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ROCKY MOUNTAIN MINERAL LAW FOUNDATION JOURNAL

Published semiannually by
ROCKY MOUNTAIN MINERAL LAW FOUNDATION
9191 Sheridan Blvd., Suite 203
Westminster, Colorado 80031

The Editorial Board, comprised of experienced natural resources law practitioners and academics, determines which articles should be printed, which law review articles should be reprinted, and which articles should be included in the Topical Reading list. Subscriptions to the semiannual *Journal* are $65 per calendar year and are automatically renewed. Annual Members receive the semiannual *Journal* electronically as a complimentary benefit of Annual Membership.

PREFACE

The Rocky Mountain Mineral Law Foundation Journal publishes original, short, practical, and scholarly articles, along with reprints of Foundation papers, law review articles, and other articles that are useful to the natural resources attorney. Published semiannually, the *Journal* emphasizes oil and gas, mining, public lands, water, and environmental law, as well as other related areas of natural resources law. The *Journal* was introduced in 2004 as the successor to the *Public Land & Resources Law Digest*.

We encourage you to submit articles for inclusion in the *Journal*. The Author Guidelines are included in this copy of the *Journal* and you may contact Executive Editor Ryan Minton at the Foundation for further information on publication.

Established in 1955 as a nonprofit Colorado corporation, the Rocky Mountain Mineral Law Foundation is a collaborative educational organization dedicated to the study of the legal systems and issues affecting natural resources law and other related areas. The Foundation trustees include representatives from law schools, bar associations, industry associations, and others in the land and legal community. The goals of the Foundation are to foster and encourage scholarly, yet practical study of the laws and regulations relating to domestic and international oil and gas, mining, water, public land management, land use, conservation, environmental protection, mineral financing, and other related disciplines.

The Foundation offers a variety of programs and services, including institutes, courses, workshops, and online distance learning; publication of treatises, books, forms and model forms, substantive newsletters, and other special studies; scholarships and research grants to law faculty and law students; and programs for natural resources law teachers.

Leading legal and land experts volunteer many hours in connection with Foundation institutes and publications and on the projects of various committees that carry out the Foundation's work. These volunteers have generously served the Foundation because of its reputation for continually striving to achieve the highest quality in its many projects.

Please consider becoming a member of the Rocky Mountain Mineral Law Foundation, joining a vibrant group of law firms, companies, government agencies, academic organizations, and others dedicated to supporting legal scholarship in the natural resources community.

Alex Ritchie
Executive Director

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Rocky Mountain Mineral Law Foundation Journal

Part I

Foundation News

From the President

The mission of the Rocky Mountain Mineral Law Foundation is to provide timely, scholarly, and practical programs and materials for natural resource professionals. The Foundation's organizational DNA is collegiality that is best experienced at our Special Institutes, short courses, and Annual Institute. We welcome you to these live events where you can build your knowledge, look for a new job, or form life-long professional friends.

The Foundation also provides its scholarship through the books it publishes, webinars, the Digital Library, and the *Journal*. The Foundation's *Journal* publishes articles of interest to natural resource professionals and students at law firms, oil and gas and mining companies, government agencies, and law schools. The articles include original pieces as well as selected reprints from other sources. Whatever their origins, articles that are selected for the *Journal* are well-written, informative, and useful as a reference for the issues you work with every day. In this age of "information overload" and dubious sourcing, you can confidently rely on the articles in the *Journal* and Digital Library. Articles are written by experts in their field and reviewed by Foundation staff and *Journal* committee members before publication.

If you are an author (or an aspiring author), please consider the *Journal* as a place to publish. The *Journal* editorial board is always interested in considering quality manuscripts on relevant topics. Placement with the *Journal* will ensure that your work reaches a broad audience engaged in natural resources law.

Rebecca W. Watson, President

VOLUNTEERS WELCOME
for
COMMITTEES, BOARDS, REPORTERS, AND UPDATE AUTHORS

The Foundation is a nonprofit legal education organization with the sole purpose of serving its constituency, including lawyers, landmen, and others interested in the Foundation's programs and publications. Our constituency recommends the subjects and programs that the Foundation sponsors and the publications that it undertakes. Volunteers working through committees provide the underlying support for the Foundation's programs and publications. In addition to serving as speakers for our many institutes and short courses, volunteers serve on program committees for each Annual and Special Institute and a variety of special committees and boards. Volunteer opportunities include the American Law of Mining, 2d ed. (ALM 2d), Audit & Risk Management, Budget Review, Digital Technology, Financial Advisory, Forms, Gower Federal Services, Grants, International, Law of Federal Oil & Gas Leases (LFOGL), Long Range Planning, Membership, Publications, RMMLF Journal, Scholarships, Site Selection, Special Institutes, and Special Projects committees. Volunteers also serve as Update Authors for the ALM 2d and LFOGL, and as Reporters for our Mineral Law and Water Law Newsletters. Please let us know if you would be interested in serving on one or more committees or boards or as an update author for either of the two looseleaf treatises, ALM 2d or LFOGL, or as a state/regional newsletter reporter. Thanks.

— Alex Ritchie, Executive Director

Online Natural Resources Education

More than 145 presentations from Annual and Special Institutes are now available on the Foundation's online learning platform. Topics include oil and gas, mining, energy, environmental, international, public lands, Native American resources, landmen's issues, water, and ethics. These on-demand presentations and podcasts are professional video and audio recordings of our high-quality live programs. They can be accessed online 24/7, making them the easiest and most convenient method to receive natural resources legal education.

Learn from top-notch faculty at your convenience while fulfilling continuing education requirements with on-demand videos and podcasts accessible from any device with an Internet connection anywhere in the world. Train on your own time with premier individual natural resources CLE and CPE hours in an online video format, with synched PowerPoint slides (as available) included with each presentation. And when you learn with Rocky you can download an original paper by the presenter that will serve as a continuing reference. Contact info@rmmlf.org for CLE or CPE credit information on any particular presentation or for group discounts.

Visit our online legal education catalog regularly to see what's been added!

rmmlf.inreachce.com

RMMLF Upcoming Programs

Virtual 66th Annual Rocky Mountain Mineral Law Institute

July 23-25, 2020

Join us from the comfort of your home or office!

The Virtual Annual Institute will open with a two-hour General Session on Thursday morning followed by online networking opportunities on Thursday afternoon. On Friday we will hold a two-hour Oil and Gas/Landman's Section in the morning and a two-hour Water/Environmental Section in the afternoon. The program will conclude with a two-hour Mining/Corporate Counsel Section on Saturday morning.

Due to the impact of COVID-19, the Foundation will provide the Virtual Annual Institute, with up to 9.6 hours of CLE or CPE credits, including 2 hours of ethics, as a complimentary member benefit for all Foundation Members who register. Nonmembers are also encouraged to register for only $95 and government and nonprofit attendees can register for only $65.

Bankruptcy and Financial Distress in the Oil & Gas Industry

Virtual Special Institute

October 21-23, 2020

The prolonged demand shock caused by the COVID-19 shutdown and excess supply, especially from Russia and Saudi Arabia, has had a substantial adverse impact on oil and gas companies, driving crude oil prices to record lows. A number of companies in the oil and gas industry have already been pushed into bankruptcy or are on the brink of bankruptcy, with many more bankruptcies expected over the next year.

This Virtual Special Institute will comprehensively review the legal, practical, and economic aspects of bankruptcy and financial distress as applied to the oil and gas industry, and is designed for a variety of professionals at all experience levels. The focus of the Special Institute is to provide oil and gas lawyers and companies an in-depth look at bankruptcy concepts and other issues related to financial distress to assist them in advising their clients and managing their companies through this difficult time for the industry. For those who practice in the areas of bankruptcy, workouts, or distress, the Special Institute will provide an understanding of unique business and financial issues applicable to the oil and gas industry, and an overview of applicable changes of law that have developed in recent years.

Water Law Institute

Virtual Special Institute

November 19, 2020

Water is a critical and finite resource, and water management impacts all aspects of environmental and resource law. In an era of limited supply and increasing demand, knowledge of the emerging issues in water law is a must, not only for water law practitioners, but for all environmental and resource professionals. This virtual Water Law Institute will provide 4 hours of CLE for only $95 for Foundation and ABA members, $65 for government, nonprofit, and law faculty, and $155 for nonmembers. Our distinguished speakers will provide insight and analysis of key water law topics, including interjurisdictional water disputes, global water stress, dam removal and fish recovery, and tribal water use.

For additional information visit www.rmmlf.org
or contact the Foundation at:
phone (303) 321-8100 • fax (303) 321-7657 • info@rmmlf.org

Rocky Mountain Mineral Law Foundation

Publications

The Rocky Mountain Mineral Law Foundation (RMMLF) produces several publications on oil, gas, mining, energy, public land, water, and environmental law.

Proceedings of the Annual Institute is published every year and contains the papers presented by the speakers at that year's Annual Institute, edited and bound into a 900-page hardbound book including law-review quality articles covering oil and gas, mining, international mineral development, environmental, public lands, water, ethics, and landman topics.

Mineral Law Newsletter reporters representing 27 states and Canada report on judicial, legislative, and regulatory developments in mining and oil and gas law. Coverage includes federal courts and agencies, Congress, and environmental issues. State coverage includes Alabama, Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington,West Virginia, and Wyoming.

Water Law Newsletter reporters representing 28 states cover water law and water rights issues, including court decisions at federal, state, and local levels; state and federal regulatory agencies; and federal, state, and local statutory developments. State coverage includes Alaska, Arizona, California, Colorado, Idaho, Illinois, Indiana, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Federal water quality and reserved water rights are also covered.

Law of Federal Oil & Gas Leases serves as a primer and reference manual offering expert legal analysis and a practical approach to problems and questions on all matters of law related to federal oil and gas leases, including surface management requirements; exploration, drilling, producing, and operating regulations; rights-of-way; royalties; assignments and transfers of interests; options and rights to acquire; federal land records; and more. Updated annually by experts in their fields and edited by the Foundation, this treatise is available from LexisNexis.

Gower Federal Services contain governmental decisions and related indices developed by the Foundation that generally are not readily available elsewhere. The different services include Oil & Gas, Mining, Outer Continental Shelf, Miscellaneous Land Decisions, and Royalty Valuation & Management. Periodic updates maintain the currency of each volume.

American Law of Mining, Second Edition provides full coverage of all aspects of U.S. and Canadian mining law and related topics, including federal lands and mineral leases, state and Indian mineral interests, mining claims, environmental regulation, ancillary use and water rights, state and local taxation of minerals, and much more. Updated annually by experts in their fields and edited by the Foundation, this treatise is available from LexisNexis.

Landman's Legal Handbook, 5th Edition is an indispensable publication for all landmen. Coverage includes preparation of instruments; oil and gas leases; minerals other than oil and gas; examination of records for leasable and locatable minerals; curative work; oil and gas spacing, pooling, and unitization; state requirements; and numerous checklists and forms.

International Petroleum Transactions, 3d Edition introduces attorneys and negotiators to the basic concepts of international petroleum transactions.

Rocky Mountain Mineral Law Foundation

Publications

Indigenous Rights in South America covers key aspects of indigenous rights legislation from the perspective of extractive industries. Authored by leading mining and oil and gas practitioners in Argentina, Bolivia, Chile, Colombia, Ecuador, Paraguay, Peru, and Venezuela, each chapter covers one country, reflecting the differences and similarities of the laws throughout South America.

Joint Operating Agreement: Applicability and Enforceability of Default Provisions covers rights and remedies in the event of default in various circumstances in common law and civil law jurisdictions, including analysis and comparison of international JOA model forms.

Mining Lease Handbook, 2d Edition contains a collection of mining lease clauses cross-referenced to enable the user to create a mining lease with a logical structure and consistent terminology.

An Introduction to Geology and Hard Rock Mining is an introduction to selected topics in geology and hard rock mining, and is written to give lawyers and landmen a source of basic technical information.

Treatise on Wyoming Water Law provides detailed coverage of existing Wyoming water law, with references to statutory provisions, regulations, and court decisions; discusses Wyoming's comprehensive administrative system for water; and considers the laws governing interstate rivers and the decisions establishing tribal and federal reserved water rights.

Nevada Law of Mining details federal and state requirements for mining claim location procedures, maintenance of unpatented mining claims, adverse possession of mining claims, the history of the development of federal statutes relating to the mining law in Nevada, and selected state statutes and rules.

Nevada Law of Water Rights details the water rights of Nevada, a considerable part of which entails federal law applicable to other public land states and states where the prior appropriation doctrine prevails.

Handbook of Due Diligence Checklists provides checklists and forms that are widely used throughout the oil and gas and mining industries. Updated and revised in 2018, with new supplemental checklists.

Forms (available electronically and in hard copy) produced by RMMLF include:

- Form 1–Rocky Mountain Unit Operating Agreement–Oil and Gas (Undivided Interest)
- Form 2–Rocky Mountain Unit Operating Agreement–Oil and Gas (Divided Interest)
- Form 3–Rocky Mountain Joint Operating Agreement–Oil and Gas
- Form 4–Rocky Mountain Mining Joint Operating Agreement
- Form 5A–Exploration, Development, and Mine Operating Agreement
- Form 5 LLC–Exploration, Development and Mining Limited Liability Company
- Form 6–Gas Balancing Agreement
- Form 7–Confidentiality and Nondisclosure Agreement

RMMLF Digital Library provides electronic access to the written materials from all RMMLF Annual and Special Institutes since 1955, as well as a number of original *Journal* articles, comprising 120,000+ pages of text from more than 4,500 articles in 250 manuals and books. The materials are searchable by keyword, author, title, or year, and contain hypertext links to other Digital Library materials and cases, statutes, and administrative codes.

For more information visit
https://www.rmmlf.org/publications

Rocky Mountain Mineral Law Foundation

Grants Program

The Rocky Mountain Mineral Law Foundation (RMMLF) established the Grants Program in 1976 to promote scholarship, research, writing, teaching, and the study of mineral resources law and related fields at law schools. In 2017 the Grants Program was expanded to include (1) innovative new projects or proposals in the fields of mining law, oil and gas law, energy law, water law, public land law, and related legal areas; and (2) a Visiting Lecture Program for Constituent Law Schools (CLS) of the Foundation. To date, 279 grants have been authorized, totaling over $798,000.

Applications are evaluated by the RMMLF Grants Committee, with preference given to the Foundation's CLSs. A grant-supported project should result in a clear, tangible outcome with widespread utility and long-term value. Examples of eligible projects include:

- Preparation of teaching materials
- Research expenses incurred by faculty and supervised law students
- Printing or publication expenses for law school seminars, short courses, or symposia
- Start-up funding for new educational programs, classes, or conferences

The Grants Program will not support recurring projects or programs; projects that involve political or positional advocacy or litigation; or scholarships, fellowships, or visiting professorships.

Faculty honoraria and travel/attendance expenses are generally not within the scope of RMMLF grants, except that CLS may apply for funding under the Visiting Lecture Program to reimburse travel costs for a CLS professor or a member-practitioner to travel to another CLS to teach a law school class or provide a scholarly lecture to the law school community.

No special application form is required. Please submit a cover letter and proposal with the following required information:

- Your contact details and qualifications to undertake the project;
- A brief narrative describing the Project's:
  - Objectives and duration,
  - Implementation,
  - Intended results and impact;
- A budget of the total anticipated expenses; and
- The amount and intended use, broken out by budget line item or specific category, of grant funds you are requesting from the Foundation.

The application (Cover Letter and Project Description) should be no more than four pages. You may also attach your organization's general brochure and other information you feel would help the Committee better understand your proposal.

Applications and requests for information regarding the Grants Program should be sent to grants@rmmlf.org. Or visit our website at https://www.rmmlf.org/professors-and-students/grants.

To apply or request further information, please contact:

Rocky Mountain Mineral Law Foundation
9191 Sheridan Blvd., Suite 203 • Westminster, CO 80031
(303) 321-8100, ext 107 • grants@rmmlf.org

Rocky Mountain Mineral Law Foundation

Grants Program
Awards Announcement

The Rocky Mountain Mineral Law Foundation is pleased to have awarded 4 grants since December 1, 2019:

- **University of Arizona, Professor Justin Pidot —**
  Funding for students to attend the "The Next Generation of Environmental Law" symposium

- **University of Wyoming, Professor Temple Stoellinger —**
  Funding for research assistance and travel expenses associated with the completion of a RMMLF publication, *NEPA eBibliography*

- **University of Calgary, Professor Rudiger Tscherning —**
  Research assistance for a presentation on "the challenge of decarbonizing Canadian oil and gas operations and the potential deployment of small modular nuclear reactors on an industrial scale"

- **Brigham Young University, Professor Brigham Daniels —**
  Funding for a research assistant to aid in researching the role of municipalities in combating air pollution

Grant applications are accepted on a continuing basis and are generally evaluated quarterly by the RMMLF Grants Committee, with preference given to Constituent Law Schools of the Foundation. To support and learn more about the Foundation's Grants and other programs, please email grants@rmmlf.org or visit https://www.rmmlf.org/professors-and-students/grants.

Rocky Mountain Mineral Law Foundation

Scholarship Programs

The Rocky Mountain Mineral Law Foundation (RMMLF) has Scholarship Programs to encourage well-qualified law students who have the potential to make significant contributions to scholarship in mineral resources law and related areas.

These are the Joe Rudd Scholarship, established in 1979 in honor of a prominent natural resources attorney in Alaska, the RMMLF Scholarship, established in 1993, the Frances Hartogh Diversity Outreach (FHDO) Scholarship, established in 2018, and the Richard H. Bate Scholarship and the Catherine J. Boggs Scholarship, both established in 2019. One RMMLF Scholarship award is the David P. Phillips Scholarship, named in honor of the Foundation's Executive Director who retired in 2012 after leading the Foundation for 42 years. To date, 585 scholarships have been awarded amounting to over $3.1 million.

Eligibility — A law student enrolled full-time at one of the Foundation's Constituent Law Schools and who can demonstrate a commitment to the study of mineral resources law and related areas is eligible to apply for these scholarships. Applicants for the FHDO Scholarship must be a member of a group (other than a gender-defined group), based in the Americas, that has been significantly deprived of equitable access to land-based resources and the applicant must have worked to promote diversity, inclusion, and equity with respect to at least one historically disadvantaged group. Applicants for the Richard H. Bate Scholarship must demonstrate an interest in, and nexus to, the practice of oil and gas law; preference may be given to students attending the University of Denver Sturm College of Law. Applicants for the Catherine J. Boggs Scholarship must demonstrate an interest in, and nexus to, the practice of domestic or international mining law, with preference given to women.

Amount of Scholarships — Joe Rudd, Richard H. Bate, Catherine J. Boggs, and RMMLF Scholarships may cover partial or full tuition. Recent awards have ranged from $3,600 to $15,000 for a semester. These tuition scholarships must be used at, and will be paid directly to, one of the Constituent Law Schools. The FHDO Scholarship may be used to partially offset the applicant's living expenses and will not prevent the applicant from also receiving a tuition scholarship.

Application Process — The application period typically begins in January, with deadlines of February 28 and March 15 for JD and LLM applicants, respectively.

The Application Form, which contains information regarding the process and requirements, is posted on our website at www.rmmlf.org under the Professors and Students tab. Please visit our website regularly for updates.

Applications are evaluated by the Foundation's Scholarship Committees according to an established set of criteria, which include:

- Potential to make a significant contribution to the field of mineral resources law and related areas
- Academic ability
- Leadership ability
- Year in law school
- Financial need

RMMLF Constituent Law Schools

University of Alberta
University of Arizona
Arizona State University
Brigham Young University
University of Calgary
University of California-Davis
University of Colorado
Creighton University
University of Denver
Florida State University
Gonzaga University
University of Houston
University of Idaho
University of Kansas
Lewis and Clark Law School
Louisiana State University
University of Minnesota
University of Montana
University of Nebraska
University of Nevada-Las Vegas
University of New Mexico
University of North Dakota
University of Oklahoma
University of Oregon
University of the Pacific-McGeorge
University of South Dakota
Southern Methodist University
Texas A&M University
Texas Tech University
University of Texas
University of Tulsa
University of Utah
Washburn University
University of Wyoming

Rocky Mountain Mineral Law Foundation

2019-2020 Joe Rudd, RMMLF, and Frances Hartogh Diversity Outreach Scholarships Awards Announcement

The Rocky Mountain Mineral Law Foundation (RMMLF) is pleased to announce the recipients of the 2019-2020 Joe Rudd, Frances Hartogh Diversity Outreach, and RMMLF Scholarships, including the David P. Phillips Scholarship.

Thirty new Foundation scholars were named this year:

Joe Rudd Scholarship Awards

Madeline Bugh, University of Oklahoma
Sydney Donovan, University of Denver
Bret Huffaker, University of Utah

Frances Hartogh Diversity Outreach Scholarship Awards

Lanna Allen, Washburn University
Morgan Johnson, University of New Mexico

David P. Phillips Scholarship Award

Noah Stanton, University of Colorado

RMMLF Scholarship Awards

Lanna Allen, Washburn University
Chinonso Anozie, Southern Methodist University
Madeline Bugh, University of Oklahoma
Cecilia Cahuayme, University of Texas
Scott Carriere, University of Calgary
Amanda Cerisano, University of Alberta
Sydney Donovan, University of Denver
Elisa Genuis, University of Alberta
Blake Gerow, University of Tulsa
Marlena Gutierrez, Southern Methodist University
Alex Hamilton, University of Colorado
Danielle Hartley, University of Denver
Bret Huffaker, University of Utah
Deborah Huveldt, Florida State University
Viktoriia Ishchenko, University of Texas
Morgan Johnson, University of New Mexico
Christina Jovanovic, Arizona State University
Patrick Kent, University of Wyoming
Kelsee Kephart, University of Oklahoma
Joseph Kmetz, University of Denver
Nicolas Lindal, University of Alberta
Henry Lindpere, University of Arizona
Pedro Llado Camarillo, University of Texas
William Thomas Machell, University of Calgary
Elias Medina, Louisiana State University
Kenryo Mizutani, University of Calgary
Joseph Reynolds, Texas Tech University
Robert Rozell, University of Tulsa
Daniel Tavera, University of Oklahoma

The Foundation congratulates the awardees and thanks all of the applicants for their interest and efforts!

Law students enrolled full-time at one of the Foundation's Constituent Law Schools and who can demonstrate a commitment to the study of natural resources law are eligible to apply. Academic and leadership ability, as well as financial need, are considered. Applicants for the Frances Hartogh Diversity Outreach, Richard H. Bate, and Catherine J. Boggs Scholarships must meet additional criteria. Applications are evaluated by the Foundation's Scholarship Committees consisting of dedicated volunteer attorneys. The application deadline is February 28 (for JD students) and March 15 (for LLM students). If you would like to support and/or learn more about the Foundation and its programs, please contact:

Rocky Mountain Mineral Law Foundation
9191 Sheridan Blvd., Suite 203
Westminster, CO 80031
(303) 321-8100 • fax (303) 321-7657
info@rmmlf.org • www.rmmlf.org

ROCKY MOUNTAIN MINERAL LAW FOUNDATION

LAW SCHOOL STUDENT PROGRAMS

RMMLF Law Student Programs aim to generate interest among students from the Foundation's Constituent Law Schools (CLS) in mineral law and related areas, increase their awareness about the Foundation's specialized educational opportunities, and encourage their involvement in the Foundation's educational programs. For further information, please email info@rmmlf.org.

Student Attendance Programs

With the active engagement of the Foundation's CLS Trustees, these programs support attendance by deserving students at RMMLF programs. Subject to space and funding availability, Foundation support can include waived registration fees, course materials, and reimbursement of pre-approved expenses for transportation and accommodations.

Scholarship Recipient Attendance Program — RMMLF, Joe Rudd, Richard H. Bate, Catherine J. Boggs, and Frances Hartogh Diversity Outreach Scholarship awardees are eligible to attend an annual or special institute following notification of their award.

CLS Law Student Attendance Program — The Foundation can make available up to $3,000 per calendar year for each of the Foundation's CLSs to support students' attendance at Foundation programs.

The Foundation may, in limited cases, also provide support for deserving students from law schools other than Foundation CLSs to attend RMMLF institutes and select short courses.

Student Networking Program

This program supports collaborative events and activities in the CLSs among student organizations, trustees, law professors, local law firms, and other Foundation members. These events are intended to foster education, generate interest in mineral law and related areas, and increase awareness about, and involvement with, the Foundation's educational programs and opportunities. This program may also support student chapters or affiliates.

For further information, please email info@rmmlf.org

About the Rocky Mountain Mineral Law Foundation

The Trustees of the Rocky Mountain Mineral Law Foundation are pleased to announce the election of the following Officers, Board Members-at-Large, and new Trustees. With the exception of the accession from Vice President to President, which is covered under the Bylaws, Trustees-at-Large are elected annually as a complement to those appointed by the Foundation's Constituent Law Schools, Bar Associations, and Oil and Gas and Mining Associations. Past Presidents become lifetime Trustees following their service, and Honorary Trustees periodically are appointed.

Officers, 2019-2020

President	Rebecca W. Watson, Denver, CO
Vice President	Stuart R. Butzier, Santa Fe, NM
Secretary	Michael J. Bourassa, Toronto, ON
Treasurer	Scot W. Anderson, Denver, CO

Past Presidents

2018-2019 – William B. Prince, Salt Lake City, UT
2017-2018 – Michael J. Malmquist, Salt Lake City, UT

Board of Directors Members-At-Large, 2019-2020

Monika U. Ehrman, Norman, OK
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Reed D. Benson, Albuquerque, NM
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Trustees-At-Large, 2019-2020

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Rocky Mountain Mineral Law Foundation Constituent Organizations

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University of Alberta
University of Arizona
Arizona State University
Brigham Young University
University of Calgary
University of California-Davis
University of Colorado
Creighton University
University of Denver
Florida State University
Gonzaga University
University of Houston
University of Idaho
University of Kansas
Lewis and Clark Law School
Louisiana State University
University of Minnesota
University of Montana
University of Nebraska
University of Nevada-Las Vegas
University of New Mexico
University of North Dakota
University of Oklahoma
University of Oregon
University of the Pacific-McGeorge
University of South Dakota
Southern Methodist University
Texas A&M University
Texas Tech University
University of Texas
University of Tulsa
University of Utah
Washburn University
University of Wyoming

Bar Associations

Alaska Bar Ass'n
American Bar Ass'n
State Bar of Arizona
Colorado Bar Ass'n
Idaho State Bar
State Bar of Montana
Nebraska State Bar Ass'n
State Bar of Nevada
State Bar of New Mexico
State Bar of South Dakota
State Bar of Texas
Utah State Bar
Wyoming State Bar

Mining Associations

Alaska Miners Ass'n
American Exploration & Mining Ass'n
Arizona Mining Ass'n
Colorado Mining Ass'n
Idaho Mining Ass'n
National Mining Ass'n
Nevada Landman's Ass'n
Nevada Mining Ass'n
New Mexico Mining Ass'n
Rocky Mountain Ass'n of Mineral Ldmn.
Utah Mining Ass'n

Oil & Gas Associations

American Ass'n of Professional Ldmn.
American Petroleum Institute
Ass'n of Int'l Petroleum Negotiators
Denver Ass'n of Petroleum Ldmn.
Indep. Petroleum Ass'n of America
Indep. Petroleum Ass'n of New Mexico
New Mexico Oil & Gas Ass'n
Western Energy Alliance

AUTHOR GUIDELINES FOR *ROCKY MOUNTAIN MINERAL LAW FOUNDATION JOURNAL*

Submissions Contact

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Rocky Mountain Mineral Law Foundation
9191 Sheridan Blvd., Suite 203
Westminster, Colorado 80031
phone: 303-321-8100 • fax: 303-321-7657

Submission

Please submit the following to the Foundation:

- **Author Information:** Author's name; company or firm affiliation and title; and contact information, including email address.
- **Manuscript:** An electronic version of the article in MS Word.
- **Disclosure Information (if applicable):** Any involvement of the author, or anyone in the author's company or firm, in litigation or legislation discussed in an article must be disclosed. Such involvement must also be noted in the footnotes to the article.
- **No Guarantee of Publication:** There is no guarantee that submitted articles will be published.

Editorial Process

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- **Format and Length:** Manuscript length should not exceed 15,000 words, and article titles should be no longer than twelve (12) words. Subheadings are encouraged, and should be a maximum of eight (8) words.

Rocky Mountain Mineral Law Foundation Journal

Part II

Articles

Managing Hotspots in Wildfire Risk at Public Lands Ski Areas

by Heidi Ruckriegle and Lauren Mercer
WilmerHale
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Synopsis

Abstract

In recent years, climate change has dramatically increased the frequency and intensity of wildfires in the American West. This uptick in fire activity comes as many ski areas have expanded their summer operations. In addition to physical damage inflicted by wildfires, ski areas must worry about the financial impact of fire damage, forced closures, and evacuations during wildfire season. This article addresses proactive fire prevention efforts that ski areas can take to develop resiliency to protect their guests, their facilities, and their bottom lines. We examine the legal framework governing fire mitigation projects on public lands and the legal rights and obligations of ski areas, and propose measures that ski areas can implement to increase preparedness in the event of a wildfire, and, ultimately, reduce the risk.

I. INTRODUCTION

Ski areas, many of which lie on federal public lands, face complex challenges as they work to adjust to the new reality of wildfires in the American West. These challenges present opportunities for creative solutions and proactive partnerships with federal regulators as wildfire risk

and public land use increasingly converge as high-priority issues. Visits to public lands—many of which include a visit to a ski area—have increased by about 15% over the last decade.[1] During that same period, the frequency and intensity of wildfires in the American West have also increased, fueled by climate change and decades of fire suppression.[2] Federal firefighting expenditures on public lands exceeded $2 billion in 2017 alone.[3]

This article surveys the landscape of ski area management, discusses the challenges facing ski areas, and proposes proactive mitigation measures that can help reduce both the risk and, ultimately, the cost of wildfire.

II. THREATS TO SKI AREAS ON PUBLIC LANDS

Federal public lands represent nearly half of the total land area of the American West.[4] Ski area operators represent an important but often overlooked element of public land administration. In terms of land management, ski areas account for only a minute portion of a vast system—1/10th of 1% of all national forest lands—but in terms of human use management, skiing calls for a great deal of attention.[5] And ski areas drive revenue: they pay $37 million in annual rental payments to the U.S. Forest Service, the managing federal agency, and contribute billions of dollars each year to the economy.[6] The unique history of the ski area and agency partnership has resulted in challenges that require attention and resources to address the growing threat of wildfire.

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[1] Kirk Siegler, "On Public Lands, Visitors Surge While Federal Management Funds Decline," *NPR* (Mar. 31, 2019).

[2] *See* Scott Wilson, "Wet California Winter Is a Boon for Skiers and Water Supply. But It Brings a Threat: Wildfires," *Wash. Post* (June 17, 2019).

[3] *See* Volker C. Radeloff et al., "Rapid Growth of the US Wildland-Urban Interface Raises Wildfire Risk," *Proc. Nat'l Acad. Sci. USA* 115(13):3314–19 (Mar. 27, 2018); Press Release No. 0112.17, USDA, "Forest Service Wildland Fire Suppression Costs Exceed $2 Billion" (Sept. 14, 2017).

[4] *See* Carol Hardy Vincent et al., Cong. Research Serv., "Federal Land Ownership: Overview and Data," at 20 (Mar. 3, 2017); *see also* Candace H. Stowell, "Federal Lands in the West: A Few Facts and Figures," *Western Planner* (Apr. 1, 2016).

[5] *See* Greg M. Peters, "The Future of Ski Resorts on Public Lands," *Your Nat'l Forests Mag.* (Winter/Spring 2014); *see also* Tom Tidwell, Chief, U.S. Forest Serv., Address at the Nat'l Ski Areas Ass'n, Public Lands Committee, "Ski Areas: An Enduring Partnership" (May 5, 2017).

[6] *See* Madeleine Osberger, "Resorts and Industry Tout Ski Fee Bill," *Aspen Daily News* (Aug. 7, 2018); *see also* Peters, *supra* note 5; Tidwell, *supra* note 5; Marca Hagenstad, Elizabeth Burakowski & Rebecca Hill, Protect Our Winters, "The Economic Contributions of Winter Sports in a Changing Climate," at 6 (Feb. 2018).

A. Ski Areas and Public Lands

For many, a visit to a ski area is a visit to U.S. public lands. Over 160 ski areas operate in the American West,[7] and 122 of them operate on Forest Service land.[8] Of the approximately 55 million visits to ski areas in 2017, almost half were made to national forest lands.[9] Indeed, downhill skiing/snowboarding is the second most popular use of national forests, after hiking.[10]

Relatively remote western national forest lands offer ideal mountain terrain for ski areas. As a result, there is a long and complex history of agency management of skiing and other alpine sports on public lands. The permitting process for ski areas on public lands was, for the majority of the twentieth century, both "cumbersome and confusing" in the Forest Service's own words.[11] In the 1960s and 1970s, Congress increasingly endorsed a multiple-use philosophy for public lands, giving the Forest Service greater discretion in management.[12]

To simplify the permitting process for ski areas and balance competing management interests, Congress passed the National Forest Ski Area Permit Act of 1986.[13] This Act established a single, more streamlined permitting process for ski areas on national forest lands, allowing the Forest Service to issue 40-year special-use permits (SUPs) for the necessary operational acreage.[14]

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[7] Nat'l Ski Areas Ass'n, "Number of Ski Areas Operating Per State During 2017/18 Season" (Sept. 1, 2018).

[8] Additional Seasonal and Year-Round Recreation Activities at Ski Areas, 79 Fed. Reg. 21,718 (Apr. 17, 2014).

[9] Nat'l Ski Areas Ass'n, "Kottke National End of Season Survey 2018/19 Final Report," http://www.nsaa.org/media/303945/visits.pdf; *see also* Tidwell, *supra* note 5.

[10] Tidwell, *supra* note 5.

[11] Ski Area Permits, 53 Fed. Reg. 40,739 (Oct. 18, 1988). Ski areas needed separate permits for structures and ski runs, each with different limitations and renewal periods. This complex process caused uncertainty in ski area operations and jeopardized opportunities for financing ski area development necessary to keep up with demand and safety requirements. *Id.*

[12] Multiple use is often characterized as a philosophy that vests land managers with discretionary authority to implement a utilitarian approach to management. *See* Jan G. Laitos & Thomas A. Carr, "The Transformation on Public Lands," 26 *Ecology L.Q.* 140, 203 (1999); *see also* Robert B. Keiter, "Beyond the Boundary Line: Constructing a Law of Ecosystem Management," 65 *U. Colo. L. Rev.* 293, 309 (1994). The National Forest Management Act of 1976 imposed administrative requirements and planning standards, requiring the Forest Service "to coordinate competing national forest uses in light of resource management plans." Laitos & Carr, *supra*, at 204.

[13] Pub. L. No. 99-522, 100 Stat. 3000.

[14] 16 U.S.C. § 497b; 36 C.F.R. § 251.56(b)(2).

B. Expanding Summer Operations

In the early 2000s, ski areas shifted their formerly winter-dependent business model by instituting or increasing summer operations.[15] Several considerations drove this shift. Changing climate patterns have led to unpredictable snowpack levels from year to year,[16] causing swings in ski area revenue[17] as ski seasons vary in quality and length. By 2050, the winter season at ski areas could be reduced by as much as a third,[18] an issue snowmaking cannot sustainably solve. Many ski areas have filled that gap with increased summer activity opportunities to round out their annual revenues.[19]

Initially, as ski areas developed summertime recreational offerings, the question of the extent of the Forest Service's authority over these additional activities loomed.[20] While permits for these activities were largely approved at the discretion of the Forest Service,[21] the 1986 Act expressly allowed for only Nordic and alpine skiing, not activities like mountain biking, ziplining, or other summer recreation. In response, Congress enacted the Ski Area Recreational Opportunity Enhancement Act of 2011.[22] This legislation allowed ski areas on federal lands to offer summer activities without the burden of obtaining new permits and, as a

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[15] *See* Megan Michelson, "Summer Is the New Winter at Ski Resorts," *Outdoor Mag.* (Dec. 7, 2015).

[16] *See* U.S. Envtl. Prot. Agency, "Climate Change Indicators: Snowpack," https://www.epa.gov/climate-indicators/climate-change-indicators-snowpack (updated Aug. 2016).

[17] One study estimated that ski resorts lost $1.07 billion in aggregated revenue between low and high snow fall years between 1999 and 2010. Elizabeth Burakowski & Matthew Magnusson, Nat. Res. Def. Council & Protect Our Winters, "Climate Impacts on the Winter Tourism Economy in the United States," at 14 (Dec. 2012).

[18] *See* Allen Best, "Ski Areas Add Warm-Weather Options," *High Country News* (Jan. 9, 2017).

[19] *See* Megan Barber, "Why Summer Is the New Boom Season for Ski Towns," *Curbed* (July 27, 2017); *see also* Peters, *supra* note 5; Press Release No. 0062.14, U.S. Dep't of Agric. (USDA), "U.S. Forest Service Finalizes Policy to Promote Year-Round Recreation on Ski Areas" (Apr. 15, 2014); Town of Vail, "Town of Vail Summer 2016 Economic Indicators Summary" (Jan. 31, 2017); Eryka Thorley, "The Ski Industry and a Changing Climate: How Climate Change Will Impact Patrolling and Our Love of Winter," *Ski Patrol Mag.* (Nov. 1, 2018); *see also* Emily Wilkins et al., Nat'l Sci. Found., "Effects of Weather Conditions on Tourism Spending: Implications for Future Trends Under Climate Change" (Oct. 18, 2017).

[20] Ski Area Recreational Opportunity Enhancement Act of 2011, Pub. L. No. 112-46, 125 Stat. 538; *see also* Marcus F. McKindra, "The Ski Area Act: Expanding Recreational Uses on Ski Areas in Our National Forest Lands," 2012 *Cardozo L. Rev. De Novo* 249, 258 (2012).

[21] Paul M. Tilley, "The Forest Service 2012 Directive: A Necessary Clarification in Ski Area Permit Act Water Rights Policy," 26 *Tul. Envtl. L.J.* 287, 291 (2013).

[22] Pub. L. No. 112-46, 125 Stat. 538.

result, expanded opportunities for ski areas to offer recreation activities year-round.[23]

Ski areas have benefited from investing in more summer infrastructure and staffing. For example, for Sundance Mountain Resort, summer 2015 was more profitable than any previous winter.[24] In 2017, the Forest Service projected about 600,000 summertime visits to ski areas and an increase of nearly $32 million in spending in neighboring towns.[25] Even before accounting for summer activities, the ski industry is a powerful economic driver: in the 2015–2016 ski season, skiing, snowboarding, and snowmobiling added over $20 billion in value to the country's economy.[26] The ski industry in Colorado alone generates about $4.8 billion annually, a significant economic impact to the state.[27] With summer offerings increasing, the economic force of ski areas will likely remain significant.

C. Climate Change and Poor Wildfire Management

In the American West, the reality of a changing climate has driven states to prepare for continuing drought despite high 2019 snowpack levels.[28] While climate change will have disparate impacts across the world, global temperatures trend strongly toward warming.[29] In addition to increased average temperatures, extreme variances in precipitation levels from year to year, more frequent and intense droughts, and more severe weather events will present increasing challenges for mitigation and adaptation.[30] One of these challenges is wildfire, the perennial bane of the American West.[31] Eight of the top 10 most wildfire-prone states—Arizona, California, Colorado, Idaho, Montana, New Mexico, Utah, and

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[23] *See* Kathryn Sosbe, U.S. Forest Serv., "Ski Areas on National Forests Slowly Zipping Toward Year-Round Expanded Recreation" (Aug. 23, 2017). These activities include ziplining, mountain biking, and disc golf, among others. *See also* Press Release No. 0062.14, *supra* note 19; Additional Seasonal and Year-Round Recreation Activities at Ski Areas, 79 Fed. Reg. 21,718 (Apr. 17, 2014).

[24] Michelson, *supra* note 15.

[25] Best, *supra* note 18.

[26] Hagenstad, Burakowski & Hill, *supra* note 6, at 6.

[27] Colo. Ski Country USA, "Economic Study Reveals Industry's $4.8 Billion Annual Impact to Colorado" (Dec. 9, 2015).

[28] *See* Intergovernmental Panel on Climate Change (IPCC), "Global Warming of 1.5ºC: Summary for Policymakers" (Oct. 2018); Bruce Finley, "Colorado, Western States Finalize Landmark Drought Plan to Voluntarily Use Less Colorado River Water," *Denver Post* (Mar. 19, 2019); Ariana Brocious, "Above-Average Snowpack Improves Colorado River Reservoir Levels," *Ariz. Pub. Media* (Apr. 17, 2019).

[29] *See* Jason Samenow, "Undeniable Warming: The Planet's Hottest Five Years on Record in Five Images," *Wash. Post* (Feb. 6, 2019).

[30] *See* IPCC, *supra* note 28.

[31] *See* Tania Schoennagel et al., "Adapt to More Wildfire in Western North American Forests as Climate Changes," *Proc. Nat'l Acad. Sci. USA* 114(18):4582–90 (May 2, 2017).

Wyoming—are western states with significant ski area operations on public lands.[32]

In addition to climate change, years of poor forest management have contributed to an increase in frequency and intensity of wildfires. Decades of fire suppression, once practiced as part of normal forest management and made famous by its mascot, "Smokey Bear,"[33] have created unmanageable swaths of dense fuel.[34] Without natural burns to periodically clear downed trees and brush, national forest lands have become tinder boxes. And climbing annual temperatures have increased the length of summers and number of hot days, drying out fuel.[35] As a result, wildfires have become larger, hotter, and more destructive than ever.[36]

The increase in wildland-urban interface (WUI)—the area where a population center meets forested land—across the West further contributes to the growing destructive power of wildfire. From 1990 to 2010, WUI grew dramatically in terms of the number of new houses in the interface (41%) as well as land area classified as WUI (33%).[37] In Colorado, the number of people living in WUI increased by 45% from 2013 to 2018.[38] The growth in WUI means that firefighting must increasingly focus on structure protection, causing shifts in technique and planning.[39]

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[32] *See, e.g.*, Ins. Info. Inst., "Top 10 Most Wildfire Prone States, 2017," https://www.iii.org/table-archive/74507.

[33] Forest History Soc'y, "U.S. Forest Service Fire Suppression," https://foresthistory.org/research-explore/us-forest-service-history/policy-and-law/fire-u-s-forest-service/u-s-forest-service-fire-suppression/.

[34] Leigh Barton, "Let It Burn: An Argument for an Adaptive Resilience Approach to Federal Wildfire Management in the Western United States," 30 *Geo. Envtl. L. Rev.* 695, 698–99 (2018).

[35] IPCC, *supra* note 28.

[36] *See* Am. Ass'n for the Advancement of Sci., "Wildfire Trends in the United States," *SciLine* (Nov. 20, 2018) ("Wildfires are not a new phenomenon, but in many regions of the United States, particularly the western states, they have become larger, longer-lasting, more frequent, and more destructive in terms of lives lost and economic costs."); Christopher Ingraham, "Wildfires Have Gotten Bigger in Recent Years, and the Trend Is Likely to Continue," *Wash. Post* (Aug. 14, 2018) ("Total consumed acreage is increasing not necessarily because there are more fires, but because the typical fire is getting bigger. Throughout the 1980s and 1990s, the average wildfire burned anywhere from 40 to 80 acres of land. The 2010s, on the other hand, have seen several years when the average fire was more than 100 acres in size. So far this year, the average fire has burned through about 130 acres."); Thorley, *supra* note 19.

[37] Radeloff et al., *supra* note 2.

[38] "2.9 Million Coloradans Live in Areas At-Risk of Wildfire," *OutThere Colo.* (Nov. 26, 2018).

[39] Radeloff et al., *supra* note 2.

At the same time, the Forest Service has struggled to meet the demands of fighting fire on 193 million acres of national forest lands.[40] Firefighting made up 57% of the Forest Service's 2018 budget, compared to only 16% of the agency's budget in 1995.[41] This focus on firefighting has diverted funding from the Forest Service's other programs—including, ironically, fire reduction initiatives.[42] Similarly, non-fire Forest Service personnel have decreased by 39% since 1995.[43] The demand for firefighting is not going away; between 2014 and 2018, each year an average of more than 6,000 wildfires burned an average of 1.85 million acres of national forest land.[44]

Ski areas are consistently at the center of these concerns, despite good snow seasons, as climate impacts are felt regionally. In June 2019, for example, snowpack in high elevations in the U.S. Rocky Mountains was much higher than average, reducing fire danger in these areas.[45] At the same time, the Canadian Rockies in Alberta burned, and fire activity there was at or above average for that same period.[46] With increasing summer activities and a shift toward year-round business models, the economic risk to ski areas from wildfire will only grow whether or not the inches pile up during the winter.

III. LEGAL FRAMEWORK GOVERNING WILDFIRE RISK MITIGATION BY SKI AREAS ON PUBLIC LANDS

Ski areas operating under a SUP on national forest lands must adhere to a complex web of federal laws and regulations. The most prominent and demanding are the procedural requirements of the National Environmental Policy Act (NEPA).[47] NEPA requires the Forest Service and other federal agencies to consider the environmental impacts before approving activities such as wildfire mitigation projects by private parties on federal land. The level of analysis and documentation NEPA requires depends on a project's scope, complexity, and potential impacts. Typically, the agency must prepare an environmental assessment (EA) to determine whether the

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[40] *See* Cong. Research Serv., In Focus IF10244, "Wildfire Statistics," at 1 (updated Oct. 3, 2019); National Environmental Policy Act (NEPA) Compliance, 84 Fed. Reg. 27,544, 27,544 (proposed June 13, 2019) (to be codified at 36 C.F.R. pt. 220).

[41] 84 Fed. Reg. at 27,544.

[42] *See* Jessica Kutz, "Fire Funding Fix Comes with Environmental Rollbacks," *High Country News* (Mar. 29, 2018).

[43] *See* 84 Fed. Reg. at 27,544.

[44] Cong. Research Serv., *supra* note 40, at 1 tbl.1.

[45] *See* Clare Menzel, "Wait, Is It Endless Winter? Or Fire Season?" *Powder Mag.* (June 7, 2019).

[46] *Id.*

[47] 42 U.S.C. §§ 4321–4347.

proposed action is likely to have a significant effect on the environment. If so, the agency must then prepare a lengthier environmental impact statement (EIS) analyzing the effects of the proposed action in comparison to alternatives.[48] The EA and EIS processes can take months—if not years—to complete.

Some activities, however, do not require full NEPA review because they are subject to a categorical exclusion (CE).[49] These actions do not require an EA or EIS because the agency has previously determined that they do not have a significant effect on the environment.[50] CEs help to expedite the NEPA process and save resources.

The NEPA process can be long and costly for a project proponent, but using a CE for small-scale wildfire mitigation projects can help land managers save time and money.[51] For larger wildfire mitigation projects, Congress enacted the Healthy Forests Restoration Act of 2003 (HFRA)[52] to speed up the regulatory process. HFRA aims to accelerate wildfire mitigation activities through (1) categorical exclusion of qualifying activities and (2) expedited NEPA review of hazardous fuel reduction projects that do not qualify for a CE.

CEs that may apply to wildfire mitigation projects include:

- Harvest of trees in area not more than 250 acres to control insects or disease[53] or to salvage dead and/or dying trees;[54]
- Timber stand improvement activities, including thinning, brush control, and prescribed burning;[55]
- Harvest of live trees not to exceed 70 acres;[56]

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[48] *Id.* § 4332.

[49] 40 C.F.R. § 1508.4.

[50] 36 C.F.R. § 220.6(a). It is worth noting that a proposed action is only categorically excluded if it (1) meets the standards of an established CE and (2) no extraordinary circumstances are present. Extraordinary circumstances include the presence of federally listed or sensitive species, municipal watersheds, tribal or archaeological sites, wilderness areas, or other similarly designated areas. *See also* CEQ, "Categorical Exclusions," https://ceq.doe.gov/nepa-practice/categorical-exclusions.html.

[51] A U.S. Government Accountability Office (GAO) study found that of 197 EISs completed in 2012, preparation time averaged 4.6 years. GAO, "National Environmental Policy Act: Little Information Exists on NEPA Analyses," at 13 (GAO-14-369 Apr. 2014); *see also* NEPA Compliance, 84 Fed. Reg. 27,544 (proposed June 13, 2019) (to be codified at 36 C.F.R. pt. 220).

[52] 16 U.S.C. §§ 6501–6591e.

[53] 36 C.F.R. § 220.6(e)(14).

[54] *Id.* § 220.6(e)(13).

[55] *Id.* § 220.6(e)(6).

[56] *Id.* § 220.6(e)(12).

- "Hazardous fuels reduction projects" in certain national forest areas[57] including prescribed fire, mechanical thinning, and installation of fuel breaks and fire breaks;[58] and
- Projects to address insect or disease infestation.[59]

Hazardous fuel reduction projects that do not meet the criteria for a CE still receive preferential treatment. HFRA relaxes NEPA's requirement that the agency analyze alternatives and expedites the review process for qualifying hazardous fuel reduction projects.[60]

In June 2019, the Forest Service announced a proposal to streamline NEPA procedures in an effort to increase efficiency.[61] If adopted, the rule would add new CEs and expand existing ones, including a CE that covers special uses of national forest lands that require less than 20 acres of land.[62] This CE is intended to cover fire mitigation, among other activities.[63] This proposed rule could help reduce administrative expenses and streamline approval processes as ski areas look to reduce their wildfire liability and to take proactive steps to mitigate wildfire risk. Additionally, in January 2020 the Trump administration proposed comprehensive amendments to the NEPA regulations.[64] The fate of this proposed rule is currently unclear, but if finalized it could exempt certain projects from NEPA review, streamline reviews, and allow project proponents to play a larger role in the NEPA process.[65]

IV. RISKS POSED TO SKI AREAS BY WILDFIRE AND STRATEGIES FOR RISK REDUCTION

A wildfire, like any natural disaster, has wide-ranging impacts. There are three categories of risk that may have especially detrimental impacts for ski areas: legal liability for ignition of a wildfire, temporary closure of a ski area due to a nearby blaze, and damage to difficult-to-replace

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[57] 16 U.S.C. § 6591d.

[58] 36 C.F.R. § 220.6(e)(10); *see* 16 U.S.C. § 6511.

[59] 36 C.F.R. § 220.6(e)(14); *see* 16 U.S.C. § 6591a. This CE and the previous CE are subject to certain environmental, spatial, and geographic restrictions.

[60] 16 U.S.C. §§ 6513(c), 6515(a).

[61] NEPA Compliance, 84 Fed. Reg. 27,544 (proposed June 13, 2019) (to be codified at 36 C.F.R. pt. 220).

[62] *Id.* at 27,547.

[63] *Id.*

[64] *See* Update to the Regulations Implementing the Procedural Provisions of NEPA, 85 Fed. Reg. 1684 (proposed Jan. 10, 2020) (to be codified at 40 C.F.R. pts. 1500–1508).

[65] For more information, see WilmerHale Client Alert, "Trump's Proposed NEPA Regulations Likely to Face Legal Challenge" (Feb. 18, 2020).

infrastructure and assets. The following discusses these risks and then proposes mitigation measures that ski areas can undertake.

A. Civil and Criminal Liability

1. Risk of Liability to Ski Areas

Given that ski areas span large swaths of forested lands likely to include dry fuels, resort operators must take care to ensure that their employees and contractors operate responsibly with respect to fire risk. A wildfire sparked by the conduct of a ski area employee or contractor can expose the operator to significant liability.

Those whose property is damaged by a wildfire started by a ski area's operations have a wide variety of claims for damages available to them. Depending on the circumstances, a ski area can be held civilly or criminally liable for starting a wildfire.[66] State statutes typically limit liability to fires started with a specific degree of culpability: intentional, reckless, or negligent behavior. However, the inquiry as to a party's culpability is fact specific and typically entails expensive litigation, so a resort is likely to expend significant resources defending itself, even if it ultimately prevails in a lawsuit.

An award for damages against a private party that starts a wildfire can be expensive. For example, the Forest Service, State of California, and private parties sued a logging company and its contractor for more than $1 billion after inspectors concluded that a bulldozer operator negligently caused a wildfire by striking a rock.[67] That fire burned 65,000 acres, including more than 46,000 acres of national forest land. Although a judge dismissed the State's lawsuit, the companies eventually settled with the federal government for about $122.5 million.[68] The U.S. Attorney's Office for the Eastern District of California alone has secured settlements of wildfire liability with private parties totaling $200 million since 2012.[69] Additionally, the federal and state governments may send liable parties a bill for firefighting expenses—which can climb into the millions.[70]

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[66] Plaintiffs have also successfully advanced common law negligence, trespass, and nuisance claims against parties responsible for wildfire damages. *See* Charles Riordan, "Calming the Fire: How a Negligence Standard and Broad Cost-Recovery Can Help Restore National Forests After Wildfires," 41 *B.C. Envtl. Aff. L. Rev.* 233 (2014).

[67] *See* Downey Brand, "Moonlight Fire Litigation," https://www.downeybrand.com/Our-Work/Moonlight-Fire-Litigation.

[68] *See* Press Release, U.S. Attorney's Office, E.D. Cal., "Judge Issues Ruling Denying Sierra Pacific's Motion to Set Aside the Settlement in the Moonlight Fire Case" (Apr. 17, 2015). The settlement consisted of $55 million plus a large conveyance of land.

[69] *See* Press Release, U.S. Attorney's Office, E.D. Cal., "United States Reaches $9 Million Settlement for Damages Caused by Forest Fire" (Dec. 10, 2018).

[70] *See* Staci Matlock, "Forest Service Sends Electric Co-Op $38M Bill," *Santa Fe New Mexican* (Nov. 7, 2013).

2. Strategies for Risk Reduction

Ski area operators can take several steps to reduce their liability. They should exercise diligence and care not only in developing the area's core operational framework but also in the training of employees. Operators should also develop thorough documentation of wildfire risk management, implement regular internal and external assessments, ensure compliance with internal fire prevention policies, and continually evaluate areas of improvement. These steps should be taken throughout the development of fire mitigation and response planning, as well as regular employee training.

Ski areas should also invest in the development of fire management plans (FMPs) that are specific to their needs. An FMP identifies wildfire risks and defines a plan to manage wildland fires. The overarching plan should include operational components targeting preparedness, emergency response, and prevention.[71] Having a plan in place, and following that plan during wildfire events, can help reduce liability in potential litigation later. A plethora of resources for developing such plans have already been utilized by ski areas.[72]

Developing best practices that reflect thoughtful engagement with preventing wildfire ignition at a ski area will also limit liability exposure. This should be documented and available to all ski area employees. Hiring fire safety consultants to conduct regular assessments of fire risk can further prove that the ski area is operating with reasonable care and good diligence.[73] Ski areas can also implement fire alert procedures that can

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[71] *See* Nat'l Wildfire Coordinating Grp., "Glossary—Fire Management Plan," https://www.nwcg.gov/term/glossary/fire-management-plan-fmp. A similar type of plan, Community Wildfire Protection Plans (CWPP), is encouraged by HFRA. *See* U.S. Forest Serv. & Bureau of Land Mgmt., "The Healthy Forests Initiative and Healthy Forests Restoration Act: Interim Field Guide," https://www.fs.fed.us/projects/hfi/field-guide/web/page15.php; *see also* Alan A. Ager et al., "Assessing the Impacts of Federal Forest Planning on Wildfire Risk Mitigation in the Pacific Northwest, USA," *Landscape & Urban Planning* 147:1–17 (2016).

