. Court of Federal Claims evaluated its jurisdiction to hear claims brought by members of the Three Affiliated Tribes of the Fort Berthold Reservation alleging that the United States breached its fiduciary duties in administering oil and gas leases. Particularly, the plaintiffs alleged that the United States breached duties under the Allotted Lands Leasing Act of 1909, 35 Stat. 781, and the Fort Berthold Mineral Leasing Act (FBMLA), 112 Stat. 620 (1998), both codified as amended at 25 U.S.C. § 396, and their implementing regulations found at 25 C.F.R. pt. 212. The case is notable because the court made specific findings as to fiduciary obligations that the United States owed the tribal lessors.

The court initially found it had jurisdiction over the plaintiffs' claim that the government breached its fiduciary duty to advertise leases that were subject to the competitive bidding process. *Birdbear*, 162 Fed. Cl. at 236. The court cited the regulation requiring the United States to advertise leases in a way that generates "optimum competition for bonus consideration or in a manner that maximizes their best economic interests." *Id.* at 235 (quotation marks omitted) (citing 25 C.F.R. §§ 212.1(a), .20(b)(1)). Ultimately, however, the court found that the statute of limitations barred the plaintiffs' claim as to certain leases because a breach of trust accrues when the beneficiaries had knowledge of the breach. *Id.* at 244. The court reasoned that the plaintiffs were aware of the lease terms when issued, had knowledge of the competitive bidding process at the time it occurred, and were not able to prove that the government had a continuing duty to remove the lessees. *Id.* at 243–44. Thus, the court found that the statute of limitations barred the claim as to leases issued on or before 120 days prior to the complaint being filed. *Id.* at 243 n.6, 244.

Next, the court determined that it had jurisdiction over the plaintiffs' claim that the United States breached its fiduciary duty to protect the plaintiffs' minerals from drainage. *Id.* at 237. The United States argued that it did not have a fiduciary duty to protect against drainage because the lessees, not the United States, were responsible for protecting mineral resources from drainage. *Id.* at 236. The court found that although lessees are primarily responsible for preventing drainage and for taking the steps necessary to mitigate drainage, the United States was ultimately responsible for enforcing the regulations and lease terms intended to prevent drainage, and as a result, the United States had a duty to protect against drainage. *Id.* at 236–37.

Similarly, the court determined it had jurisdiction over the plaintiffs' claim that the United States breached a fiduciary duty to the lessors by failing to ensure the timely development of the plaintiffs' oil and gas leases. *Id.* at 238. The court pointed to language in the leases at issue regarding lessees' diligence in drilling and operating wells, regulations requiring lessees to drill offset wells to protect from drainage, and regulations authorizing the United States to direct lessees as to their drilling operations. *Id.* at 237–38. Accordingly, the court found the United States had a specific fiduciary duty regarding the timely development of the leases. *Id.* at 238.

Finally, the court rejected the plaintiffs' allegation that the United States breached its fiduciary duty by approving communitization agreements (CAs) without majority consent of the affected mineral owners and entering into CAs that covered more than 640 acres. *Id.* at 247. The court held that the provision in the FBMLA requiring that the owners of a majority of the undivided interest consent to a "mineral lease or agreement" did not apply to CAs. *Id.* at 246–47. The court reasoned that a CA is a drilling agreement and, because the leases did not require the consent of the lessors prior to entering into the CA, no consent was required. *Id.* (citing FBMLA § 1(a)(2)(A)(i)). Additionally, the court dismissed the plaintiffs' argument that CAs could not cover more than 640 acres because the regulation on which the plaintiffs relied upon applied only to leases. *Id.* at 246 n.8 (construing 25 C.F.R. § 211.25)).

Based on these findings, the court granted summary judgment for the United States with respect to five of the plaintiffs' 10 claims and grated partial summary judgment for the United States with respect to another claim. *Id.* at 247–48.

RENEWABLE ENERGY

(continued from page 1)

Federal Production Tax Credit and Investment Tax Credit Extension

The IRA extends and strengthens the federal Production Tax Credit (PTC) and Investment Tax Credit (ITC) sections of the Internal Revenue Code that have driven the market for renewable energy for a generation. This extension, which is for qualified facilities that begin construction prior to 2025, will allow for more certainty in energy planning. The IRA renews the availability of the PTC to solar generation facilities for the first time since before 2006. *See* IRA § 13101. The IRA extends the current PTC and ITC framework for qualified facilities that begin construction prior to January 1, 2025, but also implements a new structure with a "base credit amount" and "increased credit amount" that can increase each tax credit by multiples. *Id.* § 13101(b), (f). In addition, the IRA clarifies and extends the tax credits to standalone battery energy storage units. As detailed further below, there are new adders to the PTC and ITC that seek to incentivize certain characteristics of projects, including labor, manufacturing, and project siting.

Make It in America Content Credit

In addition to the ITC and PTC extensions, the IRA establishes a "Make It in America" provision to incentivize the use of American-made construction materials for energy production projects. Beginning in 2023, the domestic content bonus credit provides for an additional 10% "bonus" ITC for qualified power generating facilities whose manufactured components include domestic steel and iron. *Id.* § 13101(g)(2). Beginning in 2023, there is an increase in the availability of federal tax credits for energy projects if American steel and iron are utilized for components of the project and meet the IRA's domestic content threshold. This provision will require a taxpayer to certify that the applicable power facility includes a certain percentage (at least 40%) of domestically-produced iron and steel. *Id.* § 13101(g)(2).

Clean Electricity Investment Credit for Battery Storage

The IRA creates a new Clean Electricity Investment Credit (CEIC) for qualifying energy projects placed in service on or after January 1, 2025. *Id.* § 13702(a). The CEIC applies to zero-emission electricity generation, without specifying a particular technology. Standalone battery storage technology will be eligible for the CEIC tax incentive. Notably, a qualified facility that is eligible for other renewable energy tax credits such as the ITC or PTC would not be able to utilize the CEIC.

The CEIC's base tax credit rate is 6% of a project's qualified investment. Similar to the ITC, this tax credit can increase as high as 30% if other requirements are met. This includes the "Make It in America" provision discussed above along with cer-

tain labor requirements, namely a "prevailing wage" standard and certain apprenticeship requirements. For the prevailing wage standard to be met, the taxpayer must pay laborers, mechanics, and contractors at least a prevailing wage rate that is determined by the U.S. Secretary of Labor. In order to satisfy the IRA's apprenticeship obligations, a certain number of labor hours on building or repairing the energy project must be performed by qualified apprentices.

Clean Vehicle Credit

The IRA makes considerable changes to electric vehicle tax credit eligibility beginning in 2023. Section 30D of the Internal Revenue Code has long provided taxpayers with a credit for qualified plug-in electric drive motor vehicles. Section 30D has been amended numerous times since its original enactment in 2009. *See* Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, div. B, § 205(a), 122 Stat. 3765. The IRA renames the credit allowed by § 30D to the "clean vehicle credit." The clean vehicle credit will apply to both electric vehicles and fuel cell motor vehicles.

Under section 13401 of the IRA, the purchase and delivery of a new electric vehicle that goes into service on or after January 1, 2023, can entitle a taxpayer to the clean vehicle credit. The clean vehicle credit provides a maximum $7,500 federal tax credit. This tax credit consists of two components: a $3,750 credit for a vehicle that meets certain critical minerals requirements and a $3,750 credit for a vehicle that meets certain battery requirements. In 2023, the clean vehicle credit also removes certain previously-imposed manufacturer sales caps for different makes and models.

Additionally, section 13401 of the IRA added a new requirement for electric vehicles purchased any time after August 16, 2022, the date of the IRA's enactment: the final assembly requirement. The clean vehicle credit is only applicable to purchases of clean vehicles whose final assembly took place in North America.

CONGRESS/FEDERAL AGENCIES

John H. Bernetich & Dale Ratliff, Reporters

Inflation Reduction Act Substantially Reforms Federal Onshore and Offshore Oil and Gas Leasing

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, 136 Stat. 1818, which directed substantial investment into reducing U.S. greenhouse gas emissions, strengthening domestic renewable energy development and expansion, and enhancing energy security. The IRA extended and expanded federal tax credits and benefits for the solar and wind energy and carbon capture industries, created new tax credits for solar energy manufacturing and energy storage, directed funding for climate resilience, and contained provisions affecting other sectors of the economy such as drug pricing and Medicare.

Since its enactment five months ago, it has been called a boon to the renewable energy industry and the most significant federal legislation aimed at combating the causes and effects of climate change. But the IRA also includes important provisions that reform oil and gas leasing on federal onshore and offshore lands.

Perhaps most notably, the IRA increases the royalty rate for all new onshore and offshore fossil fuel leases from 12.5% to a minimum of 16.67% for the next 10 years. For new offshore leases, the royalty rate is capped at 18.75% for the next 10 years but the 16.67% minimum rate will remain indefinitely. *Id.* §§ 50261, 50262. For both onshore and offshore leases, the IRA assesses a royalty rate on all gas produced from federal lands, including gas that is vented or flared, but not including gas that is vented or flared in emergency situations or used for the benefit of the lease or unit area. *Id.* § 50263.

The IRA also imposes a $5 per-acre fee to nominate parcels for leasing, raises the minimum bid price, raises the initial rental rate, imposes an escalating rental rate up to $15 per-acre, and eliminates noncompetitive leasing. *Id.* § 50262.

For onshore leasing, the IRA provides that, during the next 10 years, the U.S. Department of the Interior (Interior) may not issue a new onshore wind or solar right-of-way on federal land unless it has held an onshore oil and gas lease sale within the preceding 120 days *and* the acreage offered in oil and gas lease sales in the preceding year is at least two million acres or 50% of the acreage for which expressions of interest have been made, whichever is smaller. *Id.* § 50265. For offshore leasing, during the next 10 years, Interior cannot issue an offshore wind development lease unless it has held an offshore oil and gas lease sale during the preceding year *and* has offered at least 60 million acres in oil and gas lease sales in the preceding year. *Id.*

For offshore oil and gas leasing, the IRA reinstates Lease Sale 257, a large lease sale in the Gulf of Mexico that had been vacated by a federal district court due to the agency's failure to comply with the National Environmental Policy Act (NEPA). *Id.* § 50264; *see Friends of the Earth v. Haaland*, 583 F. Supp. 3d 113 (D.D.C. 2022), *appeal docketed*, No. 22-5037 (D.C. Cir. Feb. 11, 2022); Vol. 39, No. 1 (2022) of this *Newsletter* (Federal – Oil & Gas report). The IRA also requires Interior to hold three additional lease sales in Alaska's Cook Inlet and the Gulf of Mexico by 2023. IRA § 50264.

Finally, the IRA includes $750 million to improve the efficiency of environmental reviews under NEPA. The IRA, as signed by President Biden, does not include provisions reforming federal project permitting procedures, as some had expected. As of the time of this report, negotiations over separate permitting reform legislation continue.

The IRA makes the economics of federal oil and gas leasing more difficult for producers due to increases in royalty rates, rentals, bid prices, and nomination fees. But the IRA also ensures that an administration hostile to federal oil and gas leasing will continue to offer lands for oil and gas leases. As many expect an increase in renewable energy development in federal lands, the IRA will force administrations of both parties to continue to offer substantial amounts of land for federal oil and gas leasing.

Fish and Wildlife Service Proposes Revisions to Its Eagle Permit Regulations

On September 30, 2022, the U.S. Fish and Wildlife Service (Service) published a proposed rule to revise its eagle permit regulations. *See* Permits for Incidental Take of Eagles and Eagle Nests, 87 Fed. Reg. 59,598 (proposed Sept. 30, 2022) (to be codified at 50 C.F.R. pts. 13, 22).

The purpose of the proposed rule is to "increase the efficiency and effectiveness" of the permitting program that has been in existence since 2009, but has been largely underutilized. *Id.* at 59,598. As acknowledged in the preamble to the proposed rule, "[t]he current permit framework places an administrative burden on the public and the Service that is not commensurate with what is required to effectively preserve bald eagles" and the "permit-processing requirements that some have perceived as burdensome" have resulted in few permit applications for

golden eagles and the continued take of golden eagles "without implementation of conservation actions to offset that take." *Id.* at 59,599–600.

The crux of the proposed rule is a general permit program for activities that the Service has identified as occurring "frequently enough for the Service to have developed a standardized approach to permitting." *Id.* at 59,599. The Service proposes four categories of activities that would be eligible for a general permit: (1) incidental eagle take for permitting wind energy, (2) incidental eagle take for permitting power lines, (3) bald eagle disturbance take, and (4) bald eagle nest take. *Id.* at 59,600.

Of the four activities, the proposed general permits for qualifying wind-energy facilities and power lines present a potentially important tool for increasing eagle conservation efforts while simultaneously supporting the efficient permitting of the renewable energy and transmission infrastructure needed to meet the country's climate goals.

Wind-Energy Facilities. According to the Service, "[a]pplications for and issuance of permits authorizing incidental take of eagles at wind-energy projects [have] not kept pace with this rapidly growing industry." *Id.* at 59,601–02. The Service proposes to use "relative eagle abundance" as the primary standard for determining the eligibility of wind-energy projects to receive coverage under the general permit. *Id.* at 59,602. The Service is proposing five seasonal abundance thresholds for bald and golden eagles. *Id.* To be eligible for coverage under the general permit, "seasonal eagle abundance at all existing or proposed turbine locations must be lower than all five thresholds listed." *Id.* The rationale being: "[t]he greater the abundance of eagles in the area where a project is located, the greater the likelihood of eagle take," and siting projects "in areas where fewer eagles occur remains the best method to avoid and minimize eagle take." *Id.*

Power Lines. Under the proposed rule, power-line projects must meet six criteria to be eligible for coverage under the general permit:

(1) "new construction and reconstruction of pole infrastructure must be electrocution-safe for bald eagles and golden eagles";

(2) "new construction and reconstruction of transmission lines must consider eagle nesting, foraging, and roosting areas in siting and design";

(3) "a reactive retrofit strategy must be developed that governs retrofitting of high-risk poles when an eagle electrocution is discovered";

(4) "a proactive retrofit strategy must be developed and implemented to convert all existing infrastructure to be electrocution-safe, prioritizing poles that the permittee identifies as the highest risk to eagles";

(5) "a collision-response strategy must be implemented for all eagle collisions with power lines";

(6) "an eagle-shooting-response strategy must be developed and implemented when an eagle shooting is discovered near power-line infrastructure."

Id. at 59,605–06.

The Service is proposing a five-year term for general incidental take permits. *Id.* at 59,617. The Service is also proposing to reduce, but still retain, permittee monitoring programs and proposes to conduct annual audits for a small percentage of all general permits to ensure applicants are appropriately interpreting and applying eligibility criteria. *Id.* at 59,600.

Given the scope and magnitude of the proposed rule, and the fact that the initial advance notice of proposed rulemaking was published in September 2021, a final rule may not be seen for some time. And there is little doubt that impacted industries will have comments on the details and implementation. But the proposal—a general permit that relies on the Service's gathered experience and that has the potential to increase participation in the permit program while reducing the permitting burden for wind and transmission projects—may be a step in the right direction.

ENVIRONMENTAL

Randy Dann, Lucas Satterlee, Kate Sanford & Michael Golz, Reporters

Court Delivers Win for Legacy Mine Operator, Allocating 30% of CERCLA Response Costs to United States in Billion-Dollar Mine Cleanup

On June 28, 2022, the U.S. District Court for the District of New Mexico ruled that the U.S. government "should bear [partial] responsibility" for response costs at a former molybdenum mine near Taos, New Mexico. *Chevron Mining Inc. v. United States*, No. 1:13-cv-00328, 2022 WL 2314818, at *15 (D.N.M. June 28, 2022), *appeal docketed*, No. 22-2103 (10th Cir. Aug. 26, 2022). The mine, which is mostly located on federal land, will cost over $1 billion to clean up. The court allocated 30% of all past and future response costs to the United States and 70% to Chevron Mining Inc. (CMI).

This decision adds to the growing body of case law in which courts have held that the U.S. government is responsible for paying a portion of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response costs where it owned or had authority over activities on contaminated public lands or was actively involved in the operations or waste disposal decisions that resulted in contamination. *See, e.g.*, *El Paso Nat. Gas Co. v. United States*, 390 F. Supp. 3d 1025, 1060 (D. Ariz. 2019) (concluding that "the 25% share allocated to the United States for its purposeful promotion of uranium mining in the 1950s, and the additional 5% allocated to it because of the benefits it received from uranium production during the Cold War, should be assigned to its operator liability, not its owner liability"); *United States v. Newmont USA Ltd.*, No. 2:05-cv-00020, 2008 WL 4621566 (E.D. Wash. Oct. 17, 2008) (declaring the United States responsible for one-third of all response costs at the Midnight Mine).

Site History

The mine at issue, the Questa Mine (the "Site"), was an underground and open pit molybdenum mine operated by CMI's predecessor, Molycorp, from 1919 to 2014. Although Molycorp was the mine's sole operator, the United States was involved in ensuring the mine's success throughout its operation. For example, in the late 1950s, the Defense Minerals Exploration Administration (DMEA)—which was established to encourage mining companies to explore for "strategic and critical" minerals, such as molybdenum—recommended that Molycorp pursue exploration of low-grade molybdenum in the area. *Chevron Mining*, 2022 WL 2314818, at *3. DMEA "knew that a low-grade ore body could only be recovered through open pit mining techniques that would generate significantly more waste than underground mining techniques." *Id.* The United States then "actively oversaw" the company's exploration efforts under a DMEA contract that specified many components of the site work that were subject to DMEA approval. *Id.* at *4. In 1961, the Office of Mineral Exploration, DMEA's successor, issued a certi-

fication of mineral discovery to Molycorp that, combined with "DMEA's seed money," enabled the company to secure bank loans and other private financing that led to development of the open pit mine and essentially "allowed this project to take off." *Id.* at *5.

Additionally, the United States provided a significant amount of land for Molycorp to dispose of waste rock from the mine. In 1968, the U.S. Forest Service (USFS) rejected Molycorp's original plan to place waste rock from a landslide into nearby mill sites and instead endorsed its subsequent proposal to place the waste rock into roadside piles located on federal land near the Site. *Id.* at *8. In 1974 and 1982, Molycorp completed two land exchanges with the USFS to acquire fee title to the lands abutting the perimeter of the open pit mine with the express purpose of facilitating the removal and disposal of waste rock generated at the Site. *Id.* at *9. The USFS also (1) issued Molycorp a special use permit that allowed the company to construct a pipeline to transport mill tailings to waste impoundments located on National Forest System property and (2) approved a right-of-way application that allowed decant water to flow from the tailings impoundments across federal lands and into the Red River. *Id.* at *10–11.

CERCLA Cleanup and CMI's Contribution Action Against the United States

The U.S. Environmental Protection Agency added the Site to the National Priorities List in 2011. Since then, cleanup activities have been, and continue to be, performed at the Site under CERCLA.

In 2013, CMI asserted claims against the United States for cost recovery, contribution, and a declaratory judgment under CERCLA. The United States countered with similar claims. As is common in CERCLA contribution cases, the court bifurcated the proceedings into two phases: (1) a liability phase and (2) an equitable-allocation phase.