[72] *See* Colo. State Forest Serv., "Community Wildfire Protection Plans," https://csfs.colostate.edu/wildfire-mitigation/community-wildfire-protection-plans/; Forests and Rangelands, U.S. Dep't of the Interior & USDA, "Preparing a Community Wildfire Protection Plan: A Handbook for Wildland-Urban Interface Communities" (Mar. 2004); Routt County CWPP at 7 (Sept. 2010); *see also id.* at 54 (indicating that Steamboat Ski Area participated in the Routt County CWPP); Summit County CWPP (2018) (first adopted in 2006, revised in 2016, and re-adopted in 2018); Village of Taos Ski Valley CWPP (June 14, 2016); Alpine Meadows CWPP (Oct. 2005); *see also* Town of Frisco, "Forest Health & Fuels Project Begins Near Breckenridge and Frisco" (June 29, 2018); Village of Angel Fire CWPP: 2016 Update.

[73] *See, e.g.*, Nat'l Fire Prot. Ass'n, "Training & Certification: Certified Fire Protection Specialist (CFPS)," https://www.nfpa.org/Training-and-Events/By-type/Certifications/Certified-Fire-Protection-Specialist.

improve response times to fires by both ski area employees and local fire responders.

Additionally, employee training should comprehensively address wildfire risk, preventative strategies, and alert processes. Each employee of the ski area should have a thorough knowledge of the risk of wildfire ignition and their role in identifying and reporting risks immediately. Regular training refreshers are advisable, particularly during the transitional periods between winter and summer operations.

In short, ski area operators should implement and document processes that demonstrate care in understanding and mitigating wildfire risk. These efforts will not only help the ski area respond effectively in the event of a wildfire but also help reduce liability.

B. Temporary Closure

1. Risk of Closure to Ski Areas

Even when flames do not reach a ski area's boundaries, nearby fires can inflict damage on resorts' bottom lines. In the arid West, multiple ski areas and their base villages have been evacuated due to wildfire.[74] In summer 2018, Arizona Snowbowl and Purgatory Resort in Colorado were both forced to shut down operations due to national forest closures.[75] Red Lodge Mountain in Montana even experienced a wildfire evacuation during the ski season in 2015.[76] Evacuations and closures during operating season can have substantial financial impacts, as resorts miss out on revenue not only from on-mountain activities, but also from resort-owned dining, lodging, and retail.[77]

The Forest Service has authority to close or restrict the use of national forest land, roads, and trails due to wildfire risk; meaning that the 122 ski

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[74] *See* Staff Reports, "Summit Fire: Ski Resort Turns Snow-Making Machines into Fire-Prevention Gear," *Press-Enter.* (Aug. 24, 2015); David Mann, "Wildfire Prompts Evacuation Alert for White Pass Ski Area," *YakTriNews* (July 30, 2018, updated Dec. 18, 2019); Tiffany Caldwell, "Utah's Brian Head Fire Started While a Cabin Owner Was Doing Yard Work to Protect His Home from a Potential Wildfire, Says Defense Attorney," *Salt Lake Trib.* (Apr. 26, 2018, updated Apr. 27, 2018).

[75] *See* Emery Cowan, "Snowbowl Seeks Full Exemption to Forest Closure Barring Public Access," *Ariz. Daily Sun* (June 27, 2018); Owen Sexton, "As Forest Closures Continue[], Snowbowl Is Forced to Lay-Off Almost 50 Employees," *Lumberjack* (May 31, 2018); Purgatory Resort, "Purgatory Resort Is Temporarily Closed" (June 10, 2018).

[76] *See* Peter Holley, "Montana Wildfire Continues, but Evacuation Lifted for Ski Resort," *Wash. Post* (Mar. 29. 2015); Assoc. Press, "Red Lodge Fire Grows," *Great Falls Trib.* (Mar. 29, 2015).

[77] *See* Sawyer D'Argonne, "More Than Snow: The Economics of the Ski Industry," *Sky-Hi News* (Dec. 26, 2017) ("According to Belin, about 45 to 48 percent of revenue for ski areas come from selling lift tickets and passes. Ski schools, dining and lodging each make up about 15 percent of the pie, while rental shops and retail stores account for about five percent each.").

areas that operate on Forest Service land can be closed by the agency with little or no input from the ownership.[78] The Forest Service may exempt lessees or permittees from those restrictions,[79] but exemptions are rare.[80]

When fire danger is high, land managers may impose fire restrictions before resorting to a closure. Stage 1 restrictions do not significantly impact ski area operations, beyond prohibiting campfires and outdoor smoking. Stage 2 restrictions typically add a ban on driving off of established roads and could therefore impact summer maintenance and construction operations.[81] Of course, closures have the greatest impact on ski areas. Forest Service policy dictates that closures are to be implemented on the smallest geographic scale possible.[82]

Fire restrictions and closures are considered a measure of last resort. They are only to be used when "high to extreme fire danger exists and is predicted to persist," and most other prevention measures have already been taken.[83] But that does not mean that the Forest Service will only close a ski area when flames are at its doorstep. The agency has closed areas due to high fire danger even when there was not an active fire nearby.[84] In determining when to institute fire restrictions or closures, agencies consider weather and fuel conditions, availability of firefighting resources, and public safety.[85] These risk factors are balanced against socioeconomic considerations including the impacts on tourism and permittees.[86] However, public and firefighter safety remain top priorities.

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[78] *See* 36 C.F.R. §§ 261.50(a), .52(e). Additionally, a ski area's SUP will typically allow for immediate temporary suspension of operations when necessary to protect public health or safety or the environment.

[79] *Id.* § 261.50(e).

[80] *See* U.S. Forest Serv., "Southwest Area Interagency Fire Restrictions and Closures Toolbox," at 6–7 (Feb. 2011). However, activities occurring under a permit are more likely to be exempt than those of the general public. *Id.* at 7.

[81] *See* U.S. Forest Serv., "Fire Restriction Stages Explained," https://www.fs.usda.gov/detail/coconino/home/?cid=stelprdb5423784; U.S. Forest Serv., "Fire Restriction Definitions," https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5371474.pdf; U.S. Forest Serv., "Explanation of Fire Restriction Stages," https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd505482.pdf.

[82] *See* Missoula Area Fire Restrictions and Closures Plan (June 1, 2017).

[83] *Id.* at 3.

[84] *See* "Snowbowl Seeking Exemption from Coconino Forest Closure," *AP News* (June 27, 2018); "Extreme Fire Danger Forces Rare Shutdown of National Forests in West," *CBS News* (June 12, 2018); Colleen Slevin, "New Wildfire Erupts Near Colorado Ski Resorts, Houses," *AP News* (June 13, 2018).

[85] *See* Missoula Area Fire Restrictions and Closures Plan, *supra* note 82, at 6.

[86] U.S. Forest Serv., "Southwest Area Interagency Fire Restrictions and Closures Toolbox," at 3 (Feb. 2011).

2. Strategies to Reduce Risk of Closure

Because closure is a balancing consideration by the agency and/or local authorities, proactively establishing a line of communication and a working relationship with these decision makers is crucial to weighing in. Given the economic impact of ski areas on local communities, the relationship between ski area operators and wildfire officials is important to develop and strengthen early and often.

Additionally, officials may still think of ski areas as mostly seasonal economic drivers, so communicating average number of visitors by month and monthly revenue can aid in weighing the risks of closure against the risk of fire. Having reports on summer activity as well as numbers of current guests at the ready in the case of wildfire threat could also be helpful to decision makers if provided early.

In addition to informal lines of communication, ski areas should consider developing formal consultation protocol. Signing a memorandum of understanding or similar agreement with the local firefighting force as well as one with the forest supervisor can solidify good existing practices or establish new ones. Steps for notification and consultation during periods of potential closure can be included in a resort's operations plan or fire mitigation and suppression plan.[87] Factors that ski areas should consider including in agreements and/or plans include points of contact, timing of notice, requirements for communication with ski area prior to closure, timeline for closure decision, timeline for closure enforcement, and other beneficial information to both firefighting officials and ski area operators.

C. Damage to Infrastructure

1. Context and Types of Infrastructure Damage

Infrastructure damage presents an increasingly significant risk to ski areas as they develop structures for summer activities—including facilities for ziplining, mountain coasters, and alpine slides[88]—and maintain difficult-to-replace structures, such as ski lifts and slope-side lodges.

Some ski areas have already faced the worst-case scenario of direct wildfire damage. Ski Apache in New Mexico lost three lifts and two structures and suffered damage to 65 acres of terrain during the Little Bear Fire in 2012. Fortunately, the resort had a resort fire plan in place and was able to employ its snowmaking equipment to fight the fire.[89] Pajarito

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[87] *See Forest Service Handbook* 5109.18 - Wildfire Prevention Handbook, Chapter 50 - Wildfire Prevention Enforcement and Fire Investigation (May 23, 2019).

[88] "Summer Activities at Colorado Ski Resorts," *Colorado.com* (Oct. 10, 2019).

[89] Matt Stensland, "Ski Resorts Share Strategies in Steamboat for Wildfire Preparedness," *Steamboat Pilot & Today* (Jan. 22, 2014); "Wildfire Damages Lifts at Ski Apache," *First Tracks Online Ski Mag.* (June 12, 2012).

Mountain Ski Area, also in New Mexico, was similarly impacted by wildfire in July 2011. The resort lost two lifts to the fire and was unable to replace them before the next ski season. The impacts of these fires lingered long after the flames were extinguished. Ski Apache was not able to complete restoration of the lands burned in 2012 until late 2018 due to the difficulty of operating heavy equipment on the resort's steep terrain.[90] Similarly, as recently as 2017, Pajarito Mountain Ski Area was still feeling the effects of the fire. The resort had to close one lift for a month during ski season when a tree in the burn area broke and struck the line.[91]

2. Strategies to Reduce Risk

Proactive fire mitigation tactics, including selective thinning of surrounding tree stands, clearing defensible spaces around structures, and maintaining access routes for firefighters in the case of a fire will help ski areas reduce the risk of infrastructure damage. Under a variety of CEs discussed above, ski areas may utilize methods such as prescribed fire, mechanical thinning, and installation of fuel breaks and fire breaks without undergoing the full NEPA EA or EIS process.

Additionally, consulting with experts on reducing wildfire risk helps the ski area develop robust plans. Wildland fire experts with the Forest Service, local fire departments, and private consulting firms can provide detailed, useful suggestions for mitigation measures to undertake. And regular conferral with local firefighting experts may help the firefighting effort should there be a fire on the ski area itself.

For example, in Steamboat Springs, ski area operators worked with local fire departments and the Forest Service fire unit to discuss how snowmaking hydrants could help with firefighting.[92] The ski area even took the step of building adaptors to fit the snowmaking hydrants to the firefighters' hoses, pumper trucks, and other equipment.[93] These measures

[90] Considerations with respect to damaged infrastructure are not limited to summertime heat. Although not related to a wildfire, a blaze at Whiteface Mountain in Wilmington, New York, destroyed a beloved mid-station lodge. Even with temperatures below 10 degrees, the fire was difficult to battle. With access roads covered by snow, local firefighters had to approach the blaze on snowcats and snowmobiles using the mountain's snow guns to prevent spread to nearby chairlifts. *See* Elizabeth Izzo, "Fire on Whiteface," *Adirondack Daily Enter.* (Dec. 2, 2019).

[91] Jose Corral, "Pajarito Still Battles Burn Scars," *Los Alamos Monitor Online* (Feb. 10, 2017).

[92] Tom Ross, "Snowmaking Hydrants Could Be Used to Fight a Larger Wildfire on Ski Slopes in the Future," *Steamboat Pilot & Today* (Sept. 19, 2016).

[93] *Id.*

can help firefighters act more quickly and effectively should a fire threaten a ski area.[94]

Finally, if developing a memorandum of understanding or framework agreement with local firefighting officials,[95] ski areas should consider discussing a firefighting plan for the possibility of wildfire within ski area boundaries. Providing maps and information on structures, including buildings and infrastructure, could help firefighters prioritize in a situation that necessitates difficult decisions.

V. CONCLUSION

In the West, wildfire is an inevitability. Wet seasons such as spring 2019 might reduce summer fires but could result in more fuel for a dry autumn fire season.[96] Year-round vigilance and preparedness are the most important tools in safeguarding against wildfire. Ski areas can implement the forward-thinking strategies discussed here to reduce risk to their visitors, facilities, and bottom lines.

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[94] *See* Heather Hansman, "Fire on the Mountain," *Powder* (June 28, 2012); Betsy Z. Russell, "Snowmaking Becoming a Game-Changer for Area Ski Resorts," *Spokesman-Rev.* (Dec. 20, 2015); "Summit Fire: Ski Resort Turns Snow-Making Machines into Fire-Prevention Gear," *Press-Enter.* (Aug. 24, 2015); Nat'l Ski Area Ass'n, "Facts on Snowmaking," http://www.nsaa.org/media/248986/snowmaking.pdf.

[95] See § IV.B.2, *supra*.

[96] *See, e.g.*, Tim Arango, Jose A. Del Real & Ivan Penn, "5 Lessons We Learned from the California Wildfires," *N.Y. Times* (Nov. 4, 2019).

On Shaky Ground: Commercial General Liability Coverage for Injection-Induced Seismicity

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Synopsis

I. INTRODUCTION[*]

Managing increased volumes of produced water has posed a costly challenge to domestic oil producers. Due to high treatment costs and concerns with surface reuse, producers have largely utilized injection disposal to manage booming volumes of produced water. In recent years, however, the U.S. Geological Survey (USGS) has linked injection disposal to induced seismicity. As litigation concerning induced seismicity continues to rise, some insurers have disclaimed coverage for the seismic damages allegedly caused by injection disposal operations.

This article examines the availability of seismic coverage in commercial general liability (CGL) policies. Part II provides background

[*] The author wishes to thank Professor Don Smith, University of Denver Sturm College of Law, for making introductions to further this research and for his review of this article.

on the increased prevalence of induced seismicity and scientific recognition of causation. Additionally, Part II summarizes underlying litigation shaping the future of seismic coverage in CGL policies. Part III examines CGL policy terms, pollution exclusions, and earth movement exclusions that frequently dictate whether a CGL policy entails seismic coverage. Finally, Part IV concludes by summarizing the impact of litigation on seismic coverage and the policy provisions most likely to impact the availability of coverage.

II. BACKGROUND

A. Scientific Recognition of Induced Seismicity

Hydrocarbon reservoirs generally contain a mix of hydrocarbons and water, both of which are produced in an effort to extract the hydrocarbons. Between 2007 and 2019, U.S. oil production increased over 240%,[1] resulting in the associated production of unprecedented volumes of water. Furthermore, the amount of water produced per barrel of crude oil is likely to continue climbing as the fields mature and require more stimulation. Although the average national water-to-oil ratio is only sporadically reported, the trend is nonetheless apparent. In 2007, the water-to-oil ratio for domestic onshore production was 7.6:1.[2] By 2012, a mere five years later, the water-to-oil ratio had climbed to 9.2:1, resulting in 21.2 billion barrels of produced water.[3] Studies estimate that the water-to-oil ratio will reach 12:1 by 2025.[4]

Managing increased volumes of produced water poses a costly challenge to domestic oil producers. The water may contain ionized salts and radioactive materials naturally present in the reservoir[5] and chemicals added to the reservoir in hydraulic fracturing and other well treatments.[6] Consequently, treating produced water for surface use is typically cost intensive, yet does little to quell concerns regarding unknown health and

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[1] U.S. Energy Info. Admin., "U.S. Field Production of Crude Oil," https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfpus2&f=a (last updated Apr. 30, 2020) (comparing 2007 crude oil production of 5,074 thousand barrels per day to 2019 crude oil production of 12,232 thousand barrels per day).

[2] C.E. Clark & J.A. Veil, Envtl. Sci. Div., Argonne Nat'l Lab., "Produced Water Volumes and Management Practices in the United States," at 8 (Sept. 2009).

[3] John Veil, Veil Envtl., LLC, "U.S. Produced Water Volumes and Management Practices in 2012," at 112–13 (Apr. 2015).

[4] Nicole T. Carter, "Fossil Fuels and Water: A Complex and Evolving Relationship," *in Climate, Energy and Water* 45, 54 (Pittock et al. eds., 2015).

[5] Eng'g & Analysis Div., U.S. Envtl. Prot. Agency (EPA), "Study of Oil and Gas Extraction Wastewater Management Under the Clean Water Act," at 5 (May 2019) (draft) ("Naturally occurring constituents include, but are not limited to, bromide, calcium, chloride, magnesium, sulfate, and radioactive materials.").

[6] *Id.* ("Materials added downhole include hydraulic fracturing chemicals, well stimulation chemicals and well maintenance chemicals.").

environmental risks.[7] Because of these challenges, domestic oil producers dispose of 91% of onshore produced water through injection into Class II Underground Injection Control (UIC) wells.[8]

Although numerous subsurface activities may trigger seismicity, the USGS "consider[s] induced seismicity to be primarily triggered by the disposal of [produced water] into deep wells."[9] Such injection-induced seismicity occurs when the earth's crust abruptly shifts due to increased pore pressure or changed stress on a fault.[10] For seismicity to result from increased pore pressure, the injection pressure must directly communicate with the fault.[11] Once in communication, the injectate increases the pore pressure along the fault, separating the rock faces and decreasing frictional forces that stabilize the fault.[12] Seismicity results when the tectonic forces urging the rock faces to shift along the fault exceed these decreased stabilizing forces.[13]

Unlike seismicity due to increased pore pressure, seismicity due to changed stress does not require that the injection pressure directly communicate with the fault.[14] Rather, the injectate causes the surrounding rock matrix to expand, which in turn exerts force on the fault.[15] Seismicity results when the changed stress regime urges the rock faces to shift along the fault.[16] Although scientists recognize these two mechanisms, injection-

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[7] *See id.* at 24 ("Costs for injection disposal were reported to generally be less than $1 per barrel of produced water. . . . As a comparison, treatment for discharge may cost several dollars per barrel, and may be $10 or more per barrel depending on the market and the level of treatment needed."); *id.* at 27 ("Given the data uncertainty [non-governmental organization] representatives expressed concern that increased opportunities for [surface] discharge would result in human health and ecological impacts.").

[8] Veil, *supra* note 3, at 45 ("45.1% was injected [into Class II UIC wells] for enhanced recovery, 38.9% was injected at non-commercial [Class II UIC] disposal wells, and 6.7% was injected at offsite [Class II UIC] commercial disposal facilities.").

[9] Becky Oskin, "Fracking Is Not the Cause of Quakes. The Real Problem Is Wastewater," *Wash. Post* (Apr. 27, 2015) (quoting statement by Mark Petersen, Chief of the Nat'l Seismic Hazard Project, USGS).

[10] Nat'l Research Council, Nat'l Acad. of Scis., "Induced Seismicity Potential in Energy Technologies," at 46 (2013).

[11] Peter Folger & Mary Tiemann, Cong. Research Serv., "Human-Induced Earthquakes from Deep-Well Injection: A Brief Overview," at 5 (R43836 Sept. 30, 2016).

[12] Induced Seismicity Potential in Energy Technologies, *supra* note 10, at 47–48 ("Pore pressure increases . . . are potentially destabilizing, since they cause a reduction of the slip resistance of a fault located in the region of pore pressure increase.").

[13] *Id.* at 37–38.

[14] *Id.* at 46.

[15] *Id.*

[16] *Id.* at 37–38.

induced seismicity is nonetheless difficult to predict because of limited understanding of subsurface faults and forces.[17]

In 2014, the USGS held workshops to incorporate induced seismicity into the National Seismic Hazard Model.[18] The subsequent report issued by the USGS documents 17 zones of induced seismicity across Colorado, New Mexico, Arkansas, Oklahoma, Kansas, Texas, Ohio, Alabama, and Florida.[19] Of these states, Oklahoma has suffered the most significant increase in the number of induced seismic events.[20] Prior to 2008, the state observed fewer than two earthquakes per year exceeding a magnitude of 3.0.[21] By 2015, Oklahoma became the most seismically active state in the country with more than two earthquakes per day exceeding a magnitude of 3.0.[22]

B. Rise of Induced Seismicity Litigation

While the majority of induced seismicity litigation concerns property damage, a minority of plaintiffs have also claimed emotional distress and two plaintiffs have brought claims for personal injury. Because of the historical lack of seismicity in many impacted areas, induced seismicity has caused substantial property damage to structures not designed to withstand earthquakes. As a result, numerous Oklahoma and Arkansas plaintiffs have filed lawsuits against injection disposal operators for property damage arising from the increased seismic activity.[23] A minority

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[17] *See* States First, Ground Water Prot. Council & Interstate Oil & Gas Compact Comm'n, "Potential Injection-Induced Seismicity Associated with Oil and Gas Development: A Primer on Technical and Regulatory Considerations Informing Risk Management and Mitigation," at 134 (2d ed. 2017) ("Some faults are well known, whereas others are speculative. Very few are visible at the surface.").

[18] Mark D. Petersen et al., USGS, Open-File Report 2015-1070, "Incorporating Induced Seismicity in the 2014 United States National Seismic Hazard Model—Results of 2014 Workshop and Sensitivity Studies," at 1–2 (2015).

[19] *Id.* at 13 tbl.1.

[20] *See* Lydia Ramsey, "We Are Making Certain Parts of the US Way More Vulnerable to Earthquakes," *Bus. Insider* (Mar. 29, 2016) (ranking states at greatest risk for "potentially disastrous" induced seismicity in descending order of risk: Oklahoma, Kansas, Texas, Colorado, New Mexico, Arkansas).

[21] USGS, "Oklahoma Earthquakes Magnitude 3.0 and Greater," at 1 (2018).

[22] *Id.*

[23] *See, e.g.*, Complaint at 1, 2010–2011 Guy-Greenbrier Earthquake Swarm Victims v. Chesapeake Operating, Inc., No. 23CV-14-84 (Faulkner Cty. Cir. Ct., Ark., Feb. 11, 2014). Faulkner County landowners filed a class-action suit to recover for property damage suffered when over 1,000 earthquakes struck the area over 14 months. *Id.* at 1, 10. The plaintiffs asserted that the earthquakes resulted from the defendants' injection disposal operations. *Id.* at 1. In March 2014, the court granted the plaintiffs' motion to dismiss with prejudice. Order at 1, *2010–2011 Guy-Greenbrier Earthquake Swarm Victims*, No. 23CV-14-84; *see also, e.g.*, Class Action Petition at 2–3, Griggs v. New Dominion LLC, No. CJ-2017-174 (Dist. Ct., Logan Cty., Okla., July 21, 2017) (pending class action seeking damages for physical damage to property, diminution, emotional distress, and punitive

of these plaintiffs have also asserted damages for emotional distress. Because claims for emotional distress have either settled or are currently pending, the outcome of these claims is uncertain.[24] In September 2017, an operator and an Oklahoma plaintiff settled the plaintiff's personal injury claim for injuries sustained during an earthquake.[25] Subsequently, a second Oklahoma plaintiff filed suit after falling during an earthquake and sustaining "nerve damage . . . from which she is now permanently disabled."[26]

Although future litigation will certainly affect insurance markets, the degree of its potential impact is uncertain given the present scarcity of litigation on the merits. Nevertheless, a few trends are noteworthy. Plaintiffs alleging seismic damages most often proceed under theories of strict liability, negligence, nuisance, and trespass. While courts have not applied strict liability to injection disposal, some states have sought to legislatively mandate its application.[27]

Even if strict liability remains unavailable, a plaintiff proceeding under a theory of negligence still bears the burden of establishing duty, breach, causation, and damages. As induced seismicity has garnered greater scientific backing, plaintiffs have become increasingly foreseeable. As a result, operators may be less able to effectively deny the existence of a duty. Furthermore, increased scientific backing may allow the plaintiff to more readily establish causation despite the (1) distance between the at-fault injection well and the earthquake's epicenter, (2) delay between the time of injection and the resulting seismicity, and (3) difficulty of identifying the at-fault injection well if multiple wells are in close proximity.

Finally, courts have not decided the impact of an injection permit on an operator's trespass liability within the context of induced seismicity. In most claims for subsurface trespass, courts have declared that "a permit is

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damages); Class Action Petition at 2–3, Reid v. White Star Petroleum, LLC, No. CJ-2016-543 (Dist. Ct., Payne Cty., Okla., Dec. 5, 2016) (pending action seeking class certification and damages for physical damage to property, diminution, emotional distress, and punitive damages); Class Action Petition at 2–3, Adams v. Eagle Rd. Oil LLC, No. CJ-2016-00078 (Dist. Ct., Pawnee Cty., Okla., Nov. 17, 2016) (pending class action seeking damages for physical damage to property, diminution, emotional distress, and punitive damages).

[24] *See, e.g.*, *Griggs* Class Action Petition, *supra* note 23, at 3; *Reid* Class Action Petition, *supra* note 23, at 3; *Adams* Class Action Petition, *supra* note 23, at 3.

[25] Adam Wilmoth, "Companies, Resident Settle Prague Earthquake Lawsuit," *Oklahoman* (Oct. 20, 2017). In *Ladra v. New Dominion, LLC*, the plaintiff claimed personal injury damages exceeding $75,000 after rock facing fell from her chimney and struck her knees during an earthquake. 2015 OK 53, ¶ 3, 353 P.3d 529, 530.

[26] Petition at 45, Mercer v. Eagle Rd. Oil, LLC, No. CJ-18-00080 (Dist. Ct., Pawnee Cty., Okla., Aug. 28, 2018).

[27] *See, e.g.*, H.R. 1310, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016) (postponed indefinitely).

not a get out of tort free card."[28] A minority of jurisdictions, however, have found a government issued permit to limit the operator's trespass liability.[29] Nevertheless, given the rapidly evolving science and lack of precedent, plaintiffs alleging seismic damages will likely continue to choose settlement over the uncertainty of litigation.

III. COMMERCIAL GENERAL LIABILITY COVERAGE IN CLAIMS FOR INDUCED SEISMICITY

A. Introduction

Claims for induced seismicity may implicate numerous first-party and third-party insurance policies. While first-party insurance covers adversely affected individuals and their property, third-party insurance covers an individual's or company's liability to others.[30] CGL policies protect businesses from third-party liability for bodily injury and property damage "arising out of premises, operations, products, and completed operations."[31] Whether CGL coverage is available for seismic damages largely depends upon the terms of the policy, applicable pollution exclusions, and applicable earth movement exclusions. In litigation, the insured must first prove that the CGL policy provides coverage for the alleged damages.[32] If the insured is successful, then the burden shifts to the insurer to prove that an exclusion eliminates such coverage.[33] Because courts interpret ambiguous coverage terms in the insured's favor, exclusions eliminating coverage "must employ language that clearly and distinctively reveals that which it limits."[34]

Although the insured has the benefit of the court's interpretation of ambiguous coverage terms, the insurer has the benefit of selecting the

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[28] FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 311 (Tex. 2011).

[29] *See, e.g.*, Boudreaux v. Jefferson Island Storage & Hub, LLC, 255 F.3d 271, 275 (5th Cir. 2001) (providing that an operator with a government permit is not liable for trespass, absent damages); Tidewater Oil Co. v. Jackson, 320 F.2d 157, 165 (10th Cir. 1963) (providing that an operator acting in compliance with a government permit is not liable for punitive damages).

[30] *Compare* Int'l Risk Mgmt. Inst. (IRMI), "Glossary of Insurance and Risk Management Terms—First-Party Insurance," https://www.irmi.com/term/insurance-definitions/first-party-insurance (defining first-party insurance as "insurance applying to the insured's own property or person"), *with* IRMI, "Glossary of Insurance and Risk Management Terms—Third-Party Liability Coverage," https://www.irmi.com/term/insurance-definitions/third-party-liability-coverage (defining third-party liability coverage as "any type of insurance covering the legal liability of one party to another party").

[31] IRMI, "Glossary of Insurance and Risk Management Terms—Commercial General Liability (CGL) Policy," https://www.irmi.com/term/insurance-definitions/commercial-general-liability-policy.

[32] Harken Expl. Co. v. Sphere Drake Ins. PLC, 261 F.3d 466, 471 (5th Cir. 2001).

[33] *Id.*

[34] Siloam Springs Hotel, LLC v. Century Sur. Co., 2017 OK 14, ¶ 18, 392 P.3d 262, 276.

venue for litigation. In *Certain Underwriters at Lloyd's, London v. New Dominion, LLC*, an operator brought suit after its insurer disclaimed coverage for the underlying plaintiffs' seismic damages.[35] The operator filed suit in Tulsa County District Court despite the policy's mandate that "all litigation . . . shall take place in the State of New York."[36] Relying on the forum selection clause, the insurer sought to transfer litigation to the U.S. District Court for the Southern District of New York.[37] In response, the operator argued that the forum selection clause was unenforceable because it was contained in a contract of adhesion.[38] Because the insurance contract was "between two sophisticated businesses," the court did not agree that it constituted a contract of adhesion.[39] As a result, the court held that the forum selection clause was enforceable and the "Oklahoma Action was brought in the wrong forum."[40]

As *Certain Underwriters at Lloyd's* demonstrates, an operator cannot rely on having a local jury whose members may benefit from precedent that finds seismic coverage. Rather, jurors unfamiliar with the underlying issues will provide the policy interpretations that dictate insurance recovery for operators and available tort recovery for impacted communities. This part examines CGL policies, pollution exclusions, and earth movement exclusions that such jurors must interpret to determine the availability of seismic coverage for operators.

B. Injection-Induced Seismicity Coverage Under a Commercial General Liability Policy

Two considerations predominantly govern whether a CGL policy provides coverage for injection-induced seismic damages. First, the CGL policy must provide coverage for the damages sought. Second, an "occurrence" must have caused the damages.

1. Coverage for the Damages Sought

CGL policies generally provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage.'"[41] Bodily injury includes "bodily harm, sickness, or disease, including resulting death" sustained during the policy

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[35] *See* No. 1:16-cv-05005, 2016 WL 4688866, at *1–2 (S.D.N.Y. Sept. 7, 2016) (order denying defendant's motion to dismiss).

[36] *Id.* at *1 (quoting Certain Underwriters at Lloyd's, London, Site Pollution Liability Policy IX(N) (2014)).

[37] *Id.* at *2.

[38] *Id.* at *4.

[39] *Id.* at *5.

[40] *Id.* at *9.

[41] Lodwick, L.L.C. v. Chevron U.S.A., Inc., 48,312, p. 11 (La. App. 2 Cir. 10/2/13); 126 So. 3d 544, 552 (quoting Admiral Ins. Grp., CGL Policy I(A)(1)(a) (2000)).

period.[42] Some policies, however, provide additional coverage by defining bodily injury to also include "mental anguish[,] shock[,] or emotional distress."[43] Although few induced seismicity plaintiffs have alleged damages for bodily harm, several class actions alleging damages for emotional distress are currently pending.[44] Accordingly, the policy's definition of bodily injury will dictate the availability of insurance recovery for emotional distress damages if such plaintiffs prevail.

Property damage includes "[p]hysical injury to tangible property" and "[l]oss of use of tangible property that is not physically injured."[45] As with bodily injury, the property damage must occur during the policy period.[46] Furthermore, some CGL policies define property damage to explicitly include or exclude coverage for environmental or natural resource damages. In the absence of such explicit language, however, some courts have interpreted the above definition to nonetheless include coverage for environmental or natural resource damages.[47] Such interpretations may prove beneficial to operators "[b]ecause seismic events from injection have the potential to cause endangerment of underground sources of drinking water . . . ."[48]

Although it occurs infrequently, seismicity can damage injection wells, most often at shallow depths.[49] This shallow damage, including collapsed casing and kinked tubing, may render the well inoperable and, in rare instances, may necessitate abandonment of the wellbore.[50] Nevertheless, CGL policies generally exclude coverage for damage to "property in the

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[42] IRMI, "Glossary of Insurance and Risk Management Terms—Bodily Injury (BI)," https://www.irmi.com/term/insurance-definitions/bodily-injury.

[43] LCS Corrs. Servs., Inc. v. Lexington Ins. Co., 7 F. Supp. 3d 678, 684 (S.D. Tex. 2014) (quoting Lexington Ins. Co., CGL Policy 49 (2008)).

[44] *See supra* text accompanying notes 23–24.

[45] State Nat'l Ins. Co. v. Rainbo Serv. Co., No. 5:16-cv-00481, 2018 WL 8332538, at *3 n.4 (W.D. Okla. June 8, 2018) (quoting State Nat'l Ins. Co., CGL Policy V(17) (2016)).

[46] *See, e.g.*, *Lodwick*, 126 So. 3d at 552.

[47] *See, e.g.*, Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1514 (9th Cir. 1991) ("An ordinary person would find that the environmental contamination alleged by the EPA falls within the plain meaning of 'property damage' as that term is used in the policies."). Policies generally define environmental damage to include physical harm to land or water that gives rise to cleanup costs. Great Am. Fid. Ins. Co. v. JWR Constr. Servs., Inc., 882 F. Supp. 2d 1340, 1346 (S.D. Fla. 2012). Additionally, policies generally define natural resource damage to include physical harm to land, wildlife, air, water, and other resources controlled by any Native American tribe or government division. *Id.* at 1348.

[48] UIC Nat'l Tech. Workgroup, EPA, "Minimizing and Managing Potential Impacts of Injection-Induced Seismicity from Class II Disposal Wells: Practical Approaches," at ES-1 (2014).

[49] H.R. Pratt et al., Office of Sci. & Tech. Info., U.S. Dep't of Energy, DP-1513, "Earthquake Damage to Underground Facilities," at 36 (1978).

[50] *Id.* at 36–38.

care, custody or control of the insured."[51] As a result, CGL policies do not provide coverage for damage to an operator's injection well.

2. Damages Caused by an Occurrence

CGL policies only cover damages "caused by an 'occurrence,'"[52] defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[53] While some policies use this definition of occurrence, other policies do not define the term. Whether a policy defines occurrence, however, has little effect since courts typically adopt the commonly used definition if the policy does not provide its own.[54] Despite using the same definition, courts have differed regarding whether an occurrence requires an accidental cause or accidental effect. If the court requires an accidental cause, then the damages must result from an "unexpected, unforeseen and unintentional" act.[55] How the court defines the act based on the underlying complaint frequently dictates whether or not the court will declare it to be accidental.

For example, in *State National Insurance Co. v. Rainbo Service Co.*, the underlying plaintiffs alleged that the insured operator's injection triggered earthquakes that caused their damages.[56] In turn, the insurer sought a declaration that its CGL policy did not cover the underlying plaintiffs' claims against the operator.[57] In doing so, the insurer contended that the bodily injury and property damage alleged by the underlying plaintiffs did not result from an occurrence.[58] To determine whether the damages resulted from an occurrence, the court examined whether the underlying plaintiffs' damages resulted from the operator's accidental act. The court first defined an accident as "[a]n event that takes place without one's foresight or expectation."[59] The court next examined the operator's

[51] Selective Ins. Co. of S.C. v. Erie Ins. Exch., 14 N.E.3d 105, 109 (Ind. Ct. App. 2014) (quoting Selective Ins. Co. of S.C., Ultraflex Package Policy I(A)(2)(j) (2008)).

[52] *Lodwick*, 126 So. 3d at 552 (quoting Admiral Ins. Grp., CGL Policy I(A)(1)(b) (2000)).

[53] State Nat'l Ins. Co. v. Rainbo Serv. Co., No. 5:16-cv-00481, 2018 WL 8332538, at *3 (W.D. Okla. June 8, 2018) (quoting State Nat'l Ins. Co., CGL Policy V(13) (2016)).

[54] Courts may adopt the definition as a matter of practice or as required by statute. *See, e.g.*, Ark. Code Ann. § 23-79-155(a)(1) ("A [CGL] insurance policy offered for sale in this state shall contain a definition of 'occurrence' that includes . . . [a]ccidents, including continuous or repeated exposure to substantially the same general harmful conditions."); S.C. Code Ann. § 38-61-70(B)(1) ("[CGL] insurance policies shall contain or be deemed to contain a definition of 'occurrence' that includes . . . an accident, including continuous or repeated exposure to substantially the same general harmful conditions.").

[55] *Rainbo Serv. Co.*, 2018 WL 8332538, at *5.

[56] *Id.* at *1.

[57] *Id.* at *2.

[58] *Id.* at *4.

[59] *Id.* (alteration in original) (quoting U.S. Fid. & Guar. Co. v. Briscoe, 239 P.2d 754, 757 (Okla. 1951)).

action of "locating and operating [injection wells] . . . at or near geological faults."[60] The court held that the operator's placement of injection wells near geological faults was an "unexpected, unforeseen and unintentional" act.[61] Consequently, because the operator's act was accidental, the underlying plaintiffs' damages resulted from an occurrence.[62]

Nevertheless, another court may construe another complaint to define the at-fault act differently from the *Rainbo Service Co.* court. For example, a court may conclude that the seismicity resulted from the operator's injection rather than from locating wells "at or near geological faults." Because an operator's injection is not "unexpected, unforeseen [or] unintentional," a court is unlikely to deem it accidental. As a result, the insurer may disclaim coverage, contending that the seismic damages did not result from an occurrence.

If the court requires an accidental effect, then the consequences of the intentional act must be ones that "the insured did not expect or intend."[63] In *National Surety Corp. v. Westlake Investments, LLC*, Westlake Investments, LLC (Westlake) brought suit regarding construction defects throughout an apartment complex that it had purchased from the insured.[64] In turn, the insurer sought a declaration that its policy did not cover Westlake's claims against the insured.[65] In doing so, the insurer contended that "property damage caused by defective workmanship does not constitute an accident or an occurrence under [the] policy."[66] The court differed, holding that "[a]n intentional act resulting in property damage the insured did not expect or intend qualifies as an accident . . . ."[67] As a result, the insurer was bound to provide Westlake's recovery against the insured.[68]

Aligning with the court's holding, modern CGL policies exclude coverage for bodily injury or property damage "expected or intended from the standpoint of the insured."[69] While the majority of courts employ a subjective standard, a minority of courts employ an objective standard to determine whether the exclusion eliminates coverage.[70] The subjective

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[60] *Id.* at *5 (quoting First Amended Petition ¶ 25, Felts v. Sundance Energy Okla. LLC, No. CJ-2016-137 (Dist. Ct., Okla. Cty., Okla., Feb. 8, 2017)).

[61] *Id.*

[62] *Id.*

[63] Nat'l Sur. Corp. v. Westlake Invs., LLC, 880 N.W.2d 724, 736 (Iowa 2016).

[64] *Id.* at 727.

[65] *Id.* at 726.

[66] *Id.* at 728.

[67] *Id.* at 736.

[68] *Id.* at 744.

[69] Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc., 917 N.E.2d 1258, 1263 (Ind. Ct. App. 2009) (quoting Ind. Farmers Mut. Ins. Co., CGL Policy I(A)(2)(a) (2008)).

[70] Linemaster Switch Corp. v. Aetna Life & Cas. Corp., No. CV91-0396432S, 1995 WL 462270, at *23–25 (Conn. Super. Ct. July 25, 1995).

standard "turns on the subjective expectations of the insured, not what an objectively 'reasonable person' would have foreseen."[71] An operator's prior seismic litigation, record of similar occurrences, and geologic understanding of the reservoir are pertinent to its subjective expectations. On the other hand, the objective standard asks "whether a reasonable person doing the act would expect injury to result."[72] Under the objective standard, insurers may successfully argue that increased scientific support and regulation would lead a reasonable operator to expect the resulting seismic damage.

Even where courts employ the same standard, they nonetheless differ regarding the mens rea required for a person to expect or intend the resulting damage. While some courts merely require foreseeability, other courts require intent.[73] Between these extremes, some courts require that the person "know[] or should know that there was a substantial probability of damage from [the] acts or omissions."[74]

In *City of Johnstown v. Bankers Standard Insurance Co.*, the City's insurer disclaimed coverage after the State sued alleging groundwater contamination from the City's landfill.[75] The insurer contended that the policy excluded coverage because the City received prior warnings of contamination that rendered the damages "neither unexpected nor unintended."[76] The court differed, concluding that neither warnings nor an insured's choice to proceed despite such warnings rendered subsequent damages expected or intended.[77] Instead, the court held that the policy exclusion could eliminate the insured's recovery "only if the insured intended the damages."[78] Furthermore, the court provided that such intent was present where "the insured knew that the damages would flow directly and immediately from its intentional act."[79] Justifying its narrow interpretation, the court contended that a broader interpretation "could expand the . . . exclusion until virtually no recovery could be had on insurance."[80]

The broad interpretation dismissed by the *Johnstown* court could devastate impacted communities by barring recovery for damages caused

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[71] Harleysville Worcester Ins. Co. v. Paramount Concrete, 123 F. Supp. 3d 282, 297 (D. Conn. 2015).

[72] State Farm Fire & Cas. Co. v. Davis, 612 So. 2d 458, 464 (Ala. 1993) (quoting Horace Mann Ins. Co. v. Fore, 785 F. Supp. 947, 955 (M.D. Ala. 1992)).

[73] *Linemaster*, 1995 WL 462270, at *24–25.

[74] *Id.* at *25.

[75] 877 F.2d 1146, 1147 (2d Cir. 1989).

[76] *Id.* at 1149.

[77] *Id.* at 1150.

[78] *Id.*

[79] *Id.*

[80] *Id.*

by induced seismicity. As such, jurisdictions impacted by induced seismicity may follow *Johnstown*'s lead in narrowly interpreting the expected or intended exclusion for public policy reasons. Consequently, insurers may face the insurmountable task of proving that "the insured [operator] knew that the [seismicity] would flow directly and immediately from its [injection]."[81] Furthermore, increased scientific support, including incorporation of induced seismicity into the National Seismic Hazard Model, will unlikely render the damages expected or intended. Even if courts merely require foreseeability, however, the operator's compliance with an injection permit may preclude insurers from disclaiming coverage under the exclusion. To this end, some courts have held that where the insured "operated pursuant to [a] permit, it cannot be considered to have expected or intended to injure the underlying plaintiffs[] . . . ."[82]

C. Elimination of Coverage for Injection-Induced Seismicity Under a Pollution Exclusion

A pollution exclusion may eliminate coverage for injection-induced seismicity even if coverage is otherwise available under the CGL policy. An insurer's ability to disclaim coverage under a pollution exclusion, however, varies based on the language of the exclusion, factual circumstances, and jurisdiction. Due to a lack of precedent, the resulting uncertainty escalates when considering coverage for injection-induced seismicity. Nevertheless, two considerations predominantly govern whether a pollution exclusion eliminates coverage for injection-induced seismicity. First, the released substance must be a pollutant. Second, the bodily injury or property damage must result from a polluting event.

1. Release of a Pollutant

The pollution exclusion eliminates coverage only if the polluting event results in the release of a "pollutant."[83] Pollutants include "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste . . . ."[84] Because produced water primarily contains benign materials, insurers and operators may debate whether it possesses the irritant or contaminant qualities to constitute such a pollutant. In this debate, insurers may contend that the benign injectate nonetheless becomes a pollutant once it mixes with formation chemicals in the reservoir. Contrarily, operators may argue against the application of the pollution exclusion by contending that

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[81] *Id.*

[82] Erie Ins. Exch. v. Imperial Marble Corp., 2011 IL App (3d) 100380, ¶ 19, 957 N.E.2d 1214, 1220.

[83] *See* State Nat'l Ins. Co. v. Rainbo Serv. Co., No. 5:16-cv-00481, 2018 WL 8332538, at *6 (W.D. Okla. June 8, 2018).

[84] *Id.* (quoting State Nat'l Ins. Co., CGL Policy V(15) (2016)).

seismic damages do not depend on the injectate's composition. Furthermore, operators may contend that the injectate is not a pollutant since its composition differs little from that of the native reservoir fluid.

Finally, operators may argue that compliance with a government issued injection permit evidences that the injectate is not a pollutant. Some courts have agreed, holding that "it is unclear whether permitted emissions . . . [are] excluded under the [pollution exclusion]."[85] Because courts resolve policy ambiguities in the insured's favor, these courts have not allowed the pollution exclusion to eliminate coverage for permitted releases.[86] Regardless of the arguments presented, other cases demonstrate the success of insurers in classifying produced water as a pollutant.[87] Much of this success, however, may stem from the underlying complaints, which repetitively label the injectate as a pollutant and the injection as pollution.[88]

2. Damages Caused by a Polluting Event

To eliminate coverage, the bodily injury or property damage must result from the "discharge, dispersal, seepage, migration, release or escape of 'pollutants.'"[89] If the injectate remains contained within the intended reservoir, operators may argue that no such polluting event has occurred. Supporting this argument, some courts have ruled that "the [pollution] exclusion ha[s] no application to a contained location."[90] Nevertheless, courts differ regarding whether depositing material in a contained location constitutes a polluting event. Some courts have held that "where material has been deposited in a [contained location] . . . , the polluting event is the discharge, dispersal, release, or escape from that place of containment . . . ."[91] Other courts, however, have held that the mere act of depositing the material in the contained location constitutes a polluting event. For example, in *Star Insurance Co. v. Bear Productions, Inc.*, the underlying plaintiffs alleged that pollutants escaped from produced water

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[85] *Imperial Marble Corp.*, 2011 IL App (3d) 100380, ¶ 22.

[86] *Id.* ¶ 23.

[87] *See, e.g.*, *Rainbo Serv. Co.*, 2018 WL 8332538, at *7 ("[T]he [produced water] as defined and described in that pleading clearly falls within the policies' definitions of 'pollutants.'"); Star Ins. Co. v. Bear Prods., Inc., 983 F. Supp. 2d 1347, 1354 (E.D. Okla. 2013) ("[T]he [produced water] described in the Underlying Complaint is 'pollution' as defined in the Primary Policy.").

[88] *See, e.g.*, Petition, *supra* note 26 (referring to produced water as a pollutant and injection as pollution 18 times); *Griggs* Class Action Petition, *supra* note 23 (referring to produced water as a pollutant and injection as pollution 38 times).

[89] *Rainbo Serv. Co.*, 2018 WL 8332538, at *6 (quoting State Nat'l Ins. Co., CGL Policy I(A)(2.f) (2016)).

[90] Kerr-McGee Corp. v. Ga. Cas. & Sur. Co., 568 S.E.2d 484, 487 (Ga. Ct. App. 2002).

[91] Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, 882 P.2d 703, 719 (Wash. 1994).

disposal pits, resulting in environmental contamination.[92] Bear Productions, Inc. did not own the disposal pits but, rather, merely transported and deposited the produced water at the contained location.[93] Still, the court granted the insurer's summary judgment motion to disclaim coverage under the CGL policy's pollution exclusion.[94]

Analogous to *Bear Productions*, a court may conclude that the mere act of injecting produced water into a contained reservoir constitutes a polluting event. *Rainbo Service Co.* further supports this view. After concluding that the CGL policy provided coverage for the claims against Rainbo Service Co. (Rainbo), the court examined whether the pollution exclusion eliminated coverage for the claims.[95] Based on the pleadings, the court concluded that the seismic damages resulted from Rainbo's injection of produced water into the contained reservoir.[96] Similar to *Bear Productions*, the court held that the pollution exclusion eliminated coverage although the underlying plaintiffs did not allege a release from the reservoir.[97]

Other courts may reach a similar conclusion by incorporating the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[98] definition of release to include injection as a polluting event. Under CERCLA, a release includes "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, *injecting*, escaping, leaching, dumping, or disposing into the environment."[99] Although a few courts have employed the definition to interpret insurance policies, none have employed the definition to explicitly include injection as a polluting event.[100]

Certain Underwriters at Lloyd's illustrates arguments regarding whether produced water constitutes a pollutant and whether injection constitutes a polluting event. In the underlying lawsuits, the plaintiffs alleged that the insured injection disposal operator caused "unnatural and unprecedented earthquakes that . . . damaged Plaintiffs and others."[101] The operator sought recovery under a pollution liability policy that covered damages "result[ing] from pollution conditions at, on, under or migrating

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[92] 983 F. Supp. 2d at 1350.

[93] *Id.*

[94] *Id.* at 1355.

[95] *Rainbo Serv. Co.*, 2018 WL 8332538, at *6.

[96] *Id.* at *7.

[97] *Id.*

[98] 42 U.S.C. §§ 9601–9675.

[99] *Id.* § 9601(22) (emphasis added).

[100] *See, e.g.*, W. Am. Ins. Co. v. Tufco Flooring E., Inc., 409 S.E.2d 692, 699–700 (N.C. Ct. App. 1991).

[101] Petition at 43, Felts v. Devon Energy Prod. Co., No. CJ-2016-137 (Dist. Ct., Okla. Cty., Okla., Jan. 11, 2016).

from the Insured's site(s)."[102] Additionally, the pollution liability policy defined pollutant and polluting event as in a CGL policy.[103] However, unlike a CGL policy, which typically excludes pollution coverage, the pollution liability policy limited coverage to claims of pollution.

As a result, the insurer sought to disclaim coverage under the pollution liability policy by arguing that the underlying lawsuits did not allege pollution.[104] First, the insurer argued that the produced water did not constitute a pollutant.[105] In doing so, the insurer contended that the produced water was "not alleged to act as an irritant or contaminant, or otherwise as a pollutant."[106] Rather, the insurer contended, "[t]he alleged method of causation is the effect of pressure."[107] Next, the insurer argued that the injection did not constitute a polluting event.[108] In doing so, the insurer contended that the plaintiffs "allege[d] that the wastewater was injected . . . [rather than] discharged, dispersed, seeped, migrated, released or escaped."[109] Ironically, one of the underlying lawsuits was the same lawsuit that the *Rainbo Service Co.* court held constituted pollution under the CGL policy's pollution exclusion.[110] Here, however, the insurer and insured operator executed a standstill agreement and voluntarily dismissed the case.[111]

D. Elimination of Coverage for Injection-Induced Seismicity Under an Earth Movement Exclusion

An earth movement exclusion "eliminat[es] coverage for loss resulting from earth movement, except ensuing fire."[112] In recent years, insurers

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[102] Complaint for Declaratory Relief at 4, Certain Underwriters at Lloyd's, London v. New Dominion, LLC, No. 1:16-cv-05005 (S.D.N.Y. June 27, 2016), 2016 WL 3541187 (quoting Certain Underwriters at Lloyd's, London, Site Pollution Liability Policy I(B)(1) (2014)).

[103] *Id.* at 5 ("Pollutant(s) means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke vapors, soot fumes, acids, alkalis or toxic chemicals, and includes waste. . . . Pollution conditions mean the discharge, dispersal, seepage, migration, release or escape of pollutants." (quoting Certain Underwriters at Lloyd's, London, Site Pollution Liability Policy VII(O), (P) (2014))).

[104] *See Certain Underwriters at Lloyd's*, 2016 WL 4688866 , at *1.

[105] *Id.*

[106] Exhibit 8 at 25, *Certain Underwriters at Lloyd's*, No. 1:16-cv-05005.

[107] *Id.*

[108] *See Certain Underwriters at Lloyd's*, 2016 WL 4688866, at *1.

[109] Exhibit 8, *supra* note 106, at 26.

[110] State Nat'l Ins. Co. v. Rainbo Serv. Co., No. 5:16-cv-00481, 2018 WL 8332538, at *7 (W.D. Okla. June 8, 2018).

[111] Stipulation of Dismissal, *Certain Underwriters at Lloyd's*, No. 1:16-cv-05005 (S.D.N.Y. Oct. 28, 2016), 2016 WL 8259810.

[112] IRMI, "Glossary of Insurance and Risk Management Terms—Earth Movement or Earthquake Exclusion," https://www.irmi.com/term/insurance-definitions/earth-movement-or-earthquake-exclusion.

have modified the exclusion in response to unfavorable court interpretations that have largely arisen in induced seismicity and construction defect claims. For example, in *Broom v. Wilson Paving & Excavating, Inc.*, the underlying plaintiff brought suit against his employer after suffering injury in a trench collapse.[113] The employer's insurer subsequently sought to disclaim coverage under the policy's earth movement exclusion.[114] In response, the employer and underlying plaintiff argued that the exclusion applied only to naturally occurring earth movements.[115] The court concluded that the exclusion was ambiguous because it encompassed earth movements that "could be caused by naturally occurring events, man-made events, or both."[116] Construing the ambiguity in the insured's favor, the court held that the exclusion did not eliminate coverage for such man-made earth movements.[117]

Just a few years later, another court recognized that insurers had resolved this ambiguity in the earth movement exclusion. In *Erie Insurance Property & Casualty Co. v. Chaber*, an improperly conducted excavation project caused a landslide that damaged the plaintiffs' property.[118] The plaintiffs brought suit against their insurer after the insurer disclaimed coverage under the policy's earth movement exclusion.[119] Unlike in *Broom*, however, the earth movement exclusion comprehensively defined excluded earth movements to encompass:

> a. Earthquake, including tremors and aftershocks, and any earth sinking, rising, or shifting related to such event;
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> b. Landslide, including any earth sinking, rising, or shifting related to such event;
>
> c. Mine subsidence, meaning subsidence of a manmade mine. [sic] whether or not mining activity has ceased; or
>
> d. Earth sinking (other than sinkhole collapse), rising, or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations, or other parts of realty. Soil conditions include contraction, expansion, freezing, thawing, erosion, improperly compacted soil, and the action of water under the ground surface.[120]

The policy further provided that the exclusion "applies regardless of whether [an earth movement] is caused by an act of nature or is otherwise

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[113] 2015 OK 19, ¶¶ 2, 5, 356 P.3d 617, 620–21.

[114] *Id.* ¶ 13.

[115] *Id.* ¶ 34.

[116] *Id.* ¶ 40.

[117] *Id.* ¶ 47.

[118] 801 S.E.2d 207, 209–10 (W. Va. 2017).

[119] *Id.*

[120] *Id.* at 209 (quoting Erie Ins. Prop. & Cas. Co., Homeowner's Policy III(A)(5) (2014)).

caused."[121] Differing from *Broom*, the court held that "[t]he phrase clearly and unambiguously excludes coverage . . . resulting from a natural event or otherwise."[122] As a result, the exclusion eliminated coverage regardless of whether natural forces or improperly conducted excavation caused the earth movement that damaged the plaintiffs' property.[123]

As patterns of seismicity change in the United States, litigation will continue to challenge existing earth movement exclusions. As a result, regular revisions to the earth movement exclusion appear likely in coming years. Consequently, operators should either purchase an endorsement to override the exclusion or closely monitor for changes in the exclusion and court interpretations of them.

IV. CONCLUSION

As scientific support for induced seismicity advances, plaintiffs alleging seismic damages have been increasingly successful in litigation against operators. Whether insurance will cover these liabilities, however, largely depends upon the terms of the CGL policy and any applicable pollution or earth movement exclusions. Whether the CGL policy covers the seismic damages mostly depends upon whether the policy covers the damages sought and whether an "occurrence" caused the damages. Because most induced seismicity plaintiffs allege covered damages, litigation will likely center on the "occurrence" requirement. In assessing whether injection disposal constitutes an occurrence, jurisdictions will employ varying standards that will likely produce divergent outcomes.

Furthermore, whether a pollution exclusion eliminates coverage largely depends upon whether produced water constitutes a pollutant and whether injection constitutes a polluting event. The underlying complaint will likely influence whether the court will label produced water as a pollutant. As insurers continue to disclaim coverage under the pollution exclusion, however, underlying plaintiffs may more prudently avoid language that will invoke the exclusion. Additionally, whether injection constitutes a polluting event will likely depend upon whether the jurisdiction merely requires deposit into a contained location or a release from that location. Moreover, the court's willingness to accept a broader definition of "release," like that used in CERCLA, may further influence the outcome. Finally, an earth movement exclusion will likely eliminate coverage if it excludes damages "caused by an act of nature or [] otherwise caused."[124] However, coverage may be available if the exclusion only references naturally occurring seismic activity.