Phase I: CERCLA Liability

In 2015, the District of New Mexico granted summary judgment in favor of the United States, concluding that it was not liable as a past owner or arranger under CERCLA. *See Chevron Mining, Inc. v. United States*, 139 F. Supp. 3d 1261 (D.N.M. 2015). On appeal, the U.S. Court of Appeals for the Tenth Circuit reversed, holding that the United States was liable under CERCLA for its equitable share of response costs as a past owner of the Site. *Chevron Mining Inc. v. United States*, 863 F.3d 1261 (10th Cir. 2017). The Tenth Circuit explained that any owner of land contaminated with hazardous substances—including the federal government—"qualifies as an owner of a 'facility,' even if that person does not own any of the mining equipment or structures." *Id.* at 1277. The case was remanded to the district court to determine each party's equitable share of response costs.

Phase II: Equitable Allocation

In resolving CERCLA contribution claims, a court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Judge Paul Kelly Jr., a Tenth Circuit judge sitting by designation, presided over the case. He listed the following considerations as "most critical" to his allocation analysis for the Site:

1. The parties' land ownership throughout the operation of the [Site];
2. The parties' notice of, knowledge of, and acquiescence in, the activities that caused the contamination;
3. The degree of involvement by the parties in the generation, transport, and disposal of the waste;
4. The degree to which the parties directly oversaw or managed activity that contributed to the contamination; and
5. The benefits received from the activities that caused the contamination, including any benefits to national defense efforts and to the local economy of northern New Mexico.

Chevron Mining, 2022 WL 2314818, at *15. After considering all the evidence and the totality of the circumstances, the court concluded that the United States should be responsible for 30% of all past and future response costs, with the remaining 70% allocated to CMI. *Id.* While both parties "had knowledge of and acquiesced to the site specific and inherent environmental issues associated with open pit mining," *id.* at *16 (quoting *Newmont USA*, 2008 WL 4621566, at *60), the court found that CMI should bear most of the responsibility because, as the Site operator, it was "the primary party responsible for the generation and disposal of waste" and the one that actually performed these activities, *id.*

That said, the court also rejected the government's arguments that it should not be allocated any of the response costs. It explained that the United States "engaged in much more than mere passive ownership here" and "actively encouraged mining activities on its lands" with its "continued oversight and involvement in operations" at the Site. *Id.* (quoting *Chevron Mining*, 863 F.3d at 1278). In light of these considerations, the court determined that it would be inequitable to allocate all responsibility to CMI. *Id.*

The court's analysis focused on the fact that the United States actively encouraged the company to explore expansive open pit mining in order to strengthen the country's strategic reserve of molybdenum and foster local and regional economic development. *Id.* at *17. Its analysis also emphasized that the federal government, through the USFS and Bureau of Land Management, "'repeatedly exercised its plenary regulatory authority over' [the public] lands surrounding the [Site] for the purpose of enabling Molycorp to continue its waste rock and tailings disposal activities," *id.* at *16 (quoting *Chevron Mining*, 863 F.3d at 1278), without which the mining "likely could not have continued," *id.* at *17. In the court's view, the United States clearly knew that Molycorp would use the lands conveyed out of U.S. ownership for waste rock disposal and that these activities would lead to adverse environmental impacts. *Id.*

A Boon for Legacy Operators

The outcome of this case was closely watched by CERCLA practitioners. Following the Tenth Circuit's decision, some practitioners expected that, even though the United States was deemed liable as a responsible party, the government might ultimately be allocated only a small portion of the response costs. The District of New Mexico's ruling allocating 30% of response costs to the United States is widely considered a victory for CMI and potentially responsible parties (PRPs) at similar sites. And while the United States appealed this decision to the Tenth Circuit on August 25, 2022, the ruling is likely to stand—appellate courts rarely reverse lower courts' CERCLA allocation decisions due to the fact-intensive inquiry required to allocate response costs.

The court's ruling may have important implications for the federal government and other PRPs with ties to inactive mine properties and legacy cleanup sites throughout the country, and particularly in the American West. The federal government's involvement at the Questa Mine is not unique. With the support of the U.S. government, early mining operations flourished in many western states on unpatented mining claims from which wastes were released into the environment. In addition, the USFS and other land management agencies still manage many large tracts of mining-impacted public lands throughout the country, which have been, or have the potential to be, designated as Superfund sites. As such, the United States is a past and/or current CERCLA owner, and thus a PRP, at many other legacy mine sites that dot the American landscape.

CALIFORNIA – MINING

Christopher L. Powell & Ryan Thomason, Reporters

California Bans Seabed Mining in Coastal Waters

On September 19, 2022, California Governor Gavin Newsom signed into law the California Seabed Mining Prevention Act, A.B. 1832, 2022 Cal. Legis. Serv. ch. 433, which joins the states of Oregon and Washington in effectively banning all mining operations within coastal waters. The Act declares that seabed mining "is not consistent with the public interest, public trust, or public rights to navigation and fishing" and "poses an unacceptably high risk of damage and disruption to the marine environment of [California]." *Id.* § 2(a), (b). The Act further declares that "[i]t is in the best interest of the people of California that leasing for hard mineral mining at the seafloor be prohibited." *Id.* § 2(b).

Specifically, the Act amends the California Public Resources Code to prohibit the California Coastal Commission and local trustees from "grant[ing] leases or issu[ing] permits for the extraction or removal of hard minerals from state waters subject to tidal influence, except [specific, statutorily identified inland waters]." *Id.* § 5 (amending Cal. Pub. Res. Code § 6900). The Act stops short of outright prohibiting all mining within waters of the state. It allows contractors or permittees who are dredging state waters to retain the dredged sand, gravel, or other soils, but only "if it is in the best interests of the state." *Id.* § 3 (amending Cal. Pub. Res. Code § 6303). That said, the Act does not provide examples of instances when retaining such materials would be in the best interests of the state. As such, the State retains a significant amount of discretion when deciding if dredged materials from coastal waters can be retained by a contractor or permittee.

California Air Resources Board Proposal Would Require 100% Zero-Emission Vehicles by 2040

On October 27, 2022, the California Air Resources Board (CARB) held a public hearing on the proposed Advanced Clean Fleets (ACF) regulation, which would prohibit manufacturers from selling internal combustion-powered medium- and heavy-duty trucks by 2040. The proposed ACF regulation would also require certain entities to phase in zero-emission vehicles (ZEVs) to their fleets over time. The proposed ACF regulation is applicable to any fleet owner that owns or operates 50 or more medium- or heavy-duty trucks (i.e., Class 2b-8) or any entity with $50 million or more in annual revenue that operates at least one medium- or heavy-duty truck in California.

The proposed ACF regulation is part of a suite of regulatory proposals by CARB designed to accelerate the widespread adoption and usage of ZEVs within industries that require medium- and heavy-duty trucks. These proposals are intended to implement Executive Order B-55-18 (Sept. 10, 2018), which established a target to achieve carbon neutrality in California no later than 2045, and Executive Order N-79-20 (Sept. 23, 2020), which set specific targets to transition California's truck fleet to zero-emission technology by 2045. The public hearing generated over 150 comments, with many in the trucking industry expressing concern over electric vehicle costs and technology, and the lack of charging infrastructure.

Of particular concern to California's mining industry is the availability of specialized ZEV haul trucks required for mining operations. Under the proposed ACF regulation's phased-in ZEV schedule, mining operators subject to the regulation would be required to have 10% ZEVs by 2030, 25% by 2033, 50% by 2036, 75% by 2039, and 100% by 2042. However, the proposed ACF regulation, as currently drafted, would contain an exemption for ZEV unavailability that would allow fleet owners to purchase a new internal combustion engine vehicle if no ZEV or near-ZEV of the needed configuration is commercially available.

CARB is still developing the proposed ACF regulation and has not yet begun the official process of submitting the proposed text of the rule to the Office of Administrative Law. Interested parties that wish to review the draft language of the ACF regulation or subscribe to future meetings and events to provide feedback should visit CARB's proposed ACF regulation webpage at https://ww2.arb.ca.gov/our-work/programs/advanced-clean-fleets.

CALIFORNIA – OIL & GAS

Tracy K. Hunckler & Megan A. Sammut, Reporters

Governor Newsom Signs Package of Sweeping Climate Bills into Law

On September 16, 2022, Governor Gavin Newsom signed a package of bills into law purporting to "create 4 million jobs, reduce the state's oil use by 91%, cut air pollution by 60%, protect communities from oil drilling, and accelerate the state's transition to clean energy." Press Release, Office of Gov'r Gavin Newsom, "Governor Newsom Signs Sweeping Climate Measures, Ushering in New Era of World-Leading Climate Action" (Sept. 16, 2022). The package is stated to "complement" the Governor's $54 billion climate budget. *Id.* Included in the package signed into law were: (1) AB 1279, codifying the state carbon neutrality goal; (2) SB 1020, creating clean energy targets leading to 100% by 2045; (3) AB 1757, requiring development of a carbon removal target for natural working lands; (4) SB 905, creating a framework for carbon capture and sequestration (CCS) regulations; (5) SB 1314, previously discussed in Vol. 39, No. 2 (2022) and Vol. 39, No. 3 (2022) of this *Newsletter*, prohibiting the use of carbon capture technologies and CCS projects to facilitate enhanced oil recovery operations; and, most notably for current operators and industry professionals, (6) SB 1137, establishing a 3,200-foot setback between new oil wells and various sensitive receptors, such as schools and homes, and implementing new requirements for existing wells within the setback zone.

The new setback law, which has an implementation date of January 1, 2023, sidesteps the California Department of Conservation's Geologic Energy Management Division's (CalGEM) public rulemaking on the very same topic, which—as reported in Vol. 39, No. 3 (2022) of this *Newsletter*—received more than 83,500 public comments, including those received during two public workshops in December 2021 with more than 800 total attendees. *See* Cal. Dep't of Conservation, "Public Health Rule-

making: Update" (Feb. 15, 2022). CalGEM was presumably in the process of reviewing those tens of thousands of comments, which would have been considered in developing draft regulations for the formal rulemaking process. *Id.* But instead, lawmakers gutted and amended an unrelated bill on August 24, 2022, replacing the text with the new setback language. That amended bill was then pushed through the State Assembly and Senate in a matter of days, presented to the Governor on September 2, 2022, and signed into law on September 16, 2022.

Just days later, on September 19, 2022, opponents of SB 1137 submitted a referendum to the California Attorney General's Office to reverse the law. Circulation of the petition and signature gathering has now commenced. If enough total signatures are gathered, the referendum will be deemed qualified and the effect of SB 1137 will be stayed; it will then appear on the November 2024 ballot. If not reversed, the law will prevent the drilling of new wells and the issuance of approvals for additional operations on existing wells (other than for plugging and abandonment) located within the setback zone unless a court orders that such drilling and other operations may proceed. The law will also implement new mitigation measures on existing wells within the setback zone. If the law is not reversed through the referendum process it will certainly trigger numerous legal challenges, including unconstitutional taking of property rights without just compensation.

City and County of Los Angeles Push Forward with Ordinances to Ban New Wells and Phase Out Existing Wells

City's Ordinance

In the City of Los Angeles, the City Planning Commission (CPC) and Director of Planning have taken hurried steps to ban new wells and phase out existing wells within the city limits. Back in January 2022, the City Council unanimously approved a measure directing the City Attorney to draft an ordinance to prohibit new oil and gas extraction, and to amend the zoning laws to make extraction activities a nonconforming use in the city. Further, the measure tasked the Los Angeles Office of Petroleum and Natural Gas Administration and Safety with hiring an expert to conduct an amortization study to allow the decommissioning of existing wells. *See* Vol. 39, No. 1 (2022) of this *Newsletter*. All documents associated with the proposed ordinance are available at https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=17-0447-S2.

The ordinance has now been drafted (though no amortization study is underway yet), and the CPC considered the draft ordinance at a public meeting on September 22, 2022. Per its September 26, 2022, letter of determination, the CPC recommended that the City Council consider the whole administrative record to date, including the mitigated negative declaration (MND) and all comments received in response to the MND, adopt the MND, and adopt the proposed ordinance. The CPC report—which includes the letter of determination, draft ordinance language, findings, a staff report, and the MND—was then referred to the Arts, Parks, Health, Education, and Neighborhoods Committee (Arts and Parks Committee); the Energy, Climate Change, Environmental Justice, and River Committee (Energy Committee); and the Planning and Land Use Management (PLUM) Committee. The Energy Committee recommended approval of the ordinance as amended and adoption of the MND on October 6, 2022. The Arts and Parks Committee waived consideration on October 17, 2022. On November 1, 2022, the PLUM Committee—the final stop before City Council—voted unanimously in favor of the ordinance.

Unusually, the public comment period on the MND did not close until October 17, 2022, so neither the CPC nor the Energy Committee had the benefit of a full record before each recommended approval of the draft ordinance and adoption of the MND. Indeed, the MND is teeming with deficiencies, many of which have been raised by the industry in various public comments posted in the public file. A few common themes of the letters in opposition include that (1) the City is unlawfully piecemealing the environmental effects by preparing the ordinance with no amortization study, without considering the impacts of well abandonment and remediation, and without defining key terms like "maintenance"; (2) the MND fails to properly take into account the individual impacts of the ordinance on, among other things, sound, greenhouse gas emissions, and air quality; (3) the MND fails to consider the cumulative impacts of the same; (4) the ordinance conflicts with other land use policies of the City; and (5) the City utterly fails in its analysis of impacts to mineral resources.

The City's responses to comments in opposition fail to substantially address the issues raised, seemingly in an effort to press on with the proposed ordinance without preparing an environmental impact report. Assuming the ordinance meets the approval of City Council and the Mayor, it is likely to face legal challenges.

County's Ordinance

In Los Angeles County, the Department of Regional Planning (DRP)—pursuant to a September 15, 2021, motion by the Los Angeles County Board of Supervisors (Board)—prepared an ordinance, similar to the City of Los Angeles's proposed ordinance, to amend the County Zoning Code to prohibit new wells and designate existing wells a nonconforming use in the unincorporated areas of Los Angeles County. The ordinance also establishes additional regulations for existing wells and removes the exemption for oil wells from the County's noise and vibration regulations. Like the City's ordinance, the County intends to perform an amortization study in the future and may shorten the prescribed phase-out period after the ordinance is in effect. Unlike the City's proposed ordinance, the County has prepared a notice of exemption, claiming the proposed ordinance is exempt from California Environmental Quality Act (CEQA) review.

On September 27, 2022, the Board held a public hearing and, by a unanimous vote, found the proposed ordinance to be exempt from CEQA and indicated its intent to approve the proposed ordinance. The Board directed the County Counsel to finalize the necessary documents and return to the Board for adoption. The ordinance will become effective 30 days after adoption. *See* L.A. Cty. Dep't of Reg'l Planning, "Oil Well Ordinance," https://planning.lacounty.gov/oilwell. Where a public agency elects to file a notice of exemption, the statute of limitations on legal challenges to the agency's exemption decision is only 35 days, whereas a 180-day limit applies if no notice of exemption is filed. 14 Cal. Code Regs. § 15062.

Ventura County Zoning Amendments Move Forward

In Ventura County, new zoning ordinances that will impact oil and gas operations also continue to move quickly through the County channels. These zoning ordinances will affect the industry by (1) limiting discretionary permits for oil and gas operations to 15 years, (2) increasing the amount of the performance surety and insurance requirements for oil and gas operations, and (3) incorporating measures related to permanently plugging and restoring wells that have been idle for 15 years or more. *See* Vol. XXXVII, No. 4 (2020); Vol. 39, No. 3

(2022) of this *Newsletter*. As previously reported, the Planning Commission held a public hearing on July 28, 2022, on draft amendments to the zoning ordinances and it voted 3-2 to recommend approval to the Board of Supervisors. Another hearing was then held on August 18, 2022, because a subset of public comments was not included in the original Planning Commission staff packets. On November 9, 2022, the Planning Division hosted a virtual webinar to discuss the proposed revisions. The webinar included a staff presentation, followed by time for questions and comments. *See* Cty. of Ventura, "Proposed Amendments to Oil and Gas Regulations," https://vcrma.org/en/proposed-oil-and-gas-regulations.

Writ of Mandate Discharged, Kern County Resumes Permitting

As reported in Vol. 39, No. 3 (2022) of this *Newsletter*, the Kern County Superior Court had issued a ruling granting in part and denying in part the consolidated petitions for writ of mandate challenging Kern County's supplemental recirculated environmental impact report (SREIR). *See* Ruling on Petitions for (Third) Writ of Mandate, *Vaquero Energy v. Cty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. June 7, 2022). At the same time, the court scheduled a case management conference for September 28, 2022, "for purposes of discussing remedies and relief," *id.* at 37, while the County endeavored to cure the errors identified by the court in its June 7 ruling concerning (1) removal of legacy equipment, (2) mitigation of PM2.5 emissions, (3) the disadvantaged community drinking water grant fund, and (4) the statement of overriding consideration.

The court has now issued a ruling and second modified judgment coming out of the September 28, 2022, case management conference, granting in part and denying in part the parties' various requests for relief and issuing a third peremptory writ of mandate. *See* Ruling on Remedies and Relief and Second Modified Judgment, *Vaquero Energy v. Cty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. Oct. 4, 2022). In its ruling, the court first corrected a previous misstatement and clarified that the County's failure to amend the oil and gas emission reduction agreement (OG-ERA) to include PM2.5 emissions was not prejudicial error. *Id.* at 6. The OG-ERA did not provide enforceable mitigation for those emissions because it included PM2.5 as a subset of PM10. The County addressed those deficiencies in approving the SREIR but failed to amend the OG-ERA accordingly. While the court referred to this failure as "prejudicial" in its previous ruling, the October 4 ruling notes that its use of the word "prejudicial" was an oversight. The court provided that the OG-ERA could simply be amended to include PM2.5. *Id.*

The October 4 ruling additionally left current project approvals in place while the County addressed the four California Environmental Quality Act (CEQA) violations identified in the June 7 ruling. *Id.* at 7. The court noted that it has discretion under the law to direct its mandates to "parts" of determinations or findings, and to limit its mandates to only the portions thereof that violate CEQA. *Id.* The court stated:

> Here, the circumstances do not warrant vacating project approvals or de-certifying the SREIR. The four CEQA violations the Court identified in its [June 7] Ruling can be remedied without such order of this Court. A full suspension of project activities is already in place and will be extended until a further return is made to this Court. This is sufficient to ensure the requirements of CEQA are satisfied.

Id. at 8. As such, the SREIR was not decertified and did not need to be recirculated, and current project approvals were not vacated, though they were still on hold pending discharge of the writ.

The October 4 second modified judgment incorporated the same rulings and issued a third peremptory writ of mandate directing the County to (1) address the errors identified in the June 7 ruling and file a return to the writ describing how they have done so, and (2) continue to suspend operation of the 2021 ordinance and place a hold on permitting unless and until the court discharges the writ.

On October 12, 2022, the County filed a return to the writ and requested that it be discharged, to which the petitioners objected. On November 2, 2022, the court discharged the writ of mandate, finding the County has complied therewith and allowing the County to once again resume permitting for projects. *See* Order Discharging the Third Peremptory Writ of Mandate, *Vaquero Energy v. Cty. of Kern*, No. BCV-15-101645 (Cal. Super. Ct. Nov. 2, 2022). Thereafter, the County issued two notices to interested parties. The first states that it would begin accepting permit applications on November 4, 2022. The second provides that any well subject to SB 1137 restrictions for rework would be prioritized. The petitioners have filed a notice of appeal in the underlying litigation.