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[121] *Id.* (quoting Erie Ins. Prop. & Cas. Co., Homeowner's Policy III(A)(5) (2014)).

[122] *Id.* at 213.

[123] *Id.*

[124] *Id.* at 209 (quoting Erie Ins. Prop. & Cas. Co., Homeowner's Policy III(A)(5) (2014)).

In sum, due to a lack of litigation on the merits, uncertainty remains regarding how courts will interpret these provisions in claims for seismic damages. Nevertheless, insurance litigation involving other underlying factual scenarios may guide operators in assessing their liability and negotiating favorable policy terms.

Scientific Mediation and Serious Gaming: New Models for Dealing with the Old Problem of Dueling Experts

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Synopsis

Scientific mediators attempt to tread the path between "Merchants of Doom" and "Merchants of Doubt" as "Merchants of Discourse" using multiple working hypotheses and multiple ways of knowing as their moral compass.

I. INTRODUCTION[1]

At the time of writing, the Bureau of Land Management is gathering scoping comments for its revision of grazing regulations, the Nevada State Engineer is working with the Desert Research Institute to model the effect of groundwater pumping on downstream surface water right holders on the Humboldt River, and voters in Colorado are debating the merits of wolf reintroduction. All of these management decisions will, in some way, be based on science. Likewise, all of these management decisions face challenges from opponents who will be basing their challenges on science. These decisions will deeply affect the management of mineral resources, as questions of multiple use, groundwater pumping, and impacts on wildlife come to the fore. Any position by any stakeholder will be ostensibly based

[1] Portions of this article were previously published. *See* Curtis Moore, Todd Jarvis & Andrew Wentworth, "Scientific Mediation," *Mediate.com* (Sept. 2015), https://www.mediate.com/articles/JarvisT1.cfm.

on some kind of scientific data. But conflict is almost certainly going to arise as a result of the decisions of the agencies. This article will explore the root of scientific conflict and past models of dealing with scientific conflict that were, to some degree, unsuccessful, and will suggest new, more productive methods of managing scientific conflict.

All conflicts carry with them a combination of interests that need to be met before any agreement can be made.[2] Conflicts over the management of natural resources are further complicated because decisions about how to manage these resources must operate within the relevant scientific realities.[3] Unsurprisingly, stakeholders in these situations often disagree about the validity of the scientific evidence surrounding a certain issue or its implication. And when hired experts are invited to settle the matter, those experts become mired in their own conflict; these situations quickly spiral toward dueling experts, sometimes due to the "eager, expensive, entrenched, expert egos" that escalate enmity, and sometimes by design of the conflict beneficiaries.[4] And yet disputes between scientific experts are not limited to debates over natural resources policy issues. Large multiyear, multidisciplinary projects undertaken by the academies can also become similarly entrenched, leading to a schism among different factions within the research enterprise.

II. THE ROOTS OF SCIENTIFIC CONFLICT

Why is scientific conflict even an issue? To understand this it is necessary to understand the role science is supposed to play in natural resources management. Over the last few decades the trend in natural resource management law has been geared toward increasing the amount of public involvement and ensuring that the decisions managing agencies make are scientifically sound.[5] Many agencies are requiring more engagement with stakeholders and examining the broader impacts of their decisions, setting the stage for conflict over scientific methods that are not only considered sound science between the principal investigators, but now are also scrutinized by the stakeholders. Put together, these goals can set the stage for costly intractable conflicts to appear if they aren't managed tactfully. Without some form of scientific dispute management or conflict resolution system, the options for dealing with these conflicts are either aimed at trying to figure out whose expert is "right" or to fall back on the

[2] Kimberlee K. Kovach, "Mediation," in *The Handbook of Dispute Resolution* 304 (2005).

[3] Connie P. Ozawa, "Science in Environmental Conflicts," 39 *Sociological Perspectives* 219 (1996).

[4] John Harington Wade, "Duelling Experts in Mediation and Negotiation: How to Respond When Eager Expensive Entrenched Expert Egos Escalate Enmity" (Oct. 16, 2010).

[5] Steven E. Daniels & Gregg B. Walker, *Working Through Environmental Conflict: The Collaborative Learning Approach* (2001).

tired and overused cliché of "agreeing to disagree."

These options are tempting because they either produce a clear winner or allow the parties to talk about other things while maintaining their respective views on the subject. What they do not do, and what scientific mediation offers the parties the chance to do, is work together to discover *why* they disagree. This is valuable because often a stakeholder's or a scientist's views on the science surrounding a situation are a reflection of their deeper interests, and exploring how they came to the conclusions they came to is a way to begin peeling back the layers of positions and interests that lay at the heart of these conflicts.

In many situations scientific conflicts are caused by or made worse by "dueling experts."[6] These dueling experts are usually brought in by the stakeholders as a response to missing information or a data conflict. These same experts often see themselves and are seen by the organizations that employ them as the authority in their field. In extreme cases they might be considered by each side to be the only person doing objective research in the field. In theory, the presence of these experts would be a quick way for the stakeholders to fill holes in the information they have or to resolve data conflicts so they could continue on with the process. Wade outlines the factors that can often lead to what he has termed "duelling experts syndrome," which manifests itself as a self-perpetuating cycle of conflict where the experts employed by different stakeholders create their own opinions and dismiss the opinions of experts employed by other stakeholders. He explains that stakeholders can foster these undesirable situations when they employ an expert that has a reputation for favoring their "side," tell their expert a story that includes the information favorable to their side, and give hints at what advice they want from the expert.

The experts themselves can exacerbate these patterns when they work in isolation, tell the client what he or she wants to hear, do not clearly explain what their assumptions are, do not clearly explain the alternative views in the field, do not clearly write their report, and do not share their early drafts with other experts.[7] These experts often draft a report outlining their opinions which the stakeholders rely on to advance their strategy. Once this report is published the expert's professional reputation and prospects for future employment are tied to it, and so he or she has a strong interest in his or her opinion being the "right" opinion. A dispute between two experts over which opinion is the right opinion can quickly become personal because of the identity interests involved; and dueling experts who often find themselves on the opposite sides of similar conflicts and can bring their personal conflicts with them, further complicating the situation. Mitigating these personal conflicts can increase the amount of

[6] *See* Wade, *supra* note 4.

[7] *Id.*

time and resources the stakeholders need to expend to resolve the conflict the experts were brought in to solve in the first place.

Why is the dueling expert paradigm so powerful? If stakeholders have experienced it they know firsthand how frustrating and unproductive it can be and do not want to go through it again. So why does it come up so often? The status quo in conflict situations is incredibly powerful and culturally reinforced.[8] One explanation for this is that during conflict episodes, times when parties are actively negotiating, the participants resort to roles and scripts they have used in the past and are comfortable operating in.[9] These scripts, which Pruitt argues are culturally learned, begin with parties making requests of each other and escalate through stages until the parties are openly hostile toward each other. Negotiations most often begin after some escalation has begun; after one or both parties have voiced demands or complaints. So most negotiations take place in a situation where tension already exists. As these tensions escalate, parties begin to form separate narratives that explain the conflict in different ways.[10] These narratives, which all people have in their minds as a way of explaining the world and their place in it, have common elements that make resolving conflicts more difficult. Each party will see him or herself as the protagonist of the story and the opposing party as the antagonist, or at best an incompetent obstacle. With the characters set up, the parties will then explain not only what went wrong in their situation, but why it went wrong. And then they will begin to draw straight lines from the actions of the other party to the current undesirable situation.

By operating according to this script it is easy to see how dueling expert situations can rapidly become intractable conflicts. Stakeholders who are entering negotiations are likely entering them after some escalation has taken place. They have demanded things of each other and complained about each other's conduct. They bring in experts, who may or may not already have personal issues between themselves, and give them the information the stakeholders think is necessary to solve the problem. The experts write their reports and the stakeholders' positions are strengthened. They each have science to back up their claims. To each side, it's not surprising the other side found an "expert" willing to agree with them. The experts start making remarks about each other's work, reputations are called into question, residual bad feelings may be brought

[8] Thomas H. Hammond, Chris W. Bonneau & Reginald S. Sheehan, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (2005); Lawrence Susskind, "Confessions of a Pracademic: Searching for a Virtuous Cycle of Theory Building, Teaching, and Action Research," 29 *Negotiation J.* 225 (2013).

[9] Dean G. Pruitt, "Flexibility in Conflict Episodes," 542 *Annals of the Am. Acad. of Pol. & Soc. Sci.* 100 (1995).

[10] Douglas Stone & Sheila Heen, "Bone Chips to Dinosaurs: Perceptions, Stories, and Conflict," in *The Handbook of Dispute Resolution* 150 (2005).

up, and soon the stakeholders are entrenched in their positions. This situation becomes the frame through which the stakeholders view each other.[11] In addition to complicating the immediate conflict, the stakeholders will carry this frame with them to future conflicts and expect them to play out in a similar way. This way, stakeholders can set into motion a perpetual cycle of dueling experts and intractable conflict. And even though this situation predictably arises and is uncomfortable and costly for the participants, it remains because it is predictable and comfortable since the parties know how they will act and how the other side will act.

In general there are five ways these conflicts can come to an end:

1. *Through sound argument*. Overwhelming irrefutable evidence ends the debate.
2. *Through natural consensus*. Broad agreement is eventually reached.
3. *Through legal procedure*. Arguments are terminated by rule of law.
4. *Through natural death*. The argument becomes moot and the dispute goes away.
5. *Through negotiation*. The controversy is settled through an arranged and morally unobjectionable procedure.[12]

The fifth way is the one this article will focus on. The others are all perfectly legitimate but have significant drawbacks. Legal procedures and natural death leave the disposition of the conflict out of the hands of the stakeholders. Sound argument and natural consensus are unlikely in a dueling experts situation since if there was overwhelming irrefutable evidence a broad consensus could be easily reached the situation would not exist in the first place. Therefore, although it is the most work for the participants and can seem like the longest path, negotiation is the path this article will endorse and provide a framework for.

III. THE SHORTCOMINGS OF SCIENCE PANELS (OR WHY SCIENCE PANELS SUCK)

Early attempts to deal with the dueling experts problem employed science panels. Science panels are panels of mutually agreed-upon experts hired by stakeholders to issue an opinion and help them increase the amount of reliable information available to them.[13] These panels have been used in situations where conflicting science has impeded the efficiency of decision makers such as judges. The operation of science panels offers us the chance to see how science panels were supposed to work in theory and allows us to begin to see how they were doomed to fail from the beginning.

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[11] *Id.*

[12] Peter S. Adler et al., "Humble Inquiry: The Practice of Joint Fact Finding as a Strategy for Bringing Science, Policy and the Public Together," at 9 (Feb. 25, 2011).

[13] Laural L. Hooper, Joe S. Cecil & Thomas E. Willging, "Assessing Causation in Breast Implant Litigation: The Role of Science Panels," 64 *Law & Contemp. Probs.* 139 (2001).

In the most perfect notion of a science panel, neutral experts are appointed to sift through conflicting information and to issue a detached, politically neutral opinion based on the current science available. It is easy to see why science panels are an intuitive step to try to circumvent the problem of dueling experts. When stakeholders turn to a neutral panel of appointed experts they should be able to remove the possibility of bringing their own experts' personal conflicts into the situation and increase the amount of reliable information available to them by having information vetted and filtered by these detached experts.

Unfortunately, science panels suffer from some of the same limitations that experts employed by individual stakeholders do. They do not address the perceived unreliability of the information or reduce the distrust the stakeholders can feel when faced with information that does not affirm their worldview or further their own interests.[14] Even the process of finding mutually agreeable experts to fill these panels can be contentious since, by the very nature of their work, experts in a certain field will almost certainly have done work with players that are aligned on different sides of a conflict.[15] So the pool of completely neutral experts will be a shallow one if it exists at all. Additionally, the question of what information the panel will be looking for can be a prickly question to answer since the stakeholders may not even agree on what information they need to make a decision or what is not clear about the current body of science they have access to.[16] So science panels are an intuitive step, but their focus on having an outside group of experts evaluate the available science ignores the deeper issues of conflict cycles and mistrust that often permeate scientific conflict.

One occasion where science panels were used that highlights their shortcomings is the appointment of science panels employed by the judiciary in lawsuits over injuries allegedly caused by breast implants.[17] Along with the increased cost of hiring panels of experts, the parties experienced increased conflicts over how to identify and select the experts as well as what the proper process for screening them for conflicts of interest would be. It is difficult to assess just how much of an impact the panels' substantive work had on the settlement processes. The plaintiffs' attorneys in these cases thought that their inability to cross-examine the panels' members to impeach their opinion diminished the value of their clients' claims, and that the increased amount of time the panel needed to complete its work encouraged their clients to settle. The defense attorneys

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[14] *Id.*

[15] Roger A. Pielke, Jr., *The Honest Broker: Making Sense of Science in Policy and Politics* (2007).

[16] Steve W. Selin et al., "Social Learning and Building Trust Through a Participatory Design for Natural Resource Planning," 105 *J. Forestry* 421 (2007).

[17] Hooper, Cecil & Willging, *supra* note 13.

felt like the panels of experts were useful because they would increase the reliability of the evidence that would be submitted at trial and so they would have a better idea of what the value of a settlement should be. In this case, the use of the science panel failed to address the scientific conflict that was present because it never produced a universally trusted body of science a decision could be based on. Instead of increasing the amount of information both sides considered reliable and helpful, the stakeholders' views of the panel of experts largely depended on whether or not the panels' opinions furthered their own interests or not.

This is the problem with panels of experts. They do not necessarily increase the amount of universally trusted information available to stakeholders or increase the perceived reliability of the information they are relying on. Science panels hand down an opinion to the stakeholders without giving them a chance to engage the material and come to a conclusion themselves. They are tempting because appointing a neutral panel of experts to parse through complicated scientific information takes the heavy lifting of evaluating the value and reliability of that information off of the backs of the stakeholders themselves.[18] But it is no secret that experts are not free of biases and politics or susceptible to groupthink.[19] So even if the scientists themselves agree on a given topic, their opinions will naturally be suspected of being biased and unreliable by stakeholders whose interests are not furthered by those opinions. In essence, appointing a panel of experts to issue an opinion expands the conflict from being between opposing stakeholders and their respective experts, to being between opposing stakeholders and their respective experts and the panel. Instead of reducing the amount of conflict, this process brings an extra entity into it. The most effective method of dealing with dueling experts is by providing opportunities for the stakeholders and their experts to explore an issue with the help of a neutral third party in a scientific mediation process.

IV. DEFINING SCIENTIFIC MEDIATION

The term "scientific mediation" can seem jarring because a common view of science is that it is empirical, unambiguous, and objective.[20] Natural resource management professionals worry that mediating disagreements over scientific issues requires them to compromise their ideals in order to reach an agreement.[21] But science can play several roles in conflicts involving natural resources.[22] Science can act as a tool for

[18] Wilfred M. McClay, "What Do Experts Know?" *Nat'l Affairs* (Fall 2009).

[19] Pielke, *supra* note 15.

[20] Ozawa, *supra* note 3.

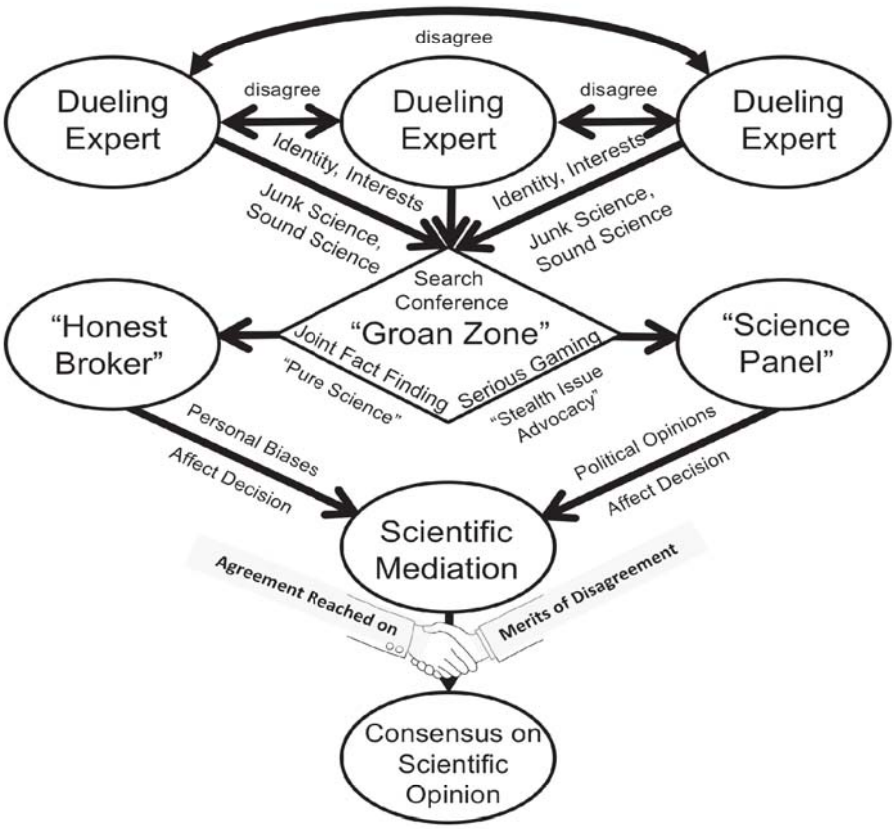
[21] Michael Fraidenburg & Linda Strever, "Diagnosing Conflict: Skills for the Natural Resource Professional," 29 *Fisheries* 20 (2004).

[22] Ozawa, *supra* note 3.

discovery, as a tool for holding decision makers accountable, as a justification for decisions that have been made, and as a tool for persuading others to make or support a certain decision.

While Abrams'[23] introduction to scientific mediation intrigued us, there was little in the way of follow-up examples to analyze and learn from. As scientists who are also practitioners in law, mediation, and conflict transformation, we built upon Wade's extensive work on "dueling experts"[24] and Pielke's framework outlined in his wonderful book *The Honest Broker: Making Sense of Science in Policy and Politics*[25] and linked these tenets to the "Groan Zone" that Kaner described as part of any decision-making process in his *Facilitator's Guide to Participatory Decision-Making*[26] to develop our conceptual model of scientific mediation depicted in Figure 1.

Figure 1.



[23] Nancy Abrams, "What is Scientific Mediation?" *Big Think* (Aug. 26, 2013).

[24] Wade, *supra* note 4.

[25] Pielke, *supra* note 15.

[26] Sam Kaner, *Facilitator's Guide to Participatory Decision-Making* (2014).

In our work, we found the most effective first step out of the Groan Zone embedded within the scientific mediation process is a search conference. This is a conference where the stakeholders will work toward distilling the issues they agree on, disagree on, and need more information on. Then, if there are areas the group needs more information on, they can begin to collaboratively search for that information. If the group needs more information that is not available any other way, they can design a joint research project they all participate in. Finally, whether or not the group decides to pursue a joint research project, they will collaboratively work toward a shared interpretation of the science based on scientific opinions rather than personal or political biases.

Natural resource management conflicts are rarely just over science, even though science should and does play a large role in managing these resources.[27] Scientific conflicts arise over specific material related to the management of the resource in question, scientific methods employed by researchers, and broken relationships between scientists and the stakeholders they report to. There are several ways to tell if you have a scientific conflict on your hands. One of them is the presence of dueling experts who spend time presenting their own research and attacking the research of competing experts.[28] In the absence of experts, scientific conflict can be diagnosed when group members spend time appealing to different research as authorities on the matter to support their view of how the resource currently exists,[29] almost literally throwing papers at each other. The increasingly large number of researchers required to respond to multimillion-dollar, multiyear research proposals also poses an organizational challenge. Research teams by design now require transdisciplinary backgrounds that make it more difficult to build a cohesive vision. Simply put, scientific conflicts are conflicts over the parameters the decision must be made within, regardless if the decision focuses on policy or the scientific process.

The goal of scientific mediation processes is to help the stakeholders provide themselves with as large a breadth of options as is possible while also improving communication between them.[30] Much of the scientific mediation process revolves around social learning, which occurs "when participants commit to a process where individually they agree they do not have all the answers."[31] This part of the process allows the stakeholders to collaboratively find the gaps in knowledge and then begin to work together to try and find a way to fill those gaps. Social learning allows the

[27] Fraidenburg & Strever, *supra* note 21.

[28] Wade, *supra* note 4.

[29] Ozawa, *supra* note 3.

[30] Fraidenburg & Strever, *supra* note 21.

[31] Selin et al., *supra* note 16.

stakeholders to act as a group to pursue knowledge they all had a hand in gathering, which increases the perceived trustworthiness of the data in addition to increasing the amount of scientific research into the problem. It also allows each stakeholder to participate and share their expertise, which helps satisfy their individual needs to be recognized as competent professionals.[32] Perhaps most importantly, social learning provides an opportunity for trust building to occur because it opens the door for smaller constructive conflicts to start and be resolved.[33] These small conflicts that do not revolve around the main issue are generally low risk and provide an opportunity for the stakeholders to engage with each other in ways that do not threaten their preferred solution to the overarching problem.

V. THE SEARCH CONFERENCE

The search conference used in the scientific mediation process is designed to collaboratively form a clear idea of what knowledge the group has or wants and where precisely the disagreements are.[34] Although they may differ in size, scope, and design, search conferences are meant to gather stakeholders and begin to assess where the science is clear, where there is conflicting science, and where there is no science. In other words, the goals of this search conference are to "(i) isolate disagreements; (ii) clarify what, for purposes of settlement, need not be contested, and (iii) search for areas of agreement . . . ."[35] In addition to the practical benefit of increasing the amount of information the group has and shares, the search conference also allows the stakeholders to gather and work collaboratively toward a goal other than a solution to the overarching problem. The search conference should produce two things: (1) the aggregation of as much relevant knowledge about the issues at hand as possible, and (2) a work product that clearly defines what the participants at the conference agree the science says, where their interpretations of the science disagree, and what information they agree is missing.

Moore provides an example of a search conference designed to address scientific mediation for an endangered species issue in Scotland—capercaillie predation.[36] The process focused specifically on pine marten predation's effect on the capercaillie population instead of on capercaillie conservation in general.

The search conference process is straightforward with Stage 1 focusing on housekeeping items like ground rules, schedules, and other practical

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[32] Fraidenburg & Strever, *supra* note 21.

[33] Selin et al., *supra* note 16.

[34] *Id.*

[35] Adler et al., "Managing Scientific and Technical Information in Environmental Cases: Principles and Practices for Mediators and Facilitators," at 26 (2011).

[36] Curtis F. Moore, "Removing Dueling Experts from the Battlefield" (Univ. of Or. 2014).

considerations. This is also a good time to set up ground rules for communication and to discuss how to deal with allegations of bad faith.

In Stage 2 the participants make presentations that should focus on the most basic components of the issue the group is working with. For example, in Moore's example the group would start with a presentation on the capercaillie's diet, move on to the bird's nesting requirements, and then finally address predation pressures on the capercaillie. During this time the participants listen to the presentations given by their colleagues and then at the end they would indicate whether they are satisfied with the information they have been given or if they have more questions. These questions should be recorded or captured in a way that the group agrees on.

Stage 3 will come after all the topics have been presented on and the participants have had a chance to record their questions and concerns. The goals of this stage are to get a clear idea of where there is broad agreement among the group and where group members feel like there is conflicting science or insufficient information. This idea should take the form of a list that will be made available to all the participants. When there is a consensus on this list it is time to start designing the next steps the group will take to fill in the gaps in information and resolve the conflicting scientific questions.

After the list of agreements, disagreements, and gaps in knowledge has been created and agreed on, the next step is to decide what the group should do going forward. As the agenda for the search conference explains, the members can choose to go ahead with the information they have, search as a group for more information that already exists, or design and carry out a research project themselves. A good example of implementing the outcomes of a search conference that we have also worked on include exempt wells (small capacity wells that do not require water rights or permits in many western states and Canadian provinces) where the subsequent research focused solely on the wells and not on water allocation as a whole. The exempt wells conference began with legal issues, economic issues, and conflicts. In this particular instance, the outcomes were articles in academic and trade journals.[37]

VI. THE SEARCH CONFERENCE IS DIFFERENT FROM, AND BETTER THAN, A SCIENCE PANEL

Science panels separate the stakeholders from the scientific analysis that needs to be done. Pielke argues that it "is naïve to think that science advisory panels deal purely with science. Such panels are convened to provide guidance on policy, or on scientific information that is directly relevant to policy."[38] These science panels also can also serve as a forum

[37] Megan A. Vinett & Todd Jarvis, "Conflicts Associated with Exempt Wells: A Spaghetti Western Water War," 148 *J. of Contemp. Water Research & Educ.* 10 (2012).

[38] Pielke, *supra* note 15.

for the "politicization of science," catering more to media coverage as opposed to the science. Science panels can also serve as a cloak for issue advocates who may try to further their agenda by "cherry picking" scientific research that supports their worldview and ignoring science that conflicts with it or by bringing junk science to the group's attention.[39] But if all the science brought forward is rigorously scrutinized by stakeholders with divergent viewpoints the possibility of junk science making it through the process will be greatly reduced.[40] This is the goal of scientific mediation: to allow these disparate stakeholders the opportunity to view the available science through their own lens and talk about the merits of their disagreement.

VII. PROCESS DETAILS AND DEALING WITH ACCUSATIONS OF BAD FAITH

Once the group makes the decision to convene a scientific mediation process they will have to decide what the focus of the process will be.[41] In this stage of the process the stakeholders, or research teams, will have to decide what areas the process will delve into. The scope should be narrow enough to efficiently isolate the issues that need to be analyzed, but broad enough to ensure the product the group generates is thorough enough to ground a science-based decision in. For teams of research scientists, the absence of a shared project vision results in researchers trying to pull in different directions without a clear approach to resolving disagreements. Numerous meetings may be held throughout the process to create opportunities for researchers to exchange ideas with one another as well as with "stakeholders" engaged in the broader impacts of the research enterprise. The absence of a shared vision leads to colleagues that are not fully engaged with the process, either by choosing not to attend project meetings or dismissing the views of others—especially stakeholders that underpin the increasingly important metric of broader impacts required by large science-based research proposals.

Scientific mediation assumes that stakeholders are all at the table in good faith. But the prospect of bad-faith negotiating is a real one, though it is hard to define and counter with any degree of certainty. Bad-faith negotiating is when a party comes to the table and appears outwardly to be negotiating but in reality has no intention of coming to an agreement.[42] It can be difficult to spot, but some indicators of bad-faith negotiation include (1) delaying tactics, (2) withdrawal of terms after a tentative agreement has

[39] *Id.*

[40] Daniels & Walker, *supra* note 5.

[41] Adler et al., *supra* note 12.

[42] Paul K. Rainsberger, "Federal Labor Laws," at XVIII-1 to XVIII-7 (Univ. of Mo. Labor Educ. Program 2008); Lucy Moore, *Common Ground on Hostile Turf: Stories from an Environmental Mediator* (2013).

been made, and (3) not sending an agent with the authority to make decisions.[43] But not all stakeholders who are being difficult to get along with are acting in bad faith. In some cases their interests just may not be met. The courts' approach in this context is to look at the totality of the circumstances surrounding the group's failure to come to an agreement to decide if the defendant came to the table in bad faith.[44] With this in mind, it would be a good idea for the participants in the scientific mediation process to agree when setting up the ground rules for the process how to deal with alleged cases of bad faith in addition to the other ground rules about the conduct of the participants.

VIII. AGREEING ON MERITS OF DISAGREEMENT

Once the group has all the information the members need to go forward it is time to engage in what may be the most contentious part of the whole process: interpreting the research, or developing a shared agreement such as a "collaboration compact" among the principal investigators to prevent conflicts from becoming entrenched by clarifying procedures regarding contributions and project budgets. Much like the advice in the section on the design of the research process, this article's advice regarding the interpretation part of the scientific mediation process will be vague because of the many possible outcomes the research process could produce. How parties interpret data is likely to be a reflection of their interests.[45] And the most reliable way to isolate and frame the interests of the parties is through a facilitative dialog.[46] So, if through a facilitative process the group's members can come to a shared interpretation of the data that meets the interests of all the participants, the resulting agreement will provide a more solid basis for natural resource management than it would have otherwise.[47]

To reach this shared interpretation of data, or in the instance of developing a research proposal to collect and share the data, the stakeholders and principal investigators need to effectively present the data to each other, share interpretations freely and creatively, and bring their individual experience and expertise to bear and share it in their interpretation.[48] Although some stakeholders may worry that the scientific integrity of the data might be compromised by this negotiation process, the scientific integrity of the decision is one of their interests and they will be

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[43] Rainsberger, *supra* note 42.

[44] *Id.*

[45] Simo Kyllönen et al., "Conflict Management as a Means to the Sustainable Use of Natural Resources," 40 *Silva Fennica* (2006).

[46] Kovach, *supra* note 2.

[47] Richard D. Margerum, *Beyond Consensus: Improving Collaborative Planning and Management* (2011).

[48] *Id.*

able to pursue that interest within the negotiations.[49] Accordingly, an interpretation that reflects the interests of all of the parties will reflect their interest in scientific integrity. Once this last step is completed the group should have a universally trusted body of science that the group can base its decision regarding the management of the resource in question on, or at a minimum, an informal agreement that is used to highlight the group's commitment to transparency and cooperation in the research enterprise.

IX. SERIOUS GAMING AS A SCIENTIFIC MEDIATION TOOL

When a process becomes stuck, it may be necessary to bring the participants out of their accustomed roles in the conflict. One way to do this is through serious gaming. Medema et al. write that "[s]takeholder participation in serious game simulations may provide significant support in the formation of new or stronger coalitions and collaborative partnerships while addressing existing power plays and building trust with other stakeholders."[50] Hockaday, Jarvis and Taha argue that "[t]he aspect of social learning in gaming brings common ground between diverse players and stakeholders, who may otherwise be unable to cooperate with each other."[51] And Jarvis writes that "[g]roundwater practitioners can begin to find the fun around water that inspired them to pursue studies and careers in groundwater once again through serious gaming."[52]

While the concept of using serious gaming is relatively new, practitioners indicate that it offers promising results. Critics of extant games have pointed out that these games are limited by their simplifying of complex problems, their current focus on river basin management, and, in the case of some of the more computationally complex games, hardware availability and user familiarity with computers.[53] Still, we are seeing the use of games and gamification continuing to expand across many different arenas beyond water including coastal and marine conservation, as well as debates over climate change.[54] There are also suggestions that gamification might have the potential to increase public participation on these issues to large numbers of laypeople.[55] Practitioners interested in these games can

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[49] Fraidenburg & Strever, *supra* note 21.

[50] Wietske Medema et al., "Exploring the Potential Impact of Serious Games on Social Learning and Stakeholder Collaborations for Transboundary Watershed Management of the St. Lawrence River Basin," 8 *Water* 175 (2016).

[51] Shelby Hockaday, Todd Jarvis & Fatima Taha, "Serious Gaming in Water," *Mediate.com* (July 2017), https://www.mediate.com/articles/HockadayS1.cfm.

[52] W. Todd Jarvis, "Scientific Mediation through Serious Gaming Facilitates Transboundary Groundwater Cooperation," 20 *Water Resources IMPACT* 21 (2018).

[53] Dragan Savic, Mark Morley & Mehdi Khoury, "Serious Gaming for Water Systems Planning and Management," 8 *Water* 456 (2016).

[54] Kristin Kessler, "Grad Student's Board Game Helps Teach Climate Change," *Around the O* (Jan. 21, 2020).

[55] Alice H. Aubert, René Bauer & Judit Lienert, "A Review of Water-Related Serious

find lists of them scattered across the internet, including ones kept by The Skimmer on Marine Ecosystems and Management.[56]

X. CONCLUSIONS

Scientific conflicts can derail a collaborative process if they are not managed well. Scientific mediation is still an emerging process, but one that offers an alternative to the pattern of dueling experts that has emerged in the field of collaborative natural resource management and plagues the best intentions of large multidisciplinary research teams. The goal of the collaborative process is to isolate the scientific issues separate from the personal or political biases of the generators and users of scientific information. Scientific mediation encourages the stakeholders to work with the information themselves and to come to a consensus on what parameters they have to work within. Serious gaming can be employed to allow stakeholders to gain insight and build relationships with other stakeholders by engaging with analogous conflicts outside their role in the overarching conflict.

This article provides the outline of a scientific mediation process that is adaptable. However, even after the group comes to a consensus on researcher collaboration and accountability, as well as what the "science" means, the overarching conflict will still exist. Resolving the overarching conflict, or reaching an agreement on the merits of a disagreement, will still take more deliberation and work on the part of the participants, but hopefully the scientific mediation process will provide a firm scientific basis on which to make their decision, increase the quality of communication and trust the group members have in each other, increase the group's capacity for conflict resolution as a whole, and increase the public's trust in the research enterprise and concomitant scientific opinions.

Games to Specify Use in Environmental Multi-Criteria Decision Analysis," 105 *Envtl. Modelling & Software* 64 (2018).

[56] The Skimmer on Marine Ecosystems & Mgmt. (MEAM), "Serious Games for Coastal and Marine Conservation, Management, and Adaptation," https://meam.openchannels.org/games.

Oil and Gas Update: Legal Developments in 2019 Affecting the Oil and Gas Exploration and Production Industry

by Mark D. Christiansen, Editor[1]

Edinger Leonard & Blakley PLLC
Oklahoma City, Oklahoma

The state reports presented below include key legal developments in most of the more active states in the areas of oil and gas exploration, development, and production.

I. ALASKA

A. Legislative Developments

The 2019 legislative session resulted in virtually no oil and gas legislation being passed. Despite the uncharacteristic lack of oil and gas legislation, the legislature addressed the prevalent issue of oil and gas leasing in the Arctic National Wildlife Refuge (ANWR) through the passage of Senate Joint Resolution (SJR) No. 7.

In passing SJR No. 7,[2] the legislature resolved to request "that the United States Department of the Interior, Bureau of Land Management implement an oil and gas leasing program in the coastal plain of the Arctic National Wildlife Refuge"[3] (ANWR). The Resolution provides that 16

[1] The lead editor for this report is Mark D. Christiansen of Edinger Leonard & Blakley PLLC, Oklahoma City, OK. The contributors of these state reports are George R. Lyle, Adam D. Harki, and Traci Bunkers of Guess & Rudd P.C., Anchorage, AK; Thomas A. Daily of Daily & Woods, P.L.L.C., Fort Smith, AR; John J. Harris of Locke Lord LLP, Los Angeles, CA; Sam Niebrugge of Davis, Graham & Stubbs, Denver, CO; Chris Steincamp of Depew Gillen Rathbun & McInteer, LC, Wichita, KS; April L. Rolen-Ogden and Michael H. Ishee of Liskow & Lewis, Lafayette, LA; Andrew J. Cloutier of Hinkle Shanor LLP, Roswell, NM; Gregory D. Russell, Timothy J. Cole and Ilya Batikov of Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Mark D. Christiansen of Edinger Leonard & Blakley PLLC, Oklahoma City, OK (Part A) and Susan Dennehy Conrad of the Oklahoma Corporation Commission, Oklahoma City, OK (Part B); Nicolle R. Snyder Bagnell, Emily A. Davis and Nicole A. Jensen of Reed Smith LLP, Pittsburgh, PA; Jolisa M. Dobbs, Conrad Hester and Aaron C. Powell of Thompson & Knight, Dallas and Fort Worth, TX; Brittany J. Alston, Katie Monroe, Matthew Chase and Curtiss Boggs of Jackson Kelly PLLC, Morgantown, WV; and Walter F. Eggers, III and Sami Falzone of Holland & Hart LLP, Cheyenne, WY.

[2] S.J. Res. 7, 31st Leg., 1st Sess. (Alaska 2019).

[3] *Id.*

U.S.C. § 3143 (section 1003 of the Alaska National Interest Lands Conservation Act (ANILCA)) and 16 U.S.C. § 3142 (section 1002 of ANILCA) authorize both "oil and gas development and production . . . and nondrilling exploratory activity within the coastal plain."[4] In passing SJR No. 7, the legislature noted that the "coastal plain . . . contains an estimated [7.687 billion] barrels of recoverable oil and [7 trillion] cubic feet of natural gas."[5]

B. Judicial Developments

In *All American Oilfield LLC v. Cook Inlet Energy, LLC*,[6] the Alaska Supreme Court accepted certified questions from both the U.S. District Court and the U.S. Bankruptcy Court for the District of Alaska regarding the breadth of Alaska's mineral dump lien statute as it applies to natural gas development.

In response to the question of whether a "'dump lien' under [Alaska Statute (AS)] 34.35.125 *et seq*. [can] apply to gas stored in its natural reservoir,"[7] the Alaska Supreme Court held that the statutory definition of "dump or mass" reflects that a mineral dump lien may extend only to gas extracted from its natural reservoir.[8] Under the relevant statutory framework, there must be a "dump" to which the lien can attach for a claimant to obtain a dump lien.

In ruling on the second certified question, whether a mineral "dump" is created under AS 34.35.140 and AS 34.35.170(a)(1) each time natural gas is released from the natural reservoir and transported through a pipeline to the point of sale, the Alaska Supreme Court found that "[b]ecause gas in a pipeline has been extracted, hoisted, and raised and is in mass, it may constitute a dump if [it] [] is located adjacent to the mine or mining claim."[9] However, whether gas is adjacent to a mine or mining claim must be decided on a case-by-case basis.[10]

The supreme court answered the final question, "whether dump lien claimants must prove that produced gas is the product of their labor,"[11] in the affirmative; however, whether a particular claimant's labor meets these requirements is case-specific and must be left to the trier of fact.[12]

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[4] *Id.*

[5] *Id.*

[6] No. 3:17-cv-000127, 2018 WL 648351 (D. Alaska Jan. 29, 2018), *certifying questions to* All Am. Oilfield LLC v. Cook Inlet Energy LLC, 446 P.3d 767 (Alaska 2019).

[7] *Id.* at *1.

[8] *All Am. Oilfield*, 446 P.3d at 773.

[9] *Id.* at 780.

[10] *Id.* at 777, 780.

[11] *Id.* at 780.

[12] *Id*. at 781.

In *Kenai Landing, Inc. v. Cook Inlet Natural Gas Storage Alaska, LLC*,[13] the Alaska Supreme Court affirmed a superior court ruling regarding compensation for producible native gas remaining in a reservoir at the time of a taking, as well as its valuation of gas storage rights. The Alaska Supreme Court held that Kenai Landing, the owner a parcel of land overlying the Sterling C Reservoir where natural gas is stored, was not entitled to compensation for either native or new gas in the Sterling C Reservoir at the time of the taking. Analyzing the principles of just compensation, the court determined that Kenai Landing lost nothing by virtue of Cook Inlet Natural Gas Storage Alaska, LLC's (CINGSA) condemnation of an easement[14] because CINGSA held both production rights and a royalty interest by virtue of a lease assignment.[15]

The Alaska Supreme Court further held that the lower court did not err in valuing Kenai Landing's pore space rights on the basis that the fullest extent rule, "which presumes that the appropriator will exercise [the rights acquired] and use and enjoy the property taken to the full extent,"[16] undermines Alaska law on just compensation. It further found that the superior court properly valued pore space rights by including a "buffer area" in its valuation and by relying on one of CINGSA's experts with respect to the actual value of the storage space.[17]

In *League of Conservation Voters v. Trump*,[18] the U.S. District Court for the District of Alaska found that section 12(a) of the Outer Continental Shelf Lands Act (OCSLA) does not endow the President with the authority to revoke withdrawals of unleased land from the Outer Continental Shelf (OCS). Plaintiffs sued the federal defendants[19] for an alleged violation of the federal Constitution's Property Clause, as well as an alleged violation of the statutory authority endowed by section 12(a) of OCSLA, after President Trump issued Executive Order No. 13,795,[20] intended to revoke three memoranda and one executive order issued by President Obama in 2015 and 2016 withdrawing certain areas of the OCS from leasing.

The district court found that, while the plain language of section 12(a) does not expressly grant to "the President the authority to revoke [] prior

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[13] 41 P.3d 954 (Alaska 2019).

[14] *Id.* at 960.

[15] *Id.* at 960–61. CINGSA, a private company building a natural gas facility for storage of natural gas, filed a condemnation action to obtain necessary property rights.

[16] *Id.* at 963 (citing Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 677 (Or. 1938)).

[17] *Id.* at 965.

[18] 63 F. Supp. 3d 1013 (D. Alaska 2019).

[19] The authors' firm, Guess and Rudd, P.C., represented Intervenor-Defendant, American Petroleum Institute.

[20] Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017).

withdrawal[s],"[21] the statute created ambiguity. As a result, the court examined the context of section 12(a) to discern Congress's intent, including the structure, legislative history and prior statutes, purpose of, and subsequent legislative history of OCSLA.

Based on the context surrounding section 12(a), the district court granted plaintiffs' motion for summary judgment, declaring the revocation in Executive Order No. 13,795 invalid and unlawful, and vacating section 5 of the order. The defendants have since filed notices of appeal with respect to the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.[22]

II. ARKANSAS

A. Legislative Developments

H.B. 1156 [23] globally reorganized Arkansas' formerly scattered collection of 42 administrative agencies into 15 cabinet-level departments whose directors report directly to the governor. The Arkansas Oil and Gas Commission is now included within the Department of Energy and Environment, along with the Arkansas Department of Environmental Quality, the Arkansas Pollution Control and Ecology Commission, and six smaller, formerly independent, agencies.

B. Judicial Developments

In *Stephens Production Co. v. Mainer*,[24] the Arkansas Supreme Court affirmed a trial court's order certifying a class of royalty owners suing Stephens, alleging improper deduction of post-production expenses from their royalties. The class, as certified, will have around 36 members. In its interlocutory appeal, Stephens argued that the proposed class failed to satisfy the numerosity requirement of Arkansas' class action rule,[25] which requires a finding that joinder of all individual class members is impractical.

A sharply divided supreme court affirmed the trial court's class certification order. The majority opinion, approved by four members of the seven-member court, relied upon Arkansas appellate courts' strong deference to trial courts on issues of class certification. In so doing, the majority distinguished the supreme court's earlier ruling in *City of North Little Rock v. Vogelgesang*,[26] where it had disallowed a 17-member class.

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[21] *League of Conservation Voters*, 63 F. Supp. 3d at 1022.

[22] *See* Notice of Appeal, League of Conservation Voters v. Trump, No. 3:17-cv-00101 (D. Alaska May 28, 2019).

[23] H.B. 1156, 92d Gen. Assemb., 2019–2020 Reg. Sess. (Ark. 2019).

[24] 571 S.W.3d 905 (Ark. 2019).

[25] ARK. CODE ANN. § 23(a) (2019) ("Arkansas Class Action Rule").

[26] 619 S.W.2d 652 (Ark. 1981).

The majority observed that, unlike *Mainer*, the *Vogelgesang* trial court order had denied class certification. According to the majority, neither trial court order constituted abuse of discretion, which the Arkansas Supreme Court has established as its standard for reviewing such orders.

Justice Wood, writing for the dissenting three-justice minority, appeared critical of the supreme court's "hands-off" oversight of trial courts' management of putative class action lawsuits, writing that "the majority further relaxes our already liberal requirements for class certification."[27] She observed that the *Mainer* class, thus certified, was apparently the smallest ever certified in Arkansas, though its record contained no proof that joinder of all class members was impractical. Specifically, Justice Wood stated: "Although our standard of review is deferential to the circuit court's discretion, we should not feel bound to affirm an unprecedented decision simply because the circuit court said so, without any indication that joinder is impracticable."[28]

Mainer showcases the polar difference in the class action certification procedure between Arkansas' state and federal courts. Federal courts are required to conduct a "rigorous analysis" to confirm that each class action requirement has been met.[29] Arkansas state trial courts have "wide discretion" regarding class certification. No such "rigorous analysis" is required.[30]

Turner v. XTO Energy Inc.[31] involved a mineral owner's claim that XTO Energy Inc. (XTO) had secretly commingled gas from a stratigraphic formation where he was a participant, and produced from a shallower zone where his interest is non-consent, so as to deprive him from revenue from its sale. The claimant, Turner, was an unleased mineral owner whose interest was subjected to separate Arkansas Oil and Gas Commission integration orders covering the shallow and deep zones and had elected to participate only in the deeper zone. Shortly before a scheduled bench trial, XTO moved for summary judgment, attaching affidavits from both a geologist and a reservoir engineer to support its defense that the deeper zone had "watered out" in 1982 and thus was incapable of contributing to production. Citing Turner's failure to rebut that proof, the district court granted the motion.

The court's primary ruling was fact-based and not of precedential value. However, the opinion commented upon other issues of interest to the

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[27] *Stephens Prod. Co*., 591 S.W.3d at 910.

[28] *Id.*

[29] Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 157 (1982).

[30] Beverly Enters.-Ark. Inc. v. Thomas, 259 S.W.2d 445 (W.D. Ark. 2007).

[31] No. 2:18-CV-00217, 2019 WL 3577676 (W.D. Ark. Aug. 6, 2019), *appeal docketed*, No. 19-2867 (8th Cir. Aug. 30, 2019).

mineral bar. Among those is the application of the statute of limitations to Turner's claim. Under Arkansas law,[32] actions on written contracts are subject to a five-year limitation period, while a three-year period applies to implied contracts. Since Turner never executed the unit operating agreement, his rights arose only by virtue of the integration orders, and were thus subject to the shorter limitation period.

Turner argued that limitations should not apply because he was unaware of the "commingling." However, the court observed that Arkansas has rejected the "discovery rule" in its application of the statute of limitations even in cases involving underground minerals.[33]

The court also rejected Turner's claim under Ark. Code Ann. §§ 15-74-601 to -604,[34] statutes permitting a person wrongfully denied "proceeds" of oil and gas sales to recover penalties and attorneys' fees. According to the court, since Turner never executed an operating agreement he was, at best, only entitled to his share of any production of gas from the deeper zone in-kind, not its proceeds.

Finally, the court rejected Turner's attempt to assert a cause of action under Ark. Code Ann. § 15-73-207,[35] a statute that defines an oil and gas lessee's "prudent operator" standard. The court ruled that the prudent operator standard is simply a measure of the lessee's duty to the lessor, not a separate cause of action.

The *Turner* decision is currently on appeal to the U.S. Court of Appeals for the Eighth Circuit.[36] That appeal is largely confined to Turner's contention that the district court improperly disregarded his own evidence, and does not challenge his rulings on the legal issues discussed above.

C. Administrative Developments

In an apparent effort to deter well operators from transferring marginal wells to avoid plugging liability, the Arkansas Oil and Gas Commission recently promulgated its General Rule B-4,[37] regulating transfers of well operations. The rule sets forth a detailed procedure that must be followed in order to transfer an Arkansas oil and/or gas well to a new operator. Particularly impacted are "marginal gas wells," producing less than 25 thousand cubic feet (Mcf) per day, and shut-in gas wells that have been granted "temporarily abandoned" status by the commission. As a prerequisite to the transfer of any such well, the new and former operators

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[32] ARK. CODE. ANN. § 16-56-105 (2019).

[33] *See* Atlanta Expl. Inc. v. Ethyl Corp., 784 S.W.2d 150 (Ark. 1990).

[34] ARK. CODE. ANN. §§ 15-74-601 to -604 (2019).

[35] *Id.* § 15-73-207.

[36] Turner v. XTO Energy Inc., No. 19-2867 (8th Cir. filed Aug. 30, 2019).

[37] Ark. Oil & Gas Comm'n, Gen. R. B-4: App. to Transfer a Well (June 16, 2019).

must secure Commission approval of the transfer, after notice and hearing of an application brought for that purpose. The successor operator is also required to post a well-specific plugging bond in the amount of $35,000 for each such marginal well included in the transfer.

Since the Commission's regulations are constantly in revision, the practitioner is advised to regularly check these regulations online.[38] Proposed rule changes as well as a tabulation of recently enacted, repealed, or amended rules are online.[39]

III. CALIFORNIA

A. Legislative Developments

Both the legislature and Governor Gavin Newsom have committed to move California away from fossil fuels.[40] To accomplish this objective, numerous bills were enacted in 2019, which intensify the regulation of California's oil and gas industry and reorganize the Division of Oil, Gas and Geothermal Resources (DOGGR), the California agency that regulates exploration and production operations. DOGGR was renamed as the "Geologic Energy Management Division" (CalGEM) of the Department of Conservation by Assembly Bill 1057.[41] Historically, the Division's mission has been to "encourage the wise development of oil and gas resources."[42] Assembly Bill 1057 modified that mission statement to include protecting public health and safety and environmental quality and the reduction of greenhouse gas emissions.[43] The bill also modified operators' bonding requirements and authorizes the Division Supervisor to request additional information from a new operator about its operation, including all current lease agreements for specified wells or production facilities. Statutory definitions of the terms "idle wells," "idle-deserted well," and a "deserted facility" were modified along with operators' reporting requirements for such wells.

Assembly Bill 1328[44] added section 3206.2 to the Public Resources Code and amended section 3229 to require the submission of testing data

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[38] *See* Ark. Oil & Gas Comm'n, *General Rules and Regulations*, http://aogc.state.ar.us/rules/rulesregs.aspx (last visited Mar. 2, 2019).

[39] *See* Ark. Oil & Gas Comm'n, *New and Proposed Rules*, http://aogc.state.ar.us/rules/new.aspx (last visited Mar. 2, 2019).

[40] Press Release, Cal. Office of the Gov., *Governor Gavin Newsom Signs Six Bills to Move California Away from Fossil Fuels* (Oct. 12, 2019).

[41] A.B. No. 1057, 2019–2020 Cal. Leg. Sess. (2019).

[42] A.B. No. 1141, 2019–2020 Cal. Leg. Sess. (2020) (amending CAL. PUB. RES. CODE § 3011(a)).

[43] *Id.*

[44] A.B. No. 1328, 2019–2020 Cal. Leg. Sess. (2019) (adding CAL. PUB. RES. CODE. § 3206.2).

conducted on idle and abandoned wells for publication on the DOGGR's (CalGEM) website.

Operators' reporting requirements of the chemical composition of leaks from natural gas storage wells in the event of a leak were modified by Senate Bill 463.[45] DOGGR (CalGEM) was also directed by the bill to review and revise its natural gas storage well regulations.[46]

Reacting to recent operator bankruptcies, Senate Bill 551[47] was enacted to require oil and gas well operators to provide estimates of the cost to plug and abandon wells and decommission related oil and gas production facilities commencing July 1, 2022.

The California State Lands Commission manages the state's four million acres of tidelands, submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, as well as the state's "school lands." Currently, the Commission has jurisdiction over 17 oil and gas leases of offshore state lands. Responding to the recent bankruptcies of the operators of Platform Holly and Rincon Island in state waters off the coast, which left the state largely responsible for the decommissioning of the platforms, Assembly Bill 585[48] was enacted to amend section 6804 of the California Public Resources Code to codify Commission requirements for the evaluation of a proposed assignee of an oil and gas lease or permit issued by the State for state lands. The bill deleted provisions releasing and discharging an assignor or transferor from obligations accruing under a lease or permit after the assignment, transfer, or sublease, and provides instead that an assignor of a lease or permit would remain liable for obligations under the lease or permit, including requirements to properly plug and abandon all wells, decommission all production facilities and related infrastructure, complete well site restoration and lease restoration, and remediate contamination at well and lease sites, except as provided. The bill requires assignments to be recorded in the office of the county recorder of the county in which the leased or permitted lands are located. The bill also provides for fines and imprisonment for certain violations.

Section 6827.5 was added to the California Public Resources Code by Assembly Bill 342[49] to prohibit any state agencies, including the State Lands Commission and the California Department of Parks and Recreation,

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[45] S.B. 463, 2019 Reg. Sess. (Cal. 2019) (amending CAL. PUB. RES. CODE §§ 3160, 3183).

[46] CAL. PUB. RES. CODE §§ 3160, 3183, 3206.2 (2019).

[47] S.B. 551, 2019 Reg. Sess. (Cal. 2019) (amending CAL. PUB. RES. CODE §§ 3206.3, 3257).

[48] A.B. 585, 2019 Reg. Sess. (Cal. 2019) (amending CAL. PUB. RES. CODE § 6804; adding § 6829.4).

[49] A.B. 342, 2019 Reg. Sess. (Cal. 2019) (adding CAL. PUB. RES. CODE § 6827.5).

among others, or any local trustee from entering into a lease or other conveyance authorizing new construction of oil and gas related infrastructure facilities on federal lands administered by the U.S. Bureau of Land Management.

Assembly Bill 936[50] will require operators to establish contingency planning under California's Lempert-Keene-Seastrand Oil Spill Prevention and Response Act[51] for all types of non-floating oil spills.

B. Judicial Developments

Leiper v. Gallegos[52] held that, in situations where the mineral interest was assessed separately for property tax purposes from the surface estate, a tax sale deed of property subject to an oil and gas lease did not include the oil and gas rights where the deed was silent on the conveyance of those rights. However, the court also held that upon termination of the oil and gas lease, the oil, gas, and mineral rights would revert to the surface owner under the tax sale deed.

Vaquero Energy, Inc. v. County of Kern[53] upheld a 2015 Kern County zoning ordinance requiring permits for new oil and gas exploration, drilling, and production, which was challenged on constitutional due process and equal protection grounds for requiring a lengthier and more expensive 120-day process when the permit applicant had not obtained the surface owner's advance consent to the proposed operation.

The California legislature enacted Senate Bill No. 4[54] in 2013 directing DOGGR to prepare an environmental impact report (EIR) pursuant to the California Environmental Quality Act (CEQA)[55] to address the need for additional information about the environmental effects of well stimulation treatments such as hydraulic fracturing and acid well stimulation. After DOGGR prepared and certified an EIR in 2015, the Center for Biological Diversity filed a petition for writ of mandate and complaint for declaratory and injunctive relief challenging the EIR. In *Center for Biological Diversity v. California Department of Conservation*, [56] the court of appeal held that DOGGR's EIR complied with both Senate Bill No. 4 and CEQA.

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[50] A.B. 936, 2019 Reg. Sess. (Cal. 2019).

[51] CAL. GOV'T CODE § 8670.1 et seq. (2019).

[52] 42 Cal. App. 5th 394, 398, 255 Cal. Rptr. 3d 293 (Ct. App. 2019).

[53] 42 Cal. App. 5th 312, 317, 22 Cal. Rptr. 3d 221 (Ct. App. 2019).

[54] S.B. 4, 2013 Reg. Sess. (Cal. 2013).

[55] CAL. PUB. RES. CODE § 21000 et seq. (2019).

[56] 26 Cal. App. 5th 210, 217, 248 Cal. Rptr. 3d 449, 455 (Ct. App. 2019).

The repeal[57] by the U.S. Department of Interior (DOI) of its "Valuation Rule" regulations governing the payment of royalties on oil, gas, and coal produced from federal and Indian lands was invalidated by the district court in *Becerra v. U.S. Department of the Interior*,[58] on the grounds that the repeal rule violated the federal Administrative Procedure Act (APA), 5 U.S.C. § 706, by failing to address the inconsistencies between DOI's prior findings in enacting the Valuation Rule and its decision to repeal the Rule and by failing to adequately considered alternatives to a complete repeal or to comply with APA notice and comment requirements. Ultimately, the district court vacated the final repeal.

C. Administrative Developments

DOGGR's new Underground Injection Control (UIC) regulations[59] took effect on April 1, 2019. The regulations impact the approximate 55,000 UIC wells in California used for water and steam injection for enhanced oil recovery and wastewater disposal. (Underground gas storage injection wells are covered by separate regulations.) Among other things, the new UIC regulations impose "stronger testing requirements to identify potential leaks . . . ; [new] data requirements . . . [for] project[] . . . evaluat[ions]; continuous well pressure monitoring; requirements to automatically [stop] injection when there is a risk to safety or the environment; [and] [r]equirements to disclose chemical additives for injection wells close to water supply wells."[60] On June 11, 2019, DOGGR issued a Notice to Operators[61] (NTO 2019-10) directing operators to contact local DOGGR offices to request clarification if the operator identified any conflicts between its current project approval letters and the new regulations.

DOGGR regulates more than 28,000 idle wells in California. However, its regulations did not provide for a comprehensive and regular testing program for idle wells. The California Office of Administrative Law approved DOGGR's new Idle Well Testing and Management Regulations,[62] which took effect on April 1, 2019, and updated testing

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[57] Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (to be codified at 30 C.F.R. pts. 1202 and 1206).

[58] 276 F. Supp. 3d 953 (N.D. Cal. 2017).

[59] Cal. Dep't of Conservation, *Underground Injection Control*, https://www.conservation.ca.gov/calgem/general_information/Pages/UndergroundinjectionControl(UIC).aspx (last visited Mar. 2, 2020).

[60] *Id.*

[61] Cal. Dep't of Conservation, NTO 2019-10 (June 11, 2019).

[62] Requirements for Idle Well Testing and Management, 14 C.C.R. §§ 1723.9 and 1752 et seq. (2019).

requirements for idle wells and active observation wells, requiring more rigorous testing of idle wells and observation wells, operator evaluations of idle wells, and engineering analyses for wells that have been idle for 15 or more years. The regulations also added new definitions and established requirements related to the maintenance and abandonment of idle wells.

At Governor Newsom's direction, DOGGR imposed a moratorium on the permitting of new "wells that use a high-pressure cyclic steaming process to break apart a geological formation to extract."[63] DOGGR also announced that pending applications to conduct hydraulic fracturing and other well stimulation practices will be independently reviewed by experts from the Lawrence Livermore National Laboratory "to ensure the state's technical standards for public health, safety and environmental protection are met prior to approval of each permit."[64] On October 24, 2019, DOGGR issued Notice to Operators 2019-16, modifying the Division's requirements for CEQA compliance.

IV. COLORADO

A. Legislative Developments

The Colorado legislature enacted Senate Bill 19-181 (SB 181),[65] a comprehensive revision of Colorado's oil and gas laws. Signed by Governor Jared Polis on April 16, 2019, SB 181 amended 10 sections of Colorado's Oil and Gas Act, as well as the Areas and Activities of State Interest Act, the Air Pollution Prevention and Control Act, the Local Land Use Control Enabling Act, and the County Police Power Statute.[66] SB 181 trailed other efforts to more aggressively regulate the oil and gas industry in Colorado. In November 2018, Colorado residents voted down Proposition 112, which would have established a 2,500-foot setback for oil and gas development from all occupied buildings and "vulnerable areas," which, according to several studies, would have greatly reduced oil and gas activity in the state.[67] SB 181 also followed the Colorado Supreme Court decision in *COGCC v. Martinez*[68] that addressed whether the Colorado Oil and Gas Conservation Commission (COGCC) could prevent drilling based on impacts to climate change. The Colorado Supreme Court held that the COGCC's directive to foster oil and gas development could not be entirely

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[63] News Release, Cal. Dep't of Conservation, *California Announces New Oil and Gas Initiatives* (Nov. 19, 2019).

[64] *Id.*

[65] S.B.19-18, 1st Reg. Sess., 72d Gen. Assemb. (Colo. 2019).

[66] *Id.*

[67] John Aguilar, *Prop 112 Fails as Voters Say No to Larger Setbacks for Oil and Gas*, THE DENVER POST (last updated Nov. 7, 2018, 8:52 AM).

[68] 433 P.3d 22, 25 (Colo. 2019).

eclipsed by the protection of public health and environment. Following this much-anticipated case and the defeated Proposition 112, the majority Democratic legislature (in both the Colorado House and Colorado Senate), with the Governor's support, made sweeping changes.

The most significant of SB 181's changes include a changed legislative mandate for the COGCC to regulate oil and gas operations to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources, without regard to cost-effectiveness and technical feasibility.[69] Local governments have much more control over oil and gas development, including approving facility siting and regulating environmental effects such as air emissions, water discharges, noise, odors, light, dust and reclamation.[70] Changes were made requiring local government siting before spacing and requiring a 45% working interest or consenting interests for compulsory pooling.[71] SB 181 also altered the COGCC makeup and reduced the number of commissioners with substantial experience in the oil and gas industry from three to one.[72] The bill called for rulemakings on specific topics, including those described in section C, *Administrative Developments*. The Colorado legislature required Colorado's Air Quality Control Commission (AQCC) to adopt rules to minimize "methane . . . hydrocarbons, volatile organic compounds, and nitrogen [] oxide"[73] emissions from oil and gas facilities, and implement continuous monitoring equipment at oil and gas facilities. The full impact of SB 181 will continue to play out as these rulemakings proceed.

B. Judicial Developments

On June 6, 2019, the Colorado Court of Appeals decided *Weld Air & Water v. COGCC*,[74] vastly expanding the classes of persons who could claim standing to challenge COGCC decisions. The case revolved around a COGCC approval of oil and gas locations near a middle school. A non-profit environmental and community rights organization sought judicial review of the approval. Although not property owners, the Petitioners claimed to "have aesthetic, recreational, health, and environmental interests in the proposed development"[75] that would be adversely impacted by air and noise pollution. While the COGCC argued that this was insufficient to establish standing, the Colorado Court of Appeals disagreed, explaining

[69] COLO. REV. STAT. § 34-60-102(1)(a) (2019).

[70] *Id.* § 29-20-104(1)(h)(I)–(VI).

[71] *Id.* § 34-60-116(6)(a)–(b).

[72] *Id.* § 34-60-104.3(2)(c).

[73] *Id.* § 25-7-109(10)(a).

[74] 2019 COA 86, 457 P.3d 727.

[75] *Id.* ¶ 17.

that "while the injury-in-fact cannot be overly indirect, incidental, or a remote, future possibility, the injury may be intangible, such as an aesthetic injury."[76] The case is significant in that it expands the class of persons qualified to challenge approvals of well locations. The COGCC has appealed the decision to Colorado Supreme Court.

On September 23, 2019, the Colorado Supreme Court announced that it was granting certiorari in the case of *Bill Barret Corp. v. Lembke*.[77] The case involved mineral lessees who brought an action against the owners of a special metropolitan district to prevent the imposition of *ad valorem* taxation of oil and gas produced by the lessees. The lessees of the severed mineral estate had received no notice of and had not consented to the inclusion of the leased minerals within the special district. The court of appeals found that the mineral lessees were not "fee owners" of the severed mineral estate for purposes of the Colorado Special Districts Act because a lessee's interest is temporary. Also, the mineral interest holders did not own "real property capable of being served with facilities of the special district,"[78] and therefore, their consent to the inclusion of the minerals within the special district was not required. The Colorado Supreme Court granted certiorari on the following questions: whether, for purposes of the Special Districts Act, only an owner, and not a lessee, of a severed mineral estate qualifies as a fee owner; and whether the Special Districts Act permits inclusion of real property into a special taxing district when (1) the inclusion occurred without notice to or consent by the property owners, and (2) that property is not capable of being served by the district.

C. Administrative Developments

Prompted by the passage of SB 181, the COGCC and AQCC underwent several rulemakings in 2019 and scheduled more for 2020.

1. 500 Series Rulemaking

On June 17–18, 2019, the COGCC held a hearing to consider proposed changes to the 500 Series, Rules of Practice and Procedure. The 500 series rules govern when and how parties are to file hearing applications, how the Commission processes applications, how to protest applications, and how hearings are conducted. The purpose of the rulemaking was (1) to authorize administrative law judges (ALJs) and hearing officers (HOs) to hear matters and issue orders that become final if uncontested, and (2) to adopt SB 181's statutory language concerning the evidentiary requirements for

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[76] *Id.* ¶ 11.

[77] 2018 COA 134. The author's law firm, Davis Graham & Stubbs LLP, represents HighPoint Resources Corporation (f/k/a Bill Barret Corporation) and Bonanza Creek Energy, Inc. in this litigation.

[78] *Id.* ¶ 47.

pooling and drilling and spacing units.[79] The final rules provided that matters submitted to the Commission for adjudication will automatically be assigned to an ALJ or HO, unless the Commission otherwise orders.[80] ALJs and HOs have the authority to hear all issues of fact and law concerning matters and to issue recommended orders that become final unless contested. Significant changes to spacing and pooling rules included requiring that lease offers contain clear and plain language and be made in good faith, and that involuntary pooling applications may be filed only upon securing the consent of owners of 45% of the mineral interest to be pooled.[81] Previously, such application could be filed by "any interested person."

2. Flowline Rulemaking

On November 19–21, 2019, the COGCC held a hearing to adopt changes to its flowline rules. SB 181 required the Commission to allow public disclosure of flowline information, determine when deactivated flowlines must be inspected before being reactivated, and determine when inactive, temporarily abandoned, and shut-in wells must be inspected before being put back into production or used for injection.[82] Despite the Commission undergoing an extensive revision of its flowline rules in 2018, which, among other things, established safety procedures for abandoning flowlines in the ground, issues surrounding abandonment became a flashpoint at the hearings.[83] The final rules adopted by the Commission established a presumption that all flowlines be removed from the ground upon abandonment, although certain enumerated exceptions apply.[84] If abandonment of a flowline in place is less impactful to public health, safety, and welfare, the environment, and wildlife resources, and one of the enumerated exceptions applies, the flowline may be safely and properly left in the ground, subject to the COGCC Director's review.[85] The Commission also determined that it will make known to the general public, through a publicly accessible online map viewer, the location of flowlines at scales greater than or equal to 1:6,000 or 1 inch equals 500 feet.[86] Members of the public may also visit the Commission's office to view special data at a closer scale.

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[79] Prehearing Statement, COGCC, Cause No. 1R, No. 180900646 (2018).

[80] 2 C.C.R. § 404-1:503(c) (2019).

[81] *Id.* § 404-1:530(a), (b).

[82] COLO. REV. STAT. § 34-60-106(19)(a)(b) (2019).

[83] *See* Rep. of the Comm'n, COGCC, Cause No. 1R, No. 171200767 (2018).

[84] 2 C.C.R. § 404-1:1105 (2019).

[85] *Id.* § 404-1:1105.d.(2).

[86] *Id.* § 404-1:1101.e.(1).

3. Air Quality Rulemakings

On December 16–19, 2019, the AQCC held hearings to implement SB 181's directive to minimize methane, hydrocarbons, volatile organic compounds, and nitrogen oxide emissions from oil and gas facilities, and to require continuous monitoring equipment at oil and gas facilities. Some of the most significant changes made to the AQCC's Regulation Number 7 include decreasing the tons per year threshold for storage tanks that must install certain emissions control equipment, increasing the frequency with which operators must engage in leak detection and repair of facilities, and increasing controls for the loadout of storage tanks.

4. Upcoming Rulemakings

In 2020, the COGCC will undergo rulemakings on additional topics. They include how the Commission will implement its changed mission to "regulate oil and gas operations in a reasonable manner to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources."[87] The Commission will address its mandate to "evaluate and address the potential cumulative impacts of oil and gas development."[88] Another rulemaking is planned to "adopt an alternative location analysis process"[89] for oil and gas locations near populated areas. A rulemaking will also establish rules ensuring proper wellbore integrity of all oil and gas production wells.

V. KANSAS

A. Legislative Developments

Kansas made a minor amendment to the Kansas Underground Utility Damage Prevention Act, codified at Kan. Stat. Ann. § 66-1802, which relieves oil and gas pipeline owners that qualify as public utilities from marking underground facilities located on another's property. Prior to the amendment, public utilities were responsible for marking all underground facilities within a designated "tolerance zone," before excavation projects. As a result, public utilities had to mark facilities on land they did not own. The amendment contains an additional caveat that the owner of the facility must also be an electric public utility to qualify for the marking exception. The law became effective April 18, 2019.

B. Judicial Developments

The Kansas Supreme Court had two influential decisions about term mineral interests in 2019. In *Jason Oil Co. v. Littler*, the court settled a

[87] COLO. REV. STAT. § 34-60-106(2.5)(a) (2019).

[88] *Id.* § 34-60-106(11)(c)(II).

[89] *Id.* § 34-60-106(11)(c)(I).

debate on the application of the Rule Against Perpetuities on term mineral interests and found the rule did not apply.[90] In 1967, Littler conveyed tracts to the Myers, reserving a term mineral interest for a "period of 20 years or as long thereafter" as minerals were produced. No minerals were produced during the term period. In 2016, Jason Oil Co. sought a quiet title action based on leases with the grantee's heirs. The grantor's heirs objected, claiming that the grantee's heirs had a springing executory interest subject to the Rule Against Perpetuities, and since the interests violated the Rule, they were void *ab initio* and remained in the grantors and their heirs. The district court relied on the intent of the parties to the original deeds to find that the grantee's heirs obtained ownership once 20 years passed. The Kansas Supreme Court affirmed, but on other grounds. The court indicated that the grantee's heirs did have a springing executory interest, but declined to apply the Rule Against Perpetuities or adopt the two-grant theory or other legal fiction as used in other states to avoid the results of the Rule. Instead, the court carved out a narrow exception to the Rule Against Perpetuities for term mineral interests based on the Rule's policy of promoting alienability of property.

In the second term mineral interest case, *Oxy USA Inc. v. Red Wing Oil, LLC*, the Kansas Supreme Court found that term mineral interest owners cannot adversely possess reversionary mineral interests by receiving royalties from a unitization agreement.[91] The original property owner sold the property in 1943, reserving a 20-year term mineral interest ("Luther interest"). Eventually, the property was included in a unitization agreement, but there was no production on the lands subject to the Luther interest. The owner with the possibility of reverter was on notice that the Luther interest terminated, but did not take action to prevent royalty distribution to owners of the terminated interest. The Luther interest heirs argued that receiving royalties amounted to adversely possessing an interest to the minerals in place. The court rejected this theory on the grounds that royalties only represent a portion of the value of minerals after production and did not put the owner on notice for adversely possessing minerals *in situ*.

The Kansas Supreme Court issued an opinion affirming the Kansas Corporation Commission's denial of a unitization plan based on the agency's interpretation of the statutory definition for "pool."[92] In *Lario Oil*, the Commission denied Lario's unitization project because it failed to prove that all of the leased area communicated in a single pressure system. Under Kan. Stat. Ann. § 55-1302(b), properties may only be unitized if

[90] 446 P.3d 1058 (Kan. 2019).

[91] 442 P.3d 504, 507 (Kan. 2019).

[92] Lario Oil & Gas Co. v. Kan. Corp. Comm'n, 450 P.3d 353 (Kan. Ct. App. 2019).

they are drawing from a common "pool" or "an underground accumulation of oil and gas in one or more natural reservoirs in communication so as to constitute a single pressure system so that production from one part of the pool affects the pressure throughout its extent."

After bottom-hole pressure tests, the Commission decided that it had not received empirical evidence that the proposed unit was one pressure system. Lario countered that the Commission's interpretation was too narrow and should instead focus on how the operator would extend the economic life of the included property. The court ruled in the Commission's favor, indicating that under the statute, the same standard for "pool" applies regardless of whether the production area is near the end of its economic life.

Turning to the ongoing *Northern Natural Gas* litigation, 2019 saw several orders from the state and federal courts over produced migrated storage gas. Three of the most significant orders were: *Northern Natural Gas Co. v. Approximately 9117.53 Acres*, *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, and *Northern Natural Gas Co. v. ONEOK Field Services Co.*

In *Northern Natural Gas Co. v. Approximately 9117.53 Acres*, the federal district court tentatively resolved the condemnation compensation issue.[93] The court's previous order awarding compensation for Northern Natural's condemnation of oil and gas rights was modified on appeal by the Tenth Circuit, substantially diminishing the award to defendants. Following the appeal, the court directed the parties to file dispositive motions on three remaining issues: (1) the proper amount of compensation, accounting for a reduction for the amount of Northern Natural's storage gas (in accordance with the Tenth Circuit's ruling); (2) the amount Northern Natural might set off against such award; and (3) other potential adjustments to the award, such as interest.

The court ruled that the report of the special commissioners, which identified the amount of recoverable gas (both native and storage gas) in the relevant property, provided a sufficient basis to determine just compensation. Based on the commissioners' report, Northern Natural submitted an affidavit of their expert witness, Randall Brush, advancing several conclusions for determining the economic value of the oil and native gas being condemned. The court found the methodology of Northern Natural's expert persuasive, and adopted it over the objections of the defendants, whom, the court noted, failed to present contrary evidence or a reliable substitute methodology to undermine the valuations urged in Brush's affidavit.

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[93] No. 6:10-cv-01232, 2019 WL 1427415, at *6 (D. Kan. Mar. 29, 2019), *reconsideration denied*, No. 6:10-cv-01232, 2019 WL 2473831 (D. Kan. June 13, 2019).

The court further found that Northern Natural was entitled to setoff from the compensation awarded to defendants for the value of storage gas produced by the defendants after June 2, 2010, when FERC issued its certificate. The court cited *Union Gas Systems, Inc. v. Carnahan*,[94] which found that setoff may be appropriate, for subsurface migration of minerals, after certification but before condemnation. Relying on *Union Gas*, the court found the appropriate amount of setoff would be equal to the selling price of the gas, less the costs of production, including a reasonable rental for the use of the owner's land. The court then identified the tracts on which Northern Natural was entitled to a setoff for the amounts of storage gas produced after the certification date. The court further found that Northern Natural owed interest on that amount from the date of the taking until payment at a rate of 4.75%, compounded annually.

In the related unjust enrichment case seeking recovery for the value of the produced storage gas, *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, the federal district court issued an order on September 3, 2019, denying summary judgment for the defendants on their rule of capture and ultra-hazardous activity defenses.[95] The defendants relied on Kansas Supreme Court opinion *Northern Natural Gas Co. v. ONEOK Field Services Co.* (*ONEOK I*),[96] to assert that rule of capture precluded unjust enrichment claims for producing migrated storage gas. The court rejected the argument because the effect of rule of capture on title to the gas was not conclusive for unjust enrichment claims.

The district court also awarded Northern Natural summary judgment on the defendants' counterclaims for nuisance, negligence, and ultra-hazardous activity. The court found subsurface migration of storage gas could not be reasonably viewed as hazardous or unreasonable interference with the surrounding area because it occurred deep within the earth and defendants presented no evidence of harm.

Three days later, the Kansas Supreme Court issued an opinion clarifying the effect of the rule of capture on storage gas in *Northern Natural Gas Co. v. ONEOK Field Services Co.* (*ONEOK II*).[97] This opinion resulted from a state action by Northern Natural seeking compensation for post-certification gas. The state district court had ruled for the defendants on three prongs: (1) the *Union Gas* ruling limiting rule of capture for storage gas was superseded in 1993 by Kan. Stat. Ann. § 55-1210; (2) *Martin, Pringle*[98] overruled *Union Gas*; and (3) *Union Gas*

[94] 774 P.2d 962 (Kan. 1989).

[95] 405 F. Supp. 3d 981 (D. Kan. 2019).

[96] 296 P.3d 1106 (Kan. 2013).

[97] 448 P.3d 383 (Kan. 2019).

[98] N. Nat. Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 217 P.3d 966 (Kan. 2009).

constituted an unconstitutional taking of property.

First, the court clarified that Kan. Stat. Ann. § 55-1210(c) only protects gas beyond the certification area. As such, *Union Gas* applied to gas within the certification area and precluded rule of capture. Second, the court rejected the proposition that another Kansas opinion, *Martin, Pringle*, had overruled *Union Gas*. *Martin, Pringle* held that storage field owners lost title to migratory gas if third parties caught the gas before the enactment date for Kan. Stat. Ann. 55-1210. It did not analyze or attempt to overrule *Union Gas*. Third, the court declined finding a taking in light of the *Northern Gas* compensation cases. Certification cut off the common-law right to produce and was not a vested property interest.

Finally, in *Hitch Enterprises, Inc. v. Oxy USA Inc.*, the federal district court featured a detailed discussion of *Fawcett*'s effect on the marketable condition rule.[99] The marketable condition rule requires operators to make gas marketable at their expense. In *Fawcett*,[100] a dispute over natural gas processing costs, royalty owners argued that natural gas was not marketable until it reached an interstate pipeline. The *Fawcett* court disagreed, but indicated that a gas is only marketable "when the operator delivers the gas to the purchaser in a condition acceptable to the purchaser in a good faith transaction."

Hitch involved a class certification dispute over natural gas processing costs and its deductibility in payments to royalty owners. The royalty owners asserted that *Fawcett* modified the marketable condition rule to make gas marketable solely by the presence of a good faith sale. As such, operators could not deduct processing costs. The court rejected this argument, finding that *Fawcett* only dealt with operators' obligations after the gas is sold. It did not negate the previous rule that gas may be marketable at the wellhead because that gas could be acceptable to a purchaser in a good faith transaction. Thus, enhancement costs may be shared with royalty owners in such circumstances.

VI. LOUISIANA

A. Legislative Developments

Louisiana Mineral Code articles 164, 166, and 175 were amended by H.B. No. 350[101] of the 2019 legislative session. Prior to Act No. 350, these articles prohibited oil and gas operations on a co-owned tract of land, co-owned mineral servitude, or under a mineral lease granted by some of the

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[99] No. 6:18-cv-01030, 2019 WL 3202257 (D. Kan. July 16, 2019), *reconsideration denied*, No. 6:18-cv-01030, 2019 WL 6310156 (D. Kan. Nov. 25, 2019).

[100] Fawcett v. Oil Producers, Inc. of Kan., 352 P.3d 1032 (Kan. 2015).

[101] H.B. 350, 2019–2020 Reg. Sess. (2019) (amending LA. STAT. ANN. §§ 31:164, :166, :175).

co-owners, unless 80% of the co-owners consented to the operations. Now, after the amendment, the threshold level of consent required is 75%.

H.B. 403[102] of the 2019 legislative session enacted La. R.S. 30:127(H). In Louisiana, the State Mineral and Energy Board is charged with the duty of administering the mineral ownership rights of the State of Louisiana, including state agencies.[103] This amendment was a compromise that was aimed at resolving the problems posed by an insolvent or bankrupt oil and gas lessee who owes unpaid royalties to the State. Specifically, this amendment grants the Board the authority to include a continuing security interest, as contemplated by the Uniform Commercial Code, in mineral leases granted by the Board on State-owned properties after July 31, 2019. However, the specific language to be included must be submitted by the Board to both the House and Senate Committees on Natural Resources for review no later than 30 days prior to entering into the first lease containing that continuing security interest.

B. Judicial Developments

One of the most significant decisions of 2019 was handed down by a Louisiana federal district court, which made an *Erie* guess on an issue of first impression relating to the propriety of deducting post-production expenses from proceeds owed to unleased mineral owners under Louisiana law. In *Johnson v. Chesapeake Louisiana, LP*,[104] Chief Judge Hicks of the U.S. District Court for the Western District of Louisiana concluded that Louisiana law disallowed the deduction of post-production expenses from the proceeds owed to an unleased mineral owner. The basis of this decision was the direction of La. R.S. 30:10(A)(3) to remit the "pro rata share of the proceeds of the sale of production"[105] to an unleased mineral owner for his tract's share of the unitized production. In reaching this decision, the court implicitly interpreted "proceeds" as "gross proceeds" rather than "net proceeds" that would factor in post-production expenses. Chesapeake and several industry amici filed motions for reconsideration, which are currently pending. One of the primary bases of those motions is the failure to consider the Louisiana doctrine of *negotiorum gestio*, which would allow the manager of the affairs of another to be reimbursed for all necessary and useful expenses incurred in managing another's affairs. Even though this decision is not yet final and remains subject to future appeal, it has certainly had a palpable effect on operators in Louisiana.

The distinction between conduct undertaken in good faith or bad faith is often critical in terms of exposure to heightened penalties under

[102] H.B. 403, 2019 Leg. Sess. (enacting LA. STAT. ANN. § 30:127(H) (2019)).

[103] LA. STAT. ANN. § 30:121 et seq. (2019).

[104] No. 5:16-cv-01543, 2019 WL 1301985 (W.D. La. Mar. 21, 2019).

[105] LA. STAT. ANN. § 30:10(A)(3) (2019).

Louisiana law, and oil and gas litigation is no exception. In *Mary v. QEP Energy Co.*,[106] Plaintiff filed suit alleging that Defendant violated a pipeline servitude agreement because the pipeline on Plaintiff's property extended beyond the permissible area of the pipeline servitude agreement, and such deviations were in bad faith. Therefore, Plaintiff sought disgorgement of Defendant's profits or an order permitting removal of the pipeline. Plaintiff's claim turned on Article 486 and the standard of "good faith," as the term is used in the article. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the district court's finding that Civil Code article 670 supplied the legal standard for good faith. The Fifth Circuit concluded that article 670 was inapplicable because the pipeline servitude holder was not a "landowner" and a pipeline is not a "building." Instead, the Fifth Circuit found that article 487 supplied the legal rule for a finding of good faith because the parties were fighting over the profits, i.e., fruits, of a thing, in this case land, in which the pipeline was located.

While environmental lawsuits alleging contamination from historical, i.e., legacy, operations are not new in Louisiana, plaintiffs have embraced novel legal theories in response to a number of successful defenses raised by defendants. In *Guilbeau v. BEPCO, L.P.*,[107] plaintiff filed an oil and gas legacy lawsuit, seeking an injunction to require the defendants, who previously conducted oil and gas activities on or around plaintiff's property, to remediate the alleged present-day contamination caused by their past operations. The injunctive relief sought was grounded in La. R.S. 30:16, which provides a person adversely affected by another person "violating or [] threatening to violate a law of this state with respect to the conservation of oil or gas, or both"[108] with the right to seek an injunction when the Commissioner of Conservation fails to do so. As the court acknowledged, the use of section 30:16 to remedy past violations of conservation law is a recent development largely due to a series of judicial decisions that tapered the viability of legacy lawsuits in Louisiana. Thus, whether section 30:16 applies to past violations remains an open question under Louisiana law. As such, the federal court abstained from exercising jurisdiction over the case under the Burford doctrine, citing the nature of the state law cause of action and its unsettled status, along with the unique state interests implicated, in support of the court's decision.

The Parish of Plaquemines and the State of Louisiana sued the oil and gas industry for restoration of Louisiana's coastal wetlands, which they contend are being lost as a result of historical oil and gas operations dating

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[106] 787 F. App'x 203 (5th Cir. 2019), *withdrawn and superseded*, 798 F. App'x 811 (5th Cir. 2020).

[107] No. 1:18-cv-00551, 2019 WL 3801647 (W.D. La. Aug. 12, 2019).

[108] *Id*. at *3 (citing LA. STAT. ANN. § 30:16 (2019)).

back to the 1940s along the coast. The Eastern District of Louisiana granted the plaintiffs' motions to remand this matter to state court in *Parish of Plaquemines v. Riverwood Production Co.*[109] The primary basis of this removal was federal question and the federal officer removal jurisdiction. The removing defendants argued they were under federal supervision and direction during World War II, which was included within the petition's time frame of alleged violations. However, the court construed the pleadings to exclude any claim arising under federal law. Further, the court rejected documents showing some federal direction of oil and gas activities during the World War II time frame. Ultimately, the court found that compliance by private oil companies with wartime federal laws and regulations failed to fall within the ambit of "acting under the color of federal office," as required for federal officer jurisdiction. The removing defendants immediately appealed the remand order as to the federal officer jurisdiction, and the matter is currently pending before the Fifth Circuit.[110]

VII. NEW MEXICO

A. Judicial Developments

Marathon Oil Permian, LLC v. Ozark Royalty Co.[111] involves the perils of failing to follow basic substantive requirements when executing deeds. Ozark acquired an oil and gas lease that it sold to Black Mountain which, in turn, flipped that lease to Marathon. The Lea County Clerk recorded the assignment from Black Mountain to Marathon but rejected the Ozark to Black Mountain assignment because of a defective notary acknowledgment.[112] Ozark refused to execute a corrected assignment and sold the lease to Tap Rock. Marathon sued and sought partial summary judgment that Tap Rock's title was inferior as it was on constructive notice of Marathon's claim based on the recorded assignment from Black Mountain to Marathon. The district court observed that New Mexico statutes provide that a writing not properly recorded of which a party does not have actual knowledge does not impart constructive notice of a claim of title[113] and that improperly acknowledged instruments are not entitled to be recorded and, even if recorded, do not impart constructive notice of its contents.[114] No evidence was presented that Tap Rock had actual notice of any portion of the Ozark to Black Mountain to Marathon transfers. Observing that County Clerks in New Mexico index assignments in a

[109] No. 2:18-cv-05217, 2019 WL 2271118 (E.D. La. May 28, 2019).

[110] *Id.* (notice of appeal filed June 12, 2019).

[111] No. 1:18-cv-00548, 2019 WL 1433363 (D.N.M. Mar. 29, 2019).

[112] *Id.* at *1.

[113] *Id*. at *4 (citing N.M. STAT. ANN. § 14-9-3).

[114] *Id.* at *5 (citing N.M. STAT. ANN. § 14-8-4).

grantor-grantee index,[115] the court ruled that Tap Rock did not have constructive notice of Marathon's claim to title: "[t]he lease [sic] from Black Mountain to Marathon, though recorded, did not impart constructive notice to Tap Rock because it was not a recorded link in Tap Rock's chain of title from Ozark."[116] Apparently no evidence or argument was presented that competent title searches in New Mexico also involve review of "tract books" maintained by private title companies, which presumably would have revealed to Tap Rock the Black Mountain to Marathon assignment and resulted in a different result.

In *TDY Industries, LLC v. BTA Oil Producers, LLC*,[117] the federal district court addressed whether laches can be used offensively to establish title. In 1968, U.S. Borax issued four deeds to CARCO (TDY's predecessor in title) of Eddy County as part of a larger transaction. The tracts at issue were described in a "surface only" deed to CARCO even though Borax owned all minerals except potassium and sodium. TDY found various unrecorded documents from the 1968 transaction that suggested that Borax intended to convey all its New Mexico property, real and personal, to CARCO. BTA leased a 40-acre tract from TDY and later discovered the break in title. It asked TDY to get a quitclaim deed from or file a quiet title action against Borax. TDY refused. BTA then obtained two deeds to the minerals from Borax. TDY sued and, among other theories, sought to claim that laches divested Borax and its assignee, BTA, from claiming title. BTA moved to dismiss that claim as laches is a defense, not a claim, citing the general rule that laches "never runs in favor of one claiming real property, by or through a void deed, who is not in possession or against a duly recorded title."[118] Citing a New Mexico Court of Appeals decision, the court ruled that there was no good reason why laches cannot be used offensively when the issues are already joined in other valid causes of action such as declaratory judgment.[119]

In *Epic Energy LLC v. Encana Oil & Gas (USA) Inc.*,[120] the federal district court considered whether New Mexico would allow parties to contractually reduce a limitation period. Encana sold various oil and gas producing properties and associated equipment to Epic in a contract that warranted no known, undisclosed environmental issues and provided that the warranties survived for six months after closing. About one year prior

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[115] *Id.* at *4 (citing N.M. STAT. ANN. § 14-10-3).

[116] *Id.* at *5.

[117] No. 2:18-cv-00296, 2019 WL 4014852 (D.N.M. Feb. 15, 2019).

[118] *Id.* at *4 (citing Mosely v. Magnolia Petroleum Co., 114 P.2d 740 (N.M. Ct. App. 1941)).

[119] *Id.* at *4–5 (citing Vill. of Wagon Mound v. Mora Tr., 62 P.3d 1255, 1265 (N.M. Ct. App. 2002)).

[120] No. 1:19-cv-00131, 2019 WL 4303325 (D.N.M. Sept. 11, 2019).

to closing, one of the tank batteries leaked and Encana repaired and engaged in cleanup operations that the regulatory agency subsequently deemed incomplete. The leak and cleanup was not disclosed to Epic and was not visible to Epic in its inspection of the property and tank. After closing, the regulatory agency required Epic to undertake various testing, delineation, and remediation activities. More than six months after closing Epic sued Encana for breach of warranty. Epic argued that New Mexico case law that "time to sue" provisions in automobile insurance policies that shorten statutory limitations periods violate public policy showed that New Mexico would not enforce the six-month survival clause.[121] Noting the absence of New Mexico authority on the issue, the federal district court made the "*Erie* guess" that New Mexico would follow the line of cases from Delaware that the public policy of freedom of contract permits parties to contractually modify a statute of limitations and dismissed Epic's suit.

In the class action royalty case of *Anderson Living Trust v. XTO Energy, Inc.*,[122] the federal district court considered issues relating to royalty owed on both gas consumed in lease operations and drip condensate[123] retained by a downstream service provider, the effect of the implied duty good faith on royalty calculations, and the retroactivity of the Oil and Gas Proceeds Payment Act[124] passed in 1985. The court analyzed the lease terms of the class representatives and determined that each lease contained a free use clause that permitted XTO and its gas gatherer to consume gas on a royalty free basis. The court ruled that the provisions of royalty clauses requiring that the gas be marketed or sold and the free use provisions allowed XTO to permit downstream service providers to recover and use drip condensate on a royalty free basis.[125] In response to plaintiffs' contention that the duty of good faith and fair dealing required disclosure of information about the nature of various deductions in royalty calculations, the court ruled that the implied duty could not be used to impose affirmative obligations on a party to a contract. Addressing the issue of whether the Act could be applied retroactively to royalties owing under instruments that predated the Act, the court declined to follow a prior district court opinion and ruled that the language of the Act evinced a clear

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[121] *Id.* at *6 (discussing Whelan v. State Farm Mutual Auto. Ins., 329 P.3d 646 (N.M. 2014)).

[122] No. 1:13-cv-00941, 2019 WL 4015210 (D.N.M. May 15, 2019).

[123] The court defines term "drip condensate" as "[natural gas liquids] that condense into liquid form in the gathering system, *i.e.*, after the gas has left the wellhead, but before it gets processed.'" *Id.* at *16 (quoting Anderson Living Trust v. WPX Energy Prod., LLC, 306 F.R.D. 312, 323 (D.N.M. 2015)).

[124] N.M. STAT. ANN. § 70-10-1 et seq.

[125] *Anderson Living Tr.*, 2019 WL 4015210, at *17–18.

legislative intent to require payors of proceeds under older instruments to pay in accordance with the requirements of the Act.

In *Ulibarri v. Southland Royalty Co.*,[126] the federal district court was confronted with a royalty clause providing for royalty on gas based on the "proceeds of the gas, as such." Plaintiff claimed that the clause unambiguously provide for royalty to be calculated and paid at the point of sale without adjustment for post-production costs. Defendant claimed the opposite. The court denied both parties motions for summary judgment holding that the language was ambiguous and extrinsic evidence concerning the meaning of the provision was disputed. Similar to the Anderson Living Trust case discussed above, the court declined to follow a prior district court opinion and ruled that the language of the Act evinced a clear legislative intent to require payors of proceeds under older instruments to pay in accordance with the requirements of the Act.

B. Administrative Developments

The New Mexico Oil Conservation Commission enacted a revised rule[127] concerning financial assurance bonds that operators are required to post. First, operators are required to maintain blanket financial assurance bonds in amounts dependent on the number of wells operated on state or fee lands as follows: "(a) $50,000 for one to ten wells; (b) $75,000 for 11 to 50 wells; (c) $125,000 for 51 to 100 wells and; (d) $250,000 for more than 100 wells."[128] Additionally, if the operator has one or more wells that are inactive or temporarily abandoned (no production or injection for two years or more), then the operator is required to post an additional financial assurance bond for those wells with the amount required based on the number of such wells operated: "(a) $150,000 for one to five wells; (b) $300,000 for six to 10 wells; (c) $500,000 for 11 to 15 wells; and, (d) $1,000,000 for more than 25 wells."[129]

VIII. OHIO

A. Legislative Developments

In July 2019, the Governor signed House Bill 166,[130] which created Ohio's operating budget for 2020 and 2021.[131] The Bill is significant for oil and gas producers in Ohio for several reasons. First, the Bill clarified

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[126] 409 F. Supp. 3d 1264 (D.N.M. 2019).

[127] N.M.A.C. § 19.15.8.9(C)(2) (rev. Jan. 15, 2019).

[128] *Id.*

[129] *Id.* § 19.15.8.9(D)(2) (rev. Jan. 15, 2019).

[130] H.B. 166, 2019–2020 Leg. Sess. (Ohio 2019).

[131] *See, e.g.*, Matthew Hammond, *State Budget Features Cost-Saving Measures for Our Members*, OHIO OIL & GAS ASS'N (Sept. 2019).

language in Ohio's unitization statute (R.C. 1509.28 et seq.) by expressly stating that a producer can count the entire interest in a lease towards the minimum 65% statutory threshold. Second, the Bill eliminated the $100 per well transfer fee, which will allow conventional producers in particular to recognize significant savings when they sell inventory. Last, the minimum severance tax was eliminated, effective as of January 1, 2020, which could save producers anywhere from a few thousand dollars per year, to well over $50,000 annually.

B. Judicial Developments

Ohio courts continued to tackle challenging oil and gas issues in 2019. In *Browne v. Artex Oil Co.*,[132] the Supreme Court of Ohio clarified that a declaratory judgment claim that an oil and gas lease terminated for lack of production is subject to the 21-year statute of limitations for recovery of title to or possession of real property in Ohio Rev. Code Ann. (ORCA) § 2305.04. The lessee argued such claim was subject to the 15-year statute of limitations for actions upon written contracts in former ORCA § 2305.06.[133] The court disagreed, noting that the lessors were not alleging a breach of the oil and gas lease, but were simply requesting a declaration that the oil and gas lease had terminated by its terms through operation of law. This claim was more like an action to quiet title than one upon a written contract, as the lessee had no obligation to produce under the lease and the parties did not dispute the lease's provisions. Relying heavily on the notion that in Ohio an oil and gas lease vests a real property interest in the lessee, the court held that ORCA § 2305.04 was the controlling limitations statute.[134] The court reasoned that because the oil and gas lease vested the lessee with a real property interest and the lessors sought recognition of their reversionary interest in that real property, ORCA § 2305.04 applied.[135] The court remanded the matter to the trial court for an evaluation of the parties' claims given the correct statute of limitations.

The court took up Ohio's Marketable Title Act (OMTA)[136] in *Blackstone v. Moore*.[137] Under that statute, an owner's marketable record title is "subject to . . . interests . . . inherent in the change of record title . . . , provided that a general reference . . . to . . . interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates

[132] 2019-Ohio-4809, 144 N.E.3d 378.

[133] *Id.* ¶ 7.

[134] *Id.* ¶ 42.

[135] *Id.*

[136] OHIO REV. CODE ANN. § 5301.49 (1963).

[137] 2018-Ohio-4959, 122 N.E.3d 132.

such . . . interest."[138] The court held that under the OMTA, a deed reference to a previously reserved royalty interest is sufficiently specific to preserve that interest from being extinguished where the reference identifies the type of interest created and the person to whom the interest was granted.

Courts also wrestled with issues involving Ohio's statutory unitization law, ORCA § 1509.28. In *Kerns v. Chesapeake Exploration, L.L.C.*,[139] the U.S. Court of Appeals for the Sixth Circuit addressed whether the state's issuance of a statutory unit order effected an unconstitutional taking of property. The court affirmed unanimous precedent from other producing jurisdictions that compulsory unitization and pooling statutes are valid, constitutional exercises of the state's police power to protect correlative rights; additionally, it found that this precedent applies in the context of modern horizontal development.

Two courts of appeals dealt with the interplay between oil and gas leases and ORCA § 1509.28. In *American Energy-Utica, LLC v. Fuller*,[140] the original parties to a 1981 lease struck a voluntary pooling clause and inserted the phrase "UNITIZATION BY WRITTEN AGREEMENT ONLY!"[141] Unable to reach an agreement with the lessors to include their property in a voluntary unit, the successor lessee applied for a statutory unitization order. Based upon the conclusion that the Division's action constituted a retroactive impairment of contract, Ohio's Fifth District Court of Appeals held: "While we do not disagree that R.C. 1509.28 permits unitization of the lease, we do find that in this case, doing so without [the lessor's] written agreement was a breach of the lease agreement."[142]

Ohio's Seventh District Court of Appeals distinguished *Fuller* in *Paczewski v. Antero Resources Corp.*[143] There, the original contracting parties struck a voluntary unitization clause from the lease. The successor parties could not come to terms on voluntary pooling, prompting the lessee to seek a statutory unitization order. The lessors claimed the lessee breached the lease by applying for the unitization order, and that the resulting order effected an unconstitutional taking of property. Finding for the lessee, the court held that striking the voluntary unitization clause from the lease merely rendered the lease silent on the subject of unitization. Thus, that "deletion does not prohibit the parties from engaging in the action that is the subject of the voided clause."[144] And *Fuller* did not lead

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[138] OHIO REV. CODE ANN. § 5301.49 (1963).

[139] 762 F. App'x 289 (6th Cir. 2019).

[140] 2018-Ohio-3250 (5th Dist.).

[141] *Id.* ¶ 7.

[142] *Id.* ¶ 37.

[143] 2019-Ohio-2641 (7th Dist.).

[144] *Id.* ¶ 34.

to a different result: "The handwritten provision in *Fuller* . . . makes the lease in that case wholly distinct from the lease at issue here . . . ."[145] The court also rejected the lessors' takings claim, noting that consistent with *Kerns* and decisions from other producing states, Ohio's statutory unitization process protects correlative property rights in oil and gas—rather than taking such rights away—and serves as a proper exercise of the state's police power.[146]

Courts of appeals continued to hear cases involving the OMTA and Ohio's Dormant Mineral Act (ODMA). In *West v. Bode*,[147] the Seventh District Court of Appeals reaffirmed that claimants can use either statute to terminate severed mineral interests. The surface owners attempted to extinguish a severed oil and gas royalty interest under the OMTA. The putative royalty owners argued, in part, that the OMTA did not extinguish the royalty interest because, as between the OMTA and ODMA, the ODMA is the more specific statute when terminating mineral interests and the ODMA did not abandon the royalty interest under the case's specific facts. The court disagreed, holding that there was no irreconcilable conflict between the OMTA and ODMA such that the latter would control.[148] It noted the different look-back periods, savings events, and termination procedures under the two acts and found that each applies independent of the other.[149]

Turning to the ODMA, in *Sharp v. Miller*,[150] the Seventh Appellate District discussed the "reasonable due diligence" standard that a surface owner must employ to locate and notify the mineral holders or their heirs by certified mail before turning to notice by newspaper publication. The appellant challenged the reasonableness of the surface owner's efforts because the surface owner did not conduct an internet search for the mineral holder's heirs along with his search of the public records.[151] But the court found that an internet search is not always required, and that here, there was no evidence that an internet search would have revealed any potential heirs since there was little information available for the appellant to use as a basis of an internet search.[152]

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[145] *Id.* ¶ 33.

[146] *Id.* ¶ 45.

[147] 2019-Ohio-4092 (7th Dist.).

[148] *Id.* ¶ 47.

[149] *Id.*

[150] 2018-Ohio-4740, 114 N.E.3d 1285 (7th Dist.).

[151] *Id.* ¶ 14.

[152] *Id.* ¶ 21.

Ohio's Fifth Appellate District also addressed the surface owner's ODMA due diligence efforts in *Gerrity v. Chervenak*.[153] As in *Miller*, the severed mineral owner's heirs argued that reasonable diligence required the surface owner to search the internet for the address of the heirs and their whereabouts.[154] The court of appeals disagreed. The court cited the state's plain language, which only requires certified mail service at the holder's last known address.[155] In this particular case, the surface owner attempted certified mail service at mineral interest holder's last known address. Additionally, after certified mail service failed, the surface owner searched two counties' property and probate records.[156] That search too failed to identify the heirs. The court found the surface owner's efforts to be reasonable under the circumstances.

The Supreme Court of Ohio agreed to hear *Gerrity* on October 15, 2019. The court will consider these propositions of law: (1) whether ORCA § 5301.56 requires strict compliance and whether a surface owner seeking to capture a severed mineral interest must first attempt service by certified mail before resorting to publication, and (2) whether, in order to satisfy due process and the publication provision of ORCA § 5301.56(E), a surface owner must employ reasonable search methods conforming to due diligence designed to locate all holder(s) of a severed mineral interest.

In *Henceroth v. Chesapeake Exploration, L.L.C.*,[157] the Northern District of Ohio addressed whether a lessee could take certain deductions when calculating its lessors' royalties under specific lease language. The court found that the lessee properly paid royalties on the netback price the lessee received on sales to an affiliate at the well; conversely, the lessee did not owe royalties on the price that the lessee's affiliate received from third parties in downstream sales.

In *Pavsek v. Wade*,[158] the Seventh District Court of Appeals considered whether a lessor must serve notice upon its lessee demanding that the lessee drill additional wells before seeking a partial forfeiture of the lease for breach of the lessee's implied covenant of reasonable development. The court held that the lessor must give this notice.[159] The lessor must also provide its lessee with a reasonable amount of time to develop the remaining leasehold before seeking forfeiture. The court refused to excuse

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[153] 2019-Ohio-2771, 140 N.E.3d 164 (5th Dist.).

[154] *Id.* ¶ 4.

[155] *Id.* ¶ 18.

[156] *Id.*

[157] No. 4:15-cv-02591, 2019 WL 4750661, at *1, *4 (N.D. Ohio Sept. 30, 2019).

[158] 2019-Ohio-5250, 136 N.E.3d 1283 (7th Dist.).

[159] *Id.* ¶ 35.

the lessor's failure to serve notice upon its lessee simply because a long period has passed since the lessee drilled its last producing well.

C. Administrative Developments

In 2019, the Division of Real Estate & Professional Licensing issued new guidance for Ohio's oil and gas land professionals (i.e., oil and gas landmen).[160] First, the Division updated its land professional disclosure form, which is required to be provided to landowners prior to or at their first meeting. Second, the Division is requesting that all land professionals complete the disclosure form in its entirety, including the address and tax parcel number of the subject property. The Division also recommends that land professionals remind landowners to return the disclosure form to the land professional and not the Division.[161]

IX. OKLAHOMA

A. Judicial Developments

In *Naylor Farms, Inc. v. Chaparral Energy, LLC*,[162] the plaintiff royalty owners (collectively, Naylor Farms) contended that Chaparral systematically underpaid royalties on production from approximately 2,500 Oklahoma oil and gas wells by improperly deducting from royalty payments certain costs that the plaintiffs contended should have been borne solely by Chaparral under Oklahoma royalty law. The district court granted Naylor Farms' motion seeking certification of a class of royalty owners under Rule 23 of the Federal Rules of Civil Procedure. In appealing the district court's order granting class certification,[163] Chaparral asserted three primary arguments in support of its effort to obtain a reversal of the class certification order. First, Chaparral contended that *marketability* constitutes an individual question under the implied duty to market (IDM) that required a "well-by-well" analysis that would predominate over any common questions. The district court in *Chaparral* was found to have not "abused its discretion by concluding that the marketability question *in this particular case* is subject to common, class wide proof for purposes of satisfying Rule 23's commonality and predominance requirements."[164]

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[160] *See* Jay Carr, *Update for Ohio's Oil and Gas Land Professionals*, VORYS ENERGY & ENVTL. L. BLOG (Sept. 10, 2019).

[161] *Id.*

[162] 923 F.3d 779, 782–83 (10th Cir. 2019).

[163] Certain of the class certification proceedings in this case occurred *after* Chaparral filed for bankruptcy. The bankruptcy court lifted the automatic stay on the underlying proceedings so that the district court could rule on Naylor Farms' motion for class certification.

[164] *Naylor Farms*, 923 F.3d at 782–83.

Second, Chaparral argued that distinctions in lease language also give rise to individual questions that likewise predominated in the case. The district court rejected that argument and found that "its decision to limit the class to leases containing a *Mittelstaedt* Clause renders such an individualized analysis unnecessary."[165] Most of the U.S. Court of Appeals for the Tenth Circuit's discussion addressing this particular area of the appellants' arguments focuses on which issues were presented and preserved below. The Tenth Circuit was not persuaded that the district court abused its discretion in certifying the class despite the existence of what the court characterized as *minor* variations in oil and gas lease language.

Finally, Chaparral urged on appeal that "Naylor Farms failed to demonstrate that Chaparral uses a uniform payment methodology to calculate royalty payments,"[166] and that such failure warranted the denial of class certification. However, while the existence of a uniform payment methodology, *alone*, was found by the Tenth Circuit to be insufficient to meet the predominance requirement, the court rejected the notion that such a methodology is a necessary component for satisfying predominance. Moreover, the court noted that "[t]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification."[167] The Tenth Circuit further noted that the district court could also, if needed, "divide the class into subclasses for purposes of determining damages."[168] The district court was found to have not abused its discretion in concluding that individual questions about damages do not defeat predominance. The Tenth Circuit affirmed the district court's order granting Naylor Farms' motion for class certification subject to certain modifications of the class definition consistent with its opinion.

In late December 2019, the U.S. Bankruptcy Court for the Southern District of Texas (Houston Division) in *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC* (*In re Alta Mesa Res., Inc.*),[169] held that certain oil and gas gathering agreements between Alta Mesa (as producer) and Kingfisher (as gatherer) "ran with the land" under the applicable Oklahoma law and were *not* subject to rejection under section 365 of the Bankruptcy

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[165] *Id.* at 795.

[166] *Id.* at 798.

[167] *Id.* (quoting Menocal v. GEO Grp., Inc., 882 F.3d 905, 916–17 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143 (2018)).

[168] *Id.*

[169] No. 4:19-bk-35133, Adv. No. 19-03609 (Bankr. S.D. Tex. Dec. 20, 2019) (memorandum opinion).

Code.[170] The court entered summary judgment in favor of Kingfisher on the issue of rejection.[171]

In the case of *Blue Dolphin Energy, LLC v. Devon Energy Production Co.*,[172] the plaintiffs appealed the district court's order granting partial summary judgment in favor of the defendant Devon. The "[p]laintiffs [had] entered into a 'Term Assignment of Oil and Gas Leases' with Felix Energy, LLC [predecessor to the defendant] in April 2014."[173] In January of 2016, Felix merged with Devon, and Devon assumed the interests covered by the assignments. The Blue Dolphin plaintiffs alleged:

> [T]hat the assignments contained a "primary term of three (3) years, commencing on the first day of the calendar month that immediately follows the Effective Date, which was April 30, 2014." Plaintiffs [Blue Dolphin] state in the petition that the Assignments "required the assignee to complete a well capable of producing in paying quantities prior to May 1, 2017, which is the expiration of the primary term." Plaintiffs [Blue Dolphin] contend that because Defendant failed to complete the well by May 1, 2017, the primary term in the lease "expired and the secondary term never commenced."[174]

The plaintiffs asserted that the leasehold interests covered by the subject assignment reverted back to the Blue Dolphin plaintiffs because Devon did not complete any well by the end of the May 1, 2017 primary term. Devon contended, among other allegations, that the assignments were extended because Devon was engaged in drilling or completion operations as of May 1, 2017.

The Oklahoma Court of Appeals agreed with the trial court "that the assignments [only] required the *commencement* of the well within the primary term or any extension thereof,"[175] and the diligent continuation of drilling operations through the completion of the well as a commercial producer. It affirmed the trial court's grant of partial summary judgment in favor of Devon, and held that the primary term of the lease was extended under the language of the term assignment to allow Devon to continue ongoing drilling operations through to their completion.

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[170] *Id.* at 1.

[171] *Id.* For another decision reaching a similar conclusion under Utah law, see Midlands Midstream, LLC v. Badlands Energy, Inc. (*In re* Badlands Energy, Inc.), 608 B.R. 854 (Bankr. D. Colo. 2019). *But see* Sabine Oil & Gas Corp., v. HPIP Gonzales Holdings, LLC (*In re* Sabine Oil & Gas Corp.), 550 B.R. 59 (Bankr. S.D.N.Y. 2016), applying Texas law, for a case reaching an opposing outcome.

[172] No. SD-117334, 90 O.B.J. 779 (Okla. Civ. App. May 30, 2019) (unpublished).

[173] *Id.* at 2–3.

[174] *Id.* at 3, 5, 13–14.

[175] *Id.* at 10.

The case of *TexasFile, LLC v. Boevers*[176] presented TexasFile's appeal of the trial court's denial of its motion for summary judgment and the court's granting of summary judgment in favor of the defendant County Clerks of Kingfisher County and Garvin County, Oklahoma. TexasFile is in the business of providing (via internet) "remote access to images of county land records to its subscribers."[177] TexasFile submitted a request to the County Clerk of Kingfisher County, "pursuant to the Oklahoma Open Records Act, [for] a complete electronic copy of all the Kingfisher County land records that [were at that time] available in electronic format."[178] The County Clerk responded and denied Texas File's request. TexasFile commenced the present declaratory judgment and mandamus action against the County Clerk "asking the trial court to enter an order determining TexasLink was entitled to an electronic copy of the Kingfisher County public land records maintained by the County Clerk, pursuant to the Oklahoma Open Records Act, and compelling the County Clerk of Kingfisher County to make available the land records of the Kingfisher County Clerk's office in an electronic format at a reasonable fee."[179]

The Oklahoma Court of Appeals stated that "[t]he issue presented on appeal is whether a county clerk is required to provide an entity with an electronic copy of the county land records maintained by the county clerk when the copies will be used for commercial purposes."[180] After proceeding through a detailed review of the issues and pertinent authorities (which we will not attempt to outline in this brief summary), the court of appeals held that the trial court did not err in denying TexasFile's request for the county land records of the two County Clerks and *affirmed* the trial court's summary judgment ruling in favor of the County Clerks.

The case of *Hobson v. Cimarex Energy Co.*[181] presented the question of "whether a vested remainderman is a *surface owner* under the [Oklahoma] Surface Damages Act."[182] The Oklahoma Supreme Court held that a vested remainderman is not a "surface owner" under the Act. Rather, the term "surface owner" under the Surface Damages Act (SDA) refers to one who holds a current possessory interest.[183] The court observed at the outset of its opinion that the present appeal "concerns the interpretation of

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[176] 2019 OK CIV APP 20, 437 P.3d 211.

[177] *Id.* at 212–13.

[178] *Id.* at 214–15.

[179] *Id.* at 212.

[180] *Id.* at 214–15.

[181] 2019 OK 58, 453 P.3d 482 (reh'g denied Nov. 4, 2019).

[182] OKLA. STAT. ANN. tit. 52, §§ 318.2–.9 (2019).

[183] *Hobson*, 453 P.3d at 483.

'surface owner' under the SDA."[184] It noted that "[t]he SDA defines 'surface owner' as 'the owner or owners of record of the surface of the property on which the drilling operation is to occur."[185] The court recognized that the SDA's definition of "surface owner" was ambiguous.[186] The court stated, "[t]his Court is persuaded by the common meaning, expressed legislative intent, and interests of justice that the SDA's use of *surface owner* applies only to those holding a current possessory interest. Under the SDA, a mineral lessee must negotiate surface damages with those who hold a current possessory interest in the property. A vested remainderman does not hold a current possessory interest until the life estate has come to its natural end."[187] The Oklahoma Supreme Court vacated the decision of the court of appeals and affirmed the order of the trial court. Four justices dissented from the majority opinion.