Judgment Entered Against Aera in Lawsuit Against CalGEM over NOIs for Established Oil Fields

As reported in Vol. 39, No. 3 (2022) of this *Newsletter*, the Kern County Superior Court held a one-day bench trial on June 28, 2022, in Aera Energy LLC's (Aera) lawsuit against the California Department of Conservation's Geologic Energy Management Division (CalGEM) and State Oil and Gas Supervisor Uduak-Joe Ntuk seeking to compel the defendants "to process and issue determinations as to Aera's [notices of intention (NOIs)] that have been pending for more than 10 business days and that seek to drill new wells within established oil fields." Petition for Writ of Mandamus [CCP Section 1085] and Complaint for Declaratory Relief ¶ 2, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. Jan. 18, 2022); *see* Court Trial Minutes, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. June 28, 2022). The matter was submitted for decision at the conclusion of trial, and on September 20, 2022, the court denied Aera's petition on the merits and denied all other relief as moot. Decision on Petition for Writ of Mandate and Complaint for Declaratory Relief, *Aera Energy LLC v. CalGEM*, No. BCV-22-100141 (Cal. Super. Ct. Sept. 20, 2022).

In denying the petition, the court noted the "inevitable tension" between CalGEM's authority to protect health, safety, and environmental quality on the one hand, and the requirement that it permit operators to utilize all known methods to increase oil recovery on the other. *Id.* at 13. The court also noted that "recent changes in the law have directed CalGEM to consider and perhaps focus the environmental component of its mission," and that the manner in which CalGEM addresses NOIs is "within the scope of CalGEM's proper exercise of discretion," meaning those decisions are not ministerial. *Id.* Because CalGEM is granted discretion in issuing permits and is exercising that discretion by requesting more information from operators, the writ must be denied. Essentially, the court found that the manner in which CalGEM responds to NOIs is discretionary and that its responses to Aera's NOIs—which included requesting more information in lieu of granting or denying NOIs—were adequate under the law. Judgment was entered against Aera on October 11, 2022.

***Peak Oil Holdings LLC v. Ventura County*: Motion to Dismiss Granted in Part, Denied in Part**

By way of another litigation update, the County of Ventura filed a motion on August 22, 2022, to dismiss Peak Oil Holdings LLC's (Peak) first amended complaint, which motion the court granted in part and denied in part on October 5, 2022. *See* Order Granting in Part and Denying in Part County of Ventura's Motion to Dismiss with Prejudice (October 5 Order), *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. Oct. 5, 2022); *see also* Vol. 39, No. 3 (2022) of this *Newsletter*.

Peak's lawsuit asserts a violation of the takings clause of the Fifth Amendment and a violation of the procedural and substantive due process clause of the U.S. Constitution, stemming from the County's ultimate refusal to issue clearance for Peak to exercise certain vested rights it asserts it has under an oil and gas lease and the related nullification of a 2012 zoning clearance. *See* First Amended Complaint, *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. July 21, 2022). The court had previously granted the County's motion for judgment on the pleadings with leave to amend, finding Peak had not sufficiently alleged a property interest with respect to either claim, and further that Peak had failed to allege that it was denied a meaningful opportunity to be heard, failed to rebut the presumption that the underlying administrative procedure was fair, and failed to establish that the County's nullification of the zoning clearance was arbitrary or an abuse of power. *See* Order Granting County of Ventura's Motion for Judgment on the Pleadings, *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. May 27, 2022).

Peak's first amended complaint reframed its property interest by placing more focus on two conditional use permits (CUPs) the County issued in the 1950s, which Peak acquired in 2012, and asserting that the 1983 ordinance requiring holders of CUPs to obtain zoning clearances in the first place is a constitutional violation. *See* October 5 Order. The first amended complaint also alleged additional facts in support of Peak's allegation that the County was not an impartial tribunal, and included additional assertions regarding the County's alleged collusion with anti-oil groups to cease Peak's operations. *See id.* The County responded with a motion to dismiss on August 22, 2022.

The court's October 5 Order granted the County's motion to dismiss with respect to Peak's takings claim, again finding Peak failed to allege a vested property interest required to assert a taking. More specifically, the court found the first amended complaint alleges no facts supporting Peak's claim that its rights under the CUPs vested before the 1983 ordinance at issue, and in fact the allegations support that Peak's rights vested in 2012 when Peak invested substantial sums to acquire the mineral development rights and begin drilling. *Id.* at 6. Because "a vested right protects only from an intervening change in the law," Peak could not claim it was protected from the 1983 ordinance that predated its interest. *Id.*

With respect to its due process claims, however, the court found that Peak sufficiently alleged a vested property interest in the CUPs as of 2012, and further that it sufficiently alleged that the County's decision to nullify Peak's zoning clearance was biased or pretextual, including the existence of emails between the County and anti-oil groups evidencing collusion. *Id.* Finally, the court found Peak's due process claims are not precluded by the County's prior proceedings because "[p]reclusion will not shield review" where the fairness of the underlying proceedings is called into question. *Id.* at 10. The motion was therefore denied with respect to Peak's due process claims.

The court granted Peak leave to amend its taking claim, and Peak timely filed a second amended complaint on October 28, 2022. *See* Second Amended Complaint, *Peak Oil Holdings LLC v. Cty. of Ventura*, No. 2:21-cv-00734 (C.D. Cal. Oct. 28, 2022). Therein, Peak adds allegations that the CUPs vested in the 1950s—long before Peak acquired them—based on investments made by Peak's predecessor holders of those CUPs. *Id.* ¶¶ 21–25. Peak asserts the CUPs run with the land, and that Peak is entitled to operate under those vested CUPs as a subsequent holder of an interest in the mineral rights of the land. *Id.* ¶¶ 26–29.

COLORADO – OIL & GAS

Scott Turner & Kate Mailliard, Reporters

Colorado Court of Appeals Holds That the Centerline Presumption Applies to Mineral Interests

In its recent holding in *Great Northern Properties, LLLP v. Extraction Oil & Gas, Inc.*, 2022 COA 110, the Colorado Court of Appeals ruled that the centerline presumption applies to mineral interests underlying a dedicated right-of-way.

The centerline presumption is a common law rule of conveyance that has been followed in Colorado for a century and provides that "a conveyance of land abutting a road or highway is presumed to carry title to the center of that roadway to the extent the grantor has an interest therein, unless a contrary intent appears on the face of the conveyance." *Id.* ¶ 14 (quoting *Asmussen v. United States*, 2013 CO 54, ¶ 3, 304 P.3d 552). No reported case in Colorado, however, had previously answered whether the centerline presumption applied to mineral interests. In *Great Northern*, the court of appeals held that the centerline presumption "applies to all interests a grantor possesses in the property underlying a right-of-way, including mineral interests." *Id.* ¶ 2.

The case concerned a parcel of land in Greeley, Colorado, that a developer subdivided and then dedicated a road across in 1974. Subsequently, the developer conveyed all the land abutting the road to three different grantees. None of the deeds reserved any mineral interests to the developer, and all three deeds described the land adjacent to the road conveyed thereby by metes and bounds. The last deed, but not the first two, contained a reference to the road. *Id.* ¶¶ 4–7. Ultimately, the parties asked the court to determine whether the developer or the lot owners owned the minerals underlying the road.

The court held that, although the precise question before it was novel, the answer is dictated by "well-settled principles of property law" that conclude that when the centerline presumption applies, it applies to all interests the grantor possesses in the property underlying the right-of-way. *Id.* ¶ 13. The court emphasized that the centerline presumption establishes the assumption that "a grantor intends to convey along with the property all its appurtenant advantages and rights" in the property, *id.* ¶ 15 (citing *Asmussen*, 2013 CO 54, ¶ 19), and that "a grantor conveying property by deed intends to convey their entire interest unless a portion of that interest is expressly excepted from the conveyance," *id.* (citing *Enerwest, Inc. v. Dyco Petroleum Corp.*, 716 P.2d 1130, 1132 (Colo. App. 1986)). The court also noted that it is well established under Colorado law that "a conveyance of land by general description, without any reservation of a mineral interest, passes title to both the land and the underlying mineral deposits." *Id.* ¶ 16 (quoting *O'Brien v. Vill. Land Co.*, 794 P.2d 246, 249 (Colo. 1990)). Thus, *Great Northern* establishes the rule that

> when a grantor conveys property abutting a right-of-way by deed without express reservation of the mineral estate, it is presumed that (1) the grantor intends to convey the highest estate owned to the centerline of the right-of-way, and (2) the highest estate includes both the surface and the unsevered mineral estate.

Id. ¶ 17.

The court also established preconditions for the centerline presumption to apply to mineral rights. The court concluded that

> the centerline presumption applies only when (1) the grantor conveys ownership of a parcel of land abutting a right-of-way; (2) at the time of conveyance, the grantor owned the fee underlying the right-of-way; (3) the grantor conveys away all the property they own abutting the right-of-way; and (4) no contrary intent appears on the face of the conveyance. Because all these conditions must be satisfied before the centerline presumption applies, we further clarify that title to the centerline of the right-of-way passes to the abutting property owners once the last of these conditions is satisfied.

Id. ¶ 24.

In its ruling, the court held that all of the *Asmussen* criteria for when the centerline presumption applies had been satisfied. *Id.* ¶¶ 19–23. The court therefore affirmed the trial court's judgment that applied the centerline presumption to hold that the abutting landowners owned the mineral interests underneath the road, but it remanded for the trial court to dismiss this quiet title action with respect to the interests owned by non-appearing parties as the court should not have quieted title to their interests. *Id.* ¶¶ 56–57. This outcome is certainly noteworthy for title attorneys, but it is also important for state and local governments, oil and gas operators, and other owners who may be under the impression that they hold an interest in the minerals under a right-of-way.

COGCC Financial Assurance Form 3 Deadline Extended

Effective April 30, 2022, the Colorado Oil and Gas Conservation Commission (COGCC) revised its financial assurance rules. *See* Vol. 39, No. 2 (2022) of this *Newsletter*. The new financial assurance rules require operators to submit financial assurance plans that demonstrate "how the Operator is financially capable of fulfilling its obligations under the [Oil and Gas Conservation Act] and the [COGCC's] Rules." Colo. Code Regs. § 404-1:702.b. Operators are required to use Form 3 created by the COGCC staff to submit financial assurance plans.

The original deadline for the COGCC staff to complete Form 3 was July 1, 2022. However, the COGCC staff was unable to meet that deadline due to unforeseen circumstances. After the COGCC granted an extension, the COGCC staff issued Form 3 on September 20, 2022. To ensure that operators had sufficient time to review and complete Form 3, COGCC Director Julie Murphy issued an updated notice to operators stating the following terms regarding Form 3:

1. The Director will not pursue an enforcement action against any operator for failure to file a Financial Assurance Plan required by Rule 702.b.(1)A.i by July 1, 2022, Rule 702.b.(1)A.ii by October 1, 2022, or Rule 702.b.(1)A.iii by December 31, 2022.
2. Operators will not submit a Financial Assurance Plan unless it is submitted on a Form 3.
3. Any Financial Assurance Plan submitted on a Form 3 that was initially due on July 1, 2022 pursuant to Rule 702.b.(1)A.i. that is received on or before November 1, 2022, will be administratively deemed to have been submitted on July 1, 2022.

Notice to Operators, COGCC, "Delayed Deadline for Rule 702.b.(1)A.1." (June 15, 2022).

LOUISIANA – OIL & GAS

Michael Schimpf, Gus Laggner, Kathryn Gonski & Court VanTassell, Reporters

Louisiana Supreme Court Authorizes Imprescriptible Citizen Suit Claim Under La. Stat. Ann. § 30:16 for Unremedied Contamination from Historical Oil and Gas Operations

In *State ex rel. Tureau v. BEPCO, L.P.*, 2021-0856 (La. 10/21/22), 2022 WL 12338524, *aff'g* 2021-0080 (La. App. 1 Cir. 5/19/21), 326 So. 3d 925, the Louisiana Supreme Court held that claims for injunctive relief brought under the citizen suit provision of La. Stat. Ann. § 30:16 are not subject to liberative prescription and that the plaintiff's allegations of unremedied past conservation law violations are sufficient to state a cause of action under section 30:16.

Under Louisiana law, the Commissioner of Conservation may sue oil and gas operators to enjoin conservation law violations. *Id.* § 30:14. But, if the Commissioner fails to sue within 10 days after receiving notice of a potential violation from an adversely affected party, that interested party may sue for injunctive relief. *Id.* § 30:16.

In *Tureau*, a landowner sued former oil and gas operators under section 30:16 for alleged unremedied contamination to his property and violations of Statewide Order 29-B from the defendants' past oil and gas operations. The trial court dismissed the plaintiff's claims as prescribed after finding that suits brought pursuant to section 30:16 are subject to the one-year liberative prescriptive period for delictual actions. The Louisiana First Circuit Court of Appeal reversed, finding the one-year prescriptive period inapplicable; however, the court of appeal stopped short of ruling that section 30:16 claims were imprescriptible. *See* Vol. XXXVIII, No. 4 (2021) of this *Newsletter*. The supreme court granted writs to determine the applicable prescriptive period, if any. Additionally, the court ordered further briefing on whether "ongoing conduct (not merely harm resulting from past conduct) is required to state a cause of action under [section 30:16]." *Tureau*, 2022 WL 12338524, at *4.

The supreme court began its ruling by agreeing with the court of appeal that section 30:16 claims are not subject to the one-year prescriptive period for delictual actions in La. Civ. Code Ann. art. 3492. *Tureau*, 2022 WL 12338524, at *5. The court then went a step further and concluded that section 30:16 claims are not subject to any liberative prescriptive period. *Id.* In reaching its holding, the court characterized the cause of action as an "enforcement action for injunctive relief" as opposed to a tort claim for damages. *Id.* The court emphasized that the plaintiff was not seeking "a monetary award as compensation for damages allegedly sustained," *id.*; instead, the plaintiff's only available remedy was equitable relief under section 30:16, *id.* at *9. "That only prospective, equitable relief is available under the statute" makes it unique, and the court found that this fact, as well as the failure of the legislature to provide a specific prescriptive period applicable to section 30:16 claims, further supported its finding that such actions are not subject to liberative prescription. *Id.* The court additionally reasoned that its holding aligns with the purpose of Louisiana conservation law and

"promotes the State's interest in the preservation, maintenance, and restoration of its natural resources for the benefit of the public as a whole, ensures enforcement of environmental laws and regulations, and adheres to the intent of the legislature and the policy written into the constitution." *Id.*

Next, the supreme court considered the defendants' exception of no cause of action. The defendants argued that the petition failed to state a cause of action because section 30:16 only applies "to violations involving present, ongoing, or continuous conduct." *Id.* The court disagreed and overruled the exception, holding that allegations of past violations of conservation laws coupled with the ongoing failure to remediate the property states a cause of action under section 30:16. *Id.* at *10–11.

Editor's Note: The reporters' law firm represented defendant-respondent BOPCO, LLC.

United States Fifth Circuit Affirms Remand in Coastal Zone Management Cases

On October 17, 2022, the U.S. Court of Appeals for the Fifth Circuit affirmed a district court's third remand order in a series of coastal zone management cases, holding that the defendants' wartime relationship with the federal government during World War II did not support federal jurisdiction under the federal officer removal statute. *Plaquemines Par. v. Chevron USA, Inc.*, No. 22-30055, 2022 WL 9914869 (5th Cir. Oct. 17, 2022).

Previously, six parishes, the Louisiana Attorney General, and the Louisiana Secretary of Natural Resources filed 42 suits in state court against approximately 200 oil and gas companies alleging violations of Louisiana's State and Local Coastal Resources Management Act of 1978 (SLCRMA). Specifically, the plaintiffs claimed that the defendants violated SLCRMA by either violating coastal use permits or failing to obtain them. The oil and gas defendants removed the cases to federal court based on federal question jurisdiction, 28 U.S.C. § 1331, and the federal officer removal statute, *id.* § 1442. The plaintiffs responded with motions to remand, which the district courts granted. *See, e.g.*, *Par. of Cameron v. Auster Oil & Gas Inc.*, 420 F. Supp. 3d 532 (W.D. La. 2019); *Par. of Plaquemines v. Riverwood Prod. Co.*, No. 2:18-cv-05217, 2019 WL 2271118 (E.D. La. May 28, 2019).

On appeal, the Fifth Circuit consolidated the cases and affirmed in part, reversed in part, and remanded the cases to the district courts. *Par. of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362 (5th Cir. 2021). The Fifth Circuit concluded that the defendants timely removed the cases but failed to prove federal question jurisdiction existed because it found no federal laws that were "actually disputed." *Id.* at 374 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)). Because the Fifth Circuit revamped its federal officer removal jurisdictional analysis during the pendency of the appeal, as stated in *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc), it remanded the cases with instructions to reconsider the federal officer removal analysis in light of *Latiolais*. On remand from the Fifth Circuit, the plaintiffs in *Riverwood* renewed their motion to remand, which the district court granted. *Par. of Plaquemines v. Riverwood Prod. Co.*, No. 2:18-cv-05217, 2022 WL 101401 (E.D. La. Jan. 11, 2022). The defendants timely appealed.

The issue before the Fifth Circuit on appeal was whether the defendants' wartime relationship with the federal government supported removal under the federal officer removal statute, which provides that "any officer (or any person acting under that officer) of the United States" may remove a case to federal court regarding claims that are "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The Fifth Circuit requires the removing defendant to prove "(1) it has asserted a colorable federal defense, (2) it is a 'person' within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Latiolais*, 951 F.3d at 296.

In this case, the Fifth Circuit zeroed in on the third prong of the analysis: whether the defendants acted pursuant to a federal officer's or agency's directions. The Fifth Circuit held that they did not. First, the court rejected the defendants' argument that they were acting under the federal government's direction because they were subjected to widespread regulation and cooperated with the federal government to support the war effort. The court stated that "merely being subject to federal regulations is not enough" to satisfy the "acted under" prong, *Plaquemines Par.*, 2022 WL 9914869, at *3; rather, the facts "must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior" beyond "simply *complying* with the law," *id.* (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 152 (2007)). Next, the court rejected the defendants' subcontractor theory. The court found no evidence of a contract or subcontract between the government and the defendants. And the court declined to extend the removal right to the defendants for supplying crude oil to government-contracted refineries to produce war products absent evidence showing the federal government's "guidance or control" over the defendants. *Id.* at *3–4. Thus, the Fifth Circuit affirmed the district court's order remanding the case to state court.

On November 14, 2022, the defendants filed a petition for rehearing or rehearing en banc.

Editor's Note: The reporters' law firm represented defendants Exxon Mobil Corp. and Graham Royalty, Ltd.

United States Fifth Circuit Reverses Western District of Louisiana's Dismissal of LDEQ from Suit Alleging Failure to Warn

In *D&J Investments of Cenla, LLC v. Baker Hughes*, 52 F.4th 187 (5th Cir. 2022), the U.S. Court of Appeals for the Fifth Circuit held that the Louisiana Department of Environmental Quality (LDEQ) was not improperly joined in a suit by plaintiff landowners alleging that LDEQ failed to warn them that their property had been contaminated by hydrocarbons stemming from the operations of a nearby manufacturing facility.