In *Meier v. Chesapeake Operating L.L.C.*,[188] the plaintiff "homeowners brought a class-action lawsuit against operators of wastewater disposal wells for hydraulic fracturing operations, alleging the injection wells were significantly increasing seismic activity across larger portions of Oklahoma. The only damages the homeowners sought were the increased costs of obtaining and maintaining earthquake insurance."[189] The defendants removed the case to the U.S. District Court for the Western District of Oklahoma under the Class Action Fairness Act. 28 U.S.C. § 1332(d). The federal district court dismissed the suit for failure to state a claim. It predicted that "the Oklahoma Supreme Court, if confronted with the issue, would find the relief requested by plaintiffs not legally cognizable under the circumstances present in the case at bar."[190]

On appeal, the Tenth Circuit found that, while no Oklahoma authority specifically addressed the question at issue, "other states have consistently failed to recognize a cause of action for increased insurance premiums based on a tortfeasor's negligence."[191] It concluded that it was "highly unlikely the Oklahoma Supreme Court would allow proportional recovery for unmaterialized risk here, given its refusal to extend the loss-of-a-chance doctrine elsewhere."[192] The Tenth Circuit concluded that, "[b]ecause the

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[184] *Id.* at 484.

[185] *Id.* (discussing OKLA. STAT. ANN. tit. 52, § 318.2 (2019)).

[186] *Id.* at 485.

[187] *Id.*

[188] 778 F. App'x 561 (10th Cir. 2019).

[189] *Id.* at 563.

[190] *Id.* at 563–64.

[191] *Id.* at 566.

[192] *Id.* at 567–68.

homeowners pleaded no legally cognizable claim for relief, the district court properly dismissed their complaint under Rule 12(b)(6)."[193]

The dispute presented in *Davilla v. Enable Midstream Partners L.P.*[194] arose in connection with the expiration of a 20-year pipeline easement that covered certain Native American allotted lands in Oklahoma. Enable Intrastate Transmission, LLC owned and operated a natural gas pipeline that traversed the lands. After the easement expired, Enable did not remove the pipeline, but rather continued to operate it. Enable ultimately approached certain of the allottees and sought a new 20-year easement. It also applied to the Bureau of Indian Affairs (BIA) for approval of a new easement. However, Enable failed to obtain approval for the proposed new easement from the allottees of a majority of the equitable interests in the land, as required by applicable regulations. As a result, the BIA cancelled Enable's right-of-way application. As Enable continued to operate the pipeline, a large group of individuals who held certain rights in the subject lands (the Allottees) filed suit in federal court alleging that Enable was trespassing on their land. They asked the court to enter an injunction compelling Enable to remove its pipeline. The Allottees moved for summary judgment on the issues of liability for trespass and injunctive relief. The court granted the Allottees' motion. Enable appealed.

The Tenth Circuit found "that Enable lack[ed] a legal right to keep the pipeline in the ground."[195] However, Enable argued that, even if the easement had expired, no duty to remove the pipeline ever arose since the Allottees never demanded that Enable remove it. The Tenth Circuit found that "Enable acquired the pipeline *already knowing* the right-of-way would eventually expire. It therefore cannot—and indeed does not—claim it lacked notice of its duty to remove or intent to maintain the trespass."[196] The Tenth Circuit affirmed the district court's grant of summary judgment in favor of the Allottees.

The case of *Urban Oil & Gas Partners B-1 v. Devon Energy Production Co.*[197] presented a dispute over "ownership of certain 'deep formation' drilling rights in an oil and gas lease known as the 'Alig Lease.'"[198] The defendant "asserted an interest adverse to the plaintiffs in the deep formation rights."[199] After reviewing the complex conveyancing and title history, the court found that the essential issue presented was

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[193] *Id.*

[194] 913 F.3d 959 (10th Cir. 2019).

[195] *Id.* at 964.

[196] *Id.* at 968, 970–71.

[197] 2019 OK CIV APP 54, 451 P.3d 218, 220.

[198] *Id.* at 220–21.

[199] *Id.* at 224.

whether a prior 1991 assignment from Amoco to MW reserved to Amoco an interest in the oil and gas leasehold rights below 9,414 feet as a matter of law. Devon contended that the 1991 assignment unambiguously limited Amoco's assignment of the Alig Lease to the first 9,414 feet below the surface. However, the court disagreed. It found "no clear expression within any provision of the 1991 assignment that Amoco intended to limit, reserve or except any part of its interest in the mineral leasehold from its conveyance to MW."[200] The court of appeals agreed with the trial court that the 1991 assignment assigned Amoco's entire interest to MW Petroleum, without reservation. The court affirmed that ruling and further affirmed the trial court's award to the plaintiffs of attorney fees, costs and expenses under the Nonjudicial Marketable Title Procedures Act.[201]

B. Administrative Developments

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission's website. Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission's Oil & Gas Conservation Rules,[202] were addressed in Cause RM No. 201900002. Following is a brief summary of the amendments that became effective on August 1, 2019:

OAC 165:10-1-2 was amended regarding definitions; OAC 165:10-1-4 to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 to update the list of Oil & Gas Conservation Division prescribed forms, to delete form(s) and to add new form(s); OAC 165:10-3-1 regarding permits to drill wells; OAC 165:10-3-4 concerning casing and cementing of wells; OAC 165:10-3-5 with respect to underground gas storage facilities; OAC 165:10-3-10 regarding hydraulic fracturing operations; OAC 165:10-3-10.1 is a new rule concerning notice of temporary lines that may be used to transport produced water; OAC 165:10-3-15 with respect to venting and flaring of wells; OAC 165:10-3-16 regarding operations in hydrogen sulfide areas; OAC 165:10-3-28 concerning horizontal drilling; OAC 165:10-5-5 with respect to applications for approval of enhanced recovery injection wells and disposal wells; OAC 165:10-5-6 regarding testing and monitoring requirements for enhanced recovery injection wells and disposal wells; OAC 165:10-5-7 concerning monitoring and reporting requirements for enhanced recovery injection wells, disposal wells and storage wells; and OAC 165:10-5-10 with respect to transfer of authority to operate enhanced recovery wells,

[200] *Id.* at 226.

[201] *Id.* at 224–26; OKLA. STAT. ANN. tit. 12, §§ 1141.1–.5 (2019).

[202] 36 OK REG. 22, tit. 165, ch. 10: Oil and Gas Conservation, 485-1092 (2019) (unofficial version).

saltwater disposal wells, commercial saltwater disposal wells and hydrocarbon storage wells.[203]

In addition, OAC 165:10-7-5 was amended regarding reporting of nonpermitted discharges of deleterious substances; OAC 165:10-7-7 concerning informal complaints pertaining to alleged violations of Commission orders or OAC 165:10; OAC 165:10-7-16 with respect to use of noncommercial pits; OAC 165:10-7-19 regarding land application of water-based fluids from earthen pits, tanks and pipeline construction; OAC 165:10-7-20 concerning noncommercial disposal or enhanced recovery well pits used for temporary storage of salt water; OAC 165:10-7-24 with respect to waste management practices; OAC 165:10-7-26 regarding land application of contaminated soils and petroleum hydrocarbon based drill cuttings; OAC 165:10-7-33 concerning truck wash pits; OAC 165:10-9-1 with respect to operation of commercial pits; OAC 165:10-9-2 regarding commercial soil farming; OAC 165:10-9-3 concerning commercial disposal well surface facilities; OAC 165:10-9-4 with respect to operation of commercial recycling facilities; OAC 165:10-10-4 regarding determination of eligibility for the Brownfield Program; OAC 165:10-10-7 concerning the Commission's Brownfield Program site list, and OAC 165:10-11-6 was amended with respect to plugging and plugging back procedures for wells.[204]

OAC 165:10-21-21, OAC 165:10-21-22, OAC 165:10-21-23, OAC 165:10-21-24, OAC 165:10-21-35, OAC 165:10-21-36, OAC 165:10-21-37, OAC 165:10-21-38, OAC 165:10-21-45, OAC 165:10-21-47, OAC 165:10-21-47.1, OAC 165:10-21-55, OAC 165:10-21-56, OAC 165:10-21-57, OAC 165:10-21-58, OAC 165:10-21-65, OAC 165:10-21-66, OAC 165:10-21-67, OAC 165:10-21-68, OAC 165:10-21-69, OAC 165:10-21-75, OAC 165:10-21-76, OAC 165:10-21-77, OAC 165:10-21-78, OAC 165:10-21-79, OAC 165:10-21-80, OAC 165:10-21-82, OAC 165:10-21-82.1, OAC 165:10-21-82.2, OAC 165:10-21-82.3, OAC 165:10-21-82.4, and OAC 165:10-21-85, in Subchapter 21, Applications for Tax Exemptions, were revoked in accordance with amendments to 68 O.S. § 1001 in Second Extraordinary Session, Enrolled House Bill No. 1010 (2018).[205]

In addition, OAC 165:10-21-90 was amended regarding sales tax exemptions for electricity and associated delivery and transmission services sold for operation of reservoir dewatering projects and/or units pursuant to 68 O.S. § 1357; OAC 165:10-21-91 concerning reservoir dewatering projects in accordance with amendments to 68 O.S. § 1001 in

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[203] *Id.*

[204] *Id.*

[205] H.B. 1010, 55th Leg., 2d Ex. Sess. (Okla. 2018).

Second Extraordinary Session, Enrolled House Bill No. 1010 (2018); OAC 165:10-21-92 with respect to qualification for sales tax exemptions for electricity and associated delivery and transmission services sold for operation of reservoir dewatering projects and/or units pursuant to 68 O.S. § 1357; OAC 165:10-21-95 regarding sales tax exemptions for electricity sold for operation of enhanced recovery methods on a spacing unit or lease pursuant to 68 O.S. § 1357; OAC 165:10-21-97 concerning qualification for sales tax exemptions for electricity sold for operation of enhanced recovery methods on a spacing unit or lease pursuant to 68 O.S. § 1357, and OAC 165:10-29-2 was amended with respect to alternative location requirements for horizontal well units.[206]

Amendments to Title 165, Chapter 5 of the OAC, which comprises the Commission's Rules of Practice, were addressed in Cause RM No. 201900001. Following is a brief summary of the amendments that became effective on August 1, 2019:

OAC 165:5-1-4.1 was amended regarding open records requests; OAC 165:5-1-5 with respect to filing of documents; OAC 165:5-1-9 concerning telephonic and videoconferencing testimony; OAC 165:5-3-1 regarding fees; OAC 165:5-3-2 with respect to Petroleum Storage Tank Division fees; OAC 165:5-3-40 is a new rule concerning assessment of fees on wind energy facilities to provide funding to the Public Utility Division (PUD) in the execution of duties and responsibilities required by the Oklahoma Wind Energy Development Act, 17 O.S. § 160.11 et seq.; OAC 165:5-3-41 is a new rule regarding definitions pertaining to assessment of fees on wind energy facilities to provide funding to the PUD in the execution of duties and responsibilities required by the Oklahoma Wind Energy Development Act; OAC 165:5-3-42 is a new rule with respect to assessment of fees on wind energy facilities to provide funding to the PUD to implement the provisions of the Oklahoma Wind Energy Development Act, and OAC 165:5-3-43 is a new rule concerning assessment of fines and penalties against wind energy facilities that fail to pay required fees, which fees are to be used to provide funding to the PUD in the execution of duties and responsibilities required by the Oklahoma Wind Energy Development Act.[207]

In addition, OAC 165:5-7-6.2 was amended regarding multiunit horizontal wells in targeted reservoirs; OAC 165:5-7-9 with respect to well location exceptions; OAC 165:5-7-20 concerning unitized management of a common source of supply; OAC 165:5-7-27 regarding applications for approval of enhanced recovery injection wells and disposal wells; OAC

[206] 36 OK REG. 22, tit. 165, ch. 10: Oil and Gas Conservation, 485-1092 (2019) (unofficial version).

[207] *Id.*

165:5-7-29 with respect to applications for exceptions to underground injection well requirements; OAC 165:5-9-2 concerning subsequent pleadings, including dismissals; OAC 165:5-13-2 regarding setting of causes; OAC 165:5-13-3 with respect to hearings; OAC 165:5-13-3.1 concerning an optional procedure for spacing related applications; OAC 165:5-13-4 regarding Administrative Law Judge reports; OAC 165:5-15-1 with respect to Commission orders; OAC 165:5-21-1 concerning procedures for the Petroleum Storage Tank Docket, and OAC 165:5-21-3.1 was amended regarding applications for variances to Petroleum Storage Tank Division rules.[208]

X. PENNSYLVANIA

A. Legislative Developments

The Pennsylvania Department of Environmental Protection's (DEP) Environmental Quality Board (EQB), which approves Pennsylvania's environmental regulations, gave preliminary approval to rules imposing limits on emissions of volatile organic compounds in December 2019.[209] The new regulations would require monthly and quarterly inspections of facilities for leaks. These requirements would apply to conventional oil and gas wells, unconventional wells, gas compressors, processing plants, and transmission stations (depending on their potential emissions). Natural gas processing plants would be required to have zero leaks in their pumps and pneumatic controllers if the regulations are passed. The proposed regulations will be open for public comment in 2020 before a final version is considered by the EQB.

B. Judicial Developments

In *Marcellus Shale Coalition v. DEP*,[210] the Commonwealth Court considered a challenge by the Marcellus Shale Coalition to the DEP's September 2016 regulations concerning unconventional oil and gas wells in the Commonwealth. There have been a series of opinions with regard to those regulations, but this specific decision relates to rules requiring drillers to identify and monitor abandoned well sites within a certain distance of proposed sites, establishing standards for restoring well sites after drilling, setting new requirements for impoundments used in water storage, and increasing the frequency of required reporting submitted to the DEP. First, striking down the regulations with regard to abandoned wells, the court determined that the DEP "failed to identify any statutory

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[208] *Id.*

[209] *See also* Approval and Promulgation of Air Quality Approval Plans; Pa.; Removal of Dep't of Envtl. Prot. Gasoline Volatility Requirements for the Pittsburg-Beaver Valley Area, 83 Fed. Reg. 65,301 (Dec. 20, 2018) (codified at 40 C.F.R. pt. 52).

[210] 216 A.3d 448 (Pa. Commw. Ct. 2019).

authority to justify regulations that impose entry, inspection, and monitoring obligations with respect to wells on the lands of others and over which the stimulating well operator has no control . . . ."[211] Next, the court concluded that while the DEP has the statutory authority to impose new standards on impoundments at well sites, it opined that it could not yet make a determination as to whether the regulation violated the Pennsylvania Constitution's prohibition of special laws, and permitted the case to move past summary relief on that claim.[212] The court also granted, in part, the Coalition's challenge to the regulation setting forth standards for restoring well sites after drilling.[213] In particular, the court struck the portion of the regulation requiring restoration of well sites to their approximate original condition within nine months, finding that the provision conflicted with the standards set forth in Act 13 permitting the time for restoration to be extended by up to two years. The court, however, declined to strike the entirety of the restoration regulations. The court also rejected the Coalition's claims with regard to waste reporting requirements, concluding that the regulation did not conflict with statutory authority as to production reporting.

On November 5, 2019, the Pennsylvania Environmental Defense Foundation (PEDF) filed a petition for review in the Pennsylvania Commonwealth Court's original jurisdiction challenging the State Forest Resource Management Plan (Plan) adopted by the Department of Conservation and Natural Resources (DCNR) in 2016.[214] PEDF alleges that the Plan requires the DCNR to impermissibly balance the economic value of the oil and gas resources that are withdrawn from state land against the value of the ecosystem in which the wells are placed, including the value of the rights contained in the Environmental Rights Amendment, article I, section 27, of the Pennsylvania Constitution "to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment."[215] PEDF requests that the Commonwealth Court direct DCNR to fulfill its responsibilities as a trustee of the Commonwealth's natural resources under the Environmental Rights Amendment consistent with the Pennsylvania Supreme Court's 2017 decision in *PEDF v. Commonwealth*.[216]

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[211] *Id.* at 467.

[212] *Id.* at 473–74.

[213] *Id.* at 486.

[214] Justin Werner, *PEDF Files New Petition for Review Based on Environmental Rights Amendment Case Law*, LAW.COM (Nov. 21, 2019).

[215] *See* PEDF v. Commonwealth, 214 A.3d 748, 754–56 (Pa. Commw. Ct. 2019).

[216] 161 A.3d 911 (Pa. 2017).

In *Mitch v. XTO Energy, Inc.*,[217] a three-judge panel of the superior court determined that a well drilled horizontally below a landowner's property did not trigger a provision in his lease addendum that would entitle him to either run a gas line to the wellhead for his own personal use or take extra payments in lieu of the gas. The provision would only be triggered where a well was drilled "on the lease premises."[218] Predominantly, the provision at issue was intended to compensate landowners for disruptions caused by well operations on their surface. Senior Judge Eugene Strassburger concluded that reading the lease and addendum as a whole, the "only reasonable interpretation of 'on the lease premises' is to mean on the surface of the lease premises."[219]

In *McCready v. Dep't of Commerce & Economic Development*,[220] the Commonwealth Court contemplated claims concerning a 1990 purchase by the Pennsylvania Turnpike Commission of a tract of land for a highway project. The deed transferring the land did not explicitly address the status of the subsurface rights. In 2012, Sarah O'Layer McCready, the landowner from whom the Turnpike Commission purchased the land, filed an action alleging that the deed's silence with regard to the subsurface rights indicates that she reserved the subsurface rights or, in the alternative, that she intended to reserve those rights and the Turnpike Commission owed her additional compensation for the subsurface rights. A three-judge panel of the Commonwealth Court rejected McCready's contentions. Writing for the court, Judge Michael Wojcik observed, "[a]s conceded by McCready in her complaint, there is absolutely no retention of the mineral rights by her through an exception or reservation that is stated in the deed."[221] Accordingly, the court concluded that McCready neither reserved the subsurface rights nor did the Turnpike Commission owe her additional compensation.[222]

In *Andarko Petroleum Corp. v. Commonwealth*,[223] the Pennsylvania Attorney General brought actions against energy companies operating in northeast Pennsylvania alleging violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL). In particular, the Attorney General claimed that the companies made false promises to landowners concerning royalty and bonus payments by deducting post-production costs and other costs from the payments. The Attorney General

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[217] 212 A.3d 1135 (Pa. Super. 2019).

[218] *Id.* at 1139.

[219] *Id.* at 1143.

[220] 204 A.3d 1009 (Pa. Commw. Ct. 2019).

[221] *Id.* at 1017.

[222] *Id.* at 1018.

[223] 206 A.3d 51 (Pa. Commw. Ct. 2019).

also alleged that the companies were engaged in a joint venture to occupy the portion of the "Marcellus shale gas play" in northeast Pennsylvania so as to avoid competing offers to landowners in violation of antitrust protections under the UTPCPL.[224]

In a 6-1 decision, an *en banc* panel of the Commonwealth Court concluded that even though the energy companies would be the "consumer" in these circumstances, the leasing of land for subsurface development fits within the definition of "trade or commerce" protected by the UTPCPL.[225] The majority further opined that the UTPCPL may protect against monopolistic activity, but the protections are not as expansive as those under federal law and, in order for the claims to remain viable, the complaint must allege specific monopolistic behavior that has been defined as "unfair methods of competition" or "unfair or deceptive acts or practices" by the legislature or the Attorney General through the rulemaking process. The court determined that entering into a joint venture did not intrinsically constitute an unfair method of competition or unfair or deceptive act or practice, as suggested by the Attorney General, nor was it defined as such in the UTPCPL. Therefore, the Attorney General's antitrust claim was dismissed in that regard. However, the court further concluded that where the Attorney General averred that the energy companies deceived lessors with regard to whether their leases were competitive and fair, allegedly committing an antitrust violation under the UTPCPL, the claim could survive preliminary objections.[226] The Pennsylvania Supreme Court has granted allowance of appeal.[227]

In *In re Appeal of Penneco Environmental Solutions, LLC*,[228] Environmental Solutions, LLC (Penneco) sought to convert an oil and gas well it operated in Plum Borough into a disposal well for storing wastewater from drilling operations. After applying for the required EPA permits for the project, Penneco filed a petition with Plum challenging its local land-use ordinance, arguing that the ordinance improperly excludes the operation of injection wells in all districts and is preempted by federal and state law.[229] Plum's Zoning Hearing Board dismissed Penneco's challenge, concluding that it would not be ripe until Penneco obtained all necessary permits from the EPA and the DEP. A unanimous panel of the Commonwealth Court rejected this position, noting that in order to obtain a

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[224] *Id.* at 53–54.

[225] *Id.* at 57–58.

[226] *Id.* at 60–61.

[227] Commonwealth v. Chesapeake Energy Corp., 218 A.3d 1205 (Table) (Pa. Oct. 30, 2019).

[228] 205 A.3d 401 (Pa. Commw. Ct. 2019).

[229] *Id.* at 402–03.

permit from the DEP, Penneco was required to demonstrate that it complied with all local ordinances. Further, the court opined that Penneco alleged that the ordinance did not permit the proposed use on its face, and so Penneco's substantive validity challenge was sufficiently developed for review by the Board.[230]

In *EQT Production Co. v. Jefferson Hills*,[231] EQT and ET Blue Grass Clearing, LLC, an affiliate of EQT (collectively EQT) filed a conditional use application with the Borough of Jefferson Hills, seeking to construct, operate, and maintain the first unconventional gas well site complex in the Borough.[232] The Borough held a public hearing on the application at which eight objectors testified in opposition.[233] Three of the objectors were residents of Union Township, adjoining township, where EQT has operated an unconventional natural gas well site since 2007 (Trax Farm).[234] Another objector had recently moved to the Borough from Union Township, where he lived in close proximity to the Trax Farm well site. These four objectors testified to their personal experiences living in close proximity to Trax Farm, including their perceptions that the well site had negative impacts on them and the environment. The Borough denied EQT's application and credited the objectors' testimony, including the testimony of the Union Township objectors and EQT appealed to the Court of Common Pleas of Allegheny County, which reversed.[235] The trial court concluded that the objectors' testimony of potential harms was too speculative, including the testimony regarding the four objectors' personal experiences of the Trax Farms site. The Commonwealth Court affirmed.[236] The Pennsylvania Supreme Court vacated the Commonwealth Court's holding in a 6-1 decision, and remanded to that court with instructions to remand the matter to the trial court to reconsider its decision.[237] The majority concluded that the objectors' testimonies detailing their personal experiences with the Trax Farm well site were relevant and probative where the entirety of the evidence presented established that the Trax Farm well site was of a similar nature to the proposed well site at issue.[238] As such, it was proper for the Borough to receive and rely upon the testimony, and the Commonwealth Court "improperly characterized this firsthand experiential evidence as

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[230] *Id.* at 403, 410–12.

[231] 208 A.3d 1010 (Pa. 2019).

[232] *Id.* at 1011–12.

[233] *Id.* at 1012.

[234] *Id.* at 1013.

[235] *Id.* at 1017–18.

[236] *Id.* at 1018–19.

[237] *EQT Prod. Co.*, 208 A.3d at 1028.

[238] *Id.* at 1027.

'speculative.'"[239] Justice Sallie Mundy dissented stating, "The Objectors presented no evidence that EQT's oil and gas operations at the Bickerton well site would have any effect on the community other than those normally associated with such activities. Instead, they presented speculative objections of a kind that courts have deemed insufficient to grant relief."[240]

In *Briggs v. Southwestern Energy Production Co.*, the plaintiffs claim that Southwestern Energy Production Company trespassed on their property by extracting gas from their 11-acre parcel through drilling and hydraulically fracturing a well on a nearby property.[241] The trial court granted summary judgment in favor of Southwestern, citing the rule of capture. The Pennsylvania Superior Court, however, found that the rule of capture does not apply to hydraulically fractured wells. The case is now before the Pennsylvania Supreme Court, where oral arguments were heard in September. At oral argument, Southwestern's counsel argued that the case should be dismissed because the plaintiffs cannot prove that the produced gas came from their property specifically, and further cannot prove that Southwestern's fracking proppants crossed property lines. Plaintiffs' counsel compared fracking to slant drilling, for which the rule of capture does not absolve liability, in arguing that Southwesthern consciously injected proppants into the plaintiffs' property to extract gas without consent. Further, the plaintiffs' counsel argued that the landowners can prove trespass through expert testimony that the defendant drillers knew where the wells were located relative to the property lines and could estimate how far fracking fluid and proppants travel. This decision, which is still pending, may have serious impacts on litigation in the oil and gas industry.

In *In re PennEast Pipeline Co.*, PennEast Pipeline Company (PennEast) had initiated an eminent domain action pursuant to the Natural Gas Act (NGA) to allow it to acquire property interests necessary for a pipeline being built through Pennsylvania and New Jersey.[242] PennEast sought condemnation orders for easements across properties along the pipeline route, and 42 of those properties were owned by New Jersey. New Jersey objected to the taking, invoking its Eleventh Amendment immunity. PennEast argued that they were vested with eminent domain power through the federal government and therefore the Eleventh Amendment immunity did not apply.[243] The Third Circuit ultimately upheld the State's argument

[239] *Id.* at 1028.

[240] *Id.* at 1031 (Mundy, J., dissenting).

[241] 184 A.3d 153 (Pa. Super. Ct. 2018).

[242] 938 F.3d 96, 99 (3d Cir. 2019).

[243] *Id.* at 104.

and found that the federal government cannot delegate its exemption from immunity to private parties, as the language of the NGA does not unambiguously show that Congress intended it.[244] Moreover, pipeline companies may now have difficulty using eminent domain to acquire easements across state lands in certain jurisdictions.

In *Orion Drilling Co. v. EQT Prod. Co*., the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's motion for a new trial and motion for judgment as a matter of law following a jury verdict in favor of EQT for breach of contract claims.[245] The court held that the trial evidence was sufficient for the jury to conclude that EQT did not breach the drilling contracts when it terminated the deals early because the drilling rigs made by Orion had safety issues.[246] The court also found that there was sufficient trial evidence to support the jury's conclusion that Orion breached the contracts for safety violations.[247] Orion failed to meet the high burden required to overturn a jury verdict.[248] Further, the court granted EQT's motion for attorney fees and costs per a provision in the contracts, leaving Orion responsible for over $2.7 million in fees and costs.[249]

In *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, the Pennsylvania Superior Court affirmed a trial court's grant of summary judgment, holding that leases were abandoned by the defendant drilling company.[250] The habendum clause in the leases provided that the leases had a primary term of five years, "and for as long thereafter as oil or gas . . . can be produced in paying quantities."[251] Further, the leases stated that if the drilling company fails to meet its drilling obligations, the lease is terminated, but the drilling company shall retain 20 acres surrounding the wells that are capable of producing.[252] Amendments to the leases later reduced the acreage to five acres. The court explained that the record established no shut-in payments were paid to the appellees under the leases and oil and gas were not produced in paying quantities for over 25 years. Due to this failure to maintain their drilling commitment or make any delay rental payments, the court found that the leases had been abandoned.[253] Further, the court held that the drilling company has no rights to the acreage

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[244] *Id.* at 111.

[245] No. 16-1516, 2019 WL 4267386 (W.D. Pa. Sept. 10, 2019), *appeal docketed*, No. 19-3307 (3d Cir. Oct. 11, 2019).

[246] *Id.* at *19.

[247] *Id.* at *20.

[248] *Id.* at *35.

[249] *Id.* at *2–3.

[250] 217 A.3d 1258, 1269 (Pa. Super. 2019).

[251] *Id.* at 1264.

[252] *Id.* at 1265.

[253] *Id.* at 1266.

surrounding the wells.[254] The court reasoned that since the leases were abandoned, any right to enter the property was also extinguished.

In *Northeast Natural Energy LLC v. Larson*, the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's motion to vacate and dismiss the suit on jurisdictional grounds.[255] The court had initially concluded that subject matter jurisdiction existed due to diversity of citizenship, and issued an order confirming an arbitration award of over $7.8 million against the plaintiff under the Federal Arbitration Act.[256] Less than three weeks after the order regarding the arbitration award was issued, the plaintiff asked the court to vacate the order and dismiss the lawsuit because the court lacked subject matter jurisdiction over the case. The plaintiff, a limited liability company, alleged that it was composed of two limited liability companies that had members that were citizens of the states of defendants to the suit. However, the plaintiff presented no evidence in support of its contention and the state records of West Virginia, where the plaintiff company was organized, showed that no members were limited liability companies.[257] The plaintiff failed to identify the LLCs that were alleged members, the members of the LLCs and their citizenships, or the dates the LLCs became members. Accordingly, the court held that the plaintiff's mere allegation that the court lacks diversity of citizenship is insufficient to establish a lack of jurisdiction. The court denied the defendant's motion for sanctions for bad faith and vexatious conduct because the plaintiff had a right to challenge subject matter jurisdiction at any time.[258]

In *Sunoco Pipeline L.P. v. Dinniman*, a state senator filed a complaint with the Public Utility Commission seeking an injunction to halt the operation of one pipeline and construction of two other pipelines in the township he represents, claiming that the pipelines were creating sinkholes and water contamination throughout the township.[259] The Public Utility Commission granted an injunction as to the construction of the two pipelines.[260] However, the Commonwealth Court reversed this decision, holding that the senator lacked standing.[261] The court reasoned that to have personal standing to pursue claims before the Public Utility Commission, the complainant must demonstrate that he is aggrieved by showing he has a

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[254] *Id.* at 1268.

[255] No. 3:18-cv-00240, 2019 WL 6311101, at *2 (W.D. Pa. 2019).

[256] *Id.* at *1.

[257] *Id.* at *2.

[258] *Id.* at *3.

[259] 217 A.3d 1283, 1285 (Pa. Commw. Ct. 2019).

[260] *Id.* at 1287.

[261] *Id.* at 1283.

"direct, immediate, and substantial interest in the subject matter of the controversy" and has been negatively impacted in some real way.[262] The court found that the senator failed to meet this burden. Notwithstanding the senator personally resided in the township two miles away from the pipelines, the construction of the pipelines had no adverse effects on his property or water. Accordingly, there was insufficient evidence to show that the construction harmed his person or his property, and thus he lacked personal standing to bring the claims. In addition, the court held that the senator lacked legislative standing because his complaint did not allege any injury to his ability to act as a legislator or vote for or against legislation as required to prove such standing.[263]

C. Administrative Developments

Governor Tom Wolf again unsuccessfully introduced a plan to create a severance tax on oil and natural gas production. The proposed tax rates in Senate Bill 725 and House Bill 1585 doubled from those introduced last year, and would have ranged from 9.1 to 15.7 cents per 1,000 cubic feet of natural gas.

XI. TEXAS

A. Judicial Developments

In *HJSA No. 3, Ltd. P'ship v. Sundown Energy LP*,[264] the court of appeals interpreted the meaning of continuous drilling program language used in a lease. The lease contained two relevant provisions:

> ¶ 7(b). The first such continuous development well shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of drilling operations on the next ensuing well.
>
> ¶ 18. Whenever used in this lease the term "drilling operations" shall mean: actual operations for drilling, testing, completing and equipping a well (spud in with equipment capable of drilling to Lessee's object depth); reworking operations, including fracturing and acidizing; and reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well.[265]

The lessor, HJSA No. 3, Limited Partnership, contended that pursuant to paragraph 7(b), the lessee, Sundown Energy LP, "was required to spud-in a new well in a non-producing area within 120 days of completion or

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[262] *Id.* at 1288–89.

[263] *Id.* at 1291.

[264] 587 S.W.3d 864 (Tex. App.—El Paso 2019, pet. filed).

[265] *Id.* at 869.

abandonment of a prior well to maintain the lease in the areas not held by production."[266] Sundown argued that the definition of "continuous drilling" in Paragraph 18 controlled and should be applied to paragraph 7(b). The court held that Sundown was required to engage in a continuous development program to maintain the lease under Paragraph 7(b) and that program required Sundown to spud in a continuous development well within 120 days of completion or abandonment of a prior well, reasoning that the specific provisions in Paragraph 7(b) control over the general provisions in Paragraph 18.

In *Endeavor Energy Resources, L.P. v. Energen Resources Corp.*,[267] the court of appeals considered whether the continuous-development clause (CDC) of an oil and gas lease should be interpreted to allow unused days to extend any subsequent well-drilling term under the program or only the directly succeeding term. The CDC provided in relevant part, "[l]essee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the *next allowed* 150-day term between the completion of one well and the drilling of a subsequent well."[268] The issue was whether the days only carried forward to the next well or if such extension could be accumulated across multiple wells. The court held that "next allowed" in the continuous-development provision meant immediately following in time, and held that unused days could only roll over from the immediately preceding to the immediately following term. The court rejected the lessee's argument that such an interpretation would render the words "accumulate" and "extend" meaningless, reasoning that Endeavor still had the ability to accumulate unused days to extend the next 150-day well term.[269]

In *Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*,[270] Carrizo entered into a farmout agreement with Barrow-Shaver Resources Co., which provided that the rights provided to Barrow-Shaver under the Farmout Agreement could not be "assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo."[271] Barrow-Shaver agreed to this provision after reassurance on more than one occasion that Carrizo would provide its consent to assign. Eventually, Barrow-Shaver wanted to assign its interest in the farmout. When Carrizo refused to provide consent unless Barrow-Shaver paid Carrizo $5 million, Barrow-Shaver filed suit, alleging breach of contract

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[266] *Id.* at 870.

[267] 563 S.W.3d 449 (Tex. App.—Eastland 2018, pet. granted).

[268] *Id.* at 452 (emphasis added).

[269] *Id.* at 455.

[270] 590 S.W.3d 471 (Tex. 2019).

[271] *Id.* at 476.

and fraud. Barrow-Shaver contended that the provision must be construed to mean that consent cannot be unreasonably or arbitrarily withheld and that Carrizo's refusal to consent was for an "illegitimate" reason and that it was inconsistent with industry custom. Rejecting this argument, the court held that the consent-to-assign provision unambiguously provided Carrizo with the unrestricted right to withhold consent.

In *Sojitz Energy Venture, Inc. v. Union Oil Co. of California*,[272] the court addressed the allocation of decommissioning liability with respect to the defendant Union Oil, who was the sole lessee and record title owner of two properties located in the Outer Continental Shelf (the Properties), and Sojitz. Union Oil assigned shallow operating rights to the Properties to ATP, pursuant to which ATP agreed to assume all costs of decommissioning and to indemnify Union Oil for all liability associated with its operations. Subsequently, ATP assigned 20% of its shallow operating rights in the Properties to Sojitz, which the court interpreted to mean that Sojitz acquired 20% of decommissioning liability. Thereafter, Sojitz reassigned its 20% shallow operating rights in the Properties back to ATP, pursuant to which Sojitz paid consideration for ATP to assume all of Sojitz's duties and obligations and to release Sojitz from any liability for plugging and abandonment. After ATP filed for bankruptcy, the Bureau of Safety and Environmental Enforcement sent a letter ordering both Sojitz and Union to decommission the Properties. Sojitz paid the entire cost of decommissioning the Properties. Based on the foregoing, Sojitz filed suit against Union asserting claims for equitable subrogation and a declaratory judgment, among other claims.

Ultimately, the court held that Sojitz could recover 100% of the decommissioning costs from Union. While both Union and Sojitz had an obligation to the government, Sojitz contracted around its liability, which, as the court explained, it was permitted to do: "The regulations govern the parties' joint and several liabilities vis-à-vis the government, not amongst themselves. [P]arties will always be jointly and severally liable to the government for the cost of decommissioning, no matter what their contract provides, but they are free to reallocate the sharing of costs among themselves in their contract."[273] Because Sojitz was contractually released, only ATP, and secondarily Union, remained liable to pay for decommissioning. Accordingly, Sojitz paid a debt for which Union was primarily liable when Sojitz paid for the decommissioning of the Properties, and, as a result, Sojitz was entitled to recover 100% of the decommissioning costs from Union.

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[272] 394 F. Supp. 3d 687 (S.D. Tex. 2019).

[273] *Id.* at 699 (internal citations and quotation marks omitted).

In *Glassell Non-Operated Interests, Ltd. v. EnerQuest Oil & Gas, L.L.C.*,[274] the U.S. Court of Appeals for the Fifth Circuit applied Texas law and held that a party to an AMI agreement did not breach the agreement by refusing to offer certain interests within the AMI to the other parties to the AMI agreement. In this case, a group of oil companies entered into an AMI Agreement to cooperatively develop oil and gas prospects in Texas. Under the AMI Agreement, if a party acquired any oil and gas interest within the AMI area, the AMI Agreement required the buyer to offer a *pro rata* share of such interests to the other parties to the agreement. Any interest owned by a party within the AMI area before the effective date of the AMI Agreement, however, was excluded from the agreement. One of the companies, EnerQuest Oil & Gas, L.L.C., bought an interest in the AMI area from two other parties to the agreement, and those parties had owned those interests prior to the effective date of the agreement. When EnerQuest refused to offer a *pro rata* share of those interests to other parties to the AMI Agreement, the other parties filed suit seeking their share of the interests acquired by EnerQuest. The court held that EnerQuest did not breach the AMI Agreement because the agreement excluded interests already owned by parties prior to its effective date. Because EnerQuest's sellers were parties to the AMI Agreement and because they had owned those interests prior to the effective date of the AMI Agreement, EnerQuest was under no obligation to offer any portion of those interests to the other parties.

In *Texan Land & Cattle II, Ltd. v. ExxonMobil Pipeline Co.*,[275] the court of appeals held that by transporting gasoline and diesel through a pipeline, a pipeline operator did not breach a 1919 easement agreement that authorized the transportation of "oil or gas" only. After collecting definitions from various dictionaries written contemporaneously with the relevant agreement, and noting that they broadly contemplated constituent substances of crude oil and natural gas, the court concluded that the agreement authorized the transportation of gasoline and diesel.

In *Murphy Land Group, LLC v. Atmos Energy Corp.*,[276] Murphy owned 48 acres in Houston County, Texas. The land was burdened by three easements that granted Atmos the right-of-way and easement to construct, maintain, and operate pipelines and appurtenances thereto along with ingress to and egress from the premises, for the purpose of constructing, inspecting, repairing, maintaining, and replacing the property of Lone Star and its successors. In May 2012, Murphy granted Atmos a road lease, which included the right-of-way and easement to construct and maintain a

[274] 927 F.3d 303 (5th Cir. 2019).

[275] 579 S.W.3d 540, 544 (Tex. App.—Houston [14th Dist.] 2019).

[276] No. 12-18-00138-CV, 2019 WL 1716359 (Tex. App.—Tyler Apr. 17, 2019).

roadway 40 feet in width, on a route to be selected by Atmos, together with the right in Atmos to free and uninterrupted use, liberty, privilege and easement in, on and over said roadway to extend on, over, through and across Murphy's 48-acre tract. The road lease expired in May 2015. Murphy believed the pipeline easements merged into the road lease when the parties signed the road lease, and that those easements ceased to exist as independent interests in land. After Atmos entered the land under the pipeline easement to conduct pipeline maintenance, Murphy sued Atmos for injunctive relief and damages.

The court noted that the "merger doctrine" in contract cases refers to the absorption of one contract into another, later contract between the same parties. Before one contract can merge into another, the plaintiff must prove that (1) the contracts are between the same parties, (2) the later contract involves the same subject matter as the prior contract, and (3) the parties intended a merger to result. The court held that the two contracts did not cover the same subject matter, so no merger occurred. Namely, the easement agreements granted the permanent right to operate and maintain pipeline easements, while the road lease granted Atmos the right to build a road of a specified width, for any purpose, during a limited time period.

In *Burlington Resources Oil & Gas Co. v. Texas Crude Energy, LLC*,[277] the court interpreted granting and valuation clauses in an overriding royalty assignment to determine whether post-production costs were deductible from that royalty. The granting clause provided for in-kind delivery of the royalty "into the pipelines, tanks or other receptacles with which the wells may be connected," while the royalty valuation clause provided for royalty to be paid on the "amount realized" for the sale of the product.[278] The court held that the "into the pipelines" language indicated that Texas Crude's royalty interest was valued at the wellhead, and thus post-production costs could be deducted from the royalty payment. The court rejected Texas Crude's argument that the "amount realized from such a sale" language in the valuation clause meant that the royalty should be paid on the price received for the product at market.

BlueStone Natural Resources II, LLC v. Randle[279] involved the allocation of post-production costs between parties to various oil and gas leases. The leases had two components. The first component was the lease itself (the Printed Lease), and the second component was a three-page exhibit (Exhibit A) attached to the lease. The Printed Lease contained a royalty clause that provided a royalty on gas based on "the market value at

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[277] 573 S.W.3d 198 (Tex. 2019).

[278] *Id.* at 201–02.

[279] No. 02-18-00271-CV, 2019 WL 1716415 (Tex. App.—Fort Worth Apr. 18, 2019, pet. granted) (mem. op.).

the well." Exhibit A, however, contained two important provisions. First, the introductory paragraph of Exhibit A stated that the Exhibit A superseded any provisions to the contrary in the Printed Lease. Second, paragraph 26 of Exhibit A provided for a method of calculating royalties and specifically stated:

> LESSEE AGREES THAT all royalties accruing under this Lease (including those paid in kind) shall be without deduction, directly or indirectly, for the cost of producing, gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and otherwise making the oil, gas[,] and other products hereunder ready for sale or use. Lessee agrees to compute and pay royalties on the gross value received, including any reimbursements for severance taxes and production related costs.[280]

The court first analyzed the royalty clause in the Printed Lease, finding that the language "at the well" acts as a clear indication that the lessor must pay post-production costs. However, when the court analyzed Exhibit A, it found that the language created a "pure-proceeds" measure of royalty that alters the burden and causes the lessee to pay post-production costs. Because the Printed Lease and Exhibit A were clearly in conflict, and Exhibit A stated that it superseded the Printed Lease when the terms conflict, the court held that Exhibit A superseded, and thus, the lessee was required to pay the post-production costs.

In *Cimarex Energy Co. v. Anadarko Petroleum Corp.*,[281] the court held that production by a cotenant on a lease does not perpetuate the lease for a non-participating cotenant in the absence of specific language to the contrary. Cimarex leased an undivided 1/6th mineral interest in a tract of land on which Anadarko subsequently acquired the remaining undivided 5/6th interest. During the primary term of Cimarex's lease, Anadarko drilled two wells on the premises without offering Cimarex the opportunity to participate in operations and without paying Cimarex's cotenant share of net proceeds. Cimarex sued, the parties settled, and Anadarko then paid Cimarex's share of net proceeds on the wells until the primary term of Cimarex's lease expired. When Cimarex sued Anadarko again, the court determined that Cimarex's failure to establish its own production extinguished its leasehold interest after the primary term expired. Invoking precedent in which other courts repeatedly construed leases as requiring the lessee itself to cause production, the court rejected Cimarex's arguments that it was entitled to rely on Anadarko's production to extend its own lease into the secondary term. The court also disagreed that the parties'

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[280] *Id.* at *2.

[281] 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed).

original settlement functioned as a joint operating agreement, noting the failure of the agreement to designate an operator. The court also determined Anadarko was not estopped from asserting that the primary term had ended based on the original lessor's acceptance of royalties from Cimarex during the primary term.

In *Archer v. Tregellas*,[282] the Texas Supreme Court analyzed the notice provision of a right of first refusal. Members of the Cook family executed a warranty deed to convey the surface estate of a tract of land in Hansford County, Texas to the trustees of the Carl M. Archer Trust No. Three and the Mary Frances G. Archer Trust No. 3. The Cooks retained the mineral interest underlying the tract, but they granted the Trustees a right of first refusal to purchase the mineral interest in the event they intended to sell their interest. Later, the Cooks executed a mineral deed conveying their interest in the aforementioned tract. Before executing the mineral deed, however, the Cooks did not offer the minerals to the Trustees as required by the right of first refusal. The Trustees did not learn of the conveyance until four years later and sued the grantee seeking specific performance. The Texas Supreme Court held that the grantee of the mineral interest that does not have actual or constructive notice of the right of first refusal stands in the shoes of the original seller, the Cooks, when the rightholder seeks specific performance. The court further held that the four-year statute of limitations certainly applied, but refused to hold that rightholders should continually monitor the public records to ensure that their interest is not impaired. As a result, when a grantor conveys property subject to a right of first refusal without first offering the property to the rightholder, such a sale is inherently undiscoverable. Therefore, the discovery rule defers accrual of the rightholder's claim until the rightholder knew or should have known of the injury.

Verde Minerals, LLC v. Burlington Resources Oil & Gas Co.[283] centered on the distinction between mineral and royalty deeds. The relevant language granted a surface estate, but at issue was language purportedly granting:

> [S]uch an undivided interest in an undivided one-half of any and all oil, gas or minerals that may be found to be in, under or upon any part of said tract of 2,092 acres . . . as the number of acres purchased by said [grantee] bears to the entire number of acres in said tract.[284]

The deed further specified:

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[282] 566 S.W.3d 281, 287 (Tex. 2018).

[283] 360 F. Supp. 3d 600 (S.D. Tex. 2019).

[284] *Id.* at 613.

> [C]onsideration paid for said above described land is in payment only for the ownership thereof, exclusive of the ownership of any and all oil, gas, minerals, mineral oils, mineral paints, fossils or ores that may be in or upon said land, except as an interest therein is granted in the grant of an undivided interest in one-half of the oil, gas, or minerals that may be found on the 2,092.08 acres . . . and that the ownership of all such oil, gas or minerals, mineral oils, mineral paints, fossils or ores that may be in, upon, or under said land is not sold, paid for, or conveyed to said second party, and that said ownership is retained by said first party and his grantors.[285]

Finally, the deed specified that the grantor:

> [C]ovenants on behalf of himself, his heirs, executors, administrators and assigns, that he will deliver and pay to said party of the second part; his heirs or assigns, such proportion of all moneys that may be received by him for one-half of all oil, gas or minerals that may be found by said first party upon said entire tract and sold by him, after paying the expenses of refining, marketing, shipping, storing and other necessary expense on same, as the number of acres conveyed to said party of the second part bears to the entire number of acres . . . .[286]

While the plaintiff argued that the deed conveyed mineral interests, the court held that the deed merely granted a royalty interest. The court reasoned that, despite the language conveying "an undivided interest" in the mineral estate, the instrument must be considered in its entirety and subsequent deed language clarified that the undivided interest is merely an interest in royalties produced. The court then construed the deeds to grant a floating royalty despite the defendants' assertion that the use of the word "covenant" and lack of "royalty" created an unenforceable personal covenant. The court reasoned that such language was common in the early-twentieth century to convey a royalty interest and that the creation of a royalty interest did not require the use of the word "royalty" in the conveyance.

In *Yates Energy Corp. v. Broadway National Bank*,[287] the court of appeals considered the validity of an amended correction deed executed solely by the original parties despite contemporaneous interests of an original party's successors and assigns at the time of correction. The court interpreted section 5.029 of the Texas Property Code, which requires a

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[285] *Id.* at 614.

[286] *Id.* at 614–15.

[287] No. 04-17-00310-CV, 2018 WL 6626605 (Tex. App.—San Antonio Dec. 19, 2018, pet. filed) (mem. op.).

correction instrument to be "executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, if applicable, a party's heirs, successors, or assigns."[288] Appellee argued that by its plain language the statute allows a correction instrument to be signed by either the original parties to the deed, or if an original party is unavailable, the party's heirs, successors, or assigns. Nevertheless, the court held that the assignment or conveyance of an interest by an original party triggers the "if applicable" requirement that the correction instrument be signed by successors in interest. The court reasoned that simply allowing a choice between the first and second options would render the conditional clause "if applicable" meaningless.

In *OBO, Inc. v. Apache Corp.*,[289] the court was required to distinguish being a "Unit Operator" from just having operator duties. OBO and Permian Basin Joint Venture (PBJV) both owned a working interest in a West Texas unit, with PBJV owning the majority. The unit's governing documents required the "Unit Operator" to be a working interest owner; PBJV was designated as the Unit Operator and then delegated certain operator duties to Apache. OBO failed to pay its portion of operating expenses to Apache, resulting in Apache and PBJV both filing suit against OBO. OBO argued it was not obligated to pay Apache because Apache was not permitted to act as the Unit Operator since it did not own a working interest. However, the court found OBO was required to pay Apache for operating expenses. OBO was mistaken in believing Apache was acting as the Unit Operator; instead, the Unit Operator PBJV had simply contracted with Apache to provide operator services, meaning OBO still had an obligation to pay Apache. OBO also attempted to countersue Apache for breach of contract and gross negligence based on Apache's breaches of the Unit Operating Agreement, however, Apache was not a party to the Unit Operating Agreement and the court of appeals affirmed the trial court's summary judgment in favor of PBJV and Apache on all issues.

In *Occidental Energy Marketing, Inc. v. West Texas LPG Pipeline L.P.*,[290] an energy marketing company, Occidental Energy Marketing Company (Oxy), sued the pipeline operator, West Texas LPG Pipeline L.P. (West Texas), over whether adjustments to gas volume included adjustments for component imbalance. West Texas owns a pipeline that transports natural gas liquids (NGLs), and operates the pipeline as a common carrier. The tariff West Texas filed with the Railroad Commission of Texas contained the rates West Texas charges and the terms and

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[288] *Id.* at *5.

[289] 566 S.W.3d 26, 34 (Tex. App.—Houston [14th Dist.] 2018).

[290] 563 S.W.3d 465 (Tex. App.—Houston [14th Dist.] 2018).

conditions for transporting NGLs on the pipeline. Oxy ships NGLs on West Texas's pipeline and claimed West Texas violated its tariff for failure to deliver Oxy's consignee a volume of "NGL Mix." Under the tariff, West Texas is obligated to deliver a volume of Mix equal to the net volume of receipts less adjustments provided therein, which West Texas argued included component imbalances. When West Texas delivered a volume of NGLs to the consignee that was less than the volume of NGLs that Oxy nominated for delivery, West Texas argued this component imbalance fell under the definition of "adjustments provided herein." The court disagreed and reversed the trial court's summary judgment in favor of West Texas for Oxy's breach of contract claim.

In *Texas Outfitters Ltd. v. Nicholson*,[291] the Texas Supreme Court clarified when an executive breaches its duty to a non-executive. Texas Outfitters, the executive, refused to lease after receiving multiple lease offers despite knowing that the Carters, the non-executives, wanted their interest leased. The court held that Texas Outfitters breached its duty of utmost good faith and fair dealing by refusing the lease offers. The court noted that while an executive duty breach inquiry is necessarily fact dependent, the unfair self-dealing standard laid out in *KCM Financial LLC v. Bradshaw*[292] controlled. That is, the executive breaches its duty by engaging in acts of self-dealing that unfairly diminish the value of the non-executive interest. The court reasoned that Texas Outfitters chose to reap the benefits of an undeveloped surface to the detriment of the non-executive. Furthermore, the harm from refusing the lease offers was not limited to lost bonuses from one lease. Rather, the refusal unfavorably affected a pool of potential lessees. The court found that there was some evidence that Texas Outfitters engaged in self-dealing.

Bell v. Chesapeake Energy Corp. [293] involved the amount of compensatory royalty due under the terms of an offset-well clause under oil and gas leases. Chesapeake drilled wells within the distance established by the leases' offset well provisions as triggering Chesapeake's offset well obligation. The dispute focused on whether compensatory royalties were due on all production from the entire length of the wellbores, or only those portions of the wellbores that were within the distance established by the offset well clauses. Based on the plain language of the leases, the court concluded that compensatory royalties were due on all production from the adjacent wells, even on portions of the wellbores that were not within the distance prescribed by the offset well clause as triggering the compensatory royalty obligation.

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[291] 572 S.W.3d 647 (Tex. 2019).

[292] 457 S.W.3d 70 (Tex. 2015).

[293] No. 04-18-00129-CV, 2019 WL 1139584 (Tex. App.—San Antonio Mar. 13, 2019, pet. denied).

XII. WEST VIRGINIA

A. Legislative Developments

The 2019 West Virginia legislature approved HB 2673,[294] a bill that would create a fund for plugging abandoned oil and gas wells. In recent years, abandoned and unplugged gas wells in West Virginia have become a prevalent issue across the state—though some of the "orphaned wells" are over 100 years old. HB 2673, a high priority for the industry, would have eliminated the severance tax for wells producing less than 60 Mcf per day. The money previously paid in severance tax would instead be directed to a new fund designated for plugging abandoned wells. However, Governor Jim Justice vetoed the bill citing "technical" problems and that the funds for plugging the abandoned wells should come from general revenue instead of through elimination of severance tax for low-producing wells. The governor and the legislature intended to "fix" the technical issue during one of the special legislative sessions. However, because no further action was taken during said sessions, this may be an issue to look out for in future legislative sessions.

B. Judicial Developments

In *EQT Production Co. v. Crowder*,[295] the West Virginia Supreme Court of Appeals affirmed a grant of summary judgment holding that although a mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying said tract, said mineral owner or lessee does not have the implied right to use the surface to benefit mining or drilling operations on other lands.

Plaintiff surface owners filed suit against EQT Production Company (EQT) alleging that although EQT had the right to enter and reasonably use their surface land pursuant to a 1901 oil and gas lease (the Lease) to extract natural gas from a 351-acre parent tract (the Parent Tract), the Lease did not grant that right concerning neighboring properties not covered by the Lease. Plaintiffs then filed a motion for partial summary judgment asserting that there was no genuine issue of material fact that EQT had trespassed on their surface tracts to extract natural gas from neighboring properties. EQT then filed its own motion for summary judgment asserting among many arguments that horizontal drilling was reasonable and necessary for natural gas production in the shale formations under the Parent Tract; thus, it was reasonable and necessary to extend that drilling under neighboring properties to produce natural gas from beneath those properties. The circuit court granted the plaintiffs' motion and denied

[294] H.B. 2673, Reg. Sess. 2019 (W. Va. 2019).

[295] 828 S.E.2d 800 (W. Va. 2019).

EQT's motion, and EQT appealed.

On appeal, the West Virginia Supreme Court of Appeals affirmed the grant of summary judgment by the circuit court.[296] The court recognized the implicit right of the owner of the mineral estate to use the surface estate overlying the minerals to access and remove those minerals, but only to the extent those uses are demonstrably reasonable, necessary, and can be exercised without substantial burden on the surface owner. However, that implicit right only applies to that specified tract of land and does not extend to benefit mining or drilling on adjacent, adjoining, or other tracts of land. The court ruled such additional burdens on the surface estate to conduct drilling or mining operations under neighboring lands are considered to be trespass, and must be expressly obtained, addressed, or reserved in the parties' deeds, leases, or other writings.

In *Andrews v. Antero Resources Corp.*,[297] the West Virginia Supreme Court of Appeals affirmed, in a 3-2 decision, a grant of summary judgment ruling that the lessee's activities to develop its mineral estate were reasonably necessary and were carried out without substantial burden to property owners.

Various surface owners of several tracts of land (the Property Owners) filed a complaint alleging claims for nuisance and negligence against Antero Resources Corporation (Antero) and its contractor, contending that their use and enjoyment of their land was being improperly and substantially burdened by activity caused by the horizontal wells being used to develop the Marcellus shale underlying their properties, even though the wells were not physically located on their properties. After the circuit court transferred the claims to the Mass Litigation Panel (MLP), Antero and its contractor filed motions for summary judgment. The Property Owners responded and voluntarily withdrew their negligence claim, leaving only their nuisance claim. However, the MLP in its summary judgment order declined to apply principles of nuisance law, and instead ruled on the summary judgment motions based upon Antero's contractual and property rights, ruling that the Property Owners' grievances were reasonable and necessarily incident to Antero's development of the underlying minerals.

On appeal, the West Virginia Supreme Court of Appeals first addressed the Property Owners' contention that a mineral owner does not have the right to extract natural gas using methods that were uncontemplated when the operative severance deeds were executed.[298] After recognizing the implied right of reasonable use of surface includes

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[296] *Id.* at 811.

[297] 828 S.E.2d 858 (W. Va. 2019).

[298] *Id.* at 864.

the evolution of technology over time, the court distinguished that right from the Property Owners' arguments, which relied on case law where the court previously rejected implied rights to methods of removing minerals that caused complete destruction of the surface. The court also noted that the Property Owners did not fulfill their burden of proving any damage, let alone complete destruction, of their surface estates. The court then balanced the rights of surface and mineral owners in relation to implied uses of the surface estate. Utilizing this balancing test to review whether summary judgment was proper, the court ruled that (1) the Property Owners did not offer evidence to establish that there was a genuine issue of material fact as to whether Antero's activities to develop its mineral estate were reasonably necessary, and (2) the various burdens the Property Owners had established did not rise to the level of a substantial burden as set by case precedent. The concurring and dissenting opinions mainly focused on the lack of analysis as to the nuisance claim in addition to the claim of property and contractual rights.[299]

In *Steager v. Consol Energy, Inc.*,[300] the West Virginia Supreme Court of Appeals (1) agreed that the Tax Department acted in violation of the applicable regulations by improperly imposing a cap on Respondents' operating expense deductions, and (2) found error in rejecting the Tax Department's interpretation of the applicable regulations concerning the inclusion of post-production expenses in the calculation of the annual industry average operating expenses.

Respondents Consol Energy, Inc. d/b/a CNX Gas Company, LLC and Antero Resources Corporation owned various gas wells, which are appraised for *ad valorem* tax purposes, and their values were determined "through the process of applying a yield capitalization model to the net receipts (gross receipts less royalties paid less operating expenses) for the working interest and a yield capitalization model applied to the gross royalty payments for the royalty interest."[301] Each tax year, the West Virginia State Tax Department issued an Administrative Notice, which states what the average annual industry operating expense is for that tax year, expressing it by way of a percentage of the well's gross receipts and a "not to exceed" amount, or "cap."

Respondents appealed their respective gas well valuations, claiming that (1) their actual expenses were in excess of the stated percentages, and that the cap resulted in an artificial operating expense reduction where their expenses exceeded the cap; and (2) with respect to the Marcellus wells, post-production expenses were not factored into the average industry

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[299] *Id.* at 877–78.

[300] 832 S.E.2d 135 (W. Va. 2019).

[301] *Id.* at 141 (citing W. VA. CODE R. § 110-1-J-4.1 (2019)).

operating expenses. The Tax Department responded that (1) the application of caps served to treat higher-producing wells differently from lower-producing wells, resulting in certain wells with higher gross receipts not realizing a full operating expense deduction; and (2) "operating expenses" included only "ordinary expenses which are directly related to the maintenance and production of natural gas and/or oil" and not "extraordinary expenses" such as post-production expenses.[302] The Circuit Court of Lewis County, Business Court Division, first concluded that the Tax Department failed to assess the wells at their true and actual value because the "not to exceed" amount or "cap" ultimately used two separate and distinct averages depending on the amount of gross receipts for a particular well. The business court also found that the Tax Department's method of calculating the average industry expense was under-inclusive of operating expenses by not including post-production expenses and therefore overvalued the wells.

On appeal, the West Virginia Supreme Court of Appeals first ruled that the regulations made no provision for an upper limit or "cap," both by the plain and unambiguous language of the rules and by the rules providing no discretion for the Tax Department to employ its own methodology for expressing and applying the annual industry average expense deduction. The court also agreed with the business court in rejecting the Tax Department's argument that the "cap" and percentage are merely two expressions of "the same" average figure. However, concerning the inclusion of post-production expenses in "operating expenses," the court reversed the business court's ruling, holding that the Tax Department's exclusion of post-production expenses from its average expense calculation was a reasonable construction of the regulation and not facially inconsistent with the enabling statute. Unlike the rejection of the upper limit or "cap," the court ruled that "operating expenses" as defined in the rules, in particular that part of the definition concerning "maintenance and production," were ambiguous and thus necessitated applying the standards set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[303] Applying the *Chevron* analysis, the court concluded that the Rule was ambiguous, and that the Tax Department's exclusion of post-production expenses from "operating expenses" was based on a permissible construction of the enabling taxation statute and not arbitrary, capricious, or manifestly contrary to said statute.

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[302] *Id.* at 140, 142.

[303] 467 U.S. 837 (1984).

C. *Administrative Developments*

Effective May 10, 2019, Senate Bill 240 repealed the Division of Environmental Protection—Office of Oil and Gas legislative rule 35 CSR 7 relating to the certification of a gas well.[304]

On January 30, 2019, the West Virginia State Tax Department issued an Administrative Notice relating to the valuation variables contained in 110 CSR 1J-1 et seq., oil and gas operating expenses, setting forth criteria for the direct and ordinary operating expenses in relation to the gross receipts from production.[305]

XIII. WYOMING

A. *Legislative Developments*

During its 2019 budget session, which convened on January 8, 2019, the Wyoming legislature addressed two issues of interest to the oil and gas industry. First, in Senate Enrolled Act 14,[306] the legislature merged two existing entities, the Wyoming Pipeline Authority and the Wyoming Infrastructure Authority, into the new Wyoming Energy Authority (WEA). The WEA will continue the work of the Pipeline Authority and Infrastructure Authority by promoting oil and gas and other mineral production, transportation, and distribution, as well as transmission projects and other energy-related projects, in Wyoming.

Second, the legislature revised the statutes governing Wyoming's tax liens on mineral production through Senate Enrolled Act 82.[307] Under the new law, counties are not required to file and perfect liens before they become effective.

B. *Judicial Developments*

SWC Production, Inc. v. Wold Energy Partners, LLC,[308] was an appeal from a trial court's summary judgment order in favor of an operator of an enhanced oil recovery unit known as the Powell Pressure Maintenance Unit in Converse County, Wyoming. The operator sued a non-operating working interest owner for failure to pay operating costs under the unit operating agreement. The trial court entered summary judgment for the operator. After judgment, the interest owner claimed newly discovered evidence showed the operator's predecessor had not properly paid revenues

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[304] S.B. 240, Reg. Sess. 2019 (W. Va. 2019).

[305] W. VA. CODE R. § 110-1-J-1 (2019).

[306] S. Enrolled Act 14, SF0037, 2019 Gen. Sess. (Wyo. 2019) (creating WYO. STAT. ANN. §§ 37-5-501 to -509, and 37-5-601 to -607).

[307] S. Enrolled Act 82, SF0118, 2019 Gen. Sess. (Wyo. 2019) (enacting WYO. STAT. ANN. § 39-13-108(d)(vi)).

[308] 448 P.3d 856, 857–58, 861 (Wyo. 2019).

to the interest owner. The trial court denied the interest owner's motion to set aside the judgment and the Wyoming Supreme Court affirmed, concluding the interest owner could have discovered the evidence before judgment if it had exercised due diligence.

Finley Resources, Inc. v. EP Energy E&P Co.[309] involved a lawsuit over a purchase and sale of oil and gas leases in northeastern Wyoming. The Wyoming Supreme Court ultimately affirmed the lower trial court's dismissal of the suit, ruling that the forum-selection clause in the purchase and sale agreement required that the action be filed in Texas.

BTU Western Resources, Inc. v. Berenergy Corp.[310] was a second opinion in two years by the Wyoming Supreme Court addressing a dispute between a coal operator and an oil and gas operator in Wyoming's Powder River Basin. The supreme court held the Bureau of Land Management was not a necessary party to a dispute over a private lease and held the accommodation doctrine applied to private lease disputes.

C. Administrative Developments

Effective December 20, 2019, the Wyoming Oil and Gas Conservation Commission (WOGCC) revised its rules[311] governing applications for permits to drill wells (APDs). The WOGCC's intent in revising the APD rules was to address and reduce the large number of APD filings and protests. The new rules establish a detailed procedure for challenging APDs and permit renewals.

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[309] 443 P.3d 838, 847 (Wyo. 2019).

[310] 442 P.3d 50, 54 (Wyo. 2019); *see* BTU W. Res., Inc. v. Berenergy Corp., 408 P.3d 396 (Wyo. 2018) ("Berenergy I").

[311] WYO. CODE R. § 8 (2019); *see generally* WOGCC Rules, ch. 3, § 8.

Dividing, Surrendering, and Assigning the Lease: How Pugh Clauses and Other Provisions Can Alter the Interest Covered by a Lease

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Synopsis

[1] Introduction[1]

Among the most important factors in any oil and gas company's ability to develop and maintain a core area of operations is the ability to assign, subdivide, and maintain oil and gas leases. In some cases, a company may acquire oil and gas leases executed several decades ago that may not necessarily reflect or be suited for the realities of modern oil and gas development. In other cases, a company may seek to obtain a new lease and encounter a lessor with a sophisticated knowledge of oil and gas leasing and significant leverage in requesting the insertion of provisions beneficial to the lessor. Decades of jurisprudence interpreting oil and gas leases add another layer of complexity in this process, particularly given the incredible variety of oil and gas leases, with the difference of a single word in some cases entirely changing the effect of a particular provision.

Retained acreage and Pugh clauses are two of the more common types of provisions inserted into an oil and gas lease with the goal of protecting the lessor's interest, both from the perspective of encouraging the lessee to efficiently develop the leased premises and in preventing dilution of the lessor's interest. The primary focus of this article is upon these clauses, including commonly litigated issues and cautionary advice for practitioners who may be charged with drafting them in the future. Specifically, these issues relate to the events that may (or may not) trigger the operation of the retained acreage or Pugh clause, certain pitfalls that have caused confusion as to the scope of the portion of the lease subject to termination, possible disputes as to the horizontal application of such clauses, and the interplay between the express lease terms and the applicability of state statutes. In addition to retained acreage and Pugh clauses, this article discusses certain practical considerations in the inclusion and drafting of entireties clauses in modern oil and gas leases, as well as the realities and complications of assigning, and in some cases, electing to surrender, an oil and gas lease.

Unless otherwise noted in this article, we have focused on clauses in fee oil and gas leases. Much of what we have written in this article could be applicable to oil and gas leases issued by each state or the Bureau of Land Management ("BLM") on behalf of the federal government, but the laws, regulations, policies, and procedures applicable to those state agencies or the BLM may demand results that are contrary to our conclusions in this article. We encourage any person dealing with these

[1] This article was originally drafted and presented by Sam Niebrugge and Anastasia Carter at the Rocky Mountain Mineral Law Foundation's 2018 special institute on Drafting and Negotiating the Modern Oil and Gas Lease. *See* Sam Niebrugge & Anastasia D. Carter, *Dividing and Surrendering, and Assigning the Lease: How Pugh Clauses and Other Provisions Can Alter the Interest Covered by a Lease*, DRAFTING AND NEGOTIATING THE MODERN OIL AND GAS LEASE 10-1 (Rocky Mt. Min. L. Fdn. 2018). The article was updated and modified for the 2019 special institute.

state or federal leases to closely consult with the agencies and experts in the field to determine what effect, if any, the topics in this article have on such leases.

[2] Common Drafting and Interpretation Issues in Pugh and Retained Acreage Clauses

In a typical oil and gas lease, the "habendum clause" provides the lessee the right to explore for and develop oil, gas, and associated hydrocarbons for a stated number of years (the "primary term") and so long thereafter as oil, gas, or associated hydrocarbons are produced in paying quantities from the leased lands or lands properly pooled, communitized, or unitized therewith (the "secondary term").[2] Termination of the lease at the expiration of the primary term is subject to the operation of "savings" provisions in the lease, such as provisions related to the payment of shut-in royalties, temporary cessations of production, and drilling operations conducted by the lessee at the conclusion of the primary term.[3] Subject to the lessee's right to pool or unitize under the terms of the lease, the express consent of the lessor to pool or unitize, or the operation of compulsory pooling or unitization statutes, the lessee may also extend the lease into its secondary term by virtue of production from lands pooled, communitized, or unitized with the leased lands.[4]

As a general principle, oil and gas leases are indivisible, meaning that production from or operations upon a portion of the leased lands (or lands properly pooled, communitized, or unitized therewith) may constitute production or operations sufficient to maintain the lease as to all leased lands.[5] Lessors and lessees may modify this principle by including a

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[2] EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 26.1 (Matthew Bender, rev. ed.) [hereinafter KUNTZ]; JOHN S. LOWE, OWEN L. ANDERSON, ERNEST E. SMITH & DAVID E. PIERCE, CASES AND MATERIALS ON OIL AND GAS LAW 336 (5th ed. 2008) [hereinafter LOWE].

[3] LOWE, *supra* note 2, at 386; PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW §§ 611–630 (LexisNexis Matthew Bender 2019) [hereinafter WILLIAMS & MEYERS]. For further discussion regarding various lease savings clauses, see Craig L. Stahl & Emmie M. Gooch, *Keeping Leases Alive: The Evolving Law of Lease Termination in Today's Unconventional Shale Plays*, 59 ROCKY MT. MIN. L. INST. 27-1 (2004).

[4] *See* WILLIAMS & MEYERS, *supra* note 3, § 603.3(e).

[5] N. Oil & Gas, Inc. v. Moen, 808 F.3d 373, 376–77 (8th Cir. 2015); Bennett v. Sinclair Oil & Gas Co., 405 F.2d 1005, 1009 (5th Cir. 1968); Peironnet v. Matador Res. Co., 144 So. 3d 791, 797 (La. 2013); Egeland v. Cont'l Res., Inc., 616 N.W.2d 861, 866 (N.D. 2000); Lewis v. Kan. Prod. Co., 401 P.3d 177 (Kan. Ct. App. 2017) (mem. op., unpublished disposition); Summitcrest, Inc. v. Eric Petroleum Corp., 60 N.E.3d 807, 814 (Ohio Ct. App. 2016); Shown v. Getty Oil Co., 645 S.W.2d 555, 560 (Tex. App.—San Antonio 1982, writ ref'd); *see* Jones v. Bronco Oil & Gas Co., 446 So. 2d 611, 615 (Ala. 1984) (referring to Delatte v. Woods, 94 So. 2d 281, 288–89 (La. 1957), for this proposition); Snowden v. JRE

retained acreage clause or a Pugh clause[6] in the lease. Although frequently confused, these are two distinct types of clauses.[7]

The retained acreage clause[8] modifies the habendum clause by providing that at the expiration of the primary term or the cessation of continuous drilling operations, the lease will automatically terminate as to all lands except those upon which a productive well is located or that have been included within a drilling, spacing, or proration unit.[9] The Pugh clause,[10] sometimes referred to in Texas as the "Freestone rider," modifies

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Invs., Inc., 370 S.W.3d 215, 220 (Ark. 2010) (providing that although oil and gas leases are typically indivisible, this principle has been modified by Arkansas' statutory Pugh Clause, discussed *infra* section [2][D]); Kysar v. Amoco Prod. Co., 93 P.3d 1272, 1283 (N.M. 2004).

[6] The "Pugh" clause is so named as the origin of the clause is generally credited to an attorney from Crowley, Louisiana, named Lawrence G. Pugh. Thomas M. Bergstedt & Daniel T. Murchison, *The Effect of Unitization on the Duration and Extent of Mineral Interests in Louisiana*, 36 TUL. L. REV. 769, 793 n.154 (1962). Pages 793 and 794 of that same law review comment quote the "original" Pugh clause:

> Notwithstanding anything to the contrary herein contained, the commencement of operations for drilling, the drilling or reworking of a well, or the production of oil, gas or other mineral from any well situated on lands included within a unit embracing a portion of the leased premises and other lands not covered hereby shall only serve to maintain this lease in force as to that portion of the leased premises embraced in such unit; but during the primary term delay rentals payable hereunder shall be proportionately reduced and be payable on that portion of the leased premises not included in such unit.

Mr. Pugh drafted this clause in 1947. Mitchell E. Ayer & Jonathan D. Baughman, *Navigating the Pooling Clause Waters: New and Recurring Issues*, 53 ROCKY MT. MIN. L. INST. 33-1 (2007) ("In 1947, Lawrence Pugh, a Louisiana attorney, recognized that a lease was normally held to be indivisible. He drafted a clause calculated to prevent the holding of non-pooled acreage in his clients' leases while other portions were held under pooled arrangements.").

[7] *See, e.g.*, WILLIAMS & MEYERS, *supra* note 3, § 603.7 n.2.2; Richard D. Watt, *Beyond the Standard Lease Form: Selected Oil & Gas Lease Issues*, DEVELOPMENT ISSUES AND CONFLICTS IN MODERN OIL AND GAS PLAYS 11-1 (Rocky Mt. Min. L. Fdn. 2004).

[8] A sample retained acreage clause from WILLIAMS & MEYERS, *supra* note 3, § 603.7:

> This lease shall terminate at the end of the primary term as to all of the leased lands except those lands located within the same section of a production unit or spacing unit prescribed by law or administrative authority on which is located a well producing or capable of producing oil or gas in commercial quantities.

Please note that the authors have provided this sample clause for illustrative purposes only, and we do not propose that it should be a "form of" or otherwise.

[9] Chesapeake Expl., L.L.C. v. Energen Res. Corp., 445 S.W.3d 878, 882 (Tex. App.—El Paso 2014, no pet.) (citing Bruce M. Kramer, *Oil and Gas Leases and Pooling: A Look Back and a Peek Ahead*, 45 TEX. TECH L. REV. 877, 881 n.28 (2013)); WILLIAMS & MEYERS, *supra* note 3, § 603.7.

[10] A sample Pugh clause from WILLIAMS & MEYERS, *supra* note 3, § 669.14.

> Upon the pooling of less than all of the leased land as above provided, this lease shall be severed and shall be considered as separate and distinct leases on

the effect of pooling by providing that production from or operations upon a pooled unit will serve to extend the lease only as to the lands included within the pooled unit.[11]

While these clauses in some instances present unique drafting issues, in many cases, they present common drafting and interpretation issues, and accordingly, much of the remainder of this section applies generally to both retained acreage and Pugh clauses. Given the possibility of partial lease termination, practitioners should use great care in drafting these clauses, particularly with respect to the events that trigger their operation and the scope of the lands to be retained by the lessee, both in a vertical and a horizontal context.[12] In addition, notwithstanding the express terms

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> separately pooled acreage and on unpooled acreage, as the case may be, and the term of this lease and all the rights and obligations of Lessee under this lease shall apply separately to separately pooled acreage and to unpooled acreage under this lease. Any act or obligation required by this lease to be performed or fulfilled by Lessee with respect to the leased land included in any such operating unit shall be deemed fully performed, fulfilled and effective by the performance or fulfillment of such act or obligation upon or with respect to any part of such operating unit … . Any part of the leased land not pooled into an operating unit shall be and remain subject to the terms and conditions of this lease unaffected by the pooling of any other part or parts of the leased land or by operations in any such operating unit.

Please note that the authors have provided this sample clause for illustrative purposes only, and we do not propose that it should be a "form of" or otherwise.

[11] LOWE, *supra* note 2, at 429–30.

[12] Although the primary focus of this article is the events causing the triggering of the retained acreage or Pugh clause and the scope and effect of such termination, it is critical to ensure that the retained acreage or Pugh clause harmonizes with other provisions of the lease, such as the continuous operations clause and the pooling clause, both of which are outside of the scope of this article. *See, e.g.*, BB Energy LP v. Devon Energy Prod. Co., No. 3:07-cv-00723, 2008 WL 2164583, at *5–9 (N.D. Tex. May 23, 2008) (addressing the interplay between a Pugh clause and continuous operations provisions); *Egeland*, 616 N.W.2d at 867 (same); Mayo Found. for Med. Educ. v. Courson Oil & Gas, Inc., 505 S.W.3d 68, 70 (Tex. App.—Amarillo 2016, pet. denied) (explaining the effect of savings provisions in the context of a retained acreage clause); *see also* Patrick H. Martin, *Mineral Rights*, 46 LA. L. REV. 569, 584–85 (Developments in the Law, 1984-1985: A Symposium 1986); H. Philip Whitworth & D. Davin McGinnis, *Square Pegs, Round Holes: The Application and Evolution of Traditional Legal and Regulatory Concepts for Horizontal Wells*, 7 TEX. J. OIL GAS & ENERGY L. 177, 209 (2011). Most recently, the Supreme Court of North Dakota addressed this issue in interpreting oil and gas leases based upon pre-printed lease forms, with typewritten Pugh clauses attached thereto, ultimately concluding that the Pugh clauses at issue were in "irreconcilable conflict" with the habendum and continuous operations clauses of the leases. *Johnson v. Statoil Oil & Gas LP*, 918 N.W.2d 58, 63 (N.D. 2018):

> Having concluded the Pugh clauses conflict with the continuous drilling operations clauses, we are required to determine which of the clauses governs the application of the leases to the disputed units at the end of the primary three-year periods. Section 9-07-16, N.D.C.C., provides the parts of the contract that are

of the lease, it should also be remembered that a few states have enacted statutory Pugh clauses that may cause a partial termination of the lease, as discussed in greater detail in section [2][D].

[A] Events Triggering Operation of the Retained Acreage or Pugh Clause

[i] Triggering the Retained Acreage Clause

The retained acreage clause has gained increasing popularity in recent years and, in many cases, is intertwined with the continuous operations provisions of the oil and gas lease.[13] Of critical importance—and the source of much litigation—is the question of when the retained acreage clause is triggered. In most cases, the retained acreage clause provides that the lease will terminate at the later of the expiration of the primary term or the cessation of continuous operations.[14] Texas, however, has seen a recent spate of litigation regarding whether the retained acreage clause requires termination of the leased lands not only as to lands not included in proration units upon the later of these two events, but also on a rolling basis as to the remaining lands as wells cease to produce.[15]

The Texas Court of Appeals for the El Paso District has considered this particular issue in great detail in recent years, twice refusing to uphold a rolling termination of the leased lands unless the lease is expressly clear

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> purely original control those parts which are copied from a form. In this case, the Pugh clauses were added by the parties to existing lease forms. The habendum and continuous drilling [operations] clauses were part of the form contracts. . . . We conclude the Pugh clauses are irreconcilable with the habendum and continuous drilling operations clauses, and the Pugh clauses control.

[13] *Mayo*, 505 S.W.3d at 70; J. Derrick Price & John "J.C." Hernandez, *Retained Acreage Clauses: – Recent Cases and Issues*, STATE BAR OF TEX. 35TH ANNUAL ADVANCED OIL, GAS & ENERGY RES. L. ch. 15, sec. II (2017) (citing WILLIAMS & MEYERS, *supra* note 3, § 681.3); *see also* WILLIAMS & MEYERS, *supra* note 3, § 603.7.

[14] WILLIAMS & MEYERS, *supra* note 3, § 603.7. At least one commentator has argued that it may be unnecessary to specify that the automatic termination required under the retained acreage clause is triggered by the later of these two events. John A. "Jad" Davis, Jr. & Ryan Clinton, *Revisiting an Old Friend: Retained-Acreage Clauses in Oil-and-Gas Contracts*, STATE BAR OF TEX. 34TH ANNUAL ADVANCED OIL, GAS & ENERGY RES. L. ch. 14, sec. III (2016). Given the frequency of litigation on this issue, however, the authors would advocate that practitioners describe the time at which the retained acreage clause is to operate as clearly as possible. *See* Chesapeake Expl., L.L.C. v. Energen Res. Corp., 445 S.W.3d 878, 883 (Tex. App.—El Paso 2014, no pet.) ("However, we will not hold the lease's language to impose a special limitation on the grant unless the language is so clear, precise, and unequivocal that we can reasonably give it no other meaning." (quoting Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 554 (Tex. 2002))).

[15] Similar issues may also be implicated in the context of Pugh clauses. *See* Summitcrest, Inc. v. Eric Petroleum Corp., 60 N.E.3d 807, 816–17 (Ohio Ct. App. 2016).

that the parties intended such a result.[16] First, in *Chesapeake Exploration, L.L.C. v. Energen Resources Corp.*, the court interpreted the effect of a retained acreage clause stating that the lease would terminate as to all acreage except for that included within a proration unit with a well capable of producing oil or gas in commercial quantities.[17] Chesapeake Exploration, L.L.C. ("Chesapeake") argued that this required termination not only upon the expiration of continuous drilling operations, but also on a rolling basis thereafter as wells ceased to produce.[18] Chesapeake based this assertion largely upon the use of the term "proration unit" in the retained acreage clause.[19] Specifically, Chesapeake submitted that because the proration unit itself exists only so long as the well produces, upon plugging and abandonment of the relevant well, the proration unit no longer existed.[20] The use of the term "proration unit," then, was evidence that the original parties to the lease contemplated termination of the lease at such time as the proration unit ceased to exist.[21] The court dismissed this argument, noting that the purpose of the reference to a "proration unit" was to designate those lands that would be retained following operation of the retained acreage clause, rather than to indicate when the clause would be triggered.[22] Most importantly, the court repeatedly cited the fact that the retained acreage clause did not *expressly* provide for rolling termination, ultimately stating that "[i]f the parties to [the lease] had wished to provide for continual relinquishment of non-producing proration units, so that a proration unit would no longer be subject to the lease once production had ceased on that particular unit, they could have done so by including such language."[23]

In 2017, in *Apache Deepwater, LLC v. Double Eagle Development, LLC*, the court again considered the issue of whether a retained acreage

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[16] The Texas Court of Appeals sitting in Amarillo has also reached a similar conclusion. *Mayo*, 505 S.W.3d at 71–73.

[17] *Chesapeake*, 445 S.W.3d at 882–83 ("Here, the leases' retained acreage clauses, in conjunction with the continuous development clauses, provide that the lessee's failure to continuously develop the leased premises terminates the leases as to all unproductive acreage except for: '[E]ach proration unit established under . . . [the] rules and regulations [of the RRC . . .] upon which there exists (either on the above described land or on lands pooled or unitized therewith) a well capable of producing oil and/or gas in commercial quantities.'" (alterations in original)).

[18] *Id.* at 883.

[19] *Id.* Chesapeake also cited to numerous other decisions reached by Texas courts with respect to retained acreage clauses, but the court determined Chesapeake's reliance on such cases to be misplaced. *Id.* at 885–86.

[20] *Id.* at 883.

[21] *Id.*

[22] *Id.* at 883–84.

[23] *Id.* at 884.

clause required rolling terminations.[24] In *Apache*, the applicable retained acreage clause provided that the lessee covenanted

> to release this lease after the primary term except as to each producing well on said lease, operations for which were commenced prior to or at the end of the primary term and the proration units as may be allocated to said wells under the rules and regulations of the Railroad Commission of Texas or 160 acres, whichever is greater, insofar as said proration units cover from surface to the base of the deepest formation penetrated by the deepest of said wells.[25]

Double Eagle Development, LLC ("Double Eagle"), like Chesapeake, argued the above-quoted language required rolling termination.[26] Double Eagle, however, asserted that the court's prior holding in *Chesapeake* was distinguishable primarily because the retained acreage clause at issue in *Chesapeake* referred to termination at the cessation of continuous operations, whereas in *Double Eagle*, the retained acreage clause was to operate "after the expiration of the primary term."[27] Though it recognized that the two cases involved differently worded retained acreage clauses, the court found this argument unpersuasive.[28] First, as in *Chesapeake*, the court cited the lease's failure to *expressly* provide for rolling termination.[29] Second, the court concluded that the use of the phrase "after the expiration of the primary term" was not synonymous with the idea that the retained acreage clause would come into operation periodically during the secondary term as wells ceased to produce.[30] Rather, the phrase was simply a recognition that the retained acreage clause only operated after the completion or abandonment of any wells "which were commenced prior to or at the end of the primary term."[31]

Although the authors have been unable to locate any case law or secondary authority supporting the imposition of rolling termination absent an express provision in the retained acreage clause to such effect, given that this issue has been the source of repeated litigation, practitioners are well advised to use caution in specifying the events that will (and will not) trigger operation of the retained acreage clause.

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[24] Apache Deepwater, LLC v. Double Eagle Dev., LLC, 557 S.W.3d 650 (Tex. App.—El Paso 2017, pet. denied).

[25] *Id.* at 653.

[26] *Id.* at 654–55.

[27] *Id.* at 657.

[28] *Id.* ("Double Eagle cannot escape that it must find language that clearly negates the habendum clause, and we simply fail to find that kind of clear unequivocal language in the retained acreage clause.").

[29] *Id.* at 656.

[30] *Id.* at 656–57.

[31] *Id.*

[ii] Triggering the Pugh Clause

Generally, operation of the Pugh clause is conditioned upon pooling that has occurred on or prior to the expiration of the primary term, subject to other "savings" provisions in the lease. Those drafting Pugh clauses should use great care in specifying the events that may trigger the operation of the clause, in particular with respect to (1) the effect of a voluntarily versus a compulsorily pooled unit, and (2) whether non-leased lands must be included within the relevant unit.

In at least some leases reviewed by the authors, the Pugh clause refers to units established or formed by the lessee or defines the unit as a unit pooled pursuant to the pooling authority in the lease (i.e., by voluntary pooling). This language may have unintended consequences, as there are two courts that have held similar language to mean that units formed by virtue of compulsory or force pooling statutes did not serve to trigger the operation of the Pugh clause.[32]

The second point the practitioner should consider in terms of the application of the Pugh clause is whether the requisite pooled unit must include third-party lands. Although there exists a split of authorities on this point, the more favored view is that pooling of units containing only leased lands at the expiration of the primary term (or the cessation of drilling operations) will not trigger the operation of the Pugh clause. In *Mathis v. Texas International Petroleum Corp.*, for example, the U.S. District Court for the Western District of Texas considered a Pugh clause providing that "a pooled unit or units established under the provision of [the pooling clause] hereof which unit embraces land covered hereby and other land, shall maintain this lease in force" only as to the lands within such unit.[33] The court determined that pooling of the leased lands with third-party lands was a prerequisite to the operation of the Pugh clause.[34] Although a portion of the leased land had been pooled into a unit, no third-party lands were included in such unit, and accordingly, production from the unit was sufficient to maintain the lease in force as to all lands after the expiration of the primary term, notwithstanding the Pugh clause.[35]

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[32] Lowman v. Chevron U.S.A., Inc., 748 F.2d 320, 322 (5th Cir. 1984); Mathews v. Goodrich Oil Co., 471 So. 2d 938, 941 (La. Ct. App. 1985); LOWE, *supra* note 2, at 430 (citing Bibler Bros. Timber Corp. v. Tojac Minerals, Inc., 664 S.W.2d 472 (Ark. 1984)); Martin, *supra* note 12; *see also* John W. Broomes, *Spinning Straw into Gold: Refining and Redefining Lease Provisions for the Realities of Resource Play Operations*, 57 ROCKY MT. MIN. L. INST. 26-1 (2011) (discussing the effect of compulsory pooling in Louisiana).

[33] Mathis v. Tex. Int'l Petroleum Corp., 627 F. Supp. 759, 761 (W.D. Tex. 1986) (emphasis omitted).

[34] *Id.*

[35] *Id.*

Two Louisiana state courts of appeal have reached the same conclusion as the *Mathis* court. In both *Will-Drill Resources, Inc. v. Huggs Inc.*, decided by the Louisiana Second Circuit Court of Appeal, and *Fremaux v. Buie*, decided by the Louisiana Third Circuit Court of Appeal, the courts described the purpose of a Pugh clause as protecting the lessor from undue dilution of its interest in the event of pooling, but reasoned that this purpose was not implicated when the pooled unit consisted solely of leased lands.[36] Accordingly, both courts held that the applicable Pugh clauses did not apply where there had been pooling solely as to leased lands.[37]

The Louisiana Fourth Circuit Court of Appeal in *Banner v. GEO Consultants International, Inc.*, reached the opposite conclusion from the courts in *Will-Drill* and *Fremaux*. In *Banner*, the court determined that the pooling of a unit containing only leased lands triggered a Pugh clause that provided "if any portion of the lands held hereunder should be unitized in any manner with other lands, then unit drilling or reworking operations on or unit production from any unit shall only maintain this lease as to the land included in such unit."[38] This decision has been roundly criticized, but the risk remains that other courts could reach a similar conclusion.[39]

[B] Leased Area to Be Retained

Of equal importance as when the retained acreage or Pugh clause comes into effect is the issue of which portion of the lease may be subject to termination. The practitioner should carefully draft the definition of the units or other lands to be retained by the lessee, especially when citing to applicable regulatory requirements, and should also consider the lessee's need for additional surface usage beyond the acreage that may be included within the proration unit or pooled area, particularly in the context of horizontal drilling operations.

[i] Recent Case Law Addressing the Retained Unit Description

References to what may be thought to be terms of art, as well as general descriptions of units formed under applicable regulatory requirements, have been the source of frequent retained acreage and Pugh

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[36] Will-Drill Res., Inc. v. Huggs Inc., 738 So. 2d 1196, 1200 (La. Ct. App. 1999); Fremaux v. Buie, 212 So. 2d 148, 151 (La. Ct. App. 1968).

[37] *Will-Drill*, 738 So. 2d at 1200; *Fremaux*, 212 So. 2d at 151.

[38] Banner v. GEO Consultants Int'l, Inc., 593 So. 2d 934, 935 (La. Ct. App. 1992).

[39] For an excellent discussion of Louisiana jurisprudence on this issue, see Aimee Williams Hebert, *A Review of Selected Lease Clauses*, 54 ANNUAL INST. ON MINERAL L. 196, 200–04 (2007).

clause litigation.[40] In particular, two recent decisions from Texas courts of appeal and one from the U.S. Court of Appeals for the Eighth Circuit are instructive.[41]

First, the Texas Court of Appeals for the Eastland District in *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc*., interpreted the effect of retained acreage clauses that required termination at the expiration of continuous drilling operations as to all lands except

> lands and depths located within a governmental proration unit *assigned* to a well producing oil or gas in paying quantities and the depths down to and including one hundred feet (100') below the deepest productive perforation(s), with each such governmental proration unit to contain the number of acres required to comply with the applicable rules and regulations of the Railroad Commission of Texas for obtaining the maximum producing allowable for the particular well.[42]

Endeavor Energy Resources, L.P. ("Endeavor") drilled and completed four wells in the relevant lands, ultimately filing certified proration plats with the Texas Railroad Commission ("TRRC") collectively describing the east half of the relevant lands; Endeavor never filed a proration plat with the TRRC describing the west half of the relevant lands.[43] Patriot Royalty and Land, LLC subsequently acquired oil and gas leases from the relevant lessors covering the west half of the relevant lands, which it assigned to Discovery Operating, Inc. ("Discovery"). Endeavor later asserted that it had incorrectly set forth the acreage submitted to the TRRC in its proration plats and sought approval of the TRRC to amend them to include additional acreage.[44] Discovery filed suit against Endeavor and the TRRC

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[40] For a thorough review of litigation on this point in the specific context of retained acreage clauses, *see* Mark Hanna & John Hicks, *Depth Severance Issues and Retained Acreage* § II, OIL & GAS DISPUTES (State Bar of Tex. 2018).

[41] Also interesting is an unreported decision out of the Texas Court of Appeals for the San Antonio District in *ConocoPhillips Co. v. Vaquillas Unproven Minerals, Ltd.*, 2015 WL 4638272 (Tex. App.—San Antonio 2015), interpreting the effect of a retained acreage clause requiring lease termination as to all acreage not included in 40-acre units for oil wells and 640-acre units for gas wells, unless the TRRC had adopted *different* unit acreages. The court ultimately determined that the lease only survived as to the smaller TRRC units, because although the units were smaller, the TRRC had, in fact, adopted *different* rules from the 40- and 640-acre units described in the retained acreage clause. *Id.* at *3. The Texas Supreme Court granted a petition for review in the case, but the parties later reached a settlement and the judgment was set aside. *See* Davis, *supra* note 14. For this reason, we have chosen not to discuss *Vaquillas* in any greater detail in this article.

[42] Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 448 S.W.3d 169, 172 (Tex. App.—Eastland 2014, pet. granted) (emphasis added).

[43] *Id.* at 174.

[44] *Id.*

refused to approve any amendment to the proration plats pending such litigation.[45]

Discovery contended that the leases terminated as to the west half of the relevant lands as a result of Endeavor's failure to assign such lands to any well in its proration plats submitted to the TRRC.[46] Endeavor, conversely, argued that notwithstanding this failure, because applicable TRRC field rules specified that proration units may contain up to 160 acres, the four wells it had drilled were sufficient to maintain the leases as to the entire 640 acres subject to those leases.[47] Although the court agreed that the applicable field rules allowed for proration units of such size, it held in favor of Discovery based in large part upon the use of the word "assigned" in the retained acreage clauses.[48] Under TRRC regulations, to "assign" a proration unit to a well requires the operator to submit a certified proration plat.[49] Accordingly, only the east half of the relevant lands, as described in Endeavor's certified proration plats, had been "assigned" to a well.[50] As a result, the leases terminated as to such lands that were not described in the plats.[51] Endeavor appealed, and in September 2017, the Texas Supreme Court granted the petition for review and heard oral arguments in January 2018.[52]

Shortly after the Texas Court of Appeals for the Eastland District's opinion in *Endeavor*, in *XOG Operating, LLC v. Chesapeake Exploration Ltd. Partnership*, the Texas Court of Appeals for the Amarillo District considered the effect of a retained acreage clause in an assignment of leases that required termination except as to "that portion of said lease included within the proration or pooled unit of each well drilled . . . ."[53] The assignment subsequently defined a "proration unit" as

> the area within the surface boundaries of the proration unit then established or prescribed by field rules or special order of the appropriate regulatory authority for the reservoir in which each well is completed. In

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[45] *Id.*

[46] *Id.* at 175.

[47] *Id.*

[48] *Id.* at 177.

[49] *Id.* (citing 16 TEX. ADMIN. CODE § 3.38(a)(3)).

[50] *Id.*

[51] *Id.* ("Therefore, we conclude that the parties intended for the [lease] to terminate as to acreage that was not included in a governmental proration unit assigned to a well by Endeavor in a certified proration plat filed with the [TRRC].").

[52] John Robert Hayes, Jr. & Alicia French, *Regulatory Update: The Railroad Commission Survived Sunset and Is Still Alive* § VI, 35TH ANNUAL ADVANCED OIL, GAS & ENERGY RES. L. (State Bar of Tex. 2017); Davis & Clinton, *supra* note 14.

[53] XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship, 480 S.W.3d 22, 25 (Tex. App.—Amarillo 2015, pet. granted) (emphasis omitted).

> the absence of such field rules or special order, each proration unit shall be deemed to be 320 acres of land in the form of a square . . . .[54]

With respect to its six producing wells, Chesapeake Exploration Ltd. Partnership ("Chesapeake Ltd.") elected to designate only fractional proration units as to each well for purposes of calculating production allowables, as reflected in the Form P-15 (Statement of Productivity of Acreage Assigned to Proration Units) filings it made with the TRRC, totaling 802 acres.[55] Applicable field rules for five of the wells established 320-acre proration units and the parties agreed the proration unit of the sixth well was 320 acres.[56]

Chesapeake Ltd. contended that notwithstanding the smaller areas shown in its Form P-15s, the total retained area equaled the 320-acre proration unit for each well, totaling 1,920 acres.[57] XOG Operating, LLC ("XOG") instead maintained that the retained acreage equaled that set forth on Chesapeake Ltd.'s Form P-15s, totaling 802 acres.[58] XOG based this argument largely upon the assertion that the "'common' practice in the oil and gas industry is to tie the retained acreage clause to the regulatory framework" of the TRRC and the fact that the applicable TRRC regulations did not specify the configuration of the relevant proration units.[59] The court held in favor of Chesapeake Ltd., stating that the definition of "proration unit" was clear and unambiguous and did not refer to regulatory filings, such as the Form P-15s, submitted to the TRRC.[60] The references in the definition of "proration unit" to applicable field rules, which established 320-acre proration units, and the catch-all allowance of 320-acre units in the absence of field rules were controlling.[61] XOG appealed and the Texas Supreme Court heard oral arguments in January 2018.[62]

On April 13, 2018, the Texas Supreme Court announced its decision in both *Endeavor* and *XOG Operating*, in each case affirming the decision of the Texas Courts of Appeal.[63] The Texas Supreme Court's opinion in *Endeavor* provides a thorough background of the origin of retained acreage

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[54] *Id.* (emphasis omitted).

[55] *Id.* at 25–26.

[56] *Id.* at 26.

[57] *Id.*

[58] *Id.* at 25–26.

[59] *Id.* at 28.

[60] *Id.*

[61] *Id.* at 29.

[62] Hayes & French, *supra* note 52.

[63] Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 554 S.W.3d 586 (Tex. 2018); XOG Operating, LLC v. Chesapeake Expl. Ltd. P'ship, 554 S.W.3d 607 (Tex. 2018).

clauses; how these clauses relate to and modify other provisions of the lease, including the continuous operations provisions and the habendum clause; and the effect of the rules and policies of relevant regulatory bodies upon the operation of retained acreage clauses. In a well-reasoned decision, the Texas Supreme Court, like the Texas Court of Appeals for the Eastland District, concluded that the use of the word "assigned" was the critical factor.[64] Although the TRRC rules quantify the number of acres that may be assigned to a well, the actual assignment of acreage to a particular well is within the purview of the working interest owner, and accordingly, the Texas Court of Appeals for the Eastland District correctly found that the relevant leases terminated as to lands not included on Endeavor's certified proration plats.[65] The Texas Supreme Court's decision concisely emphasized the importance of careful drafting of references to regulatory rules and policies:

> Defining the retained acreage [clause] by reference to a [TRRC] designation like a proration unit can provide certainty or clarity regarding the extent of the acreage that remains under lease. But the inclusion of such regulatory principles in a retained-acreage clause may also cause confusion or disappointment, as the contracting parties may not fully understand the ramifications of including a regulatory term in the typical mineral lease. . . . This is such a case.[66]

In the companion decision in *XOG Operating*, the Texas Supreme Court distinguished the relevant retained acreage clause, which, unlike in *Endeavor*, did not refer to the "assignment" of acreage. Parsing the language of the retained acreage clause, the Texas Supreme Court focused on the use in the definition of "proration unit" of the phrase "prescribed by field rules."[67] Although XOG correctly asserted that the applicable field rules generally are in place for the purpose of allocating production allowables, not determining the portion of a lease (or, in this instance, assignment) that would remain in force and effect, XOG and Chesapeake Ltd. had unambiguously incorporated those field rules into the retained acreage clause.[68] Upholding the decision of the Texas Court of Appeals for the Amarillo District, the Texas Supreme Court delivered a final cautionary remark, stating that "[t]his case and *Endeavor* apply the same principles and ascribe the words the parties chose their plain meaning. That is not confusing."[69]

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[64] *Endeavor*, 554 S.W.3d at 603–04.

[65] *Id.* at 607.

[66] *Id.* at 598.

[67] *XOG Operating*, 554 S.W.3d at 610.

[68] *Id.* at 612.

[69] *Id.* at 613.

Turning to jurisdictions outside of the State of Texas, the U.S. District Court for the District of North Dakota and the Eighth Circuit have recently addressed an unusually phrased clause stating that the lease would terminate at the expiration of the primary term except as to "those lands located within the same *section of* a production unit or spacing unit."[70] In *Northern Oil & Gas, Inc. v. Moen*, the lessee had drilled and completed a well within a 160-acre spacing unit located in Section 3, Township 155 North, Range 99 West ("Section 3").[71] The lessors contended that, with respect to Section 3, the lease terminated at the expiration of the primary term except as to the 160 acres included within the relevant spacing unit; lessee Northern Oil & Gas, Inc. ("Northern") asserted that the lease remained in force and effect as to the entirety of Section 3.[72]

As a threshold matter, the magistrate judge for the district court issued a report and recommendation noting that the lease did not define the term "section," but that based upon the legal description of the leased lands, which referred to the Section, Township, and Range in the Public Land Survey System, logically, the word "section" meant "governmental section."[73] Given this meaning, the termination language referred to the section as a whole and was not limited to the portion of the section included within the 160-acre spacing unit.[74] For that reason, the district court determined that the lease did not terminate as to the remaining acreage in Section 3.[75] The district court subsequently adopted the report and recommendation, which the lessors ultimately appealed to the Eighth Circuit.[76]

The Eighth Circuit, like the district court, agreed that the lease did not terminate as to any portion of Section 3, although on slightly different grounds.[77] The Eighth Circuit discussed the meaning of the word "section" at length, concluding that the most reasonable reading is that it referred to the governmental section.[78] The Eighth Circuit differentiated, however, the use of the phrase "section *of*," as referred to in the lease, from the lessee's suggested interpretation that the lease would survive as to all lands within

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[70] N. Oil & Gas, Inc. v. Moen, No. 4:13-cv-00122, 2014 WL 11381406, at *1 (D.N.D. 2014) (unreported).

[71] *Id.* at *1–2.

[72] *Id.* at *3.

[73] *Id.*

[74] *Id.* at *4.

[75] *Id.*

[76] N. Oil & Gas, Inc. v. Moen, No. 4:13-cv-00122, 2014 WL 11381444 (D.N.D. 2014) (unreported).

[77] N. Oil & Gas, Inc. v. Moen, 808 F.3d 373, 377 (8th Cir. 2015).

[78] *Id.* at 378.

the same "section *as*" the lands within the proration unit.[79] Although the use of "section *of*" did not make complete sense, the court reasoned that the lessor's interpretation did more violence to the plain language of the clause by essentially giving no effect to the phrase "the same section of."[80] If, as the lessors maintained, the parties had intended for the lease to terminate as to all lands not included within the relevant section, they could have written the clause to refer to termination "except as to those lands located within a production unit or spacing unit."[81] Although, as noted above, the language in this lease was unusual, it is important to remember that even the slightest difference in wording—such as between "of" and "as"—can make a tremendous difference in the interpretation of a retained acreage or Pugh clause.

[ii] Additional Surface-Related Considerations

One topic that has not been addressed in great detail in either case law or secondary authorities in the context of retained acreage or Pugh clauses is the importance of considering the operator's surface-related and other operational requirements, particularly given the unique operational considerations necessary with respect to horizontal development. For example, it is critical to contemplate whether, even if the retained acreage or Pugh clause would allow for the lease to remain in force as to a 1,280-acre unit, the lessee may wish to locate its surface hole on leased lands outside of such unit.[82] In such event, the applicable retained acreage or Pugh clause needs to specify that the lease will remain in effect as to the 1,280-acre unit, *plus*, at a minimum, that the lessee will have the subsequent right to use the surface location and to maintain the wellbore as to the portion falling outside of the unit. Separately, it is also wise to think about facilities that the operator may require on or near the surface, such as pipelines, roads, electric lines, compressor stations, and tank batteries.[83] One would be well-advised to consider adding a caveat to the retained acreage or Pugh clause to maintain the lessee's right to use such facilities, considering the significantly high cost of relocating or reclaiming them.[84]

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[79] *Id.* at 378–79.

[80] *Id.*

[81] *Id.*

[82] *See, e.g.*, Lightning Oil Co. v. Anadarko E&P Onshore LLC, 520 S.W.3d 39 (Tex. 2017).

[83] Although the authors have not reviewed any case law directly on point, one case out of the Supreme Court of New Mexico at least suggests that the lessee would not retain the right to use such surface facilities. *See* Kysar v. Amoco Prod. Co., 93 P.3d 1272, 1284 (N.M. 2004).

[84] An example of such a caveat to the retained acreage clause is found in *HJSA No. 3, Ltd. P'ship v. Sundown Energy LP*, 587 S.W.3d 864, 868 (Tex. App.—El Paso 2019, pet. filed) (emphasis omitted):

[C] Severance on a Horizontal Basis

In the context of retained acreage and Pugh clauses specifically, it is important to clearly delineate whether severance of the lease should be on a vertical or horizontal basis, and, given conflicting case law in certain jurisdictions, to the extent a horizontal severance is not contemplated, it may be worth including an express statement to such effect.[85]

In *Rogers v. Westhoma Oil Co.*, the U.S. Court of Appeals for the Tenth Circuit, applying Kansas law, considered the effect of twenty-seven leases containing substantially similar terms. Each provided that "in the event of consolidation the lease shall be continued 'as to the premises covered hereby and included in any such consolidation of estates' by a producing gas well located on a consolidated unit or by oil production from a well on leased land," but that the leases would terminate at the expiration of their respective primary terms as to any "tract or tracts not included in a consolidation held in force by production."[86] The lease had been consolidated as to certain lands and depths above sea level and the owner of the working interest in such depths had drilled a producing well.[87] The owner of the working interest in those depths below sea level had neither caused such depths to be consolidated, nor had any well been completed to such depths.[88] Because the lease did not expressly contemplate horizontal severance, the owner of the working interest in the depths below sea level argued that production from depths above sea level was sufficient to maintain the lease as to all depths.[89] The lessors, conversely, argued that the Pugh clause impliedly required horizontal severance.[90]

Based upon the fact that the Pugh clauses did not expressly require horizontal severance, and because they were written in "surface sounding terms," the trial court held that the leases did not terminate as to those depths below sea level.[91] The Tenth Circuit reversed, holding that the Pugh

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> Lessee shall reassign to Lessor or Lessor's designee, all of Lessee's operating rights in all tracts of the lease not then held by production, retaining only the right to remove equipment and the nonexclusive right to continue to use the surface of the reassigned tract in connection with Lessee's operations on the remainder of the Lease.

[85] *See* Hebert, *supra* note 39, at 204–07. The term "vertical Pugh clause" refers to severance based upon producing and non-producing areal units, whereas the term "horizontal Pugh clause" refers to severance based upon producing and non-producing depths within a given unit.

[86] Rogers v. Westhoma Oil Co., 291 F.2d 726, 730 (10th Cir. 1961).

[87] *Id.* at 729.

[88] *Id.* at 731.

[89] *Id.*

[90] *Id.* at 728.

[91] *Id.* at 729.

clauses, though not express, required a horizontal severance.[92] First, the Tenth Circuit noted that consolidations are effected with respect to specific formations or pools, and the Pugh clauses at issue referenced "tracts not included in a consolidation."[93] Based upon this phrasing, the Tenth Circuit reasoned that production from consolidated units was not sufficient under the leases' pooling clauses to maintain the lease as to unconsolidated depths, and the Pugh clause, in turn, required termination as to such unconsolidated depths.[94] The court then went on to discuss the commonplace nature of depth severances and found "nothing in the leases which confines the application of the Pugh clauses to surface areas and vertical divisions."[95]

Courts in both Oklahoma and Texas have expressly disagreed with the Tenth Circuit's holding in *Rogers*. Only two years after the Tenth Circuit's decision, in *Rist v. Westhoma Oil Co.*, the Supreme Court of Oklahoma considered the effect of lease language identical to that addressed in *Rogers*.[96] Following a lengthy discussion of *Rogers*, the Oklahoma Supreme Court rejected the Tenth Circuit's logic, stating that

> [t]here is nowhere contained any language that purports to recognize or show intention that these terms are to apply or even recognize other than the customary application of vertical severance. Certainly the parties could have made reference to partial consolidation of separate horizontal structures by appropriate terms. But they say nothing as to depths, levels or strata. . . . Thus it seems clear to us that the parties entered into a lease agreement for a primary term of ten years with the term to be extended on production from the area described or from unit production of the area with no thought in mind of a severance as to horizontal divisions.[97]

Although construing different lease language, two Texas courts of appeal have adopted the logic of the Oklahoma Supreme Court in *Rist*. First, in *Friedrich v. Amoco Prod. Co.*, the Texas Court of Appeals for the Corpus Christi District discussed the Tenth Circuit's and the Oklahoma Supreme Court's respective reasoning in *Rogers* and *Rist*, determining the logic in *Rist* to be more persuasive.[98] Second, in a more recent memorandum opinion, the Texas Court of Appeals for the San Antonio district adopted a

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[92] *Id.* at 731.

[93] *Id.* at 730.

[94] *Id.* at 731.

[95] *Id.*

[96] Rist v. Westhoma Oil Co., 385 P.2d 791, 794 (Okla. 1963).

[97] *Id.* at 795–96.

[98] Friedrich v. Amoco Prod. Co., 698 S.W.2d 748, 752–54 (Tex. App.—Corpus Christi-Edinburg 1985, writ ref'd n.r.e.).

similar reasoning as the *Friedrich* court in determining a Pugh clause only required vertical severance.[99]

Although the Tenth Circuit's holding has been criticized by some commentators,[100] and rejected by the Oklahoma Supreme Court and certain courts of appeal in Texas, to avoid the risk of an unexpected termination of the lease on a horizontal basis, in the event the parties intend to cause only a vertical severance of the lease, they are well advised to expressly state that no horizontal severance is contemplated.

Both in the context of retained acreage clauses, as well as more generally with respect to any other agreement purporting to terminate or alter a party's rights based upon horizontal severance, it is extremely important to use care in drafting the description of the relevant depth severance. For example, one should consider whether the applicable instrument affects rights in an area of a known geological makeup or, conversely, in an area in which there is no such geological data upon which to base a description of the relevant formations.[101] Also relevant is the likelihood that the lessee or operator of such lands may wish to complete a well to multiple formations, requiring allocation between the producing formations.[102]

[D] State Statutory Pugh Clauses

Certain states, including Arkansas, Oklahoma, Mississippi, and North Dakota, have adopted a statutory Pugh clause or compulsory pooling statutes having a similar effect.[103] Specifically, Ark. Code Ann. § 15-73-201 provides that "[t]he term of an oil and gas, or oil or gas, lease extended by activities on lands in one (1) section or pooling unit, whether established by rule or by order of the Oil and Gas Commission or the lease, shall not be extended to sections or pooling units under the lease where there has been no activity."[104] The lessee may extend the lease as to undeveloped lands if the lease contains a continuous drilling provision, but

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[99] El Paso Prod. Oil & Gas v. Tex. S. Bank, 2007 WL 752209 (Tex. App.—San Antonio Mar. 14, 2007, pet. denied) (mem. op.) (unpublished).

[100] *See* Ernest R. Fleck, *Selected Leasing Problems—Protection Leases, Life Estate and Remainder Interest, Interest in a Particular Stratum*, 15 ROCKY MT. MIN. L. INST. 9-1 (1969) (text accompanying nn.62–65).

[101] *See* Hebert, *supra* note 39, at 207–09.

[102] For a particularly thorough discussion of issues created by the specific wording of horizontal severances, see Tim George, *A Survey of Depth Severance Issues and Related Drafting Considerations*, 63 ROCKY MT. MIN. L. INST. 30-1 (2017).

[103] LOWE, *supra* note 2, at 431.

[104] ARK. CODE ANN. § 15-73-201(a)(1) (2019).

the language allowing such extension must be in bold, enlarged, or other conspicuous text.[105]

The statutory Pugh clause adopted in Oklahoma provides that "[i]n case of a spacing unit of one hundred sixty (160) acres or more, no oil and/or gas leasehold interest outside the spacing unit involved may be held by production from the spacing unit more than ninety (90) days beyond expiration of the primary term of the lease."[106] The statute is applicable to leases entered on or after May 25, 1977,[107] but is not applicable to secondary recovery units created under Okla. Stat. tit. 52, § 287.1 *et seq*.[108]

Under the terms of its Compulsory Fieldwide Unitization Act, originally enacted in 1964, Mississippi statutes provide:

> The portion of unit production allocated to a separately owned tract within the unit area shall be deemed, for all purposes, to have been actually produced from such tract, and operations with respect to any tract within the unit area shall be deemed for all purposes to be the conduct of operations for the production of oil or gas, or both, from each separately owned tract in the unit area. *However, when an oil, gas and mineral lease contains land partially within and partially without said unit area, the unit agreement and production from the unit shall have no force and effect on lands lying outside of such unit area and failure of the lessee or lessees thereof to drill and develop such lands lying outside said unit area within one (1) year or during the term of the lease, whichever is a longer period of time, from the date of determination of the unit area by the state oil and gas board shall render such lease or leases on lands lying outside said unit area void and of no force and effect, unless otherwise held by production other than from unit production*.[109]

Only one court has had occasion to discuss this statute and there is very little secondary authority providing further guidance as to its operation.[110]

Also in the context of a state exploratory unit, the North Dakota legislature has adopted a similar statute requiring that when only a portion of a lease is unitized, "unit operations and unit production allocated to the lease . . . may not be deemed operations on or production from the lease as

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[105] *Id.* A prior version of the statute stated that the state's statutory Pugh clause was applicable to all oil and gas, or oil or gas, leases entered on or after July 4, 1983. ARK. CODE ANN. § 15-73-201(c) (2010); Snowden v. JRE Invs., Inc., 370 S.W.3d 215, 219 (Ark. 2010). This provision was removed in the 2011 update of the statute.