The plaintiffs filed this lawsuit in Louisiana state court seeking damages from several defendants for property contamination allegedly caused by the defendants' 50-year operation of a nearby industrial valve manufacturing facility. The plaintiffs also named LDEQ as a defendant under the theory that LDEQ knew of the contamination and failed to timely warn the plaintiffs.

The defendants removed the litigation to the U.S. District Court for the Western District of Louisiana on diversity grounds, arguing that LDEQ was an improperly joined defendant. Applying a Rule 12(b)(6) analysis to the plaintiffs' claims against LDEQ, the district court held that Louisiana tort law did not create a duty on LDEQ to inform landowners of reported contamination within any particular time frame. As a result, the district court dismissed LDEQ and denied the plaintiffs' motion to remand. *See D&J Invs. of Cenla LLC v. Baker Hughes*, 501 F. Supp. 3d 389 (W.D. La. 2020). That ruling was certified as a partial final judgment under Rule 54(b), and the plaintiffs appealed. *See* Vol. 39, No. 3 (2022) of this *Newsletter*.

Reviewing the dismissal of LDEQ de novo, the Fifth Circuit held that improper joinder occurs when "there is no possibility of recovery by the plaintiff against an in-state defendant." *D&J Invs.*, 52 F.4th at 195 (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004)). "[I]n making this determination, we must 'resolve any contested issues of material fact, and any ambiguity or uncertainty in the controlling state law, in [the plaintiffs'] favor.'" *Id.* (quoting *Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007)). Further, "[w]hen controlling state law 'is too uncertain to support improper joinder,' remand to state court is required." *Id.* (quoting *Rico*, 481 F.3d at 244).

The Fifth Circuit found that remand was necessary in this case because of the uncertainty of whether discretionary immunity under La. Stat. Ann. § 9:2798.1 would apply to the Louisiana Environmental Quality Act public notification regulations. *See* 33 La. Admin. Code tit. 33, pt. I, § 109. Discretionary immunity requires that liability shall not be imposed on a state department, such as LDEQ, based on the failure to exercise or perform discretionary acts. La. Stat. Ann. § 9:2798.1(B). The public notification regulations provide contents and time frames for notification based upon certain "triggering events" related to health and safety concerns associated with off-site contaminant releases. The Fifth Circuit found that these regulations could be subject to alternative reasonable interpretations by state courts as to whether they allow LDEQ to exercise discretion with respect to when and how to provide public notice. *D&J Invs.*, 52 F.4th at 199. In reaching this conclusion, the Fifth Circuit considered that in other circumstances, the provisions used mandatory language regarding public notification, and it also relied on a prior decision from a Louisiana appellate court finding that LDEQ could be sued in tort for negligence under circumstances similar to those alleged by the plaintiffs. *See Wilson v. Davis*, 2007-1929 (La. App. 1 Cir. 5/28/08), 991 So. 2d 1052.

Because the Fifth Circuit's improper joinder rules require uncertainty to be resolved in the plaintiffs' favor, the Fifth Circuit held that LDEQ was not improperly joined. LDEQ's presence in the litigation thus precluded diversity jurisdiction, and the Fifth Circuit remanded with further instructions to the Western District of Louisiana to remand to Louisiana state court. *D&J Invs.*, 52 F.4th at 199–200.

In addition, after the district court dismissed LDEQ, one plaintiff filed a declaratory judgment action in Louisiana state court seeking a judgment that LDEQ owes a duty to warn landowners of contamination affecting their property. The district court stayed this state court action while its order dismissing LDEQ was appealed. Upon holding that the district court lacked subject matter jurisdiction over the action, the Fifth Circuit vacated the stay.

NORTH DAKOTA – OIL & GAS

Ken G. Hedge, Reporter

Portions of Pore Space Bill Held Unconstitutional

In 2019, the North Dakota Legislative Assembly enacted Senate Bill 2344 (SB 2344), 2019 N.D. Sess. Laws ch. 300, which addressed various aspects of subsurface pore space, separately defined in N.D. Cent. Code § 47-31-02 as "a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum." Of primary import, section 1 of SB 2344 contained provisions, codified at N.D. Cent. Code § 38-08-25(5), allowing an oil and gas operator to use subsurface pore space and denying the surface owner the right to exclude others or demand compensation for the subsurface use. Section 3 of SB 2344 expressly excluded pore space from the definition of "land" within the meaning of North Dakota's Oil and Gas Production Damage Compensation Act, which, among other things, requires oil and gas operators to compensate surface owners for lost land value and lost use of and access to the surface owner's land. *See* N.D. Cent. Code § 38-11.1-03. Further, section 4 of SB 2344 provided that the injection or migration of substances into pore space for disposal operations, for secondary recovery operations, or to otherwise facilitate oil and gas production is not unlawful and, by itself, does not constitute trespass, nuisance, or other tort. *See id.* § 47-31-09.

Northwest Landowners Association (Association) challenged, on its face, the constitutionality of SB 2344 under state and federal takings clauses. *See Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 1, 978 N.W.2d 679. The district court granted the Association's cross-motion for summary judgment and, in the process, denied Continental Resources, Inc.'s (as an intervening defendant), motion to conduct discovery prior to ruling, finding that "pore space has value as a matter of law." *Id.* ¶ 9.

The Fifth Amendment to the U.S. Constitution, as made applicable to the states through the Fourteenth Amendment, guarantees that private property shall not be taken for public use without just compensation. *Id.* ¶ 16 (citing U.S. Const. amend. V; *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 12, 705 N.W.2d 850). The North Dakota Constitution offers "overlapping and broader protection against government interference with property rights." *Id.* It provides that "[p]rivate property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for[,] the owner." *Id.* (quoting N.D. Const. art. I, § 16.). In order to establish a violation of the takings clause, challengers must first demonstrate that they have a constitutionally protected property right under state law, and, in this case, the court assessed whether surface owners have a property interest in subsurface pore space. *Id.* ¶ 19. (The court did not address any potential differences between the federal and state takings clauses, as none of the parties argued that "the state constitutional provision requires us to apply a different standard for per se takings." *Id.* ¶ 23.)

The Oil and Gas Production Damage Compensation Act, originally passed in 1979, aimed to protect surface owners "from the undesirable effects of development of minerals." *Id.* ¶ 20 (quoting N.D. Cent. Code § 38-11.1-02). It required oil and gas operators to pay damages to surface owners for, among other things, lost land value and lost use of, and access to, the land. *Id.* (citing N.D. Cent. Code § 38-11.1-04; *Mosser v. Denbury Res., Inc.*, 2017 ND 169, ¶ 22, 898 N.W.2d 406). Although the Act did not define "land," the legislature enacted separate pore space statutes in 2009 to provide a statutory definition of pore space and to confirm that title to pore space was vested in the surface owner. *Id.* (citing N.D. Cent. Code §§ 47-31-03, -05). Further, in *Mosser*, the court held that the word "land," as used in section 38-11.1-02, included pore space, such that a surface owner may be entitled to compensation under the Act when an operator disposes of saltwater into subsurface pore space. *Id.* (citing *Mosser*, 2017 ND 169, ¶¶ 23–24); *see also* Vol. XXXIV, No. 4 (2017) of this *Newsletter*. In addition, the court noted that, prior to SB 2344, surface owners could sue for trespass when use of the surface estate was not "reasonably necessary" for the development of the mineral estate. *Nw. Landowners*, 2022 ND 150, ¶ 21 (quoting *Mosser v. Denbury Res., Inc.*, 112 F. Supp. 3d 906, 918–19 (D.N.D. 2015)). The court thus found that surface owners have a constitutionally protected property interest in pore space under North Dakota law. *Id.* ¶ 22.

Having found that surface owners have a constitutionally protected property interest in pore space, the court examined whether there was, in fact, a per se taking. First, the court noted that, although it has recognized two categories of per se takings, only one was argued by the Association and, therefore, addressed by the court. *Id.* ¶¶ 23–24. Specifically, the court examined whether the challenged statutes fit within the U.S. Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which held that the government must provide just compensation when there has been a "permanent physical invasion" of property. *Nw. Landowners*, 2022 ND 150, ¶ 23 (quoting *Wild Rice River Estates*, 2005 ND 193, ¶ 13). Further, even physical occupations that are only temporary or have minimal economic impact require the payment of just compensation, "because when there is a physical occupation of property, it effectively destroys the owner's rights to possess, use, and dispose of the property." *Id.* ¶ 25.

Against this backdrop, the court found that SB 2344 constitutes a per se taking. *Id.* ¶ 26. It permits oil and gas operators to inject substances into the surface owner's pore space, allows operators to use pore space to "temporarily or permanently store or dispose of gases and wastes," and grants operators a right of access to private property. *Id.* Further, SB 2344 eliminates a surface owner's right to compensation for waste disposal, a right previously recognized by the court in *Mosser*. *Id.* ¶ 27 (citing *Mosser*, 2017 ND 169, ¶ 24). Finally, the court noted that, although the mineral estate is the dominant estate and an operator may have an implied easement to use the surface estate as "reasonably necessary" to explore for and develop minerals, SB 2344 authorizes "disposal of waste generated outside the unit or field," thereby exceeding rights that may exist under the implied easement. *Id.* ¶¶ 29–30. Further, the court found that additional discovery "was not needed because calculating the exact value of pore space was not essential to resolve the Association's facial challenge." *Id.* ¶ 43.

Overall, the court found certain aspects of SB 2344 unconstitutional per se, being that part of section 1 codified at N.D. Cent. Code § 38-08-25(5), the newly codified definition of "land" in section 3, and that part of section 4 that negated otherwise actionable claims for trespass, nuisance, or other tort as a result of the mere injection or migration of substances into pore space for disposal operations. *Nw. Landowners*, 2022 ND 150, ¶¶ 34–35. Certain other aspects of the SB 2344, consisting primarily of legislative findings, public interest statements, and other similar provisions, were not found to be constitutionally defective as they can operate independently of the unconstitutional provisions. *Id.* ¶ 40.

OHIO – OIL & GAS

J. Richard Emens, Sean Jacobs & Cody Smith, Reporters

Seventh District Court of Appeals Narrows Evidence Available in Oil and Gas Lease Termination Case Centered on "Production in Paying Quantities"

Hogue v. Whitacre, 2022-Ohio-3616 (7th Dist.), is the fourth in a series of cases against Koy Whitacre, Whitacre Enterprises, Inc. (Whitacre Enterprises), and the Whitacre Store involving claims that oil and gas leases have terminated due to a lack of "production in paying quantities." *Id.* ¶ 2. In *Hogue*, the Ohio Seventh District Court of Appeals further narrowed what expenses may be considered when analyzing whether a specific oil and gas lease has terminated due to a lack of production in paying quantities.

Appellees Donald G. and Carol L. Hogue entered into an oil and gas lease with Koy Whitacre on September 11, 2006. *Id.* ¶ 3. The lease contained a typical habendum clause that stated that the lease was to remain in effect beyond the primary term "as much longer as oil or gas is found in paying quantities thereon." *Id.* On June 12, 2009, Koy Whitacre drilled the G. Hogue Well on the leasehold and produced oil and gas from 2010 through 2016. *Id.* ¶ 4. The G. Hogue Well was then assigned to Whitacre Enterprises. *See id.* ¶ 7.

Whitacre Enterprises and the Whitacre Store are both entities owned by Koy Whitacre. Whitacre Enterprises owned 350 wells at the time of litigation. The Whitacre Store provided services to the wells owned by Whitacre Enterprises. The services were provided for a flat monthly fee. If one well was plugged and abandoned, the service charge for the remaining wells was increased to cover the reduction in the flat monthly fee. *Id.* ¶¶ 6–9. In 2018, the Hogues filed a lawsuit claiming that the lease terminated because the G. Hogue Well failed to produce in paying quantities from 2010 through 2016. The Hogues argued that the cost to operate the G. Hogue Well, including the service charge from the Whitacre Store, exceeded the profits. *Id.* ¶ 12.

After considering competing motions for summary judgment, the trial court granted summary judgment in favor of the Hogues. *See id.* ¶ 23. Koy Whitacre, Whitacre Enterprises, the Whitacre Store, and other entities who owned an interest in the lease appealed the decision. *See id.* These appellants claimed that the trial court improperly considered the flat monthly fee as a component of the production in paying quantities analysis. *Id.* ¶ 1.

On appeal, the Seventh District reiterated that "our only concern in a '[production in] paying quantities' analysis is the difference between gross profit and the direct expenses attributable to the production of oil or gas." *Id.* ¶ 30. Indirect expenses that do not contribute to production or are paid whether or not a well is in existence are properly excluded. *Id.* Therefore, an oil and gas lease may be held when an oil and gas well sees any profit, no matter how small, when the gross revenues exceed only those costs directly related to the production of oil and gas. *See id.*

Here, because the flat monthly fee paid from Whitacre Enterprises to the Whitacre Store did not contribute to production and fluctuates per well based on the total number of wells owned by Whitacre Enterprises, it is an indirect expense that is properly excluded from any production in paying quantities analysis. *Id.* ¶ 49. After excluding the indirect expenses, the uncontroverted evidence before the Seventh District showed that the G. Hogue Well was profitable in each year from 2010 through 2016. *Id.* ¶¶ 55–79. Therefore, the appellants' argument had merit and the trial court's summary judgment decision was reversed. *Id.* ¶ 80.

Hogue is another significant win for oil and gas producers in Ohio. The Seventh District reiterated that the burden of proof in production in paying quantities cases is held by the party asserting that the oil and gas lease has terminated. In these situations, however, the evidence needed to prove such a claim is maintained entirely by the other party. By requiring certain evidence to be excluded from a production in paying quantities analysis, the party asserting that an oil and gas lease has terminated may find difficulty in providing evidence to support their claim, meaning historical oil and gas leases may remain in effect longer than originally intended.

PENNSYLVANIA – MINING

Joseph K. Reinhart, Sean M. McGovern,
Gina N. Falaschi & Christina M. Puhnaty, Reporters

Supreme Court of Pennsylvania Upholds Preliminary Injunction for RGGI Rule

The Supreme Court of Pennsylvania has upheld a preliminary injunction of the Regional Greenhouse Gas Initiative (RGGI) rule granted by the Commonwealth Court of Pennsylvania. On July 8, 2022, the commonwealth court granted a preliminary injunction preventing the state from participating in RGGI pending resolution of the case. *See* Vol. 39, No. 3 (2022) of this *Newsletter*. Governor Tom Wolf appealed the injunction to the supreme court. On August 31, 2022, the supreme court denied the state's emergency request to reinstate the automatic supersedeas, thereby maintaining the preliminary injunction while litigation on the merits proceeds before the commonwealth court later this year. *See Ziadeh v. Pa. Legis. Reference Bureau*, No. 79 MAP 2022 (Pa. Aug. 31, 2022).

As previously reported in Vol. 39, No. 2 (2022) of this *Newsletter*, the Pennsylvania Department of Environmental Protection's (PADEP) CO_2 Budget Trading Program rule, or RGGI rule, which links the state's cap-and-trade program to RGGI, was published in the *Pennsylvania Bulletin* in April 2022. *See* 52 Pa. Bull. 2471 (Apr. 23, 2022). RGGI is the country's first regional, market-based cap-and-trade program designed to reduce carbon dioxide (CO_2) emissions from fossil fuel-fired electric power generators with a capacity of 25 megawatts or greater that send more than 10% of their annual gross generation to the electric grid.

On April 25, 2022, owners of coal-fired power plants and other stakeholders filed a petition for review and an application for special relief in the form of a temporary injunction, and a group of state lawmakers filed a challenge as well. *See Bowfin KeyCon Holdings, LLC v. PADEP*, No. 247 MD 2022 (Pa. Commw. Ct. filed Apr. 25, 2022). Briefing has been completed and a hearing is expected to occur in November 2022.

Additionally, on July 12, 2022, natural gas companies Calpine Corp., Tenaska Westmoreland Management LLC, and Fairless Energy LLC filed a third legal challenge to the rule with arguments similar to those brought in the other two cases. *See Calpine Corp. v. PADEP*, No. 357 MD 2022 (Pa. Commw. Ct. filed July 12, 2022). Constellation Energy Corporation and Constellation Energy Generation LLC have petitioned to intervene in the case and a hearing on this application was scheduled for November 2, 2022. Briefing in this case is due in December 2022.

Further information regarding the rule and the history of the rulemaking can be found on PADEP's RGGI webpage at https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx.

Rulemaking Review Committees Disapprove Proposed Water Quality Standard for Manganese

As reported in Vol. 55, No. 3 (2022) of the *Water Law Newsletter*, the Pennsylvania House and Senate Environmental Resources and Energy standing committees (Standing Committees) and the Independent Regulatory Review Commission (IRRC) recently disapproved a proposed rulemaking to change the water quality criterion for manganese in Pennsylvania. The future of the rulemaking is now uncertain.

Proposed Changes to Manganese Water Quality Criterion

The proposed manganese rule would add a numeric water quality criterion for manganese of 0.3mg/L to Table 5 at 25 Pa. Code § 93.8c, which is intended to "protect human health from the neurotoxicological effects of manganese." Executive Summary at 1, "Final-Form Rulemaking: Water Quality Standards and Implementation—Manganese" (Aug. 9, 2022). Section 93.8c establishes human health and aquatic life criteria for toxic substances, meaning the Pennsylvania Department of Environmental Protection (PADEP) would be regulating manganese as a toxic substance. The existing criterion of 1.0 mg/L, which was established in 25 Pa. Code § 93.7 as a water quality criterion, would be deleted. The 0.3 mg/L criterion would apply to all surface waters in the commonwealth. PADEP identified the parties affected by the manganese rule to be "[a]ll persons, groups, or entities with proposed or existing point source discharges of manganese into surface waters of the Commonwealth." Executive Summary at 3.

PADEP also specifically identified "[p]ersons who discharge wastewater containing manganese from mining activities" as affected parties, and expects that mining operators would need to perform additional treatment to meet this criterion. *Id.* Final amendments to treatment systems would be implemented through PADEP's permitting process and other approval actions. Consulting and engineering firm Tetra Tech estimated the overall cost to the mining industry to achieve compliance with the 0.3 mg/L standard "could range between $44–$88 million in annual costs (that is, for active treatment systems using chemical addition for manganese removal) and upwards of $200 million in capital costs." Comment and Response Document at 213, "Water Quality Standard for Manganese and Implementation" (Aug. 9, 2022).

Rulemaking History

The Pennsylvania Environmental Quality Board (EQB) adopted the proposed rulemaking in December 2019. *See* Proposed Rulemaking Preamble, "Water Quality Standard for Manganese and Implementation" (Dec. 17, 2019). This rulemaking was prompted by the addition of subsection (j) to section 1920-A of the Administrative Code of 1929, 71 Pa. Stat. § 510-20, by Act 40 on October 30, 2017. Act 40 directed the EQB to promulgate regulations under Pennsylvania's Clean Streams Law, 35 Pa. Stat. §§ 691.1–.1001, and related statutes to require that the water quality criteria for manganese established under 25 Pa. Code ch. 93 be met.