[106] OKLA. STAT. tit. 52, § 87.1(b) (2019); *see also* Hall v. Galmor, 427 P.3d 1052, 1070–73 (Okla. 2018) (providing a detailed discussion of the purpose and application of such statute).

[107] Siniard v. Davis, 678 P.2d 1197, 1201 (Okla. Civ. App. 1984) (citing Wickham v. Gulf Oil Corp., 623 P.2d 613 (Okla. 1981)).

[108] Stephens Prod. Co. v. Tripco, Inc., 389 P.3d 365, 366 (Okla. Civ. App. 2016).

[109] MISS. CODE ANN. § 53-3-111 (2019) (emphasis added).

[110] *See* Palmer Expl., Inc. v. Dennis, 730 F. Supp. 734 (S.D. Miss. 1989).

to the lands covered by the lease lying outside the unit area" after two years following the later of (1) the North Dakota Industrial Commission's order approving the unit, or (2) the expiration of the primary term of the lease.[111] After such time, the remainder of the lease must be maintained in force and effect according to the express terms of the lease.[112]

[3] Entireties Clauses

Although the primary focus of this article has been upon the drafting and interpretation issues arising out of retained acreage and Pugh clauses, the authors also wish to briefly address the effect of the inclusion of an "entireties" clause in the lease.[113] In a majority of producing states, in the event of production from a unit covering less than all tracts subject to the lease, only those lessors owning an interest in the lands within such unit are entitled to a share of production or royalties thereon.[114] This principle is often referred to as the "doctrine of non-apportionment" or the "non-apportionment theory."[115]

An entireties clause has the effect of negating the non-apportionment theory by providing that in the event the landowner's interest in the lease is owned in different proportions in the various tracts covered by the lease, the lessee will continue to develop the lease and pay royalties to all owners in the lease based upon each lessor's proportionate interest in the entire leased acreage.[116] Accordingly, if a lessor owned all of the oil, gas, and associated hydrocarbons in a particular governmental section, subject to an oil and gas lease containing an entireties clause, but later conveyed its interest in the east half to a third party, and the lessee drilled and completed a producing well on the east half, the original lessor would be entitled to one-half of the landowner's royalty, while the third party owning all of the

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[111] N.D. CENT. CODE § 38-08-09.8 (2019).

[112] *Id.*

[113] A sample entireties clause is as follows, as quoted in Robert E. Hardwicke & Robert E. Hardwicke, Jr., *Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease*, 32 TEX. L. REV. 660, 668 (1954):

> If the leased premises are now or shall hereafter be owned in severalty or in separate tracts, the premises, nevertheless, shall be developed and operated as one lease, and all royalties accruing hereunder shall be treated as an entirety and shall be divided among and paid to such separate owners in the proportion that the acreage owned by each such separate owner bears to the entire leased acreage.

[114] LOWE, *supra* note 2, at 691.

[115] *Id.*; WILLIAMS & MEYERS, *supra* note 3, § 204.8 ("The non-apportionment rule is the normal rule in Arkansas, Colorado, Illinois, Indiana, Kansas, Kentucky, Louisiana, Nebraska, New Mexico, Ohio, Oklahoma, Texas, and West Virginia, and the apportionment rule is normally followed in California, Mississippi, Pennsylvania, and Ontario."); Hardwicke & Hardwicke, *supra* note 113, at 671.

[116] Hardwicke & Hardwicke, *supra* note 113, at 661.

oil, gas, and associated hydrocarbons in the east half of the section would be entitled to the remaining one-half of the landowner's royalty. Absent the entireties clause, in a state that follows the non-apportionment theory, the third party owning the oil, gas, and associated hydrocarbons in the east half would be entitled to 100% of the landowner's royalty.

Although lessors may push for the inclusion of an entireties clause in the oil and gas lease, it is important to consider whether such a provision is appropriate in a particular factual scenario. One should assess the size of the lease and the likelihood that one portion of the lease may be developed, and another left undeveloped for a longer period of time; the number of parties owning an interest in the lands expected to be covered by such lease(s); and the potential administrative burden to be placed upon the lessee.[117] For example, if a lease containing an entireties clause covers multiple sections, and an operator (who may have acquired the lease decades after its execution) owns only a small portion of such acreage and drills a producing well thereon, the operator will need to obtain title opinions covering the ownership of oil, gas, and associated hydrocarbons as to all sections covered by the lease—a fact that could pose considerable time delays and expense to the operator.

If the parties ultimately agree to include an entireties clause in the lease, the party drafting the lease should also specify whether the leased lands are already owned severally at the time of lease execution.[118] Further, the parties may also wish to add specific provisions in the event that various depths of the lease are owned in different proportions, as it is unclear what the effect of an entireties clause may be where the lease ownership is uniform on a vertical basis, but varies as to different depths.[119]

[4] Surrendering and Assigning the Lease

[A] Surrendering the Lease

Most modern oil and gas leases contain a surrender or release clause that entitles the lessee to surrender or release all or a portion of the lands covered by the lease before or after the primary term of the lease back to the lessor. For purposes of this article, we have referred to a surrender or release clause as simply a surrender clause, as the modern trend is to not

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[117] *See generally* STEPHEN A. HESS, 1B COLO. PRAC., METHODS OF PRACTICE § 14.1 (6th ed. 2016).

[118] *See, e.g.*, Hardwicke & Hardwicke, *supra* note 113, at 660, 668 (quoting various entireties clauses, including one stating "[i]f the leased premises *shall hereafter* be owned severally" and another providing "[i]f the leased premises *are now or shall hereafter* be owned in severalty or in separate tracts" (emphases added)).

[119] James W. Adams, *Lease Issues for Opinion Purposes*, MINERAL TITLE EXAMINATION 16-1, 16-14 to 16-15 (Rocky Mt. Min. L. Fdn. 2012).

recognize a distinction.[120] The surrender clause was historically implemented to protect the lessee against damages for failure to comply with an "or" type of drilling and delay rental clause.

Although the modern trend is that most oil and gas leases are paid-up leases,[121] some leases contain an "or" type of drilling and delay rental clause.[122] Generally, the "or" type of drilling and delay rental clause requires that the lessee either drill a well, pay rentals to the lessor, or, while not as common, perform some other prescribed operation prior to some defined period—often on an annual anniversary of the lease—that is still within the primary term of the lease.[123] Since the obligation is structured with the conjunction "or," the lessee *must* satisfy at least one of the covenants or subject itself to money damages, equitable penalties, or potential lease forfeiture.[124] Here is a sample of a simple "or" type of drilling and delay rental clause:

> Lessees agree to commence a well on said premises on the first anniversary from the date hereof, or thereafter pay to lessor a yearly rental of ____ dollars per acre until said well is drilled.[125]

Again, although the modern trend is that most oil and gas leases are paid-up leases, some leases contain, as an alternative to the "or" type of drilling and delay rental clause, an "unless" type of drilling and delay rental clause. Under the "unless" type of drilling and delay rental clause, the lessee must drill a well prior to some defined period—often on an annual anniversary of the lease—that is still within the primary term of the lease, but, in lieu of that obligation, the lessee may make a rental payment,

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[120] WILLIAMS & MEYERS, *supra* note 3, § 680 n.4 ("As we have noted elsewhere, although the terms 'surrender' and 'release' have distinct meanings at common law, the terms have been used synonymously in the case of oil and gas leases to describe the transfer of the lessee's estate to the lessor.").

[121] One significant caveat to this statement is that many state oil and gas lease forms contain drilling and delay rental clauses. *See, e.g.*, (1) section 2 of the Colorado State Land Board form Oil and Gas Lease, *available at* https://www.colorado.gov/pacific/statelandboard/oil-gas (accessed on Oct. 3, 2019); (2) section 3 of the Texas General Land Office form Oil and Gas Lease for Relinquishment Act lands, *available at* http://www.glo.texas.gov/energy-business/oil-gas/mineral-leasing/leasing/ (accessed on Oct. 3, 2019); and (3) section 1(c) in the terms and conditions of the Wyoming Office of State Lands form Oil and Gas Lease, *available at* http://lands.wyo.gov/resources/applications-forms (accessed on Oct. 3, 2019). Further, with respect to federal oil and gas leases, the Mineral Leasing Act and the regulations of the BLM require that annual delay rentals be paid. 30 U.S.C. § 226(d); 43 C.F.R. §§ 3103.2-1, -2 (2019). For additional insight concerning delay rentals owed on federal oil and gas leases, see 1 *Law of Fed. Oil & Gas Leases* §§ 12.03–.06 (2019).

[122] WILLIAMS & MEYERS, *supra* note 3, § 605.

[123] *Id.*

[124] *Id.*

[125] Adapted from *id.*

thereby delaying the drilling obligation.[126] Since the obligation is often structured with the conditional word "unless," if the lessee does not either drill the well or pay the delay rental, the lease terminates for the failure to satisfy a condition precedent. Here is a sample of a simple "unless" type of drilling and delay rental clause:

> If no well be commenced on said land on or before the first anniversary hereof, this lease shall terminate as to both parties unless the lessee shall on or before that date pay or tender to the lessor, an amount equal to ___ per acre, which shall operate as a rental and cover the privilege of deferring the commencement of a well for twelve months from said date. In like manner and upon subsequent like payments or tenders the commencement of the well may be further deferred for like periods of the same number of months successively.[127]

A core difference between the "or" and "unless" type drilling and delay rental clause is the lessor's remedy for the lessee's failure to comply. Generally, damages for breaching the "or" type of drilling and delay rental clause are based on a breach of contract claim and would be in the form of equitable penalties or money damages as the lessee must satisfy the covenants described by the conjunction "or," and damages for breaching the "unless" type of drilling and delay rental clause are forfeiture of a lease for failure to satisfy a condition precedent.[128] As is the case with all lease clauses, however, the terms of a particular lease may require a different result.

With that foundational background, lessees began to draft a surrender or release clause in their oil and gas leases to protect against the remedies that lessors would be entitled to under the "or" type of drilling and delay rental clause. Here is a sample of a simple surrender clause:

> Lessee may, at any time and from time to time, deliver to Lessor or file of record a written release of this lease as to a full or undivided interest in all or any portion of the area covered by this lease or any depths or zones thereunder, and shall thereupon be relieved of all obligations thereafter arising with respect to the interest so released. If Lessee releases less than all of the interest or area

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[126] WILLIAMS & MEYERS, *supra* note 3, § 605.

[127] Adapted from *id.*

[128] KUNTZ, *supra* note 2, § 29.1:

> From the standpoint of theory, it would be more descriptive to call the "unless" type of drilling clause a "special limitation" type, for the reason that it describes the events which will result in an automatic termination of the lease. Likewise, it would be more descriptive to call the "or" type of drilling clause a "covenant" type, for the reason that it contains a covenant on the part of the lessee to do one thing or another.

> covered hereby, Lessee's obligation to pay or tender shut-in royalties shall be proportionately reduced in accordance with the net acreage interest retained hereunder.[129]

One key aspect of this sample clause is that the lessee is entitled to surrender the lease as to only a portion of the leased lands (including portions of the leased zones or depths). If, alternatively, the surrender clause permitted the lessee to surrender the lease only as to all of the leased lands, the lessee would be left with the difficult decision of complying with the drilling, delay rental, and other provisions of the lease, or forfeiting the entire lease.

With a surrender clause in a lease with an "or" type drilling and delay rental clause, the lessee would not be forced to drill new wells or pay a delay rental. Instead, the lessee could simply surrender the lease as to portions of the lands so as to both protect its existing investment and prevent any going-forward investment it wished not to make.

To close the foundational loop, the surrender clause has less impact in an "unless" type of drilling and delay rental clause when compared to the historical need for that clause under an "or" type of drilling and delay rental clause. In this case, the lessee could simply not drill a well or not pay a rental, and the lease would terminate by its own terms.

Although most modern oil and gas leases—and the vast majority of those in the Rockies based on the authors' experience—are paid-up oil and gas leases that do not contain a delay rental clause, the surrender clause still has significant practical application. For example, under most state laws, each oil and gas lease carries with it certain implied duties imposed on the lessee. For example, the lessee has the implied duty (1) of reasonable development, which requires that "upon securing production of oil or gas from the leasehold, the lessee is bound thereafter to drill such additional wells to develop the premises as a reasonably prudent operator, bearing in mind the interests of both lessor and lessee, would drill under similar circumstances";[130] (2) of further exploration, which requires that the lessee drill exploratory wells to untested formations;[131] and (3) to protect against drainage, which requires that the lessee drill additional wells to protect the leased premises from drainage from neighboring lands.[132] If a lessor were to seek damages (or, in rarer circumstances, lease termination) against the lessee based on the lessee's alleged failure to comply with any of these implied covenants, rather than going to court and

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[129] Milam Randolph Pharo & Gregory R. Danielson, *The Perfect Oil and Gas Lease: Why Bother!* 50 ROCKY MT. MIN. L. INST. 19-1, § 19.05 (2004).

[130] *See* WILLIAMS & MEYERS, *supra* note 3, § 832.

[131] *See id.* § 841.

[132] *See id.* § 821.

litigating the issue, the lessee could simply surrender the lease as to those lands or formations for which the lessor alleges that the lessee has failed to satisfy its implied duties.

Further, beyond any implied duties, assume that a particular lease expressly requires that the lessee drill four wells on four different tracts. Also assume that the lessee has drilled two of those wells, one of which is economic and the other of which is not, and that the lessee wishes to drill a third well on one of the undrilled tracts near the economic well, but does not wish to drill a fourth well on the final undrilled tract near the uneconomic well. Without the surrender clause, the lessee may be subject to certain development obligations on certain lands that, after the date of the lease, it does not wish to comply with. With the surrender clause, however, the lessee can surrender the lease as to the affected lands without being forced to drill potentially uneconomic wells.

[B] Assigning the Lease

Absent a contractual restriction to the contrary, oil and gas leases, like most contracts and real property rights, are generally freely assignable and delegable.[133] As such, unless there is an express provision to the contrary, the lessee can assume that it can assign its interest in an oil and gas lease to an assignee.

Although not required, most oil and gas leases contain an express provision permitting the lessee to assign the lease to third parties.[134] Those express provisions also frequently contain what Professor David Pierce, of

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[133] 9 CORBIN ON CONTRACTS § 49.1; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981):

> (2) A contractual right can be assigned unless:
>
> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
>
> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
>
> (c) assignment is validly precluded by contract.

Although under the common law there is a distinction between the assignment of rights under a contract and a delegation of duties under the contract, that distinction is "eroding in many ways." Alex Ritchie, *How Contract Boilerplate Can Bite*, OIL & GAS AGREEMENTS: CONTRACTING FOR GOODS, SERVICES, AND PEOPLE 6-1, 6-4 (Rocky Mt. Min. L. Fdn. 2013). Accordingly, for purposes of this article, we have referred to all assignments and delegations as assignments.

[134] A sample clause: "The interest of either Lessor or Lessee hereunder may be assigned, devised, or otherwise transferred in whole or in part, by area and/or by depth or zone, and the rights and obligations of the parties hereunder shall extend to their respective heirs, devisees, executors, administrators, successors, and assigns."

Washburn University, has termed an "advance novation" clause.[135] One of the authors of this article has previously written on the advance novation clause:

> The advance novation is a term in an oil and gas lease whereby the lessor, in advance of any assignments, approves a novation of a lease. The typical advance novation lease clause may state: "in the event of an assignment hereof in whole or in part, liability for breach of any obligation issued hereunder shall rest exclusively upon the owner of this Lease, or portion therefore, who commits such a breach."[136] Under this provision, if Seller is the original lessee and assigns its interests in the lease to buyer, who computes royalties incorrectly, the lessor may only bring suit against buyer. The lessor has, in advance of assignment, approved a novation releasing seller, the predecessor-in-interest under the lease, from liability due to breaches of the terms of the lease. As Professor Pierce points out, "this adopts a privity of estate basis for liability with each party liable only for acts occurring during their ownership of the leasehold and to the extent of their leasehold ownership."[137]

Additionally, some oil and gas leases contain a clause that purports to limit the lessee's ability to assign the lease without the lessor's prior written consent. The impact of a consent provision depends on its exact language. "Soft consent" provisions, for example, typically do not provide a penalty for assigning without consent and typically limit the non-assigning/consenting party's discretion by requiring it to exercise its consent authority reasonably.[138] "Hard consent" provisions, by contrast, typically provide a penalty for assigning without consent, such as lease forfeiture or termination or rendering the assignment made in violation of the provision void.[139]

Reasonableness of consent (as is required in most "soft consent" provisions) is defined differently from jurisdiction to jurisdiction. Texas,

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[135] David E. Pierce, *Developments in Nonregulatory Oil and Gas Law: Beyond Theories and Rules to the Motivating Jurisprudence*, 58 INST. ON OIL & GAS L. 1-1 (2007).

[136] *Id.* at 1-25 (quoting AAPL Form 675 Oil and Gas Lease, Texas Form - Shut-In Clause, Pooling Clause ¶ 8). Another advance novation clause might say: "If all or any part of this lease is assigned, no leasehold owner shall be liable for any act or omission of any other leasehold holder."

[137] Gregory R. Danielson & Sam G. Niebrugge, *Evaluating the Purchase and Sale Agreement in Light of Potential Royalty and Tax Claims*, PRIVATE OIL AND GAS ROYALTIES: THE LATEST TRENDS, DEVELOPMENTS, AND CHALLENGES IN OIL AND GAS ROYALTY LITIGATION 12-1, 12-5 to 12-6 (Rocky Mt. Min. L. Fdn. 2009); Pierce, *supra* note 135, at 1-25.

[138] Mitchell E. Ayer & David W. Cias, *Consents to Assignment in Oil and Gas Leases*, 34TH ANNUAL ADVANCED OIL, GAS & ENERGY RES. L. ch. 19, at 3 (State Bar of Tex. 2016).

[139] *Id.*

for example, has created no standard for reasonableness.[140] In other jurisdictions, the party with the right to consent may consider factors such as the prospective transferee's ability to perform its obligations under the relevant contract,[141] but in some jurisdictions may not consider "[a]rbitrary considerations of personal taste, convenience, or sensibility."[142]

Specifying a penalty for assigning without consent (as do many "hard consent" provisions) carries some significance, at least in Texas, as absent such specification Texas courts will generally limit the consent holder's remedy to damages, if any.[143] Texas courts, like most courts, generally disfavor forfeiture, so in the absence of clear language requiring that result, courts in jurisdictions such as Texas will likely not require forfeiture for violation of a consent provision.[144]

Further, some oil and gas leases contain a clause that requires that the lessee provide written notice to the lessor of any assignment by the lessee. A sample clause may read: "Within 30 days after any assignment of any rights of the lessee under this lease, the lessee shall provide written notice to lessor regarding such assignment." In practice, most lessees will track these types of clauses in their land administration files, but these types of clauses generally do not impede the lessee's ability to assign the lease.

Finally, although rare in most modern oil and gas leases, a lease may also contain a clause that requires the lessor's prior written consent upon the lessee's change of control.[145] If the owners of a company wish to sell

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[140] Benjamin Robertson, Katy Pier Moore & Corey F. Wehmeyer, *Consent to Assignment Provisions in Texas Oil and Gas Leases: Drafting Solutions to Negotiation Impasse*, 48 TEX. TECH L. REV. 335, 345 (2016).

[141] *Id.* at 346.

[142] List v. Dahnke, 638 P.2d 824, 825 (Colo. App. 1981) (citing Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc., 297 N.Y.S.2d 156 (N.Y. Sup. Ct. 1969)).

[143] Ayer & Cias, *supra* note 138, sec. I ("Without express penalty for breach, [c]onsent [p]rovisions which merely prohibit an unconsented transfer generally cannot be enforced to prohibit or unwind an assignment, and a lessor's only remedy for breach will likely be her actual damages, if any.").

[144] Calce v. Dorado Expl., Inc., 309 S.W.3d 719, 742 (Tex. App.—Dallas 2010, no pet.) ("[S]ince forfeitures are not favored . . . . [i]f the terms of a contract are fairly susceptible of an interpretation which will prevent a forfeiture, they will be so construed."). *But see* Hoop v. Kimble, No. 14 HA 9, 2015 WL 3489020 (Ohio Ct. App. May 28, 2015) (holding void an assignment made in violation of consent provision that did not specify remedy for violation).

[145] The following is an example of a change of control clause:

> Lessee shall obtain Lessor's prior written consent, which consent may not be unreasonably withheld, prior to a Change of Control of the Lessee. "*Change in Control*" means the Equity Holders shall cease to own, free and clear of all liens or other encumbrances, at least 50% of the outstanding voting Equity Interests of the Company on a fully diluted basis.

Please note that this is an over-simplified change-of-control clause, and any practitioner should consult with a securities law expert in drafting a change-of-control clause.

all of the company's assets, the owners may effectuate that sale not by assigning or conveying all of the company's *assets* to a third party, but rather by selling all (or some controlling share) of the *equity* in the company. Upon this equity transfer, and as a general statement of corporate law that is subject to exceptions, the "old" entity is the same as the "new" entity and third parties dealing with the target company may see no difference.

The counterparty to a contract (such as a lessor to an oil and gas lease) may strongly value the relationship with the particular equity owners of the company (such as a lessee to an oil and gas lease) and require that should the controlling portion of the equity in the company (i.e., lessee) be sold, the counterparty (i.e., lessor) has some control over who the other party to the contract should be.

As discussed above, courts tend to strictly construe anti-assignment provisions. Accordingly, it is generally the case that a contract or lease that contains an anti-assignment provision is not triggered by a change of control.[146] If the lease in question contains a change of control clause, the lessee (and its equity successors) should carefully review the change of control provision so as to structure the transaction around any potential limitations in that change of control.

[5] Area of Mutual Interest Issues

Although there are many typical oil and gas industry contracts that may affect the interest covered by an oil and gas lease,[147] we draw your attention to one called an area of mutual interest ("AMI"). While not discussed in detail in this article,[148] an AMI is either contained as a clause in a larger agreement or as a standalone contract and requires the party acquiring an oil and gas lease (frequently defined as the "Acquiring Party") within an identified area to offer or convey that interest to the other party (frequently defined as the "Non-Acquiring Party") in a defined percentage. For purposes of this article we have focused on the effect a typical AMI

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[146] Ritchie, *supra* note 133, at 7.

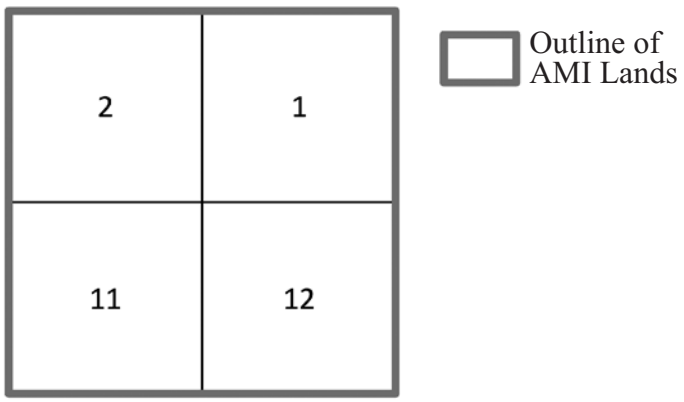
[147] For a discussion of the various types of industry agreements that affect record title, see Milam Randolph Pharo & Sam G. Niebrugge, *Industry Agreements Affecting Record Title*, NUTS & BOLTS OF MINERAL TITLE EXAMINATION 9-1 (Rocky Mt. Min. L. Fdn. 2015).

[148] For additional papers discussing area of mutual interest clauses, see Allen D. Cummings, *Area of Mutual Interest Agreements*, OIL AND GAS AGREEMENTS: THE EXPLORATION PHASE 10-1 (Rocky Mt. Min. L. Fdn. 2010); Allen D. Cummings, *Old Area of Mutual Interest Dedication Agreements—New Problems*, 52 ROCKY MT. MIN. L. INST. 27-1 (2006); Pharo & Niebrugge, *supra* note 147; Dante L. Zarlengo, *Area of Mutual Interest Clauses Regarding Oil and Gas Properties: Analysis, Drafting, and Procedure*, 28 ROCKY MT. MIN. L. INST. 14-1 (1982); *see also* Scott Lansdown, *Golden v. SM Energy Company and the Question of Whether an Area of Mutual Interest Covering Oil and Gas Rights Is Binding on Successors and Assigns*, 89 N.D. L. REV. 267 (2013).

may have on an oil and gas lease, but it is common to have AMIs apply to fee mineral interests or other types of oil and gas interests or estates. AMIs present a number of complicated legal issues including whether AMIs (1) violate the rule against perpetuities, (2) violate prohibitions on alienation, (3) are anti-competitive and subject to antitrust challenges,[149] or (4) are covenants running with the land that are binding on successors and assigns of the Acquiring Party and Non-Acquiring Party.[150]

There are a few ways in which AMIs can affect the modern oil and gas lease. First—and most fundamentally—a party subject to an AMI that wishes to acquire an oil and gas lease needs to be aware of the effect of the AMI and plan accordingly. Unless the Acquiring Party seeks some sort of advance waiver from the Non-Acquiring Party regarding a particular acquisition, the Acquiring Party may go through the time, effort, and expense of acquiring a lease only to have to partially assign that lease to the Non-Acquiring Party. Of course, the benefit to most AMIs is that they are reciprocal, so parties could be both an Acquiring Party and a Non-Acquiring Party even in the same lease tract.

Additionally, a party should closely examine the terms of the AMI to determine whether the entire acquired lease—or, alternatively, some portion of the lease—is subject to the terms of the AMI. As a simple example, assume that two parties have entered into an AMI covering Sections 1, 2, 11, and 12 in a fictitious Township and Range, illustrated as follows:



Next assume that the AMI contains one of the following sample clauses (differences between the two are in italics):

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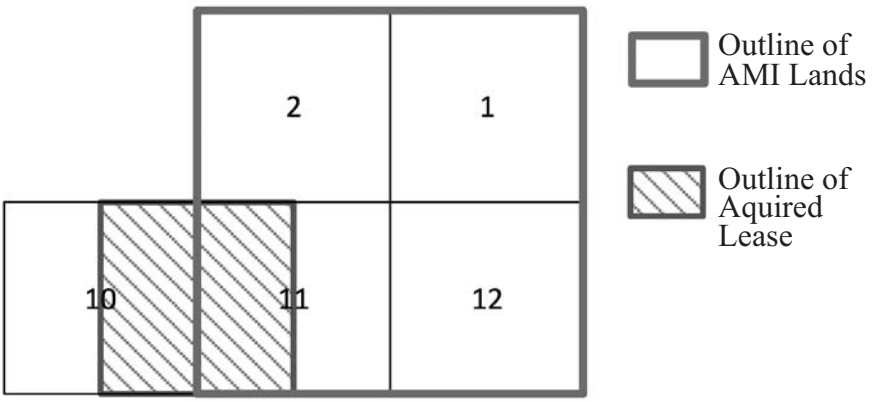
[149] Timothy R. Beyer, *Tangled Relationships: Antitrust Considerations, Recent Enforcement Actions, and Proposed Solutions When Using AMIs and Other Forms of Collaborations in Acquiring Leases*, 59 ROCKY MT. MIN. L. INST. 13-1 (2013).

[150] Pharo & Niebrugge, *supra* note 147, § 3.

Clause A: Should the Acquiring Party obtain an oil and gas lease within the boundary of the AMI lands, then the Acquiring Party shall deliver written notice to the Non-Acquiring Party, and the Non-Acquiring Party will have an option, for a period of 30 days after receipt of such notice, to acquire a 50% interest in the acquired oil and gas lease by delivering to the Acquiring Party 50% of the expenses (including any lease bonus paid or landman or brokerage costs) incurred to acquire such oil and gas lease.

Clause B: Should the Acquiring Party obtain an oil and gas lease within the boundary of the AMI lands, then the Acquiring Party shall deliver written notice to the Non-Acquiring Party, and the Non-Acquiring Party will have an option, for a period of 30 days after receipt of such notice, to acquire a 50% interest in *only that portion of* the acquired oil and gas lease *contained within the boundary of the AMI lands* by delivering to the Acquiring Party 50% of the expenses (including any lease bonus paid or landman or brokerage costs) incurred to acquire such oil and gas lease.

Finally, assume that an Acquiring Party acquires a lease that is both inside and outside the boundary of the AMI lands, illustrated as follows:



Assuming the Non-Acquiring Party exercises its rights under the AMI provision to acquire its proportionate share of the acquired lease, that portion of the acquired lease that the Acquiring Party must assign may be dramatically different under Clause A or Clause B. Under Clause A, since the acquired oil and gas lease is "within the boundary of the AMI lands," the Acquiring Party would have to offer the entire lease—including that portion covering the E/2 of Section 10—to the Non-Acquiring Party. The

Acquiring Party may object that that was not the spirit of the deal, but the language appears on its face unambiguous.

The outcome under Clause B is, however, dramatically different. Under that clause, the Acquiring Party would offer to the Non-Acquiring Party *just that portion* of the lease covering the W/2 of Section 11. Under these facts, (1) the Acquiring Party would be left with a 100% working interest in the lease as to the E/2 of Section 10 and a 50% working interest in the lease as to the W/2 of Section 11, and (2) the Non-Acquiring Party would be left with a 0% working interest in the lease as to the E/2 of Section 10 and a 50% working interest in the lease as to the W/2 of Section 11. Under Clause B, although we are not aware of any case law directly on point, it is our view that the lease in question, in the absence of an express clause in the lease to the contrary, would not be treated as a "different" lease for purposes of that portion of the lease inside the AMI boundaries versus outside the AMI boundaries. So, if there was production from a well located in the W/2 of Section 11, the lease would be held by production beyond its primary term as to all the lands covered by the lease, not just that portion of the lease located within the AMI boundary.

[6] Conclusion

The purpose of this article has been to provide a description of some of the more commonly encountered issues in dividing and assigning oil and gas leases, particularly in cases in which the lease contains a retained acreage, Pugh, or entireties clause, or other express lease provisions relating to assignment or surrender. In particular, the authors hope that this discussion has been helpful in terms of providing a summary of the relevant jurisprudence on these points, as well as practical advice on how to avoid ambiguities and future conflicts, with the key takeaway being the importance of precision in drafting and thorough consultation with the parties to the lease as to their expectations and operational needs.

Legal and Policy Considerations for Voluntary Conservation Programs for Range-Wide Species Involving Private Lands and Minerals

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Synopsis

[1] This article expresses the personal views of the authors. The views in this article do not represent those of Beatty & Wozniak, P.C. or their clients. For author biographies and experience, please visit https://www.bwenergylaw.com.

I. Introduction

Over the past 10 years, a growing number of range-wide species have been listed or proposed for listing under the Endangered Species Act (ESA).[2] Range-wide species present unique challenges for development, administration, and implementation of voluntary conservation programs under Section 10 of the ESA.[3] The regulations implementing Section 10 have not been updated to address the necessary unique components of programmatic or "umbrella" permits and conservation programs being developed for range-wide species. These challenges are compounded when the species range is found predominantly on privately owned lands and with underlying privately owned minerals.

The range of the lesser prairie chicken (LEPC) encompasses over 20 million acres, with nearly 95% of the LEPC's estimated occupied range on private lands in Texas, Kansas, Oklahoma, New Mexico, and Colorado. Similarly, the range for the dunes sagebrush lizard (DSL) in West Texas occurs primarily on privately owned surface and minerals, although range also occurs on state owned lands with active or potential oil and gas development. In New Mexico, there is a mixture of federal, state, and privately owned lands and minerals that arguably constitutes targeted species range.

The legacy landscape for both of these species encompasses extensive agricultural, ranching, and oil and gas development on these privately owned rural working lands dating back more than 100 years. The ranges for these two species fall within several of the most prolific oil and gas basins in the United States, and the prevalence of split estate lands (i.e., different surface and subsurface ownership) within these oil and gas basins presents unique and complex legal issues and challenges. The U.S. Fish and Wildlife Service (USFWS) and proponents of proposed voluntary conservation programs must take into account the significant complex contractual relationships and obligations that already exist between private landowners, private mineral owners, and companies.

In terms of developing a viable and sustainable voluntary conservation program for a range-wide species found on private lands, one of the most significant factors is robust acceptance and participation by private landowners. The centralized approach for species management and conservation on federal lands (e.g., through federal lease stipulations, federal land use plans, and federal permit conditions of approval) is not appropriate or viable for privately owned lands and minerals.

Unlike federal oil and gas lessees, USFWS and the Bureau of Land Management (BLM) do not have the ability to impose restrictions such as seasonal wildlife or no surface occupancy lease stipulations or mitigation

[2] 16 U.S.C. §§ 1531–1544.

[3] *Id.* § 1539.

requirements on private landowners. Nor do they have the authority to access private land without permission. A voluntary conservation program under Section 10 of the ESA should be designed to incentivize broad private landowner participation by offering a variety of conservation methods and empowering farmers and ranchers to obtain funding and credits for customized conservation measures tailored to their lands.

This article provides an overview of key legal issues that must be accounted for in developing a voluntary conservation program for range-wide species located predominantly on privately owned lands with underlying private minerals. It also discusses mechanisms to encourage conservation on private land and the need to incentivize voluntary conservation.

II. Contractual and Legal Issues to Consider for Private Lands and Private Minerals

Conservation programs for range-wide species that involve predominantly privately owned lands and minerals should take into account various legal and contractual issues that may arise with respect to development on enrolled properties. These issues include: (1) split estate ownership; (2) surface use and access agreements; and (3) various complex contractual relationships related to mineral leasing and development agreements, particularly when multiple stacked formations are owned by different individuals and/or companies. These variables should also help inform flexible adaptive management provisions and be taken into account when developing incentives for private landowner participation.

A. Split Estate Ownership

Nearly 95% of the LEPC's estimated occupied range is on private land in Colorado, Kansas, New Mexico, Oklahoma, and Texas. These private lands include substantial acreage where the surface estate and mineral estate are severed, i.e., the surface owner does not own any rights to the mineral estate, which is owned by another individual. This severed estate situation is referred to as a "split estate."

Similarly, for DSL habitat in Texas, the Permian Basin contains numerous stratified layers of productive formations, each owned by different private individuals. The stratification of mineral ownership may create additional contingencies to be considered for purposes of administering surface estate enrolled in a voluntary conservation plan.

B. Split Estate Legal Framework

Common law has long held that where there is a split estate, the mineral estate is the dominant estate.[4] The surface estate, in turn, is subservient to the dominant mineral estate. In other words, a mineral owner's rights are superior to those of the surface owner in the event of a conflict.

There are two main doctrines governing the relationship between the mineral estate and the surface estate: the "reasonable necessity doctrine" and the "accommodation doctrine." Under the reasonable necessity doctrine, the mineral owner/lessee may use as much of the surface estate as is reasonably necessary for exploring and producing minerals.[5] The mineral estate includes an implied right to enter, occupy, and use the surface lands, including the "rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of [the mineral] interest."[6] This implied right exists because "a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved."[7]

Under the reasonable necessity doctrine, the surface owner has no right of recovery for surface damages from the mineral estate owner or lessee, unless the surface owner can prove specific acts of negligence or that the mineral estate owner or lessee used more of the land than was reasonably necessary.[8]

In contrast, the accommodation doctrine requires the mineral interest owner/lessee to accommodate existing surface use where "reasonable" alternatives are available for developing the mineral estate.[9] Courts developed the accommodation doctrine to further define what constitutes "reasonableness." In doing so, the courts affirmed that the mineral owner will not be held liable for interference with a preexisting surface use absent negligent, excessive, or unreasonable use by the mineral owner.[10]

Some states, such as Colorado, Oklahoma, and New Mexico, have enacted surface owner protection laws that impose a heightened standard

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[4] Moreover, the deed severing the surface and mineral estates may include restrictions or limitations placed on the surface estate, or mineral estate, that go beyond the common law split estate doctrine.

[5] Brown v. Lundell, 344 S.W.2d 863, 866 (Tex. 1961).

[6] Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913, 926 (Colo. 1997) (alteration in original) (quoting Rocky Mountain Fuel Co. v. Heflin, 366 P.2d 577, 580 (Colo. 1961)).

[7] Harris v. Currie, 176 S.W.2d 302, 305 (Tex. 1943).

[8] Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967).

[9] Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971); *Gerrity*, 946 P.2d at 927; Amoco Prod. Co. v. Carter Farms Co., 703 P.2d 894, 896 (N.M. 1985).

[10] *Getty*, 470 S.W.2d at 623; McNeill v. Burlington Res. Oil & Gas Co., 2008-NMSC-022, ¶ 35, 182 P.3d 121, 130; *Gerrity*, 946 P.2d at 922; *Amoco*, 703 P.2d at 897.

of liability on mineral interest owners. For the states with a surface use statute, similar to BLM Onshore Order No. 1, these statutes generally limit a surface owner's reasonable compensation to direct impacts on tangible items or improvements on the surface, such as lost crops, agricultural production, or impacts on structures such as irrigation. In addition, these state statutes, as with BLM Onshore Order No. 1, allow a mineral owner/lessee to "bond on" to the surface in the event that the mineral owner cannot reach a surface use agreement with the surface owner. In contrast, Texas codified the dominance of the mineral estate through legislation, but did not adopt a surface protection law.

C. Examples of Common Split Estate Conflicts and Complexities

The inherent challenges of split estate ownership provide literally thousands of different situations and issues that companies must confront on a daily basis. For example:

- Surface owners attempt to bar access to surface by mineral owner and initiate legal proceedings to obtain restraining orders and injunctions (these attempts to bar access typically fail through litigation, but result in substantial cost, delay, and uncertainty);
- Conflicts between multiple mineral owners that underlie a single surface owner;
- Conflicts between multiple surface owners that overlie a single mineral estate; and
- Working with the state oil and gas commissions to initiate legal proceedings to "statutorily pool" nonconsenting mineral owners when allowed by state law, which in some instances causes additional surface owner conflicts.

Below are three simplified examples that illustrate the complex split estate situations that companies routinely deal with involving surface use and the exercise of mineral rights. These situations are common and highlight the potential ramifications for administration and implementation of conservation programs where such surface and subsurface issues are prevalent.

Example 1.

- Country Farm owner places a permanent conservation easement on the property for preservation of a listed threatened species and its habitat. Parties A, B, C, D, and E own undivided fractional interests of the minerals underlying Country Farm, which were severed prior to Country Farm owner entering into the conservation easement.

- Parties A, B, C, D, and E execute oil and gas leases to XYZ Oil that contain pooling clauses allowing their separate mineral interests to be pooled together into one drilling and spacing unit.
- XYZ Oil spaces/pools Country Farm, selects a drilling location in the middle of Country Farm, and commences to build an access road, pipeline, and electric transmission line across Country Farm to reach the drilling location, despite the wishes of Country Farm owner who unavailingly argues that permanent conservation easement prohibits oil and gas development on Country Farm.
- Developed portions of Country Farm are carved out of participation in permanent conservation easement.

Example 2.

- Family Farm is owned by Matriarch who passes away and leaves Family Farm to her children as follows: full surface estate and undivided 1/3 mineral interest to Farmer Child 1; undivided 1/3 mineral interest each to City Slicker Children 2 and 3.
- City Slicker Child 3 dies and leaves her undivided 1/3 mineral interest in Family Farm to Grandchildren 1 and 2. Farmer Child 1 refuses to lease his undivided mineral interests in Family Farm due to desire to preserve the pristine nature of Family Farm.
- City Slicker Child 2 and Grandchildren 1 and 2 hold no such sentiments about Family Farm and, in the hopes of an oil and gas royalty bonanza, lease their undivided mineral interests in Family Farm to XYZ Oil. The company proceeds with oil and gas exploration on Family Farm despite the wishes of Farmer Child 1, the sole surface owner of Family Farm, who defiantly fights to keep XYZ Oil out of Family Farm altogether to no avail.

Example 3.

- Party A owns surface and minerals of Green-acre, which is not accessible by a public road but is adjacent to Red-acre, which fronts the county road. Party B owns surface and an undivided fractional interest of the minerals in Red-acre. Party C owns no surface but also owns an undivided fractional interest of the minerals in Red-acre.
- Parties A and C execute oil and gas leases to XYZ Oil that both contain pooling clauses allowing their separate tracts of land to be pooled together into one drilling and spacing unit. XYZ Oil spaces/pools Green-acre and Red-acre together.
- XYZ Oil selects a surface drilling location on Green-acre, and commences to build an access road, pipeline and electric transmission line from the county road/public easement fronting

> Red-acre across Red-acre to reach the drilling location on Green-acre by virtue of the spaced/pooled oil and gas leases from Parties A and C over the vehement objections of Party B who owns the surface estate of Red-acre.

These examples illustrate the legal complexities and business considerations that go into development of split estate lands. These scenarios can be compounded further when there are multiple different mineral owners for various underlying stratified producing geologic formations. Given the inherent challenges presented by the dominance of the mineral estate, conservation programs must candidly acknowledge this legal framework and seek to provide incentives to all parties to the extent possible to address these situations, while at the same time providing flexibility to avoid overly burdensome requirements that may deter participation by private landowners, private mineral owners, and companies seeking to develop their leasehold.

III. Limitations on Permanent Conservation Easements for Split Estate Lands

A conservation easement is a voluntary legal agreement between a landowner and a third party, such as a land trust or government agency, where the landowner agrees to permanently limit uses of their land in order to conserve its habitat or other resource values. Permanent conservation easements provide long-term certainty in terms of preservation of habitat, and USFWS will often favor this form of conservation action because it provides long-term durability and conservation benefits for static species. As a result, USFWS often seeks to impose permanent conservation requirements for Section 10 permits and conservation programs. However, there is often not a full understanding or appreciation of the legal limitations and practical barriers to programmatic permit holders and participants to obtain large blocks of permanent conservation, particularly when most of the species' habitat is found on privately owned lands. Voluntary conservation programs that address habitat that is exclusively or predominantly on private lands and with underlying private minerals must take into account the legal limitations and risks associated with easements in the context of split estate.

Moreover, as explained in more detail below, there must be a recognition that private farmers and ranchers oftentimes do not want to tie up their lands in perpetuity so that they can preserve operational flexibility of their lands for future family generations. This sentiment is prevalent with many farming and ranching families and the utilization of term contracts, particularly those similar to the U.S. Department of Agriculture's (USDA) successful Conservation Reserve Program (CRP), discussed in more detail below, offers opportunities for durable conservation in a manner that is favored by these landowners.

A. Restrictive Use Covenants by Surface Owners for Split Estates

There is substantial legal precedent explaining that a surface owner may not bind a mineral estate owner or lessee after the estates have been severed. "The mineral owner, having the dominant estate, cannot be limited by . . . restrictions imposed by surface owners after the estate is severed."[11] As explained by the Texas Court of Appeals, a landowner's "preferences regarding the use of the surface are not controlling" and do not restrict the mineral estate owner or lessee from reasonably using the surface for exploration and development of oil, gas and other minerals.[12] This presents a significant legal hurdle to implementation of permanent conservation easements on split estate lands.

In the case of split estates, conservation organizations acknowledge the difficulties of implementing conservation easements for permanent mitigation purposes. The Colorado Coalition of Land Trusts, for example, recognizes that "with a split estate, the surface owner does not control the mineral estate and the conservation easement does not bind any third-party mineral estate owner or lessee."[13]

B. Other Barriers to Permanent Conservation Easements

There are other practical barriers to implementation of permanent conservation easements in split estate situations. For example, federal regulations pertaining to tax incentives for conservation easement donations include restrictions on mineral development for conservation easement donations that preserve land for wildlife, plant habitats and ecosystems. More specifically, under U.S. Treasury regulations, one is prohibited from receiving a tax benefit for a conservation easement donation if there is a possibility that the underlying mineral estate will be developed in a manner that would frustrate the purpose of the easement.[14] Given the uncertainty in split estate situations, the uncertainty as to the acquisition of tax benefits could be an additional deterrent to parties entering into permanent conservation easements.

Conservation organizations, case law, and federal regulations recognize that mineral rights development has the potential to adversely affect the permanence of a property's conservation measures. Based on federal regulations and relevant case law, it appears that courts will likely

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[11] Property Owners of Leisure Land, Inc. v. Woolf & Magee, Inc., 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990).

[12] *Id.*

[13] James Armstrong & Colo. Coal. of Land Trusts, *Mineral Development and Land Conservation: A Handbook for Conservation Professionals* 5 (rev. ed. 2011); *see also* Kristi Hansen et al., *Market-based Wildlife Mitigation in Wyoming: A Primer* 4 (2013) ("[P]rivate landowners may be unable to commit to a perpetual contract if their mineral rights are owned by somebody else.").

[14] 26 C.F.R. § 1.170A-14(g)(4).

not consider conservation a reasonable use such that a mineral estate owner or lessee will have to accommodate conservation easements during oil and gas development.

C. No Legal Distinction Between Conservation Easements and Conservation Credit Contracts; Increased Fee or Penalty Requirements Cannot Be Imposed

In the split estate context, there is no legal distinction between a permanent conservation easement and a contract for a conservation credit. For each, the mineral estate remains dominant and surface uses cannot prevent development. Similarly, conservation easements or credits cannot unilaterally impose monetary fees or penalties upon the mineral estate owner or lessee if it chooses to develop its minerals.

Nor can a habitat conservation plan mandate that conservation easements or conservation credit contracts include contractual provisions that impose higher fees or penalties in the event of split estate development. In addition, relying upon a conservation easement-only model or focusing upon punitive penalty provisions for deterrence purposes would likely discourage broad participation in a habitat conservation plan and reduce its ability to conserve and recover the species and its habitat.

Moreover, given the extensive split estate acreage within the Delaware and Permian oil and gas basins in Texas, Oklahoma, and New Mexico, utilization of a third-party conservation bank for purposes of obtaining conservation easements or credits would create a high degree of uncertainty, as well as substantial problems with monitoring and enforcement. In these third-party conservation bank situations, there is legal and operational uncertainty and legal risk regarding who would be responsible for replacing easements or credits from these banks in the event split estate development nullifies the easement or credit. These uncertainties and legal risks would act as a deterrent to broad-scale participation in a habitat conservation plan that includes substantial split estate/stratified acreage.

D. Practical Realities and Potential Solutions

Significantly, voluntary conservation programs cannot unilaterally impose mechanisms that hinder private property ownership and access; valid existing property rights must be acknowledged and respected to incentivize private landowner participation. A viable conservation program should provide for flexible opportunities for offsetting unavoidable surface disturbance from the exercise of valid existing property rights.

One option may be to formulate a reserve account to hold conservation credits for use on other similarly situated surface (e.g., habitat classification) to be implemented to account for split estate related surface disturbance on privately owned surface that is enrolled in the conservation

program. A voluntary conservation program can mitigate uncertainty and risk of split estate development to some extent by making the programmatic permit holder responsible for replacing nullified credits through an account that holds conservation credits or projects in reserve.

In terms of parameters for operating and contributing to a reserve account, factors may include whether the enrolled property only includes the surface and not subsurface mineral estate, or whether the surface and mineral owners were able to reach an agreement to minimize disturbance on enrolled surface. Another option may be to simply require all participants to contribute a defined percentage or amount of their enrollment and programs fees, or generated conservation credits, to fund the reserve account.

Another conservation program mechanism may be to provide incentives (e.g., additional credits or discounted program fees) to enrolled surface and mineral owners to work with other mineral owners to formulate a mutually agreeable development footprint that avoids or minimizes potential disturbance on enrolled surface.

In sum, a voluntary conservation program should provide flexible options to mitigate the risk of split estate development.

IV. Removing Roadblocks and Incentivizing Private Landowner Participation in Voluntary Conservation Programs

The legislative history for Section 10 of the ESA evidences the need for the U.S. Department of the Interior to encourage and incentivize voluntary conservation in the private sector:

> To the maximum extent possible, the Secretary should utilize this authority under this provision to encourage creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation.
>
> . . . .
>
> The terms of this provision require a unique partnership between the public and private sectors in the interest of species and habitat conservation. However, it is recognized that significant development projects often take many years to complete and permit applicants may need long-term permits. . . . [I]n order to provide sufficient incentives for the private sector to participate in the development of such long-term conservation plans, plans which may involve the expenditure of hundreds of thousands if not millions of dollars, adequate assurances must be made to the financial and development communities that a section 10(a) permit can be made available for the life of the project. Thus, the Secretary should have the discretion to issue section 10(a) permits that run for periods significantly longer than are commonly provided for under

> current administration practices. . . . No particular time limit should be implied.[15]

The Candidate Conservation Agreements with Assurances (CCAA) regulations provide important regulatory assurances and allow for an extended permit term to incentivize private landowners to participate in voluntary conservation plans. Together, these provisions provide long-term economic certainty to landowners in the event a species is listed. However, these assurances are only one of several factors influencing the decision to enter a CCAA. Ultimately, private landowners must believe that a voluntary conservation agreement will help them accomplish their goals, economic or otherwise. Conservation plans require the expenditure of time and money, and therefore additional incentives are necessary to attract broad participation. Congress intended for the Secretary to encourage voluntary conservation to the maximum extent possible.

A. Roadblocks—Lack of Information and Distrust

A private landowner must be aware of species or habitat present on their property, the potential threats to the same, and the CCAA program in order to participate in voluntary conservation. A lack of knowledge will limit participation in CCAAs. People will not voluntarily conserve if they do not know that a species or habitat is present on or near their land or they are unaware of the potential threats facing that species or habitat.

In addition, public distrust of the government and the ESA listing process is another roadblock that prevents some people from entering into CCAAs.[16] Researchers note a general distrust of the federal government. For example, the potential unilateral surrender or abdication of a Section 10 permit by a programmatic permit holder would significantly erode private landowner trust and discourage further participation in future plans. In these circumstances, USFWS must work with the participants and enrollees in the conservation plan to amend the permit to name a new permit holder thereby ensuring conservation program continuity, public trust, and preservation of both the integrity of voluntary conservation programs and the contractual commitments and regulatory certainty provided by them.

Education and relationship building with private landowners and key trade associations will help remove these barriers to CCAA participation. Nongovernmental organizations, trade organizations, and programmatic permit holders may be best positioned to distribute information and facilitate relationships between private landowners and USFWS.

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[15] H.R. Rep. No. 97-835, at 30–31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860.

[16] Kendra Womack, "Factors Affecting Landowner Participation in the Candidate Conservation Agreements with Assurances Program" (2008) (Utah State Univ. Graduate Thesis).

B. Flexibility

CCAAs that provide land use flexibility will attract broader private participation than CCAAs that employ strict prohibitions and absolute mandates. Flexible conservation plans will allow landowners to continue using their land for commercial purposes but will encourage avoidance of sensitive areas while also providing a framework to offset the potential impacts of land use.

Likewise, conservation plans that allow some flexibility to implement conservation measures where operationally feasible will further incentivize private landowner participation. CCAAs that fundamentally conflict with private property rights or commercial activities, or provide excessive or absolute restrictions on private land use, will deter private participation.

Generational flexibility is another consideration for incentivizing voluntary conservation. Some landowners, particularly farmers and ranchers, are reluctant to permanently encumber their land for conservation purposes because of concern about ensuring future income streams for succeeding generations of their family. The Conservation Reserve Program (CRP) is one example of a voluntary conservation program that provides generational flexibility. Under the CRP, agricultural landowners enter into 10- to 15-year conservation agreements whereby landowners forgo crop and other land development and agree to implement conservation measures in exchange for rental payments and conservation cost sharing. The CRP has successfully sustained enrollment of over three million acres within the LEPC range, with approximately 763,000 acres of land within the top two tiers of LEPC habitat.[17]

USFWS and programmatic permit holders should support flexible conservation mechanisms to attract broad participation to achieve the ESA's conservation goals.

C. Financial Incentives

Conservation programs that offer financial incentives are generally more attractive to private landowners such as farmers and ranchers. Researchers observe that landowners who receive financial assistance are more likely to conserve than those who acted upon regulatory mandate alone. Further, conservation occurs more slowly under regulation than with financial incentives.[18]

For example, the Texas Conservation Plan (TCP) incentivizes participation by offering reduced fees for private landowners who enroll

[17] "The most recent data available to WAFWA (February 2017) indicates that 3,145,629 acres are enrolled within the LPC action area (Table 18; Appendices A-B). Of those acres, there are 763,693 that lie within the boundaries of CHAT 1 and CHAT 2 which equates to 8.0% of that total area." Western Ass'n of Wildlife Agencies, "The 2018 Lesser Prairie-Chicken Range-wide Conservation Plan Annual Progress Report," at 53 (2019).

[18] Womack, *supra* note 16.

surface interests only. In addition, the TCP provides conservation credit for the removal of the mesquite tree. Mesquite is an invasive tree that is believed to compete with the DSL's preferred vegetation, and it causes problems for agricultural operations. Agricultural participants can generate credits for removing mesquite from their property. They can then sell the credits to other participants who need the credits to offset the impacts of their surface disturbing activities. Thus, participating surface owners can receive the benefit of removing a pest from their property and income from the sale of credits. The CRP provides financial incentives in the form of annual rent payments and cost sharing assistance for the implementation of conservation measures.

These are just two examples of the types of program mechanisms that are attractive to ranchers and farmers. These conservation mechanisms can incentivize participation, build trust, and set the foundation for their agreement to perform additional beneficial conservation actions on their lands for the benefit of the species.

D. Streamlining Enrollment and Participation Requirements

To incentivize participation by private landowners, particularly farmers and ranchers, it is important that the enrollment process is streamlined and straightforward. Similarly, for landowners seeking to generate conservation projects on their lands for use by conservation program participants, the application procedures should also be easy to navigate and achieve.

The success of this approach is evident in the CRP, the largest private-lands conservation program in the United States. Farmers and ranchers are very familiar and comfortable with the enrollment process. The CRP enrollment process for grasslands, for example, involves a simple application form and straightforward competitive bidding process. The eligibility requirements to participate in the program are also straightforward. The landowner must have owned or operated the land for at least 12 months prior to submitting an offer. Exceptions are provided to allow participation by new owners with less than 12 months ownership or operatorship in certain circumstances.

To the extent feasible, voluntary conservation programs should consider following the template of the CRP program to maximize participation by private landowners. By providing a familiar and similar process, farmers and ranchers are more likely to seek to participate. Conversely, the more burdensome and time-consuming the paperwork, documentation, and application process is, the less likelihood that private landowners will be incentivized to participate.

E. Privacy

Private landowners value their privacy and do not want their personal or business information to become public by virtue of their participation in

a voluntary conservation program. Many landowners wish to avoid involvement in lawsuits brought by environmental groups with respect to listed and non-listed species and voluntary conservation plans. Because CCAAs are contracts with the federal government, the Freedom of Information Act (FOIA)[19] applies to records collected by USFWS in connection with CCAAs. Generally, information submitted to USFWS becomes part of the public record unless it fits within one of the FOIA exemptions. Upon a request for release of the information, the submitting party must meet its burden to show the information is confidential. There is no guarantee that the agency will determine the information is protected.