On June 30, 2020, PADEP submitted a copy of the proposed rulemaking to the IRRC and to the chairpersons of the Standing Committees for review and comment. The proposed rulemaking was published in the *Pennsylvania Bulletin* on July 25, 2020, 50 Pa. Bull. 3724, with a 60-day public comment period that closed on September 25, 2020. Comments were received from 957 commenters, including testimony from 13 witnesses at the public hearings. Since the proposed rulemaking, PADEP met with the Mining and Reclamation Advisory Board, the Aggregate Advisory Board, the Public Water Systems Technical Assistance Center Board, and the Water Resources Advisory Committee to discuss the proposed rule. On August 9, 2022, the EQB voted to adopt the final manganese rule.

Recent Disapproval of Proposed Manganese Criterion and Possible Next Steps

After the EQB adopted the manganese rule as final at its August 9 meeting, the rulemaking was sent to the Standing Committees and the IRRC. The IRRC received over 30 comments on the rulemaking and heard in-person testimony from numerous interested parties, including members of the regulated industry. The Standing Committees and the IRRC each voted to disapprove the rulemaking in early September. *See* IRRC, "Regulation #7-553: Water Quality Standard for Manganese and

Implementation," http://www.irrc.state.pa.us/regulations/RegSrchRslts.cfm?ID=3271.

Because of these disapprovals, the manganese rule was not sent immediately to the Office of the Attorney General for final approval. Instead, the rule was sent back to the EQB, who can choose to withdraw the regulation or resubmit it—with or without changes—to the IRRC and the Standing Committees within 40 days. If the EQB resubmits the rulemaking, the IRRC will hold a second public meeting within 15 days, and the Standing Committees then receive the rulemaking and can issue a concurrent resolution disapproving the regulation within 14 days. If the Standing Committees do not issue a concurrent resolution, the rulemaking can become final after the Attorney General's approval. If the Standing Committees do issue a concurrent resolution, the rulemaking is sent to the General Assembly for a vote. If the General Assembly adopts the concurrent resolution, the General Assembly presents it to the Governor to sign or veto. If the General Assembly does not adopt the concurrent resolution, the rulemaking is sent to the Attorney General, who can approve the rulemaking. The regulation becomes final at publication in the *Pennsylvania Bulletin*. *See* 71 Pa. Stat. § 745.7; IRRC, "The Regulatory Review Process in Pennsylvania," at 17–22 (2019).

PADEP's RACT III Rule Requires Action from Major Sources of NO_x and VOCs by End of Year

On November 12, 2022, the Pennsylvania Environmental Quality Board (EQB) published amendments to the Pennsylvania Department of Environmental Protection's (PADEP) regulations in 25 Pa. Code chs. 121 and 129 for all major stationary sources of nitrogen oxides (NO_x) or volatile organic compound (VOC) emissions, which is commonly known as the RACT III rule. *See* 52 Pa. Bull. 6960 (Nov. 12, 2022). The rule requires major sources of either or both of these air pollutants in existence on or before August 3, 2018, to meet reasonably available control technology (RACT) emission limits and requirements by January 1, 2023. *See also* Vol. 39, No. 1 (2022) of this *Newsletter* (Pennsylvania – Oil & Gas report).

These regulations are being promulgated to address federal Clean Air Act (CAA) RACT requirements to meet the 2015 ozone National Ambient Air Quality Standards (NAAQS) in the commonwealth. The CAA requires a reevaluation of RACT when new ozone NAAQS are promulgated. RACT is required in nonattainment areas, including the Ozone Transport Region, which includes Pennsylvania. The RACT III rulemaking establishes presumptive RACT requirements and emission limits for specific source categories of affected facilities. The RACT III rulemaking also imposes additional requirements for all major sources of NO_x and/or VOCs, not just those subject to the presumptive RACT requirements and limitations.

RACT III applies to all major sources of VOCs and NO_x. Because the commonwealth is in the Northeast Ozone Transport Region, the major source threshold is 50 tons per year (tpy) of VOCs and 100 tpy of NO_x. PADEP estimates that 425 title V facility owners and operators will be subject to the final rule. Affected source categories include combustion units; process heaters; turbines; stationary internal combustion engines; direct-fired heaters, furnaces, or ovens; and other sources that are not regulated elsewhere under chapter 129. The sources included in these categories are located at various facility types, including fossil fuel-burning and other electric generation, petroleum and coal products manufacturing, and iron and steel milling. RACT III imposes presumptive RACT limitations at 25 Pa. Code § 129.112 on additional categories of facilities that were not previously subject to any presumptive RACT limitations or requirements. These categories include glass melting furnaces, lime kilns, and certain combustion units.

The owner or operator of a NO_x air contamination source with a potential emission rate equal to or greater than 5.0 tpy of NO_x for which presumptive RACT requirements are not outlined in section 129.112 is required to propose a NO_x RACT requirement or RACT emission limitation to PADEP. Similarly, the owner or operator of a VOC air contamination source with a potential emission rate equal to or greater than 2.7 tpy of VOCs for which presumptive RACT requirements are not outlined in section 129.112 is required to propose a VOC RACT requirement or RACT emission limitation to PADEP.

Notably, 25 Pa. Code § 129.115 requires that all major VOC or NO_x emitting facilities submit a written notification to PADEP or the appropriate local air pollution control agency by December 31, 2022, identifying air contamination sources at the facility as covered by—or exempt from—RACT III requirements. This written notification requirement applies to all major sources of NO_x and VOC emissions, even if those facilities are not subject to the presumptive RACT provisions of section 129.112. The written notification must include the following for each identified air contamination source:

- a description of each identified air contamination source at the facility, including make, model, and location;
- the applicable RACT requirement or RACT emission limitation;
- how the owner or operator will comply with the application RACT requirement or RACT emission limitation; and
- the reason why a source is exempt from the RACT requirements and RACT emission limitations, if applicable.

Operators are not required to immediately amend operating permits to include RACT III, but as of January 1, 2023, the final rulemaking will apply to those sources covered by the rulemaking. As of this compliance date, RACT III's requirements could supersede any conflicting requirements and emissions limitations in a facility's permit or Pennsylvania regulations, unless those conflicting requirements are more stringent than RACT III. *See* 25 Pa. Code § 129.112(*l*)–(m).

The EQB adopted the proposed rulemaking in May 2021. The proposed rulemaking was published for public comment, *see* Vol. XXXVIII, No. 4 (2021) of this *Newsletter*, and PADEP held public hearings on the proposal. PADEP reviewed and responded to comments on the proposed rule and presented the final rule to the EQB at its August 9, 2022, meeting, where it was approved. Upon approval, the regulation was submitted to the Pennsylvania House and Senate Environmental Resources and Energy standing committees and the Pennsylvania Independent Regulatory Review Commission (IRRC). The standing committees approved the regulation on September 14, 2022, and the IRRC approved the regulation on September 15, 2022. The regulation was then approved by the Office of the Attorney General before being published in the *Pennsylvania Bulletin*. PADEP will now submit the regulation to the U.S. Environmental Protection Agency (EPA) for incorporation into Pennsylvania's state implementation plan.

The RACT III compliance date established by EPA is January 1, 2023, and this regulation went into effect immediately upon publication in the *Pennsylvania Bulletin*. Owners and oper-

ators should take note of the impending December 31, 2022, notification deadline described above.

PADEP Non-Regulatory Agenda for 2023 Focuses on Mining Program

In late July 2022, the Pennsylvania Department of Environmental Protection (PADEP) published its Non-Regulatory Agenda, which outlines the agency's upcoming plans related to its documents, manuals, and technical guidance. The Non-Regulatory Agenda outlines the agency's intent to rescind its Engineering Manual for Mining Operations, TGD No. 563-0300-101 (Jan. 1, 1999), by the end of this year. The agenda also notes PADEP's intent to revise several other technical guidance documents (TGDs) related to coal mining activities in the commonwealth. The TGDs identified by PADEP to be revised in early 2023 are:

- Surface Water Protection – Underground Bituminous Coal Mining Operations, TGD No. 563-2000-655 (Oct. 8, 2005);
- Financial Assurance and Bond Adjustments for Mine Sites with Post-Mining Discharges, TGD No. 563-2504-450 (Dec. 15, 2007) (draft);
- Increased Operation and Maintenance Costs of Replacement Water Supplies (on All Coal and Surface Noncoal Sites), TGD No. 562-4000-102 (Dec. 2, 2006);
- Water Supply Replacement and Permitting, TGD No. 563-2112-605 (Dec. 31, 1998); and
- Water Supply Replacement and Compliance, TGD No. 562-4000-101 (Oct. 18, 1999).

Draft revisions will be published in the *Pennsylvania Bulletin* and should be available online at https://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=4556. The public will have an opportunity to comment on these draft revisions for a period of at least 30 days.

PENNSYLVANIA – OIL & GAS

Joseph K. Reinhart, Sean M. McGovern, Matthew C. Wood & Gina N. Falaschi, Reporters

PADEP General Permit for Short Duration Processing and Beneficial Use of Oil and Gas Liquid Waste Available for Use

On June 25, 2022, the Pennsylvania Department of Environmental Protection (PADEP) published General Permit WMGR163 (Permit) in the *Pennsylvania Bulletin*, 52 Pa. Bull. 3632 (June 25, 2022). PADEP issued the Permit following a 60-day comment period that closed on March 15, 2022. As issued, the Permit authorizes the short-term processing, transfer, and beneficial use of oil and gas liquid waste to hydraulically fracture or otherwise develop an oil or gas well under the authority of the Solid Waste Management Act, 35 Pa. Stat. §§ 6018.101–.1003, and the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 Pa. Stat. §§ 4000.101–.1904. The Permit covers facilities that process and beneficially reuse oil and gas liquid waste for no more than 180 consecutive days at any one time.

Any company interested in using the Permit must register its authorized activities with PADEP. 25 Pa. Code § 287.643. In addition, PADEP is prohibited from requiring an applicant to obtain a determination of applicability from the agency prior to the issuance of the final permit for the land application of material. *See id.* § 287.641(c), (d). The Permit is applicable to the same oil and gas facilities eligible for coverage under General Permit WMGR123 ("Processing and Beneficial Use of Oil and Gas Liquid Waste"), but with fewer conditions. Key provisions in the Permit include:

(1) An authorized facility may process and transfer oil and gas liquid waste for no more than 180 consecutive days during the Permit's two-year coverage period and a permittee can only operate for a maximum of one year during that period. A permittee's coverage automatically expires one year from the date waste is first received or processed, or two years from date of permit issuance, whichever is less.

(2) Under the Permit, oil and gas liquid waste is not subject to concentration limits or chemical testing in order to be stored in an impoundment (unlike General Permit WMGR123).

(3) The applicable facility must meet the siting requirements set forth in the Permit (e.g., it must not be located within a 100-year floodplain or within certain distances of exceptional value wetlands, occupied dwellings, or property lines, subject to certain exceptions).

(4) A permittee must develop and make available at the facility a preparedness, prevention, and contingency plan that is consistent with applicable PADEP guidance.

The following key terms and provisions were revised based on public comments:

(1) The duration of the Permit's coverage was extended from one year to two years, with the maximum operational timeframe of one year.

(2) The definition of "operate" was revised to clarify that the operational period does not commence prior to oil and gas liquid waste being received or processed at the permitted location.

(3) Condition C.1 in the draft version of the Permit, which stipulated no more than 100,000 gallons of oil and liquid waste could be stored on-site, was eliminated.

(4) Former Condition C.26 (now Condition C.25) was revised to clarify that permittees are not authorized to store oil and gas liquid waste in impoundments. The condition was also revised to allow permittees to demonstrate they are exempt from emission permits for open-top storage tanks or other emissions sources in accordance with applicable regulations.

(5) Condition F.1 was revised to clarify that a renewal request must be submitted at least 180 days in advance of the Permit expiration date and include a certified statement that information contained in the original Permit application has not changed since Permit issuance.

(6) Condition F.3 was revised to clarify that a permittee may apply for coverage at a previously covered site, but a new Permit cannot be issued until the permittee successfully completes closure and post-closure activities in accordance with Condition C.4 of the Permit.

The Permit became effective June 25, 2022, and expires June 25, 2032.

PADEP Updates Guidance for Handling Radioactive Waste to Address Unconventional Oil and Gas Operations and Publishes Radioactive Materials Disposal Data

On June 11, 2022, the Pennsylvania Department of Environmental Protection (PADEP) published a substantive revision to its technical guidance document (TGD) Radioactivity Monitoring at Solid Waste Processing and Disposal Facilities (Guidance), TGD No. 250-3100-001 (June 11, 2022), in the *Pennsylvania Bulletin*, 52 Pa. Bull. 3374 (June 11, 2022). PADEP updated the Guidance, which was immediately effective, to assist unconventional oil and gas operators in complying with the obligation under 25 Pa. Code § 78a.58(d) to prepare an action plan specifying procedures for monitoring for and responding to radioactive material produced by the treatment processes (and other procedures). The Guidance does not cover waste from conventional oil and gas operations.

The Guidance applies to all solid waste processing or disposal facilities, including underground injection control wells, as defined in the Guidance, and well sites where fluids or drill cuttings generated by the development, drilling, stimulation, operation, or plugging of an oil or gas well are processed on-site. Facilities that are not required to monitor radiation, but do so voluntarily, are also subject to the Guidance.

PADEP originally published a draft version of the Guidance in the *Pennsylvania Bulletin* in October 2019. *See* 49 Pa. Bull. 6197 (Oct. 19, 2019). The final Guidance follows PADEP's July 2021 announcement that all Pennsylvania landfills, including those accepting unconventional oil and gas waste, would be required to conduct quarterly testing of leachate for radiological contamination prior to the liquid being treated on-site or being sent to an off-site wastewater treatment facility. *See* Press Release, PADEP, "Wolf Administration to Move Forward with Radiological Testing of Leachate at Landfills" (July 26, 2021).

In a September 30, 2022, meeting with the Low-Level Waste Radioactive Advisory Committee, PADEP presented its most recent data summarizing low-level radioactive waste (LLRW) disposal among the Appalachian Compact states (Pennsylvania, West Virginia, Delaware, and Maryland). Among the data presented, PADEP noted that in 2021 oil and gas operators sent approximately 236,000 cubic feet of technologically enhanced naturally occurring radioactive material (TENORM) waste generated during operations for disposal to out-of-state LLRW facilities. According to PADEP, shale gas operators disposed of a total of 811,070 cubic feet of TENORM waste between 2016 and 2021, most of which was sent to LLRW disposal facilities in Texas and Utah. *See* PowerPoint Presentation, PADEP, "Appalachian Compact: Low Level Radioactive Waste (LLRW) Disposal Data—Calendar Year 2021" (Sept. 30, 2022). PADEP is also currently reviewing its regulations allowing on-site disposal of radioactive and nonradioactive waste associated with well plugging activities, a response to the increased scale of the well plugging that will occur pursuant to the federal Infrastructure Investment and Jobs Act's conventional well plugging program. *See* Meeting Minutes, Oil & Gas Technical Advisory Bd. (Apr. 25, 2022).

Bill Setting Pennsylvania's Conventional Oil and Gas Bonding Levels Becomes Law

On July 19, 2022, House Bill 2644, 2022 Pa. Legis. Serv. Act 2022-96 (Act 96), became law, without Pennsylvania Governor Tom Wolf's signature. The new law keeps Pennsylvania's oil and gas well bonding amounts at the current levels of $2,500 per conventional well and $25,000 for a blanket bond for multiple conventional wells. The blanket bond amount will increase by $1,000 for every additional conventional well drilled six months after July 19, 2022, not to exceed $100,000. However, the Pennsylvania Department of Environmental Protection (PADEP) will waive the $1,000 increase for a new conventional well if the operator has plugged an orphan well at the operator's own expense. Other than the $1,000 increase for blanket bonds, Act 96 precludes PADEP and the Environmental Quality Board (EQB) from raising bonding amounts for 10 years from the effective date. During this time, only the general assembly has such authority. Act 96 does not place a similar 10-year protection period on the adjustment of unconventional well bond amounts, allowing the EQB to adjust amounts every two years to reflect PADEP's projected well plugging costs. The EQB has been considering two petitions: one to increase well bonding amounts for conventional wells to $38,000 per well and another to increase unconventional well bonding amounts to $83,000 per well. Act 96's enactment effectively prevents the petitioned increase for conventional wells. *See* Vol. XXXVIII, No. 4 (2021) of this *Newsletter*.

In a formal statement published in the July 30, 2022, *Pennsylvania Bulletin*, Governor Wolf said he allowed Act 96 to become law, but had several concerns with the legislation, including: (1) the directive that federal Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, 135 Stat. 429 (2021), funds be deposited into the commonwealth's orphan well plugging fund, in apparent contravention of the IIJA's framework for administering funds; (2) that grant amounts are tied to well depths and not actual plugging costs; (3) the elimination of PADEP's authority to impose federally mandated requirements on recipients receiving plugging grants; and (4) the withdrawal of the EQB's authority to establish bonding amounts for conventional operations. *See* 52 Pa. Bull. 4229 (July 30, 2022).

Due to these concerns, Governor Wolf stated that PADEP is reviewing existing processes and procedures and will provide evaluations and recommendations on the following by September 1, 2022:

> 1) Evaluation of the conventional industry's recent record of compliance with reporting requirements and performance requirements under existing law.
>
> 2) Evaluation of using existing authority, including increased exercise of civil penalty authority and forfeiting conventional oil and gas well bonds and requiring submission of replacement bonds, as methods to deter and motivate conventional operators to address abandoned wells and violations of the applicable law.
>
> 3) Recommendations for increased scrutiny of conventional oil and gas operators' requests for regulatory inactive status approval and permit transfers, because these steps are often precursors to improper abandonment of wells.
>
> 4) Evaluation of using existing criminal provisions related to conventional oil and gas operations as a means of deterring and motivating conventional operators to address abandoned wells and violations of the applicable law.
>
> 5) Recommendations for regulatory reform to comprehensively regulate conventional drilling according to modern best practices and industry standards.

Id. at 4230.

Act 96 also requires PADEP to create a new initiative to provide grants to well plugging companies to maximize the volume of orphan wells being plugged. Grants of $10,000 would be awarded for plugging wells less than 3,000 feet deep, with grants of $20,000 awarded for plugging wells more than 3,000

feet deep. Further, Act 96 exempts conventional wells drilled prior to April 1985 from bonding requirements. PADEP estimates a majority of the more than 110,000 active conventional oil and gas wells in Pennsylvania were drilled before April 1985.

Opponents of Act 96 claim that its passage potentially risks Pennsylvania's receipt of federal funding from the IIJA's conventional oil and gas well plugging program to plug abandoned and orphan oil and gas wells. Sierra Club, for example, which is one of the entities that filed a petition to increase conventional well bond amounts in Pennsylvania, claims that Pennsylvania may have to return already-allocated funding or may miss out on future funding because Act 96 precludes PADEP from following federal requirements for use of the funds. *See* Press Release, Sierra Club, "Pennsylvania Legislation Will Exacerbate Massive Oil and Gas Well Backlog and Mismanagement of Federal Funds" (July 19, 2022). In a statement to the *Pittsburgh Post-Gazette*, Governor Wolf's Press Secretary Elizabeth Rementer said that "[t]he administration is currently exploring the next steps to ensure the industry is held accountable in order to protect the environment and that we don't lose out on millions of dollars in federal funding for well plugging." Laura Legere, "As Pa. Faces 'Looming Crisis' of New Abandoned Wells, State Law Will Freeze Well Bonding Rates for a Decade," *Pittsburgh Post-Gazette* (July 19, 2022).

Allegheny County Bans Future Oil and Gas Development of County Park Land

On July 19, 2022, the Allegheny County Council voted 12-3 to override County Executive Rich Fitzgerald's veto on Bill No. 12162-22. The bill, which the Council originally passed on July 5, and Fitzgerald vetoed on July 12, bans new natural gas drilling and other industrial activity, including hydraulic fracturing, mining, and commercial forestry, within and underneath county-owned parks. The ban, which does not apply to existing leases, but does prevent expansion of existing operations at Deer Lakes Park, took effect immediately.

In his veto message, Fitzgerald described his opposition to the measure, stating it prevents the County from negotiating environmental protections for any future oil and gas or other industrial activity in the vicinity of county park land. *See* Fitzgerald Veto Message (July 12, 2022). Specifically, Fitzgerald said passage of the bill prevents

- baseline water testing before, during, and after extraction activities;
- air monitoring requirements during natural gas drilling and other industrial activity; and
- limiting hours of operation and setting noise, dust, trucking, and light pollution limits from natural gas drilling and other industrial activity.

Id. Moreover, Fitzgerald said future legislation authorizing natural gas extraction under county land would act to repeal the ban. *Id.* Fitzgerald supported a separate bill, Bill No. 12357-22, that would have prevented surface drilling within county parks but allowed leasing of subsurface rights deeper than 7,000 feet. It would have also mandated that the County include environmental protections, including bad actor provisions, in any future lease agreements. Despite his opposition and subsequent veto prior to Bill No. 12162-22's passage, Fitzgerald said he had no plans to lease county park land for natural gas operations. *Id.* On October 18, 2022, the Pennsylvania Senate Environmental Resources and Energy Committee reported out Senate Bill 1331, which would deny revenue from Act 13 of 2012 drilling impact fees to counties that ban fracking on county-owned land. The bill now moves to the full Senate for action.

Study Finds Spreading of Conventional Oil and Gas Wastewater Poses Danger to Environment and Human Health

On May 26, 2022, Penn State announced that a health study commissioned by the Pennsylvania Department of Environmental Protection (PADEP) to examine the environmental and human health impacts of spreading conventional oil and gas produced water (OGPW) as a dust suppressant concluded the practice is ineffective for that purpose and poses dangers to the environment and human health. *See* News Release, Tim Schley & Ashley J. WennersHerron, Penn State Coll. of Eng'g, "Oil and Gas Brine Control Dust 'No Better' than Rainwater, Researchers Find" (May 26, 2022). The announcement coincided with PADEP's finalization of the study. *See* William Burgos et al., Penn State Univ., "Evaluation of Environmental Impacts from Dust Suppressants Used on Gravel Roads" (May 26, 2022) (Study).

Historically, road spreading OGPW was authorized in Pennsylvania, but PADEP placed a moratorium on the practice in response to a 2018 legal challenge and subsequent decision by the Environmental Hearing Board. *See* Lawson v. PADEP, EHB Docket No. 2017-051-B (May 17, 2018). In accordance with Pennsylvania solid waste laws, using OGPW on roads for dust control could continue if conventional operators demonstrated the chemical makeup of the wastewater was similar to commercially available dust suppressants.

The Study assessed the effectiveness and environmental impacts associated with various dust suppressants used on dirt and gravel roadways, which included testing synthetic rainwater, calcium chloride ($CaCl_2$) brine, soybean oil, and OGPW from three conventional oil and gas operations.

PADEP presented the study results at the July 25, 2022, Oil and Gas Technical Advisory Board meeting. In sum, the study found that OGPW is no more effective than rainwater as a dust suppressant on roadways, likely due in part to OGPW's high sodium concentrations, which can affect how OGPW "sticks" to dust particles. Further, the study showed OGPW actually destabilized gravel roadways, which could lead to more dust and increased long-term road maintenance costs. According to the study results, only $CaCl_2$-based brines and soybean oil were effective dust suppressants, with the study's rainfall-runoff experiments showing that $CaCl_2$-based brines led to the lowest concentration of total suspended solids washed off the roadbeds. Study at 9.

The study also found that runoff from spreading OGPW on unpaved roadways contained concentrations of barium, strontium, lithium, iron, and manganese that exceeded human-health based criteria and levels of radioactive radium that exceeded industrial discharge standards. In addition, most contaminants contained in the applied dust suppressants washed from the roadbed during rain events. However, roadbeds treated with OGPW retained traces of radium, sodium, iron, and manganese after rainfall events and had the highest concentration of combined radium in runoff. *Id.* at 9–10. The study supports Penn State's conclusions from a similar peer-reviewed study published in 2021. *See* Audrey M. Stallworth et al., "Efficacy of Oil and Gas Produced Water as a Dust Suppressant," 799 *Sci. of the Total Env't* 149347 (2021).

On September 20, 2022, PADEP informed the Citizens Advisory Council (CAC) that analysis of brine as a co-product submitted by conventional operators to allow for spreading on roadways for dust control did not meet the state's residual

waste regulations. PADEP is currently updating waste disposal and handling standards for conventional operations and a draft rulemaking is expected to be presented to oil and gas advisory committees following the December 18, 2022, Pennsylvania Grade Crude Development Advisory Council meeting. *See* Meeting Minutes, CAC (Sept. 20, 2022); PADEP, "October 2022 Report to the Citizens Advisory Council" (Oct. 2022). A report from PADEP detailing, among other things, conventional operators' compliance with state environmental and regulatory requirements was due to the Governor's Office on September 1, 2022, but has not been made public as of the time of this report. *See* 52 Pa. Bull. 4229 (July 30, 2022).

EQB Adopts Regulations Reducing Emissions from Unconventional and Conventional Operations

During its June 14, 2022, meeting, the Pennsylvania Environmental Quality Board (EQB) voted 15-3, with one abstention, to adopt Part I of a revised final regulation reducing volatile organic compound (VOC) and methane emissions from unconventional wells and facilities. *See* Final-Form Rulemaking Preamble, EQB, "Control of VOC Emissions from Unconventional Oil and Natural Gas Sources" (June 14, 2022). This regulation establishes reasonably available control technology (RACT) requirements for unconventional oil and natural gas sources of VOC emissions. These sources include natural gas-driven continuous bleed pneumatic controllers, natural gas-driven diaphragm pumps, reciprocating compressors, centrifugal compressors, fugitive emissions components, and storage vessels installed at unconventional well sites, gathering and boosting stations, and natural gas processing plants, as well as storage vessels in the natural gas transmission and storage segment. *Id.* at 1.

A substantially similar rule approved by the EQB in March 2022 did not distinguish between conventional and unconventional emission sources. That rulemaking had advanced to the Pennsylvania House and Senate Environmental Resources and Energy (ERE) Committees and the Independent Regulatory Review Commission (IRRC) for consideration, but the House ERE Committee issued a disapproval letter for the rulemaking on April 26, 2022. Three trade associations also filed a petition for review of the rulemaking in the Commonwealth Court of Pennsylvania. The petition and the House ERE Committee's disapproval letter alleged that the Pennsylvania Department of Environmental Protection (PADEP) failed to comply with Act 52 of 2016, which requires that any rulemaking concerning conventional oil and gas wells be undertaken separately and independently from those concerning unconventional oil and gas wells or other subjects. As a result, PADEP withdrew the regulation from IRRC consideration on May 4, 2022. *See* Vol. 39, No. 2 (2022) of this *Newsletter*.

PADEP revised the regulation to remove provisions regulating conventional wells and facilities and submitted the regulation to the EQB for approval, which it approved during its June 14, 2022, meeting. The House ERE Committee met on July 11, 2022, and approved a letter to the IRRC announcing its opposition to the final EQB regulation on a number of grounds, including that the revised regulation had not gone through public notice and comment. During its July 21, 2022, meeting, the IRRC unanimously voted to approve the regulation. The House ERE Committee met on August 2, 2022, to vote on a concurrent resolution disapproving of the rule, and the resolution was voted out of committee. The House and Senate each had 30 calendar days, or 10 legislative voting days (whichever is later), to adopt the concurrent resolution. Neither body took further action.

On October 12, 2022, the EQB voted 15-3 to approve Part II, a separate rule addressing VOC and methane emissions from conventional wells and facilities. *See* Final-Omitted Rulemaking Preamble, EQB, "Control of VOC Emissions from Conventional Oil and Natural Gas Sources" (Oct. 12, 2022). PADEP recommended that the EQB adopt Part II as a final-omitted regulation as part of the process to meet the U.S. Environmental Protection Agency's December 16, 2022, deadline for the state to adopt methane emission controls for oil and gas operations. *See* Executive Summary, "Control of VOC Emissions from Conventional Oil and Natural Gas Sources—25 Pa. Code Chapter 129" (Oct. 12, 2022). Adoption of Part II as a final-omitted regulation allows for the rulemaking to skip the proposed rulemaking stage and proceed forward without any public comment. Per the Pennsylvania Commonwealth Documents Law, PADEP may use the final-omitted process if starting at the proposed stage for rulemaking is "impracticable, unnecessary, or contrary to the public interest." 45 Pa. Stat. § 1204(3). In its executive summary of the rulemaking, PADEP justified promulgation of Part II as a final-omitted regulation, stating that "[a] public comment period is also contrary to the public interest because it will delay the implementation of the VOC RACT requirements in this final-omitted rulemaking, resulting in the Commonwealth being unable to satisfy the December 16, 2022, sanction deadline." Executive Summary at 5. Under the Regulatory Review Act, 71 Pa. Stat. §§ 745.1–.14, the IRRC and the House and Senate still have the opportunity to review the rulemaking. Failure of the state to adopt this rule reportedly may result in the loss of over $500 million in federal highway funding. Executive Summary at 5.

PADEP Officials Hold Workgroup Meetings and Finalize First Bid Packages to Plug Conventional Oil and Gas Wells Using Federal Funds

In response to passage of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, 135 Stat. 429 (2021), and its conventional well plugging component, the Pennsylvania Department of Environmental Protection (PADEP) invited stakeholders to participate in several workgroup sessions to gather information and assist with PADEP's development of a new conventional oil and gas well plugging program. *See* PowerPoint Presentation, PADEP, "Infrastructure Investment and Jobs Act (IIJA) Implementation" (Apr. 28, 2022); Notice, "DEP Inviting Stakeholders to Participate in Workgroups on New Federal Conventional Oil & Gas Well Plugging Program," *PA Env't Digest* (Aug. 4, 2022).

PADEP held seven workgroup sessions between August 23 and September 19, 2022. The sessions were open to the public, other interested parties, and industry. Covered topics included due diligence and documentation of previously undocumented abandoned wells; project prioritization; engineering design, permitting, and monitoring requirements; and handling of waste generated from plugging abandoned wells and reclaiming well sites. *See* PADEP, "September 2022 Report to the Citizens Advisory Council" (Sept. 2022); PADEP, "October 2022 Report to the Citizens Advisory Council" (Oct. 2022).

Of note, at a September 1, 2022, workgroup meeting, Joe Kelly, PADEP Bureau of Oil and Gas Planning and Program Management, said that any waste generated by the new plugging program will *not* be exempt from hazardous waste requirements, unlike the same or similar wastes generated from active oil and gas production wells and facilities (as exempted by 40 C.F.R. § 261.4(b)(5)). *See* David E. Hass, "DEP: Wastes Generated by the New Conventional Oil & Gas Well Plugging

Program Will NOT Be Exempt from Hazardous Waste Regulations, Unlike Wastes from Active Wells," *PA Env't Digest Blog* (Sept. 1, 2022). Kelly went on to say that contractors will also have to meet existing spill notification and cleanup requirements and prepare pollution prevention contingency plans to implement spill and leak prevention measures. *Id.*

The stakeholder input PADEP received during the workgroup meetings will assist the agency in developing Pennsylvania's IIJA well plugging program, including preparing invitations to quote, requests for bids, and requests for proposals. Following the last workgroup session, PADEP finalized the first group of bid packages to plug 249 conventional oil and gas wells using IIJA funds, which were posted on BidExpress.com for review by potential contractors. *See* PADEP, "Plugging Contractor Information," https://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/LegacyWells/Pages/Contractors.aspx.

Waste disposal and handling updates are expected to be presented to the Pennsylvania Grade Crude Development Advisory Council at its scheduled December 18, 2022, meeting. The most recent draft of the waste handling regulations update was posted by PADEP in September 2021. *See* PADEP, Draft Chapter 78 Conventional Oil and Gas Well Regulations (Aug. 19, 2021).

Third Circuit Finds Plaintiffs Lack Standing to Challenge the DRBC's Hydraulic Fracturing Ban

On September 16, 2022, the U.S. Court of Appeals for the Third Circuit affirmed a district court ruling that Pennsylvania state legislators and municipalities lacked standing to challenge the Delaware River Basin Commission's (DRBC) regulation banning hydraulic fracturing for natural gas within the basin. *Yaw v. DRBC*, 49 F.4th 302 (3d Cir. 2022), *aff'g* No. 2:21-cv-00119, 2021 WL 2400765 (E.D. Pa. June 11, 2021); *see* Vol. XXXVIII, No. 3 (2021) of this *Newsletter*. The court held that the appellants failed to meet the standing requirements of Article III of the U.S. Constitution because: (1) in the case of the state senator appellants, individual members of the state legislature lack standing to assert the interests of the legislature as a whole; and (2) in the case of the municipality appellants, their alleged injuries were "conjectural" or "hypothetical," as opposed to "actual" or "imminent." The court also held that none of the appellants had standing as trustees of Pennsylvania's public natural resources under the Environmental Rights Amendment to the Pennsylvania Constitution because the DRBC's ban has not cognizably harmed the trust.

The five-member DRBC is governed by a compact between the federal government and four states that draw water from the Delaware River: Pennsylvania, New Jersey, Delaware, and New York, represented by a member of the U.S. Army Corps of Engineers and each state's governor, respectively. *See* Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688. The DRBC has authority to approve, construct, operate, and regulate projects and facilities that use the basin's water resources. It can also address issues outside the basin if they have a substantial effect on the basin's water quality and water supply and if the issues conflict with the DRBC's comprehensive plan. *See* Cong. Research Serv., "Federal Conservation of the Delaware River" (Mar. 18, 2015).

The Third Circuit's decision follows the DRBC's February 2021 vote to ban hydraulic fracturing in the basin, which had been under a de facto moratorium since 2010. In support of the ban, the DRBC found that hydraulic fracturing for extraction of oil and natural gas "poses significant, immediate and long-term risks to the development, conservation, utilization, management, and preservation" of water resources within the basin. *Yaw*, 49 F.4th at 307. Following the ban, Pennsylvania legislators and municipalities filed suit, arguing that the DRBC overstepped its legal authority. Among other things, they alleged the ban "violated the Takings Clause of the United States Constitution, illegally exercised the power of eminent domain, and violated the Constitution's guarantee of a republican form of government." *Id.*

Acknowledging that challenges are likely to continue, the court noted that its ruling is narrow. It said that although the legislators and municipalities lack standing, they can attempt to seek redress of the issues by other means, such as requesting that the DRBC reverse the ban, seeking to amend the compact, or persuading a party with standing to assert the institutional injuries. *Id.*

TEXAS – OIL & GAS

William B. Burford, Reporter

Royalty Deed Conveyed Grantor's Individual Ownership, Not Separate Interest Held as Trustee

Brown v. Underwood, No. 11-20-00138-CV, 2022 WL 1670693 (Tex. App.—Eastland May 26, 2022, no pet.) (mem. op.), involved a royalty interest in land in Glasscock County, Texas, acquired in 1975 by R. J. Smith, Jr. Shortly after the acquisition Smith entered into an agreement, confirmed by a subsequent assignment, that he held one-half of the royalty interest as trustee for W. H. and Shirley Ann Underwood. In 1985, after Shirley Ann Underwood had received the interest held in trust in a divorce settlement, Smith executed a deed to Shirley Ann Conaway (formerly Underwood), conveying one-half of the interest he had acquired in 1975. The deed named R. J. Smith, Jr., as grantor without any indication of whether he was conveying his individual interest or that held in his capacity as trustee. *Id.* at *1–2. Affirming the trial court's summary judgment in a suit filed by Sandra Smith Brown, the surviving wife of R. J. Smith, Jr., against the successors to Shirley Ann Conaway's interest, the court of appeals construed the deed to have conveyed the interest that Smith had owned individually.

The 1985 deed did not specify which of the two interests Smith was conveying and was silent as to the capacity in which he conveyed, the court observed. *Id.* at *7. The four corners of the deed therefore indicated that Smith conveyed his individual interest, the court declared, and Brown's lawsuit was an attempt to change the effect of its express language. *Id.* She had no evidence, but presented only speculation, of mistake in the execution of the deed. (The opinion does not discuss whether reformation may have been long barred by the statute of limitations even if mutual mistake were proven.) Further, an affidavit of clarification that Brown had executed, which she contended operated as a correction of the deed to show it conveyed the interest held as trustee, could not be given effect. *Id.* at *9. Under the murky Texas "correction instrument" statutes, the purported correction must be considered a material one, according to the court, requiring that it be joined by parties on both sides. *Id.* (citing Tex. Prop. Code § 5.029).

Bona Fide Purchaser Status Depends on Notice

Last year the Texas Supreme Court held, in *Broadway National Bank v. Yates Energy Corp.*, 631 S.W.3d 16 (Tex. 2021), that the infamous Texas "correction instrument" legislation enables the original parties to a conveyance to execute an effective correction conveyance without the participation of subsequent purchasers of one of the parties' interest. *See* Vol.

XXXVIII, No. 3 (2021) of this *Newsletter*. Such a correction instrument would not be binding, however, on a subsequent bona fide purchaser for value without notice of the mistake being corrected, and the supreme court remanded the case to the court of appeals for consideration of the bona fide purchaser claims of the owners of interests under the conveyance that had been corrected after their acquisition. *Yates Energy Corp. v. Broadway National Bank*, No. 04-17-00310-CV, 2022 WL 3047107 (Tex. App.—San Antonio Aug. 3, 2022, no pet. h.) (mem. op.), addressed those claims on remand.

The dispute involved mineral interests in Gonzales and DeWitt Counties, Texas, owned by Broadway National Bank (Broadway) as trustee of a trust created by Mary Frances Evers before her death in 2003. According to the trust agreement, as amended, three-fourths of the trust assets were to be distributed upon her death to her three daughters, and the remaining one-fourth was to be held in trust for the benefit of a son, John, until his death and then distributed to other descendants of Mary's. Notwithstanding that John's interest was to continue to be held in trust, Broadway, as trustee, executed a mineral deed in 2005 conveying 25% of the trust's mineral interests to John in fee simple. In 2006 Broadway executed and filed for record a correction mineral deed, in which John did not join, purporting to change the interest conveyed to John from a fee simple to a life estate and to convey the remainder to the ultimate beneficiaries under Mary's trust agreement, reciting that the subject minerals had been conveyed to John in fee simple "[b]y oversight." *Id.* at *1 (alteration in original). Broadway sent copies of the correction deed to Yates Energy Corp. (Yates Energy), which was the lessee of some of the mineral interests, in November 2006.

In 2012 John executed a deed conveying his mineral interests in the land to Yates Energy, which then conveyed some of the interests to EOG Resources, Inc., Jalapeno Corporation, ACG3 Mineral Interests, Ltd., Glassell Non-Operated Interests, Ltd., and Curry Glassell. After a title attorney questioned the effect of Broadway's 2006 correction deed, Broadway, this time joined by John and the other distributees under the 2005 mineral deed, executed another correction mineral deed in 2013, conveying only a life estate to John and stating that the 2005 fee simple conveyance to him had been an oversight. When John died on February 10, 2014, a dispute arose between Yates Energy and its assignees, on the one hand, and the remaindermen under Mary's trust agreement, on the other, over whether Yates Energy had acquired the fee simple title to the mineral interests purportedly conveyed to John in 2005 or only the life estate conveyed to him in the 2013 correction deed. The probate court hearing the matter granted summary judgment in favor of the remaindermen, but the court of appeals reversed on the basis that the 2013 correction deed was ineffective for failure of the purchasers of John's interest to join in it. In its reversal of that judgment the supreme court held that the 2013 correction deed was effective, but the question remained whether Yates Energy and its assignees might have been bona fide purchasers free of its effect. *Id.* at *2.

The sole issue on remand, the court began, was whether Yates Energy and its assignees had acquired their interests without notice, actual or constructive, of the remaindermen's claim. *Id.* at *6. Broadway had sent Yates Energy copies of its 2006 correction deed, establishing that it had actual notice of the remaindermen's claim. *Id.* at *7. The court rejected Yates Energy's argument that it should not be charged with notice of the claim, despite having been notified of the ineffective 2006 correction deed, because "a void correction deed provides notice of nothing." *Id.* The validity of the remaindermen's claimed interest, said the court, was irrelevant to the question of whether Yates Energy had notice of that claim. *Id.* Because Yates Energy had actual notice of the remaindermen's claim before its acquisition, and because that claim was validated by the 2013 correction deed, the court of appeals affirmed summary judgment against Yates Energy. *Id.* at *8.

The court reached a different result regarding Yates Energy's assignees, however. There was no summary judgment evidence that any of them had been or should have been actually aware of the 2006 correction deed. Because it was outside their chain of title, John having been conveyed his fee simple title before Broadway executed and filed for record the purported 2006 correction deed, Yates Energy's purchasers were not on constructive notice of the remaindermen's claim by way of the 2006 deed. *Id.* at *9–11. The court of appeals accordingly reversed the probate court's summary judgment for the remaindermen against Yates Energy's assignees and remanded the case to that court for further proceedings. *Id.* at *12.

Statute of Limitations Bars Contamination Claims

Ali Reza Lahijani in 2002 and 2004 acquired land on which there was a producing oil well. Merit Energy Company, L.L.C. (Merit), operated the well from 1995 until April 1, 2002, and Americo Oil & Gas Production Co. (Americo) operated it until production ceased in 2008. Lahijani sued Americo in 2017, and, as reported in Vol. 39, No. 2 (2022) of this *Newsletter*, summary judgment dismissing the suit on the basis of the statute of limitations was upheld in *Mustafa v. Americo Energy Resources, LLC*, 650 S.W.3d 760 (Tex. App.—Houston [14th Dist.] 2022, pet. denied). In 2019 Lahijani sued Merit in a different district court. In *Lahijani v. Merit Energy Co.*, No. 14-20-00393-CV, 2022 WL 3452894 (Tex. App.—Houston [14th Dist.] Aug. 18, 2022, no pet.) (mem. op.), the same court of appeals reached the same conclusion as in *Mustafa*.

Merit's operations on the property ceased in April 2002, so that unless the discovery rule applied, the two-year limitations period began to run at that time. *Id.* at *3. Because the type of injury alleged by Lahijani—soil and groundwater contamination stemming from oil and gas operations—is not inherently undiscoverable, the court held here as in *Mustafa*, the discovery rule was inapplicable. *Id.* Even if the discovery rule had been applicable, the court went on, Merit presented undisputed evidence that Lahijani was aware of contamination on the property more than two years before he filed suit against Merit. *Id.* Even if he was not aware of the full extent of the injury, the statute of limitations began to run once he learned of an injury to the property. *Id.* at *4.

Suit Against City Based on Alleged State Regulatory Preemption Allowed to Proceed

City of Port Arthur v. Thomas, No. 09-21-00111-CV, 2022 WL 3868106 (Tex. App.—Beaumont Aug. 31, 2022, no pet.), involved a lawsuit filed by Kirk C. Thomas, the owner of land on which he conducted landfarming for the disposal of waste drilling mud, against the City of Port Arthur and its Director of Public Works, Alberto Elefano. Thomas had been using a residential street as access for heavy trucks transporting the drilling mud. He sued for an injunction when Elefano sought to require permits, according to ordinance, for the use of the street on terms that would be, in Thomas's view, unduly onerous or impossible to meet. This appeal followed the trial court's denial of the City's plea to the jurisdiction asserting immunity from Thomas's claims.

"[W]hile governmental immunity provides broad protection to the state and its officers," the court began, "it will not bar a suit against a governmental officer for acting outside his authority—i.e., an *ultra vires* suit." *Id.* at *7. "To qualify under the *ultra vires* exception, a [plaintiff] cannot complain of a government officer's exercise of discretion, 'but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" *Id.* (internal quotation marks omitted) (quoting *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016)). That Thomas had been required to seek a permit, while others who had allegedly used the street to haul heavy loads had not, did not mean that Elefano had acted outside his authority, the court said. *Id.* at *8. The court found that there were fact issues, however, bearing on whether the City's and Elefano's authority to enforce the ordinance was preempted by Tex. Nat. Res. Code § 81.0523. That statute generally prohibits municipal regulation of "oil and gas operations," including disposal and remediation activities, with some exceptions, among which are traffic regulations if they are "commercially reasonable" in that they allow a "reasonably prudent operator" to "fully, effectively, and economically exploit" their operation. *Port Arthur*, 2022 WL 3868106, at *9 (quoting Tex. Nat. Res. Code § 81.0523). Thomas contended that the City's enforcement against him was commercially unreasonable, while the City maintained that Thomas was not acting as a reasonably prudent operator. How the facts emerged at trial, the court concluded, would determine the lawfulness of Elefano's enforcement of the ordinance. *Id.* at *10.

The court went on to hold that Thomas had not established an equal protection claim under the Texas Constitution. It is insufficient, the court noted, to show that a law has been enforced against some but not others. *Id.* at *12. Here the City had reacted to citizen complaints, and courts have recognized that as a rational basis for governmental entities focusing and allocating their limited resources. *Id.* Nor did Thomas assert a valid inverse condemnation claim. A party may have such a claim if governmental action has resulted in the taking, damaging, or destruction of the party's property for public use, but the ordinance here dealt with regulation of road use, not regulation of Thomas's property. *Id.* at *13.

Deed Held Not Limited by Mischaracterizing Described Royalty Interest as Community Property

Smith v. Kingdom Investments, Ltd., No. 14-20-00447-CV, 2022 WL 3725070 (Tex. App.—Houston [14th Dist.] Aug. 30, 2022, no pet. h.) (mem. op.), involved ownership of 1/4 of the 1/8 royalty payable under an oil and gas lease covering land in Brazoria County, Texas. Ronald D. and Kimberly Smith claimed the interest as the grantees of a 1996 deed from Henry and Ophelia Avitts with no mineral reservation. The principal issue was whether the grantors had owned the royalty interest at the time of the deed or had conveyed it in 1974 into a trust for the benefit of their five daughters.

The deed to the daughters' trustee had described the interest being conveyed as "all of the community property Interest of Henry Avitts and wife, Ophelia Avitts, being a 0.03125 royalty interest lease" on the property. *Id.* at *7. The interest in question had been Henry's separate property, and the Smiths argued that the description indicated that Henry had intended to convey only community property. *Id.* The court disagreed. The deed did not simply convey the Avittses' community property, it pointed out, but had specifically described the interests being conveyed into the trust as 1/4 of the 1/8 royalty interest in the land. *Id.* at *8. The labeling of the trust assets as community property was an incidental factual matter that was intended to describe the assets of the trust, not govern their disposition, the court concluded. *Id.*

The Smiths also asserted that Henry had owned an additional 1/4 of 1/8 royalty interest in part of the land, which had been conveyed to them in the 1996 deed. Henry's parents had conveyed to him an undivided 1/2 interest in that tract in 1932, effective on both their deaths; and Henry and his parents had joined in conveying 1/2 of the 1/8 royalty to others in 1934. In 1936 Henry's parents had then conveyed Henry another 1/4 of the 1/8 royalty. If Henry had thus become vested with all of the unsold 1/2 of the 1/8 royalty, his parents would have been left with no interest. Henry, however, had later accepted a gift deed in which his mother had conveyed 1/28 of the 1/8 royalty to each of her six children, retaining 1/28 to herself, thereby waiving or abandoning, according to the court, any claim to an additional royalty interest. *Id.* at *6. (A more straightforward analysis might be that the evidence indicated Henry concurred that the 1/2 of the 1/8 royalty conveyed in 1934 had been the entire interest that would have vested in Henry's possession on his parents' death.)

Indemnity Obligations Held Unreduced by Indemnitee's Failure to Allocate Settlement Between Indemnified Claims and Other Settlement Benefits

In *Wagner v. Exxon Mobil Corp.*, No. 14-21-00122-CV, 2022 WL 3970872 (Tex. App.—Houston [14th Dist.] Sept. 1, 2022, pet. filed), *withdrawn and superseded*, 2022 WL 16756860 (Tex. App.—Houston [14th Dist.] Nov. 8, 2022), the court reinstated a jury award of $57.5 million in favor of Exxon Mobil Corp. (Exxon) against Bryan C. Wagner and Duer Wagner III that the trial court had reduced in its judgment to $14.11 million.

M.J. Farms had sued both Exxon and the Wagners in Louisiana for oilfield contamination on a mineral servitude the Wagners had acquired from Exxon in 1994. After Exxon settled the claim for $57.5 million, it sought that sum from the Wagners under the indemnity provisions of the purchase and sale agreement and assignment between them, which broadly required the Wagners to indemnify Exxon against claims resulting from ownership or operation of the property, including those connected with the environmental condition of the property, by either Exxon or the Wagners at any time before or after the sale. The jury found that Exxon's settlement was made in good faith and reasonable and prudent under the circumstances, but the trial court determined that only $14.11 million of Exxon's settlement should be considered applicable to the indemnified claims. *Id.* at *1–2.

The Wagners maintained, and the trial court had largely agreed, that Exxon's failure to allocate the sum paid to the plaintiff in its settlement between indemnified and non-indemnified claims was fatal to its recovery, pointing out that Exxon's settlement agreement gained it not only the dismissal of the suit but also a right of first refusal to purchase the plaintiff's land, an assignment of the plaintiff's claims against the Wagners, and dismissal of unrelated lawsuits. *Id.* at *4. Even though the Wagners had elicited testimony that tended to show that the settlement was thus not reasonable because it included benefits allegedly outside the indemnity obligations, said the court, the jury was entitled to disregard this contrary evidence in reaching its finding. *Id.* at *9. Considered in conjunction with the sources and extent of the environmental contamination at issue, the court remarked without much explanation, all costs related to the settlement likely fell within the scope of the Wagners' extensive indemnity obligations. *Id.* at *10.

Editor's Note: The reporter's law firm has represented the Wagners in this case.

Free-Gas Clause Held Not to Preclude Deduction of Fuel Gas as Post-Production Expense

The court in *EnerVest Operating, LLC v. Mayfield*, No. 04-21-00337-CV, 2022 WL 4492785 (Tex. App.—San Antonio Sept. 28, 2022, no pet. h.) (mem. op.), construed an oil and gas lease from Stanley B. Mayfield and his sister Gerry Ingham covering a tract in Sutton County, Texas, from which the current lessee, EnerVest Operating, LLC (EnerVest), produced gas and paid Mayfield and Ingham royalty. The lease called for gas royalty to be paid on the market value at the mouth of the well. Another lease clause provided that the lessee would have "free use of oil, gas, and water from said land . . . for all drilling operations hereunder, and royalty shall be computed after deducting any so used." *Id.* at *2.

Enervest used some of the gas produced from the lease as fuel for compressors and dehydrators necessary for the marketing of gas production and deducted the fuel gas before calculating the lessor's royalty. The lessors contended that because the free-gas clause only allowed the lessee the free use of gas for drilling operations on the premises, the fuel gas should not have been deducted. *Id.* Reversing the trial court's judgment, the court of appeals agreed with EnerVest's interpretation of its royalty obligation.

Royalty provisions specifying a "market value at the well" calculation, the court pointed out, require the royalty holder to share in post-production costs. *Id.* at *3. Market value, it continued, is determined by subtracting post-production costs from downstream sale proceeds. *Id.* Because the gas used as fuel contributed to the enhancement of the value of the gas sold, it could be deducted as a post-production cost. *Id.* at *4. An isolated reading of the free-gas clause as a limitation against deduction of gas from royalty except when used in drilling operations would ignore the plain language of the gas royalty provision requiring the valuation of gas at the mouth of the well. *Id.* The court further held that the conduct of EnerVest's predecessors-in-interest in paying royalty on the fuel gas they had used was not binding on EnerVest: to interpret the lease based on such past conduct would impermissibly alter its plain language. *Id.* at *5.

Overriding Royalty Reservation Held Void Because Assignor Was Stranger to Title

Armour Pipe Line Co. v. Sandel Energy, Inc., No. 14-20-00412-CV, 2022 WL 4542049 (Tex. App.—Houston [14th Dist.] Sept. 29, 2022, no pet. h.), involved a 1999 assignment of oil and gas leases from Armour Pipe Line Co. (Armour) and individuals and entities associated with the Cashman family to Sandel Energy, Inc. (Sandel).

The assignment purported to except and reserve to Armour a specified overriding royalty interest. Armour held no title to the leases at the time of the Sandel assignment, however, but only a mortgage lien on them that was never foreclosed. *Id.* at *1–2. The court of appeals affirmed summary judgment in favor of Sandel on the basis that a reservation to a stranger to title is void.

Armour argued that its overriding royalty should be recognized on the basis of the doctrine of estoppel by deed, contending that recitals in the assignment were binding on Sandel. *Id.* at *5. The contents Armour relied on, the court countered, were not statements that Armour owned any interest in the leases or in the reserved overriding royalty interests. *Id.* The court also rejected the Cashmans' contention that if the purported exception and reservation of the overriding royalty interest to Armour was ineffective, it left the interest vested in the Cashmans. The Cashmans pointed to no authority, the court noted, that title to a property that is the subject of an invalid reservation or exception remains in the grantor. Courts that have addressed the issue, according to the opinion, have concluded that title passes to the grantee. *Id.* at *12.

Presumed-Grant Theory Held Not Available to Establish Mineral Title

The court in *Balmorhea Ranches, Inc. v. Heymann*, No. 08-20-00127-CV, 2022 WL 14049796 (Tex. App.—El Paso Oct. 24, 2022, no pet. h.), affirmed summary judgment for Ann Ross Heymann, a granddaughter of E. F. Rosenbaum and owner by inheritance of 1/12 of his interest, if any, in 200 acres of land in Reeves County, Texas.

Rosenbaum had owned the 200 acres in question, as well as other land in the same Section 52, under deeds from his parents executed in 1917 and 1919. In 1926 he conveyed the other land, but not the 200 acres at issue here, to Balmorhea Livestock Company (Balmorhea Livestock). In 1942 a trustee in Balmorhea Livestock's bankruptcy conveyed the same land, not including the disputed 200 acres, to Balmorhea Ranches, Inc. (Balmorhea Ranches). Balmorhea Ranches executed oil and gas leases purporting to include most or all of Section 52, including the 200 acres never conveyed by Rosenbaum, in 1957 and in ensuing years, culminating in a 2015 lease to Apache Corporation (Apache). When Apache questioned Balmorhea Ranches' title to the 200 acres, it filed suit against Heymann to establish its title on the basis of the presumed lost grant doctrine. *Id.* at *1–2.

Generally, the court began, "the doctrine applies when there is a gap in the chain of title and operates to create an evidentiary presumption that a deed may have been executed in favor of the party who has asserted ownership for a long time." *Id.* at *5. Usually a question of fact, "the presumption may be established as a matter of law in cases where the deeds are ancient and the evidence is undisputed." *Id.* Here, according to the court's analysis, there was no evidence of a gap or defect involving "ancient" deeds, a prerequisite for proving the application as a matter of law. *Id.* at *6. The court considered it notable that in fact Balmorhea Ranches' own claim to title depended on the same 1919 deed as Heymann's title traceable to Rosenbaum. *Id.* at *7.

For the same reason—the lack of any gap or defect derived from "ancient" documents—the court concluded that "Balmorhea Ranches [had] not even raised a fact issue as to the potential application of the doctrine of presumed grant." *Id.* While it was not out of the realm of possibility, the court acknowledged, that Rosenbaum could have conveyed the rest of Section 52, Heymann had presented evidence of a clear chain of title to her from 1919 to the present. *Id.* The court remarked that "[t]he decades-long period of time during which no Rosenbaum heir asserted ownership over the property would likely be a relevant fact if the dispute could be traced back to a gap or defect in title from what Texas courts consider ancient documents." *Id.* None of the relevant dates here, it concluded, met that threshold requirement. *Id.*

The result in this case seems correct in that establishment of title to a mineral interest by presumed grant should require something more than the execution of oil and gas leases by a party with no record source of any interest. The court's suggestion that any claimed gap in the title here was simply not suffi-

ciently ancient, though, may not be an altogether satisfactory explanation of its decision.

Deed to Trust, Rather than Its Trustee, Held Valid

Not an oil and gas case, *Fugedi v. Initram, Inc.*, No. 21-40365, 2022 WL 3716198 (5th Cir. Aug. 29, 2022) (per curiam), is of significant interest to mineral title examiners.

Yale Development, LLC (Yale Development), conveyed real property in Houston, Texas, to the "CARB Pura Vida Trust." Nicholas Fugedi, as trustee of the trust, filed suit to quiet title to the property shortly after the deed was executed and recorded. When defendants in the suit argued that the deed was invalid because a trust is not a legal entity, Fugedi executed a corrected deed with Yale Development naming the grantee as "Nicholas Fugedi in his capacity as Trustee of the CARB Pura Vida Trust" along with an affidavit clarifying that Fugedi was always the intended grantee in his capacity as trustee and that it was a scrivener's error for the original deed to state otherwise. *Id.* at *1. The district court granted summary judgment to the defendants on the basis that the original deed was invalid because it did not name a grantee. The correction deed was ineffective, according to that court, because it purported to make a material change, requiring that both parties join, an impossibility since one of the parties did not exist. *Id.*

The court of appeals reversed. It appeared to the court that the deed was valid under Texas law. *Id.* at *3. Although it acknowledged that a trust is not a legal entity under Texas law but instead a relationship, it observed that "Texas courts have long recognized a certain amount of flexibility in naming the grantee." *Id.* Texas decisions, the court went on, indicate that its courts would read the original deed to convey to Fugedi in his capacity as trustee inasmuch as Fugedi was in fact the trustee of the named trust and the only entity capable of holding property for the trust. *Id.* He was therefore the obvious party that should have been named as grantee so that the identity of the grantee could be ascertained from the deed's context. *Id.* Moreover, even if the original deed were determined to have been invalid, said the court, the correction deed's clarification was nonmaterial in that it merely clarified Fugedi's capacity. *Id.* at *4. Texas statutes expressly allow corrections by a party to a deed if accompanied by an affidavit by someone with personal knowledge explaining the correction, the court pointed out. *Id.* (citing Tex. Prop. Code § 5.028).

WYOMING – OIL & GAS

Jamie Jost & Amy Mowry, Reporters

Wyoming Supreme Court Considers Deduction of Fee Under Netback Tax Valuation

WPX Energy Rocky Mountain, LLC. v. Wyoming Department of Revenue, 2022 WY 104, 516 P.3d 449, consolidated two appeals involving the deduction of certain expenses from tax liability by WPX Energy Rocky Mountain, LLC (WPX). The cases concerned the extent to which WPX was entitled to deduct a "reservation fee" for the tax years 2013–2015 under Wyo. Stat. Ann. § 39-14-203. The cases were certified to the Wyoming Supreme Court under Wyo. R. App. P. 12.09(b).

Oil and gas producers in Wyoming must pay a severance tax on the value of the gross product extracted. *WPX Energy*, 2022 WY 104, ¶ 6 (citing Wyo. Stat. Ann. § 39-14-203(a)(i)). The amount of the tax may be calculated using the "netback valuation method" under section 39-14-203(b)(vi)(C), which allows an oil and gas producer to deduct transportation expenses and third-party processing fees from the taxable value of production. *Id.* ¶ 7. WPX used this method to value its production for the tax years 2013–2015. *Id.*

In 2017, the Wyoming Department of Audit (DOA) began auditing WPX's tax records for 2013–2015. While the audit was underway, the State Board of Equalization (Board) issued a decision on WPX's deduction in 2012 of "reservation fees"—monthly charges paid by WPX to pipeline companies to reserve a certain amount of pipeline capacity—that WPX fully deducted even though it did not use some of the capacity, and that the Wyoming Department of Revenue (DOR) challenged. The Board's decision affirmed WPX's deduction of all its reservation fees, and DOR did not seek review of the Board's ruling. *Id.* ¶¶ 5, 8–9. At the conclusion of its audit, notwithstanding the Board's ruling, DOA rejected WPX's deduction of all its reservation fees, including for those months when no gas was shipped. *Id.* ¶ 10. DOR charged WPX with approximately $2.7 million in additional severance taxes plus interest, and WPX appealed to the Board. *Id.*

The Board issued its decision in 2021, concluding that (1) WPX was entitled to deduct its pipeline reservation fees for those months during which it transported some, but less than its reserved capacity of, production; (2) WPX was not entitled to deduct its reservation fees for those months when no production was transported; and (3) WPX was not entitled to deduct reservation fees used by the pipeline company to recoup pipeline construction costs. *Id.* ¶ 13. Both WPX and DOR sought review of their respective unfavorable portions of the decision, and the district court consolidated and certified the cases to the supreme court. *Id.* ¶ 14.

Interpreting the netback valuation statute as a matter of law, the court acknowledged the statute was "certainly . . . ambiguous in that reservation fees are deductible if they are 'expenses incurred by the producer for transporting produced minerals to the point of sale[.]'" *Id.* ¶ 21 (alteration in original) (quoting Wyo. Stat. Ann. § 39-14-203(b)(vi)(C)). Considering the legislature's intent as to the application of the statute, the court concluded that WPX's reading of the statute to allow deductions even when no product was transported was overbroad, but that DOR's disallowance of the deduction of reservation fees used by the pipeline operator to offset construction costs was unsupported by the statutory language. *Id.* The court affirmed the Board's decision allowing WPX to deduct its reservation fees for any months when some product, even if less than its reserved capacity, was transported, and also affirmed the Board's conclusion that WPX's reservation fees were not deductible in those months when no product was transported. *Id.* ¶¶ 30, 34. The court reversed the Board's decision that WPX's reservation fees were not deductible if the pipeline company used those fees to recoup pipeline construction costs. *Id.* ¶ 43.

Wyoming Supreme Court Finds Term Interest Covered by Remainderman's Oil and Gas Lease

North Silo Resources, LLC v. *Deselms*, 2022 WY 116A, 518 P.3d 1074, consolidated two cases involving an oil and gas lease covering lands in Laramie County, Wyoming. North Silo Resources, LLC (North Silo), the current mineral lessee, claimed the lease covered 100% of the minerals in the lands, sought to quiet title to its lease interest, and asserted a claim for breach of lease against the mineral owner. The appellees, a group of landowners, claimed the lease covered only 50% of the minerals and that North Silo lacked standing to bring its quiet title and breach of lease claims. The district court found in favor of the landowners on all claims and North Silo appealed.

The supreme court considered two dispositive issues: (1) what minerals were encumbered by North Silo's lease, and (2) whether North Silo had standing to assert its quiet title and breach of lease claims.

The facts of the case revealed the dispute traced back to a warranty deed in which the grantor, C Bar J Ranches, Inc. (C Bar J), as the owner of both the surface and all minerals in the property, conveyed the property to William and Charlotte Hutton and reserved to itself a term mineral interest for 20 years, at the end of which "the mineral rights [were] to become the property of the purchasers." *Id.* ¶ 3. In 1992, the Huttons entered into a contract for deed with Paul and Cheryl Woods and recorded a memorandum of the contract. Under the terms of the contract, the Huttons reserved a life estate in all minerals they owned along with "the exclusive right and privilege of making, executing and delivering leases of the land for the extraction or production of minerals." *Id.* ¶ 4. In 2008, the Woods fulfilled the terms of the contract and recorded the Huttons' 1994 warranty deed of the property. *Id.*

Also in 2008, the Woods entered into separate contracts for deed with Kirstin Deselms and Hugh Deselms covering the property. The related deeds, recorded in 2013, covered the surface and one-half of the oil, gas, and other minerals "now owned" by the Woods or that the Woods would later acquire. *Id.* ¶ 5. The Woods reserved the other one-half oil, gas, and mineral interest for their lives and the lives of their children. These contracts each acknowledged that "all mineral rights associated with the Property were previously reserved by William and Joanne [Charlotte] Hutton for their joint lifetimes, and that it cannot be determined with certainty when Sellers will acquire clear title to the mineral rights associated with the Property." *Id.* In 2015, Kirstin Deselms conveyed her parcel to Singletree Land, LLC. *Id.*

After entering their contract with the Woods in 1992, the Huttons quitclaimed all of their rights in the property to the Hutton Family Partnership. In 2010, the Huttons and the Hutton Family Partnership executed a lease covering the property in favor of Cirque Resources (Cirque). Cirque exercised its option to extend the lease in 2015. In 2016, the Hutton Family Partnership quitclaimed all of its oil, gas, and mineral rights in the property to Hutton Minerals, LLC. *Id.* ¶¶ 6, 7.

The crux of the dispute centered on whether the Huttons' remainder interest in C Bar J's 20-year term mineral reservation vested at the time of the C Bar J warranty deed such that the Huttons' life estate covered 100% of the minerals in the property. North Silo argued it did. The landowners claimed the remainder did not vest, and the Huttons' life estate covered only the 50% mineral interest the Huttons owned outright in 1992. According to the landowners, C Bar J's 50% term mineral interest passed to the Woods upon its expiration. *Id.* ¶¶ 9, 10. In an effort to clarify the mineral ownership between themselves, in 2019 the landowners executed and recorded a stipulation instrument (Stipulation) asserting the parties' mineral ownership. *Id.* ¶¶ 10, 12. Neither C Bar J nor William R. Hutton were parties to the Stipulation, which was stated to be effective as of May 13, 2008. *Id.* ¶ 17. Although North Silo argued the Stipulation was "legally unsound" due to the absence of certain parties' signatures, *id.* ¶ 18 n.5, the Stipulation was given "great weight" by the district court in deciding for the landowners, *id.* ¶ 18.

Relying on principles of contract interpretation, the supreme court sided with North Silo, finding the district court's interpretation of the Stipulation "disregarded our longstanding rules of contract interpretation." *Id.* Although a court may consider extrinsic evidence in some situations, for example where the terms of a deed are ambiguous or to consider whether a deed is ambiguous, the court "may not consider the parties' own extrinsic expressions of intent." *Id.* ¶ 19 (quoting *Caballo Coal Co. v. Fidelity Expl. & Prod. Co.*, 2004 WY 6, ¶ 11, 84 P.3d 311); *see Hickman v. Groves*, 71 P.3d 256, 259 (Wyo. 2003). "Because we use an objective approach to interpret contracts, evidence of party's subjective intent is not admissible, regardless of whether the court determines a contract is ambiguous or clear." *North Silo*, 2022 WY 116A, ¶ 19 (quoting *Ultra Res., Inc. v. Hartman*, 2010 WY 36, ¶ 23, 226 P.3d 889). The court found the Stipulation to be "subjective intent evidence that our rules of contract (and deed) interpretation exclude from a court's consideration," and thus it was improperly relied upon by the district court. *Id.* ¶ 20.

Disregarding the Stipulation, the court focused on the deeds from C Bar J to the Huttons and from the Huttons to the Woods. Starting with the C Bar J-Hutton deed, the court found the deed to be unambiguous and that it clearly intended to vest the term mineral interest remainder in the Huttons. The court distinguished a vested remainder, where "there is some person in esse known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate, and whose right to such remainder no contingency can defeat," from a contingent remainder, which "depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all." *Id.* ¶ 24 (quoting *Jackson as Tr. of Phillip G. Jackson Family Revocable Tr. v. Montoya*, 2020 WY 116, ¶ 24, 471 P.3d 984). In the case of the C Bar J-Hutton deed, "[t]he passage of twenty years was certain to occur and was not a contingency that could be defeated." *Id.* ¶ 26. The court was unpersuaded by the landowners' arguments that the use of the word "purchasers" in the deed could be understood to be any party other than the Huttons. *Id.* ¶¶ 27–30; *see id.* ¶ 30 ("In the C Bar J-Hutton Deed, the designations 'grantee' and 'purchasers' were used synonymously."). The court further noted that the parties' course of conduct after the deed was consistent with North Silo's interpretation, including the facts that the Huttons executed the lease and accepted bonus payments for 100% of the net mineral acreage, and the acknowledgment in the Woods-Deselms deeds—that the Huttons had reserved "all mineral rights"—also supported North Silo's position. *Id.* ¶¶ 31, 32. In short, the court concluded the Huttons had a vested remainder in the 50% term mineral interest reserved by C Bar J.

The court then turned to the Hutton-Woods deed, determining the Huttons reserved all minerals in the property conveyed. The court noted three quanta of interest that must be ascertained in construing a deed containing a reservation: (1) the quantum of interest specified in the granting clause, (2) the quantum of interest reserved in a subsequent clause, and (3) the quantum of interest the grantee is to receive. *Id.* ¶ 36 (citing *Gilstrap v. June Eisele Warren Tr.*, 2005 WY 21, ¶ 14, 106 P.3d 858). In the Hutton-Woods deed, the quantum conveyed was "all rights" to the property, but the quantum reserved by the Huttons for their lifetime was "all minerals [the Huttons] may own." *Id.* ¶ 37. The court determined the Huttons' owned minerals included their vested remainder and that the Woods received the property subject to the Huttons' reserved life estate in 100% of the minerals and the executory rights to lease those minerals. *Id.* ¶¶ 41, 42.

With respect to the duration of the lease, the court found the Huttons' life estate reservation limited the time during which they could execute an oil and gas lease covering their minerals, but it did not limit the length of any leases the Huttons could make. Thus, even after the Huttons' lifetimes, the lease re-

mained in effect according to its terms and could continue beyond the Huttons' lives if those terms provided. *Id.* ¶ 49. The court agreed that North Silo could quiet title to its leasehold, since standing to bring the claim requires only "an interest in land," and a lease is an "interest" in land within the meaning of Wyo. Stat. Ann. § 1-32-201. *North Silo*, 2022 WY 116A, ¶ 56. Further, because an oil and gas lease is akin to a contract, North Silo, as a party to the lease, had standing to bring its breach of lease claim against the Huttons. *Id.* ¶ 58. The court reversed and remanded the case to the district court for proceedings consistent with its opinion. *Id.* ¶ 59.

CANADA – OIL & GAS

Matthew Cunningham, Evan Hall, Zakariya Chatur & Hayden Logan, Reporters

Lithium: Alberta's Next Resource Boom?

Lithium is set to play an integral role in the international transition to carbon neutrality. Lithium extraction in Canada will not only assist in Canada's transition to a low carbon-economy, it can also contribute to domestic economic security and provide a sustainable source of the mineral for trade. Lithium is used in lubricants, air treatment, ceramics, glass, metallurgy, polymers, and pharmaceuticals. One of lithium's most important uses is in the rechargeable lithium-ion battery, which is used to power smart electronics, electric vehicles (EVs), and renewable energy storage. Global demand for EVs continues to rise, and the International Energy Agency estimates that EV sales could exceed 45 million vehicles globally by 2030. The 2020 World Bank report "Minerals for Climate Action: The Mineral Intensity of the Clean Energy Transition" estimates that production of lithium-ion batteries will have to increase by 500% to meet demand by 2050. In connection with this, lithium prices hit their all-time high in October 2022.

Canada has the sixth-largest identified lithium resources in the world, at 530,000 tons. However, Canada may have up to 2.9 million tons of the world's known lithium resources. New and innovative techniques for extracting lithium compounds from oil and gas fields currently being explored in Alberta could increase Canada's lithium resources even further, as the province contains an estimated 12.01 million tons of lithium carbonate equivalent. Following the federal government's "Canadian Minerals and Metals Plan," released in 2019, the Government of Alberta released its "Mineral Strategy and Action Plan" (Mineral Strategy) in November 2021 and its "20-Year Strategic Capital Plan" (Capital Plan) in December 2021 to capitalize on, among other things, the value potential of lithium. The Mineral Strategy highlights studies performed by the Alberta Geological Survey identifying elevated lithium concentrations in formation waters. These lithium-rich brines occur in Devonian aquifers in west-central Alberta.

Current Landscape of Alberta Mineral Laws

On November 4, 2021, the Government of Alberta introduced Bill 82, the *Mineral Resource Development Act* (MRDA), S.A. 2021, c M-16.8, to implement the Mineral Strategy and part of the Capital Plan. The MRDA received Royal Assent on December 2, 2021, but has not yet come into force. The Alberta Energy Regulator (AER) will be empowered by the MRDA to act as the life cycle regulator of Alberta's mineral resources, including the initiation, construction, operation, and closing of resource developments (i.e., petroleum, natural gas, coal, and now minerals). Among other things, the purpose of the MRDA is

- to promote the economic, orderly, efficient, and responsible development in the public interest of mineral resources in Alberta;
- to control pollution and ensure the protection of the environment and public safety in the development of mineral resources in Alberta; and
- to provide for the timely and useful collection, appraisal, and dissemination of information relating to mineral resources in Alberta.

The AER's responsibilities will be similar to its current role in regulating the oil and gas sector, such as developing and administering regulatory instruments, establishing the process for review, providing alternative dispute resolution services, managing industry compliance, including monitoring and enforcement, and mitigating risks to public safety and the environment. The AER's regulatory authority will apply to current and future mineral resource developments.

Under the MRDA, the AER will regulate two categories of minerals: brine-hosted and hardrock minerals. A brine-hosted mineral is typically found in subsurface salt water and is usually extracted through well infrastructure. Conventional hardrock minerals are generally recovered using more traditional mining practices, such as open pit mines.

The AER recently sought public consultation on the "Draft Directive: Brine-Hosted Mineral Resource Development," which sets out industry requirements and standards for the entire development life cycle. *See* AER, Bulletin 2022-28 (Sept. 20, 2022). Additionally, AER Directive 056, "Energy Development Applications and Schedules," has been updated to include brine-hosted mineral developments and enables well, pipeline, and facility licensing requirements. Public consultation closed on October 31, 2022, and the feedback received will be used in the finalization of the directives.

Innovative Lithium Extraction Techniques

Alberta is home to significant sources of lithium contained in high-salinity brines found in underground reservoirs, as well as abandoned and active oil and gas wells. While traditional lithium extraction techniques like evaporation and hardrock mining have proven successful elsewhere in the world, Alberta has taken a different approach.

One of the issues with lithium extraction in Alberta is the concentration of lithium amongst other elements within the brines. While studies have found concentrations of lithium as high as 140 mg/L, the average concentration appears to be around 75 mg/L, which poses economic challenges for recovery. To this point, Alberta companies are working on developing direct lithium extraction (DLE) methods that would remove lower concentrations of lithium directly from brine. These methods include ion-exchange, electrochemical, and membrane and nanoparticle technology. One application of the ion-exchange method uses sorbents that reject other ions and metals but absorbs lithium. Other companies have taken an interest in the electrochemical approach, which involves the use of an electric force to collect and release lithium ions. Lastly, a nanotech company uses sponges designed to absorb only lithium ions and nothing else. One of the benefits of this technique is that it does not require the use of acids to acquire the lithium from the sponge, reducing cost and chemical waste.

While new wells may need to be drilled to access lithium brines, drilling could occur from abandoned well sites, connecting to existing infrastructure in an effort to reduce environmental impact and repurpose wells that would have been reclaimed by other organizations. This approach would take advantage of

Alberta's oil and gas expertise, as well as preexisting oil and gas infrastructure that would otherwise be costly to develop. Commercially, DLE could significantly reduce land disturbance as compared to other brine-hosted mineral recovery methods. More specifically, the expected land disturbance of DLE in Alberta is estimated to be only 3% of the land disturbance caused by evaporation ponds. Additionally, once lithium is extracted using DLE methods, the remaining brine can be reinjected into the reservoir from which it came, removing the need to store the filtered brine.

Recent Developments in Alberta

With the passing of the MRDA and recent advancements in DLE technology, Alberta has seen an influx of projects in the lithium sector. While many of these projects are in their early stages, it is a positive start to what could be a major economic driver in years to come. These recent Alberta developments include

- the drilling of the first lithium evaluation well in the Leduc aquifer to test brine samples;
- the creation of a lithium-ion battery produced with lithium obtained through DLE;
- the acquisition of various tracts of land above aquifers with the hopes of establishing long-term lithium extraction sites;
- the testing of various DLE methods that could result in an economic form of extraction;
- DLE companies partnering with established players in the mining and oil and gas sectors; and
- an Alberta company agreeing to test their DLE technology in South America.

With the global demand for lithium increasing, one may reasonably expect to see continued interest in Albertan lithium.

What's Next for Lithium Extraction in Alberta?

While the MRDA has not yet come into force, the Government of Alberta and AER will draft regulations, rules, and directives, supported by public consultation, that reflect requirements of producers and other stakeholders. With proper guidelines in place, Canada, and particularly Alberta, has the potential to become a dominant player in not only the production of lithium, but also lithium-ion batteries. Alberta's current infrastructure is poised to support domestic EV battery production due to its technical expertise and skilled workforce from the existing oil and gas industry. However, until companies have a chance to implement the changes prescribed by the MRDA and future regulations, the lithium landscape in Alberta remains unclear.

The Foundation
FOR NATURAL RESOURCES AND ENERGY LAW
FORMERLY ROCKY MOUNTAIN MINERAL LAW FOUNDATION
9191 Sheridan Blvd., Ste. 203
Westminster, Colorado 80031
www.fnrel.org