To address this privacy concern, Texas passed a law preventing the disclosure of information collected by a government agency from a private landowner or other participant in a conservation plan, without the landowners written consent, if the information relates to the specific location, species identification, or quantity of any animal or plant life.[20] However, this law protects only information presented to the State of Texas, and would not necessarily govern information simultaneously submitted to a federal agency.

Another option to address privacy is to allow USFWS access to conservation program information through a password protected database on an as-needed basis. This would allow the agency to review all of the program information while ensuring it does not enter the public record.

Ultimately, USFWS should recognize landowners' privacy needs and support creative solutions to further incentivize voluntary conservation.

V. Conclusion

Administering and implementing voluntary conservation agreements for range-wide species found predominantly on private lands with underlying private minerals presents unique challenges, and requires significant flexibility. In this context, incentivizing participation of private landowners is one of the most important aspects of ensuring a viable and durable conservation program. USFWS, the permit holder, and enrolled companies must recognize and understand the key drivers that entice, or dissuade, private landowner engagement in voluntary conservation programs. Utilizing analogous mechanisms to the very successful USDA CRP should be considered as an avenue to increase private landowner participation. Similarly, USFWS needs to recognize the significant limitations that permanent conservation requirements impose, both legally and practically, upon landowners and permit administrators and provide flexibility for longer duration conservation to be achieved through shorter term conservation contracts.

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[19] 5 U.S.C. § 552.

[20] Tex. Gov't Code Ann. § 403.454.

The legal realities of split estate ownership must also be acknowledged and USFWS should not seek to overcompensate for uncertainties that are beyond the control of the permit holder and plan participants by imposing inflated mitigation or conservation requirements. In that same vein, when presented with scientific uncertainties for issues such as indirect effects, USFWS should not seek to overcompensate by requiring significantly inflated mitigation ratios or conservation requirements. Instead, to incentivize participation in voluntary conservation programs, an adaptive management framework should be developed to inform potential future changes after the development of additional science and insight gained through administration of the program.

Finally, the regulations governing Section 10 permits and voluntary conservation plans should be updated to address the growing trend toward utilization of third-party programmatic permit holders. These regulatory reforms should, among other things, provide for more flexibility in allowing a permit holder to transfer a permit to a qualified new third party, and also provide more regulatory and contractual certainty for plan participants in the event of a change in permit holder or change in plan administration. These reforms should consider prioritizing adaptive management and flexibility over the duration of a 30-year permit term so that systematic improvements can be made in a manner that is supported by science, and also does not alienate participants, including private landowners that are contributing conservation measures, as well as enrolled program participants.

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Part III

Reprints

Constitutional Environmental Law, or, the Constitutional Consequences of Insisting that the Environment Is Everybody's Business

by Robin Kundis Craig*

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Constitutional environmental law has become a recognized and institutionalized specialty within environmental law, an acknowledgement of the pervasive interactions between the U.S. Constitution and the federal environmental statutes that go well beyond the normal constitutional underpinnings of federal administrative law. This Article posits that constitutional environmental law is the result of Congress consciously deciding that environmental protection is everybody's business—specifically, from Congress's decisions that states should participate in rather than be preempted by federal environmental law, that private citizens and organizations should help to enforce the statutes, and that private land and water rights are necessary components of national environmental protection. Nevertheless, despite almost five decades of constitutional environmental litigation and scholarship, the federal courts had never recognized environmental rights within the U.S. Constitution until 2016, raising the possibility that constitutional environmental law may soon assume another dimension.

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I. INTRODUCTION

Somewhere in the early 2000s, constitutional environmental law became a thing—a recognized sub-specialty of environmental law practice and scholarship. The institutional signals of this fact are strong. The American Bar Association's (ABA) Section on Environment, Energy, and Resources (SEER) has included a committee on Constitutional Law[1] since 2005.[2] The Constitutional Accountability Center considers environmental justice to be a core focal area.[3] For the last thirteen years, the Environmental Law Institute in Washington, D.C., through the support of Beveridge & Diamond, P.C., has sponsored an annual law student writing competition on constitutional environmental law.[4] Law schools advertise specializations in constitutional environmental law,[5] and there are textbooks on constitutional environmental law.[6] And, of course, there is constitutional environmental law scholarship—*lots* of it, including domestic[7] and comparative[8] legal analyses as well as work in and about other countries.[9]

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1 *Constitutional Law Committee*, AM. BAR. ASS'N., https://perma.cc/M982-LJ7A (last visited July 13, 2019).

2 Author's personal recollection, confirmed through communication with Professor James R. May, who petitioned SEER to create the committee.

3 *Environmental Justice*, CONST. ACCOUNTABILITY CTR., https://perma.cc/Q54N-U9Z6 (last visited July 13, 2019).

4 *ELI Constitutional Environmental Law Writing Competition*, ENVTL. L. INST., https://perma.cc/Z69R-WAEG (last visited July 13, 2019).

5 *See, e.g.*, Jim May, *Constitutional Environmental Law*, WIDENER ENVTL. L. CTR., https://perma.cc/R7ND-V5DY (last visited July 13, 2019) (providing examples of some institutions that offer certificates in environmental law).

6 *See, e.g.*, JAMES R. MAY, PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 1 (2011).

7 Bill Funk, of course, has been a contributor to this scholarship, including: William Funk, *Constitutional Implications of Regional CO_2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 UCLA J. ENVTL. L. & POL'Y 353, 354 (2009) [hereinafter *Constitutional Implications of Regional CO_2*] (discussing environmental constitutional law issues pertaining to the regional northeast cap-and-trade program); William Funk, *Justice Breyer and Environmental Law*, 8 ADMIN. L. REV. AM. U. 735, 735–36 (1995) (discussing Justice Breyer's views on environmental law under the U.S. Supreme Court's jurisdiction); William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 127 (1995) (discussing a case involving a regional city plan to develop a green area and bike path using the power of eminent domain); William Funk, *Revolution or Restatement? Awaiting Answers to* Lucas*' Unanswered Questions*, 23 ENVTL. L. 891, 891 (1993) (discussing the potential impact of a U.S. case on environmental law in the United States); William

Constitutional environmental law in many respects signals that environmental law is a different kind of federal regulatory law. Complexity is probably not the explanation. While environmental law can certainly be complicated, there are a number of other fairly complicated areas of federal statutory and regulatory law where the Constitution plays a fairly minimal role, especially outside the realm of enforcement and occasional preemption issues; drug safety regulation through the United States Food and Drug Administration and securities law under the Securities and Exchange Commission immediately suggest themselves. Notably, no other area of federal regulatory law appears to have an established subspecialty to address the constitutional issues that it raises. So, why has this subspecialty arisen for environmental law?

This Article argues that one of the key differences between federal environmental law and other areas of federal regulatory law is that federal environmental law effectively makes environmental protection *everybody's* business.[10] Federal environmental statutes establish a suite of relationships between and among federal agencies, federal courts, state agencies, state courts, regulated entities, property owners, and general citizens, creating new issues of constitutional boundaries while at the same time incorporating all the constitutional issues that arise when citizens and regulated entities interact with federal agencies within classic administrative law procedures—rulemaking, licensing, and adjudication or enforcement.

While the list of environmental law relationships is somewhat long, constitutional environmental law, as distinct from the routine constitutional aspects of administrative law, tends to emerge from three specific features of the federal statutes, which in turn provide the structuring of this Article. Part II explores the constitutional consequences of cooperative federalism, Congress's deliberate decision to not only allow but actively encourage state involvement in implementing federal environmental requirements. As a result, federal environmental law has raised significant issues regarding the balance between Congress's Commerce Clause authority and states' Tenth Amendment rights, federal preemption, federal sovereign immunity from state regulation, the dormant Commerce Clause, and the Compact Clause. Part III, in turn, examines environmental citizen suits, Congress's expansion of civil rights causes of action to allow individual citizens and private organizations help to enforce environmental

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Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Preemption*, 16 ENVTL. L. 1, 1–3 (1985) (discussing state and federal statutes that impact and address environmental justice). Other scholarly contributions are cited throughout this Article.

8 *E.g.*, Roderic O'Gorman, *Environmental Constitutionalism: A Comparative Study*, 6 TRANSNAT'L ENVTL. L. 435, 435–62 (2017) (discussing the phenomena of environmental laws being built into constitutions across the world).

9 *E.g.*, Carl Bruch et al., *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 132–33 (2001) (considering ways in which constitutional provisions in African countries may be used to further environmental law).

10 In many ways, this Article is the next step in my own constitutional environmental law scholarship and is indebted to both my 2004 (first edition) and 2009 (second edition) book, *The Clean Water Act and the Constitution: Legal Structure and the Public's Rights to a Clean and Healthy Environment* (Environmental Law Institute Press) and the many articles on constitutional environmental law that I have written both before and after that book.

law requirements, creating a separate set of constitutional boundary issues. When citizens can bring enforcement actions in federal courts, they raise issues of states' Eleventh Amendment sovereign immunity, federal sovereign immunity, and, above all, constitutional standing. Finally, environmental enforcement by governments against private entities not only raises classic constitutional issues common to all federal administrative enforcement, such as the Fourth Amendment's protection against unreasonable searches and seizures and the Seventh Amendment's right to a jury trial, but also directly influences use of private property, creating recurring issues of constitutional takings. Part IV explores takings jurisprudence as it has played out across environmental statutes.

As these Parts together make clear, federal environmental law practitioners and scholars must be well-versed in a wide range of constitutional law doctrines. The resulting weaving of statutory and constitutional legal issues created the tapestry now recognized as constitutional environmental law. This sub-discipline, moreover, stands poised to expand once again, as environmental plaintiffs once again are trying to convince the federal courts to recognize a fundamental right to a functional environment within the U.S. Constitution.[11]

II. THE CONSTITUTIONAL MESSINESS OF COOPERATIVE FEDERALISM

The United States protects its environment through a fairly comprehensive array of federal legislation—the National Environmental Policy Act of 1969[12] (NEPA), the Clean Air Act[13] (CAA), the Federal Water Pollution Control Act, better known as the Clean Water Act[14] (CWA), the Resource Conservation and Recovery Act of 1976[15] (RCRA), which amended the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[16] (CERCLA), and many others. As a constitutional matter, it would have been fairly easy for Congress to expressly preempt state law, completely taking over these areas of environmental regulation.

As constitutional issues go, express preemption under the Supremacy Clause[17] is a fairly easy analysis. Indeed, on the occasions when Congress *has* expressly preempted some aspect of state environmental regulation, the federal courts have generally had no problem displacing state law. For example, CERCLA expressly preempts state statutes of limitation—but not statutes of repose[18]—in favor of a

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11 *See generally* Juliana v. United States, 217 F. Supp. 3d 1224, 1271–72 (D. Or. 2016) (discussed at the end of this Article).

12 42 U.S.C. §§ 4321–4370h (2012).

13 *Id.* §§ 7401–7671q.

14 33 U.S.C. §§ 1251–1388 (2012).

15 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

16 *Id.* §§ 9601–9675.

17 The Supremacy Clause of the U.S. Constitution states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

18 CTS Corp. v. Waldburger, 573 U.S. 1, 17–18 (2014).

federal discovery rule.[19] The CWA expressly preempts state regulation of marine sanitation devices.[20] Many of the federal environmental statutes expressly preempt states from imposing environmental requirements that would be less stringent than federal law.[21] Perhaps most contentious has been the preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act[22] (FIFRA), which expressly preempts state labeling or packaging requirements for pesticides,[23] because it creates a fairly complex relationship between federal regulatory law and state tort law.[24]

For the most part, however, Congress has chosen *not* to expressly preempt state regulation through its environmental statutes. Instead, it created structures of cooperative federalism.[25] These statutory provisions define specific regulatory roles that Congress preferred states to play—setting water quality standards[26] and issuing permits[27] under the CWA, devising implementation plans to meet National Ambient Air Quality Standards under the CAA,[28] management of non-hazardous solid waste under RCRA,[29] coastal zone management under the Coastal Zone Management Act of 1972,[30] and many others. *Sharing* regulatory authority with the states, it turns out, is a whole lot messier, constitutionally, than express federal preemption.[31] This Part explores five of the constitutional federalism issues that

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19 42 U.S.C. § 9658(a)(2) (2012).

20 33 U.S.C. § 1322(f)(1)(A), (n)(6)(A) (2012).

21 *E.g.*, *id.* § 1370 (containing the CWA's statement that a "[s]tate or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent that the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter").

22 7 U.S.C. §§ 136–136y (2012).

23 *Id.* § 136v(b).

24 Bates v. Dow Agrosciences LLC, 544 U.S. 431, 442–53 (2005) (holding that FIFRA did not preempt state-law tort claims for defective design, defective manufacture, negligent testing, breach of express warranty, and violation of Texas Deceptive Trade Practices Act (DTPA), but that it might preempt state-law fraud and failure-to-warn claims); Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 606–10 (1991) (holding that FIFRA does not preempt local governmental regulation of pesticide use).

25 *E.g.*, California v. United States, 438 U.S. 645, 650 (1978) (characterizing the Reclamation Act of 1902 as a cooperative federalism statute); Hodel v. Va. Surface Mining & Reclamation Ass'n, (*VSMRA*) 452 U.S. 264, 288–89 (1981) (characterizing the Surface Mining Control & Reclamation Act (SMCRA) as a cooperative federalism statute); Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 767 (1982) (characterizing the Public Utilities Regulatory Policies Act as a cooperative federalism statute); New York v. United States, 505 U.S. 144, 167–68 (1992) (listing the CWA, Occupational Safety and Health Act, RCRA, and the Alaska National Interest Lands Conservation Act as cooperative federalism statutes) (citations omitted); Envtl. Prot. Agency v. EME Homer City Generation, L.P., 572 U.S. 489, 510–11, 537 (2014) (describing the CAA as a cooperative federalism statute).

26 33 U.S.C. § 1313(c), (d) (2012).

27 *Id.* §§ 1342(b), 1344(d).

28 42 U.S.C. § 7402(a) (2012).

29 *Id.* §§ 6941–6949a.

30 16 U.S.C. § 1454 (2012).

31 Environmental federalism has prompted significant amounts of scholarship—over 1,000 articles, according to Westlaw. For representative examples, see generally Erin Ryan, FEDERALISM AND THE TUG OF WAR WITHIN (2012); Erin Ryan, *The Spending Power and Environmental Law After* Sebellius, 85 U. COLO. L. REV. 1003 (2014); Brigham Daniels, *Environmental Regulatory Nukes*, 2013 UTAH L. REV. 1505 (2013); Robin Kundis Craig, *Federalism Challenges to CERCLA: An Overview*, 41 SW. L.

environmental cooperative federalism has raised: the balance between the Commerce Clause and the Tenth Amendment; the tension between implied preemption and savings clauses with respect to the continued operation of state common law; federal sovereign immunity from state permitting and enforcement; the dormant Commerce Clause; and the Compact Clause.

A. The Commerce Clause and the Tenth Amendment

As the United States Supreme Court itself has noted, "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases."[32] The Commerce Clause and the Tenth Amendment undergird much federalism litigation and have interacted frequently with federal environmental statutes.[33]

The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[34] The Framers intended the Commerce Clause to promote free trade among the states and thus render the United States a single commercial entity, but it also provides most of Congress's authority to enact environmental statutes. Commerce Clause jurisprudence seeks to strike a balance between the states' "reasonable exercise of [their] police powers over local affairs" and "matters of local concern" and the federal government's power to oversee matters of "national interest[]."[35] Thus, federal power over interstate commerce "'may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the

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REV. 617 (2012); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006); Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377 (2005); Dean B. Suagee, *Tribal Self-Determination and Environmental Federalism: Cultural Values as a Force for Sustainability*, 3 WIDENER L. SYMP. J. 229 (1998); Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265 (1997); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995).

32 *New York*, 505 U.S. 144, 155 (1992).

33 For discussions of the Commerce Clause and the Tenth Amendment and their relation to environmental law, see generally David M. Metres, Note, *The National Impact Test: Applying Principled Commerce Clause Analysis to Federal Environmental Regulation*, 61 HASTINGS L.J. 1035 (2010); Jennifer A. Maier, Comment, *Outgrowing the Commerce Clause: Finding Endangered Species a Home in the Constitutional Framework*, 36 GOLDEN GATE U. L. REV. 489 (2006); Mollie Lee, Note, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456 (2006); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003); Jamie Y. Tanabe, *The Commerce Clause Pendulum: Will Federal Environmental Law Survive in the Post-*SWANCC *Epoch of "New Federalism"?*, 31 ENVTL. L. 1051 (2001); Charles Tiefer, *After* Morrison*, Can Congress Preserve Environmental Laws From Commerce Clause Challenges?*, 30 Envtl. L. Rep. (Envtl. Law Inst.) 10,888 (2000); Lydia B. Hoover, *The Commerce Clause, Federalism and Environmentalism: At Odds After* Olin*?*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 735 (1997); Peter A. Lauricella, *The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377 (1997); John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L. Rep. (Envtl. Law Inst.) 10,421 (1995).

34 U.S. CONST. art. I, § 8, cl. 3.

35 Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370–71 (1976).

distinction between what is national and what is local and create a completely centralized government.'"[36]

Balancing the Commerce Clause is the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[37] The Tenth Amendment functions as the outer boundary of federal power and hence immediately raises questions of how far federal Commerce Clause authority can extend. The U.S. Supreme Court emphasized the close relationship between these two provisions in *New York v. United States*,[38] noting that the Commerce Clause and Tenth Amendment analyses

> are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[39]

Nevertheless, the relationship between these two constitutional provisions has evolved over time. Until 1937, Congress' Commerce Clause authority was limited to regulating activities that directly affected interstate commerce.[40] In 1937, however, the U.S. Supreme Court began to accord the federal government much broader regulatory authority in decisions such as *National Labor Relations Board v. Jones & Laughlin Steel Corp*. As the Court emphasized in that case, "[t]he congressional authority to protect interstate commerce from burdens and obstructions . . . is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"[41] Thus, according to the *Jones & Laughlin Steel* Court, Congress possessed expansive powers to regulate not only interstate commerce itself but also intrastate activities that affect interstate commerce.[42]

This understanding of the Commerce Clause provided the constitutional law foundation for Congress when it began to enact the federal environmental statutes in the late 1960s. Congress had broad Commerce Clause authority, and if Congress wanted to induce state participation in federal regulatory programs, Congress could "'attach conditions on the receipt of federal funds'" or "offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation," but it could not "simply 'commandee[r] the

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36 United States v. Lopez, 514 U.S. 549, 557 (1995) (quoting Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

37 U.S. CONST. amend. X.

38 505 U.S. 144 (1992).

39 *Id.* at 156.

40 *See*, *e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down statutes regulating allowable hours and wages because those issues were too remotely related to interstate commerce).

41 *Jones & Laughlin Steel*, 301 U.S. at 36–37 (quoting Mandou v. New York, New Haven, & Hartford R.R. Co. (*Second Employers' Liability Cases*), 223 U.S. 1, 51 (1912)).

42 *Id.* at 37.

legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[43]

Congress stayed well within these constitutional boundaries in the federal environmental statutes. For example, in *Hodel v. Virginia Surface Mining and Reclamation Ass'n* (*VSMRA*), the Supreme Court upheld the federal Surface Mining Control and Reclamation Act of 1977[44] (SMCRA) against allegations that it unconstitutionally intruded upon state regulatory authority.[45] Notably, Congress had explicitly found that surface mining operations affected interstate commerce,

> by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.[46]

Moreover, "coal is a commodity that moves in interstate commerce," and "nationwide 'surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders.'"[47] As a result, the SMCRA was constitutional.[48]

In *California Coastal Commission v. Granite Rock Co.*,[49] the U.S. Supreme Court specifically distinguished environmental regulation from land use planning with respect to the Commerce Clause/Tenth Amendment balance, concluding that "[l]and use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits."[50] While land use planning is presumptively a *state* prerogative, environmental regulation clearly could be the subject of federal statute,[51] and the *VSMRA* Court "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution . . . ."[52]

For a time, therefore, the Commerce Clause/Tenth Amendment limitations on federal environmental law were functionally insignificant. However, in 1995, the

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43 *New York*, 505 U.S. 144, 161,167 (1992) (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987); *VSMRA*, 452 U.S. 264, 288 (1981)).

44 30 U.S.C. §§ 1201–1279 (2012).

45 *VSMRA*, 452 U.S. at 291.

46 *Id.* at 277 (quoting 30 U.S.C. § 1201(c)).

47 *Id.* at 281–82 (quoting 30 U.S.C. §1201(g)).

48 *Id.* at 268.

49 480 U.S. 572 (1987).

50 *Id.* at 587.

51 *See id.* at 588.

52 *VSMRA*, 452 U.S. at 282.

U.S. Supreme Court decided *United States v. Lopez*,[53] revitalizing Commerce Clause challenges to the federal environmental statutes. In that case, the Court invalidated, on Commerce Clause grounds, the Gun Free School Zones Act of 1990,[54] in the process "identif[ying] three broad categories of activity that Congress may regulate under its commerce power."[55] "First, Congress may regulate the use of the channels of interstate commerce."[56] "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities."[57] "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce."[58]

Lopez inspired new constitutional challenges to many federal environmental statutes, especially those statutes, like the Endangered Species Act (ESA)[59] and

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53 514 U.S. 549 (1995). The *Lopez* decision inspired much commentary. Some of the discussions regarding its federalism implications include: Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403 (2002); Bill Swinford & Eric N. Waltenburg, *The Supreme Court and the States: Do* Lopez *and* Printz *Represent a Broader Pro-State Movement?*, 14 J.L. & POL. 319 (1998); Julian Epstein, *Evolving Spheres of Federalism After* U.S. v. Lopez *and Other Cases*, 34 HARV. J. LEGIS. 525 (1997); Russell F. Pannier, Lopez *and Federalism*, 22 WM. MITCHELL L. REV. 71 (1996); Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793 (1996); Debbie Ellis, *A* Lopez *Legacy?: The Federalism Debate Renewed, But Not Resolved*, 17 N. ILL. U. L. REV. 85 (1996); Rachel Elizabeth Smith, Note, United States v. Lopez*: Reaffirming the Federal Commerce Power and Remembering Federalism*, 45 CATH. U. L. REV. 1459 (1996); Michael J. Trapp, Note, *A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal Power Under the Commerce Clause* United States v. Lopez, 64 U. CIN. L. REV. 1471 (1996); Gregory W. O'Reilly & Robert Drizin, United States v. Lopez*: Reinvigorating the Federal Balance by Maintaining the States' Role as the "Immediate and Visible Guardians" of Security*, 22 J. LEGIS. 1 (1996); Eric W. Hagen, Note, United States v. Lopez*: Artificial Respiration for the Tenth Amendment*, 23 PEPP. L. REV. 1363 (1996); Anthony B. Ching, *Travelling Down the Unsteady Path:* United States v. Lopez*,* New York v. United States*, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99 (1995).

54 18 U.S.C. § 922(q) (Supp. II 1994).

55 *Lopez*, 514 U.S. at 558.

56 *Id.*

57 *Id.*

58 *Id.* at 558–59.

59 16 U.S.C. §§ 1531–1544 (2012). *See* People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990, 1000–06 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 649 (2018); Markle Interests v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 475–78 (5th Cir. 2016), *cert. granted and vacated on other grounds*, 139 S. Ct. 590 (2018); San Luis & Delta–Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1174–77 (9th Cir. 2011); Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271–77 (11th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064–76 (D.C. Cir. 2003); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 636–41 (5th Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483, 490–99 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1046–57 (D.C. Cir. 1997); Shields v. Babbitt, 229 F. Supp. 2d 638, 659–64 (W.D. Tex. 2000), *vacated sub nom.* Shields v. Norton, 289 F.3d 832 (5th Cir. 2000), *cert. denied sub nom.* Schuele v. Norton, 537 U.S. 1071 (2002); Bldg. Indus. Ass'n of Superior Cal. v. Babbitt, 979 F. Supp. 893, 906–08 (D.D.C. 1997) (all except *Shields v. Babbitt* upholding the ESA against post-*Lopez* Commerce Clause challenges); *see also* Christopher S. Turner, Gibbs v. Babbitt*: The Vitality of Endangered Species Protection in the* Lopez *Era*, 15 J. NAT. RESOURCES & ENVTL. L. 301, 301, 303 (2000–2001) (analyzing application of *Lopez* to ESA cases); Rob Strang, Note, Gibbs v. Babbitt*: The Taking of Red Wolves on Private Land, A Post-*Lopez *Challenge to the Endangered Species Act*, 14 TUL. ENVTL. L.J. 229, 241 (2000) (using post-*Lopez* cases to argue that *Lopez* gives the courts latitude to uphold regulation of activities that may not normally be considered interstate commerce); Gavin R. Villareal, Note, *One Leg*

CERCLA,[60] that can interfere with commercial development and land use. Nor have these challenges completely abated, and courts continue to debate whether and how the Commerce Clause limits the scope of federal environmental law, generating more constitutional environmental law in the process.[61] Perhaps the longest-running controversy that can be directly traced to *Lopez* is the scope of the CWA's "waters of the United States"[62] and, hence, the scope of federal jurisdiction under the Act. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*,[63] the United States Court of Appeals for the Seventh Circuit squarely teed up the post-*Lopez* Commerce Clause issue with respect to the CWA's application to isolated waters used by migratory birds, finding Commerce Clause support for such jurisdiction.[64] Although the U.S. Supreme Court decided its review on statutory, not constitutional, grounds, it refused to accord the Corps' interpretation of "waters of the United States" *Chevron* deference because that interpretation threatened to violate the Commerce Clause and undermine the demands of federalism.[65] According to the Court, the Migratory Bird Rule raised "significant constitutional questions," because "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[66] Almost twenty years later, a constitutional cloud still hovers over the CWA, although the "waters of the United States" debate has taken on a legal life of its own, spurred by the Court's fractured 2006 decision in *Rapanos v. United States*,[67] two controversial rulemakings,[68] and a fairly dramatic change in presidential administration in 2017.

Few constitutional environmental law scholars doubt that Congress *could* successfully establish and clarify its Commerce Clause authority over the constitutionally gray environmental regulatory issues remaining after *Lopez*. The question instead is whether it *has*. *Lopez* and its progeny create an expectation that Congress will justify its authority to enact statutes, and thus far Congress has generally been unwilling to amend the classic federal environmental statutes to make their constitutional grounding clearer. The absence of this key player in federal environmental law underscores the importance of a continuing dialogue

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to Stand On: The Treaty Power and Congressional Authority for the Endangered Species Act After United States v. Lopez, 76 TEX. L. REV. 1125, 1127 (1998) (arguing that the Commerce Clause does not give Congress the authority to support legislation as broad as the ESA).

60 Voggenthaler v. Md. Square LLC, 724 F.3d 1050, 1059–61 (9th Cir. 2013); Freier v. Westinghouse Elec. Corp., 303 F.3d 176, 200–03 (2nd Cir. 2002); United States v. Olin Corp., 107 F.3d 1506, 1509–11 (11th Cir. 1997).

61 *See, e.g.*, Lighthouse Res. Inc. v. Inslee, No. 3:18-cv-05005-RJB, 2018 WL 5264334, at *6–8 (W.D. Wash. 2018) (arguing that the denial of a § 401 certification under the CWA violated the Commerce Clause).

62 *See* 33 U.S.C. § 1362(7) (2012).

63 191 F.3d 845 (7th Cir. 1999).

64 *Id.* at 850.

65 *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 172–74 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

66 *Id.* at 174 (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994)).

67 547 U.S. 715 (2006).

68 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (Jun. 29, 2015); Revised Definition of "Waters of the United States," 84 Fed. Reg. 4145 (Feb. 14, 2019).

between the courts and the legislature as constitutional jurisprudence evolves over time.

B. Implied Preemption, Savings Clauses, and the Common Law

Under the Supremacy Clause, Congress may implicitly preempt state law as well as expressly preempt it.[69] This is the most complex kind of federal preemption analysis, in part because the U.S. Supreme Court has recognized several different pathways to implicit preemption, all of which focus upon Congress's overall purpose in enacting the federal legislation. For example, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"[70] a type of implicit preemption generally known as field preemption. For example, the Natural Gas Act of 1938,[71] a "comprehensive scheme of federal regulation" that gives the Federal Energy Regulatory Commission (FERC) "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale," embodies a congressional intent to occupy the field of interstate natural gas regulation because it gives FERC authority to regulate almost every aspect of natural gas transportation and sale.[72] Courts will also imply a congressional intent to preempt state law if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[73] Finally, courts will find implicit preemption if "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal" Congress's intent to preempt state law.[74]

Implicit preemption tends to be rare in federal environmental law, however. Because Congress intended these statutes to work through cooperative federalism, many of their preemption-related provisions actually function as "saving clauses" that preserve states' rights to regulate. For example, the CWA's first section preserves "the authority of each State to allocate quantities of water within its jurisdiction" and specifies that nothing in the CWA "shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."[75] The CWA thus distinguishes between water rights, which remain under state control, and water quality, which is the CWA's subject.[76] The

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69 Ray v. Atl. Richfield Co., 435 U.S. 151, 157–58, 167–68 (1978).

70 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citing Pa. R.R. Co. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919)); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942)); *see also Ray*, 435 U.S. at 157.

71 15 U.S.C. §§ 717–717w (2012).

72 *See* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300–04 (1988) (discussing the powers FERC is given to regulate).

73 *Rice*, 331 U.S. at 230 (citing Hines v. Davidowitz, 312 U.S. 52, 62–63 (1941)); *see also Ray*, 435 U.S. at 157.

74 *Rice*, 331 U.S. at 230 (citing S. R.R. Co. v. R.R. Comm'n, 236 U.S. 439, 446 (1915); Charleston & W.C. R.R. Co. v. Varnville Co., 237 U.S. 597, 601–04 (1915); N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 149, 150, 153 (1917); Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605, 611 (1926)); *see also Ray*, 435 U.S. at 157–58.

75 33 U.S.C. § 1251(g) (2012).

76 *Id.*; *see also* 33 U.S.C. § 1251(a) (2012) (compare the water quality language of subsection (a) with the water quantity language of subsection (g)).

provisions of environmental statutes that prohibit states from enacting less stringent regulation also implicitly *permit* states to enact more stringent regulation than federal law requires.[77] Environmental citizen suit provisions, discussed in more detail in Part II, almost universally *preserve* plaintiffs' state-law causes of action rather than preempting them.[78]

The savings provisions in the federal environmental statutes have allowed states to create large operating spaces of their own within environmental law. For example, California prohibits land disposal of biosolids through its Integrated Waste Management Act, and the United States District Court for the Central District of California has upheld this ban against claims that the CWA preempts such prohibitions—although the California Constitution might forbid them.[79] The savings clauses in environmental citizen suit provisions generally leave state tort law fully in force to provide redress when pollution or other environmental mishaps harm persons or property. As one example, the United States District Court for the Eastern District of Virginia relied on the CWA's savings clause to conclude that the CWA does not preempt state nuisance, trespass, or negligence claims in connection with the spraying or spreading of sewage sludge on land.[80]

Nevertheless, not all implied preemption claims in environmental law fail. In particular, in areas where federal control is clearly dominant—such as is true for regulation of vessels on the ocean—courts will still preempt state law. Thus, when the State of Washington attempted to regulate oil tankers more stringently than federal law requires in an attempt to better protect itself from oil spills, the U.S. Supreme Court reversed the normal Supremacy Clause presumption of non-preemption and narrowly construed the savings clauses in both the Ports and Waterways Safety Act[81] and the Oil Pollution Act of 1990[82] (OPA) in order to "respect[] the established federal-state balance in matters of maritime commerce between the subjects as to which the States retain concurrent powers and those over which the federal authority displaces state control."[83] Washington was "regulat[ing] in an area where there has been a history of significant federal presence," and its laws were preempted.[84]

Cooperative federalism and savings clauses, therefore, cannot completely eliminate the Supremacy Clause's shadow, prompting new preemption challenges

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77 U.S. Steel Corp. v. Train, 556 F.2d 822, 830 (7th Cir. 1977).

78 *See infra* Part II and accompanying discussion. For example, the CWA's citizen suit provision emphasizes that "[n]othing . . . shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek other relief (including relief against the Administrator or a State agency)." 33 U.S.C. § 1365(e).

79 City of Los Angeles v. Cty. of Kern, 509 F. Supp. 2d 865, 894 (C.D. Cal. 2007) (holding that "merely because the Clean Water Act *does not preempt* local bans on land application [of biosolids] does not mean that it *expressly authorizes* them despite state constitutional limitations to the contrary").

80 Wyatt v. Sussex Surrey L.L.C., 482 F. Supp. 2d 740, 745–46 (E.D. Va. 2007).

81 33 U.S.C. § 1225(a) (2012).

82 *Id*. § 2718.

83 *See* United States v. Locke, 529 U.S. 89, 106 (2000).

84 *Id.* at 106, 108. For more in-depth discussions of this case, see Paul S. Weiland, *Preemption of Environmental Law: Is the U.S. Supreme Court Heading in the Wrong Direction?,* 30 Envtl. L. Rep. (Envtl. Law Inst.) 10,579 (July 2000); *see generally* R. Brent Walton & Daniel J. Gunter, United States v. Locke*: The Supreme Court Preempts States from Protecting Their Navigable Waters and Marine Resources From Oil Tanker Spills*, 15 J. ENVTL. L. & LITIG. 37 (2000).

to test—successfully or unsuccessfully—the exact contours of the operating spaces that Congress has left for states. When Congress is not expressly clear about its intent to preempt—or conversely, its intent to preserve—state law, the U.S. Constitution thus remains a potential limit on state regulatory authority, promoting the continual creation of constitutional environmental law in ways that comprehensive displacement of state regulatory authority would not.

C. Federal Sovereign Immunity and State Regulation of Federal Facilities

According to the U.S. Environmental Protection Agency (EPA) in its 2009, and apparently last, report on federal facilities' environmental compliance,

> the U.S. government owns and/or operates more than 42,000,000 acres of land with 922,000 buildings, leases, and structures. Federal land ranges from forests, parks, and historic monuments to office buildings, hospitals, hydroelectric dams, and prisons. Operations from all types of federal facilities can generate pollution, create waste and impact the environment.[85]

These federal facilities must comply with federal environmental laws, and, "[a]s of FY08, the EPA and states track[ed] more than 12,000 permits at nearly 11,000 sites, including underground storage tanks, community water systems, and air emissions sources."[86] For example, under the Emergency Planning and Community Right to Know Act (EPCRA),[87] 265 federal facilities must report their releases of hazardous materials to the Toxics Release Inventory.[88]

While the EPA often still takes the lead in enforcing federal environmental requirements against federal facilities,[89] as states increasingly took over environmental permitting programs and enforcement authority, federal sovereign immunity in connection with these facilities became a serious constitutional issue. Sovereign immunity is a penumbral constitutional right of the United States, deriving from an English doctrine that "the King could do no wrong."[90] The federal courts have always required a plaintiff suing the federal government to demonstrate that the United States has waived its sovereign immunity and that the plaintiff's case falls within that waiver.[91] Only Congress can waive U.S. sovereign immunity[92]

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85 OFFICE OF ENF'T & COMPLIANCE ASSISTANCE, U.S. ENVTL. PROTECTION AGENCY, THE 2008 STATE OF FEDERAL FACILITIES: AN OVERVIEW OF ENVIRONMENTAL COMPLIANCE AT FEDERAL FACILITIES 5 (2009) [hereinafter 2009 EPA FEDERAL FACILITIES REPORT].

86 *Id*.; *see also* Exec. Order No. 12,088, § 1–102, 43 Fed. Reg. 47,707 (Oct. 13, 1978) (requiring all federal facilities to comply "with applicable pollution control standards," including those in the Toxic Substances Control Act, the CWA, the Safe Drinking Water Act, the CAA, the Noise Control Act, RCRA, and FIFRA).

87 42 U.S.C. §§ 11001–11050 (2012).

88 *See* 2009 EPA FEDERAL FACILITIES REPORT, *supra* note 85, at 5.

89 *See generally id*.; *Enforcement at Federal Facilities*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/E9KW-U5S4 (last updated July 13, 2018).

90 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 171 (1996) (Souter, J., dissenting).

91 *See* United States v. Sherwood, 312 U.S. 584, 586 (1941); Price v. United States, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it."); Schillinger v. United States, 155 U.S. 163, 166 (1894); United States v. Clarke, 33 U.S.

and it must do so unequivocally.[93] In addition, "[C]ongress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination."[94] As a result, the federal courts construe any waiver of sovereign immunity strictly and in favor of the United States.[95]

Environmental sovereign immunity issues came to a head when states began to assume permitting authority under various federal statutes and then attempted to force federal facilities to obtain state permits. In general, the relevant waivers of sovereign immunity from state permitting requirements must come from the various environmental statutes' federal facilities provisions.[96] The U.S. Supreme Court addressed the federal sovereign immunity issue for state permitting in 1976 in two companion cases—*Hancock v. Train*,[97] which dealt with the CAA, and *U.S. Environmental Protection Agency v. California* ex rel. *State Water Resources Control Board*,[98] which dealt with the CWA. In both cases, the Court held that the relevant Act's federal facilities provision was not specific enough to subject federal facilities to state permitting processes.[99] However, Congress then amended those two provisions to make the waiver more explicit.[100]

436, 444 (1834) ("As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it."); Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997); Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 791–92 (8th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); Fostvedt v. United States, 978 F.2d 1201, 1202–03 (10th Cir. 1992), *cert. denied*, 507 U.S. 988 (1993) (quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting *Sherwood*, 312 U.S. at 586)); McCarty v. United States, 929 F.2d 1085, 1087 (5th Cir. 1991); Voluntary Purchasing Grps., Inc. v. Reilly, 889 F.2d 1380, 1385 (5th Cir. 1989); *see also* Robin Kundis Craig, Comment, *Of Fish, Federal Dams, and State Protections: A State's Options Against the Federal Government for Dam-Related Fish Kills on the Columbia River*, 26 ENVTL. L. 355, 369 (1996) (discussing the basic principles of sovereign immunity); Kenneth Culp Davis, *Sovereign Immunity Must Go*, 22 ADMIN. L. REV. 383, 384 (1970) (discussing the role of the courts in sovereign immunity jurisprudence).

92 Block v. North Dakota *ex rel*. Bd. Of Univ. & Sch. Lands, 461 U.S. 273, 280 (1983); Dalehite v. United States, 346 U.S. 15, 30 (1953); Presidential Gardens Assocs. v. United States *ex rel.* Sec'y of Hous. & Urban Dev., 175 F.3d 132, 139 (2d Cir. 1999) (citing Millares Guiraldes de Tineo v. United States, 137 F.3d 715, 719 (2nd Cir. 1998)); Sprecher v. Graber, 716 F.2d 968, 973 (2nd Cir. 1983).

93 U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992) (citing United States v. Mitchell, 445 U.S. 535, 538–39 (1980)); *Beamon*, 125 F.3d at 967; *Preferred Risk Mut. Ins. Co.*, 86 F.3d at 792; Alaska v. Babbitt, 38 F.3d 1068, 1072 (9th Cir. 1994) (quoting United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992)); *Fostvedt*, 978 F.2d at 1203 (citing United States v. King, 395 U.S. 1, 4 (1969)).

94 *Schillinger*, 155 U.S. at 166.

95 Orff v. United States, 545 U.S. 596, 601–02 (2005); *U.S. Dep't of Energy*, 503 U.S. at 615 (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)); *Block*, 461 U.S. at 287; *Babbitt*, 38 F.3d at 1072 (quoting *Nordic Village, Inc*., 503 U.S. at 34); *Fostvedt*, 978 F.2d at 1202 (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983)); *McCarty*, 929 F.2d at 1087.

96 *E.g.*, CWA, 33 U.S.C. § 1323(a) (2012); CAA, 42 U.S.C. § 7418(a) (2012); RCRA, 42 U.S.C. § 6961 (2012).

97 426 U.S. 167, 168 (1976).

98 426 U.S. 200, 201–02 (1976).

99 *Hancock*, 426 U.S. at 198–99; *California* ex rel. *State Water Res. Control Bd.*, 426 U.S. at 227–28.

100 Clean Air Act Amendments of 1977, Pub. L. No, 95-95, § 116, 91 Stat. 685, 711 (1977); Clean Water Act of 1977, Pub. L. No. 95-217, §§ 60, 61(a), 91 Stat. 1566, 1597 (1977) (amending 33 U.S.C. § 1323).

The next issue was whether federal facilities could be held liable for state-assessed civil penalties. In 1992, in *U.S. Department of Energy v. Ohio*, the U.S. Supreme Court decided this issue in the context of both the CWA and RCRA, deciding once again that the waivers of sovereign immunity were not broad enough to subject federal facilities to state-issued (or indeed any) civil penalties.[101] Congress amended RCRA's federal facilities provision to fix the problem,[102] but it has not amended the CWA's.

The federal sovereign immunity doctrine thus challenges and, under many statutes, still limits states' constitutional ability to become full-fledged environmental regulators. In particular, because Congress has to be exceptionally—one might argue excessively—clear in drafting its waivers of federal sovereign immunity, assertions of state authority pursuant to the most natural readings of federal facilities provisions can still prompt constitutional challenges to that authority. Again, therefore, cooperative federalism generates constitutional environmental law.

D. Dormant Commerce Clause

Because the U.S. Constitution's Commerce Clause gives authority over interstate commerce to Congress, it also restricts the states from discriminating in trade or from enacting protectionist laws—the effects of the so-called dormant Commerce Clause.[103] According to the U.S. Supreme Court, the Interstate Commerce Clause "has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'"[104] In 2008, it emphasized that "[t]he modern law of what has come to be called the dormant Commerce Clause is driven by concern about 'economic

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101 *U.S. Dep't of Energy*, 503 U.S. 607, 621–27 (1992). For more detailed discussions of this decision, see Mirth White, *Can Congress Draft a Statute Which Forces Federal Facilities to Comply With Environmental Laws in Light of the Holding in* United States Department of Energy v. Ohio*?*, 15 WHITTIER L. REV. 203, 211–15 (1994); Daniel Horne, Note, *Federal Facility Environmental Compliance After* United States Department of Energy v. Ohio, 65 U. COLO. L. REV. 631, 635–37 (1994); Rebecca Heintz, Note, *Federal Sovereign Immunity and Clean Water: A Supreme Misstep*, 24 ENVTL. L. 263, 264–65 (1994); Gregory J. May, U.S. Department of Energy v. Ohio *and the Federal Facility Compliance Act of 1992: The Supreme Court Forces a Hazardous Compromise in CWA and RCRA Enforcement Against Federal Agencies*, 4 VILL. ENVTL. L.J. 363, 364–65 (1993); Karen M. Matson, Note, *Waiver of Sovereign Immunity—Did Congress Intend to Exempt Federal Facilities From Civil Penalties Under the Clean Water Act?* United States Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992)*, 28 LAND & WATER L. REV. 489, 489–90 (1993); Peter McKenna, *States May Not Impose Civil Penalties on the U.S. Government for Violations of State Statutes Promulgated Under the Authority of the Clean Water Act and the Resource Conservation and Recovery Act*, 23 SETON HALL L. REV. 762, 775–77 (1993).

102 Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, § 102(a), (b), 106 Stat. 1505, 1505–06 (Oct. 6, 1992) (amending 42 U.S.C. § 6961).

103 *See, e.g.*, Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 956–60 (1982) (groundwater); Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 669–79 (1981) (trailer requirements for commercial trucking); Hughes v. Oklahoma, 441 U.S. 322, 336–38 (1979) (transporting or shipping minnows) (all striking down state laws that burdened interstate commerce).

104 Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 310 (1994) (quoting S. Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)).

protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'"[105]

With this principle as the touchstone, dormant Commerce Clause challenges are evaluated in two steps. First, if state legislation facially discriminates against interstate commerce, it is "virtually *per se* invalid."[106] The federal courts will uphold such a law "only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'"[107] Second, if a state law appears to regulate even-handedly but indirectly affects interstate commerce, it is evaluated under the *Pike v. Bruce Church, Inc.*[108] balancing test. Under this test:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[109]

State laws are almost always constitutional under *Pike* balancing.[110]

In environmental law, the dormant Commerce Clause has been especially important in the context of solid waste, which, as noted, RCRA generally leaves to the states. In a series of decisions spanning almost twenty years, the U.S. Supreme Court has repeatedly emphasized that waste disposal is a commercial or economic activity and thus that, under the dormant Commerce Clause, state and local governments cannot discriminate against out-of-state waste in their waste disposal plans.[111] These decisions overturned virtually every attempt states made to

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105 Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).

106 *Id.* at 338–39 (2008) (citing Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)); Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

107 *Dep't of Revenue of Ky.*, 553 U.S. at 338–39 (quoting *Or. Waste Sys., Inc.*, 511 U.S. at 100–01).

108 397 U.S. 137 (1970).

109 *Id.* at 142 (citations omitted); *see also Dep't of Revenue of Ky.*, 553 U.S. at 338–39 (reciting this same test).

110 *But see* Levy v. Rowland, 359 F. Supp. 2d 267, 273 (E.D.N.Y. 2005) (suggesting that the burdens on interstate commerce caused by Connecticut's moratorium on transmission of electricity to New York via high-voltage fiber optic cables outweighed the alleged environmental benefits to Connecticut citizens of the moratorium).

111 *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393 (1994) (holding that a town ordinance that required handling of solid waste at the town's transfer station violated the dormant Commerce Clause); Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality of Or., 511 U.S. at 108 (holding that Oregon violated the dormant Commerce Clause by imposing a $2.50 per ton surcharge on in-state disposal of waste generated out of the state); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 367–68 (1992) (holding that a Michigan statute that prohibited private landfill operators from accepting solid waste that originated outside of the county in which the landfill was located violated the dormant Commerce Clause); Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 346 (1992) (finding that an Alabama statute that imposed an additional fee on all hazardous wastes generated outside Alabama discriminated against interstate commerce in violation of the Constitution);

distinguish between in-state and out-of-state waste, despite the burdens—economic, environmental, and in terms of land use—that importation of another state's waste can impose on the receiving state's landfills and other waste treatment facilities. Only in 2007, in *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[112] did the Court give states a constitutional break, upholding local "flow control" ordinances that directed trash to government-owned waste processing facilities.[113] Thus, somewhat perversely, in a cooperative federalism scheme designed specifically to encourage state participation, the dormant Commerce Clause constitutionally limits state creativity.

The dormant Commerce Clause can also limit *interstate* creativity, as both Bill Funk and I were exploring almost simultaneously—he in the context of regional cap-and-trade programs for greenhouse gases,[114] I in the context of multistate agreements and projects related to renewable energy.[115] Bill identified two aspects of the Regional Greenhouse Gas Initiative (RGGI) that could run afoul of the dormant Commerce Clause: offsets and leakage.[116] With regard to offsets, the RGGI

> limits the location of offset projects to participating states or nonparticipating states whose regulatory agency has entered into a memorandum of understanding to carry out certain obligations, including auditing and enforcement of offset terms. By distinguishing between participating states and nonparticipating states, the Model Rule facially discriminates against interstate commerce in offsets. [117]

Hence, it would seem to violate the dormant Commerce Clause.[118] Nevertheless, "the restriction is not protectionist in intent or effect," and, pursuant to the *Dean Milk Co. v. City of Madison*[119] line of cases, "reasonable attempts to provide equivalent out-of-state safeguards as are provided with respect to in-state entities are not discriminatory merely because they differ in certain ways or involve an added cost attributable to the difficulty of out-of-state enforcement."[120]

Leakage, in turn, arises "[b]ecause generators within RGGI must have allowances for their CO_2 emissions, which will increase their costs," incentivizing them "to import 'dirty' electricity rather than pay the higher price for 'clean'

City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (holding that a New Jersey statute that prohibited importation of most solid and liquid waste that originated or was collected outside of the state violated the dormant Commerce Clause). *But see* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981) (upholding a Minnesota statute that banned the retail sale of milk in plastic, nonreturnable, nonrefillable containers).

112 550 U.S. 330 (2007).

113 *Id.* at 334.

114 *Constitutional Implications of Regional CO_2*, *supra* note 7, at 362–69.

115 Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 792–96 (2010).

116 *Constitutional Implications of Regional CO_2*, *supra* note 7, at 362–64.

117 *Id.* at 362.

118 *Id.*

119 340 U.S. 349 (1951).

120 *Constitutional Implications of Regional CO_2*, *supra* note 7, at 362–63 (citing Dean Milk v. City of Madison, 340 U.S. 349 (1951)).

electricity generated within the RGGI area."[121] One of the potential solutions to the leakage problem would be to ban electricity generated in non-RGGI states from the RGGI area,[122] but "[t]his facial discrimination would almost surely violate the Dormant Commerce Clause because it would impose the most extreme burden on interstate commerce (a ban) in order to achieve the local purpose."[123] Similarly, a "hybrid approach would require LSEs to obtain allowances for any power purchased from outside RGGI . . . [which] would also be facially discriminatory and could be upheld, if at all, only under the theory underlying the compensatory tax doctrine."[124]

The dormant Commerce Clause also dogs multistate arrangements regarding renewable energy. "A number of dormant Commerce Clause cases have involved energy production, and they systematically conclude that states cannot create legal requirements or preferences based on the source of the fuel or energy."[125] "Nor can states 'hoard' state-created energy within their borders."[126] As a result,

> multistate renewable energy arrangements could implicate the dormant Commerce Clause in a number of ways. Clearly, at the state level, [Renewable Portfolio Standard] requirements that favor in-state [Renewable Energy Credits] or forbid out-of-state RECs could run afoul of the dormant Commerce Clause. Similarly, multistate agreements that allow REC trading within the consortium but prohibit RECs from other states could raise constitutional concerns. Finally, multistate arrangements that favor—either through RECs, transmission access, or taxes or other financial incentives—renewable energy produced in certain states and to disfavor renewable energy produced in others could raise dormant Commerce Clause concerns.[127]

Thus, Bill Funk and I agree that creative multistate attempts to deal with climate change and to promote the decarbonization of the United States' energy supply could fairly easily run afoul of the dormant Commerce Clause, potentially thwarting first-best regulatory structures for dealing with this most pressing of environmental problems.

E. The Compact Clause and Interstate Agreements

If the dormant Commerce Clause can interfere with interstate creativity, the Compact Clause gives states a constitutional mechanism for pursuing new kinds of arrangements—so long as they have Congress's blessing. The U.S. Constitution's Interstate Compact Clause provides that:

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121 *Id.* at 363.

122 *See id.* at 366.

123 *Id.*

124 *Id.* at 366 & n.57 (citing Henneford v. Silas Mason Co., 300 U.S. 577 (1937)) ("upholding Washington State's use tax on imported goods to compensate for the State's sales tax against a dormant commerce clause challenge").

125 Craig, *supra* note 115, at 793.

126 *Id.* at 794.

127 *Id.* at 795.

> *No State shall, without the Consent of Congress,* lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State*, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.[128]

As the italicized language indicates, the Interstate Compact Clause operates as an explicit restriction on state authority. States entering into any kind of environmental agreement among themselves need to consider whether Congress's approval is necessary, because multistate agreements deemed interstate compacts for purposes of this clause are unconstitutional without such approval.[129]

The U.S. Supreme Court's first—but still guiding—statement about the applicability of the Interstate Compact Clause derives from the 1893 case of *Virginia v. Tennessee*.[130] In this case, Virginia sought to void an 1802–1803 agreement with Tennessee regarding the border between the two states on the grounds that the agreement was an interstate compact that Congress had not approved.[131] The Court created a legal touchstone that interstate agreements need Congress's approval when they "tend[] to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[132] Because states' agreements regarding borders could encroach "upon the full and free exercise of Federal authority," they require Congress's consent.[133]

In contrast, in 1985, the Supreme Court determined that Massachusetts and Connecticut had not formed an interstate compact when both enacted statutes that allowed regional but out-of-state bank holding companies to purchase banks and bank holding companies within each state's borders.[134] Whatever agreement existed did not infringe upon either federal supremacy or other states' sovereignty, and hence Congress's consent would not be required.[135] Similarly, in 2002, the United States Court of Appeals for the Fourth Circuit concluded that the Master Settlement Agreement in the state tobacco litigation, which involved forty-six states and most of the major tobacco manufacturers, was *not* an interstate compact requiring Congress's approval.[136] As the court explained, while "the Master Settlement Agreement may result in an increase in bargaining power of the States vis-a-vis the tobacco manufacturers, . . . this increase in power does not interfere with federal supremacy because the Master Settlement Agreement 'does not purport to authorize the member States to exercise any powers they could not exercise in its absence.'"[137] "In addition, the Master Settlement Agreement does not derogate from the power of the federal government to regulate tobacco," especially because

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128 U.S. CONST. art. I, § 10, cl. 3 (emphasis added).
129 West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27–28 (1951).
130 148 U.S. 503 (1893).
131 *Id.* at 517.
132 *Id.* at 519.
133 *Id.* at 520.
134 Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175–76 (1985).
135 *See id.* at 176.
136 *See* Star Sci., Inc. v. Beales, 278 F.3d 339, 345, 360 (4th Cir. 2002).
137 *Id.* at 360 (quoting U.S. Steel Corp v. Multistate Tax Comm'n, 434 U.S. 452, 473 (1978)).

the Master Settlement Agreement anticipated—and expressly subordinated itself to—any future federal statutes regulating tobacco.[138]

In examining the constitutional implications of the RGGI, Bill Funk concluded that it did not need Congress's consent as an interstate compact. Analogizing to the Multi-State Tax Commission at issue in *U.S. Steel Corp. v. Multistate Tax Commission*,[139] he concluded that:

> RGGI does not limit the federal government's authority to regulate CO_2 in any way it sees fit. Like the Commission, RGGI, Inc.—the entity created to support development and implementation of the RGGI program—does not impinge on federal supremacy. No state has delegated its sovereign powers to RGGI, Inc., nor can RGGI, Inc. exercise any powers over the states. It acts at most in a ministerial and advisory capacity, much like the Commission. All of RGGI's actual powers stem solely from individual states' laws, which—as was the case under the Compact—are "nothing more than reciprocal legislation" with no capacity to bind other member states.
>
> This similarity between RGGI and the Compact suggests that RGGI does not violate the Compact Clause because it lacks congressional consent.[140]

In contrast, "[m]ost multistate cooperative agreements involving electricity have proceeded as interstate compacts" and probably need to, given the pervasiveness of federal regulation in this area.[141]

However, even when congressionally approved interstate compacts are not *required*, congressional approval can confer constitutional benefits on the compacting states and their created regulatory regime. First, "the existence of an interstate compact affects the application of the Supremacy Clause and the federal preemption analysis. Interstate compacts approved by Congress become federal law, with the result that other federal statutes cannot automatically preempt a compact."[142] Second, "congressional approval of an interstate compact and its status as federal law insulates multistate programs from dormant Commerce Clause scrutiny."[143] As such, a congressionally approved interstate compact represents cooperative federalism at the multistate level, providing a constitutional mechanism for interstate creativity to accomplish aims that the U.S. Constitution might not otherwise allow.

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138 *Id.*

139 434 U.S. 452, 456–57 (1978); see *Constitutional Implications of Regional CO_2*, *supra* note 7, at 358–60, for a discussion of the test used to determine when interstate compacts are valid without Congress' approval.

140 *Constitutional Implications of Regional CO_2*, *supra* note 7, at 360. I was less convinced. *See* Craig, *supra* note 115, at 820–22. The courts have not (yet) decided the issue.

141 Craig, *supra* note 115, at 819 (citing Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1363–66 (9th Cir. 1986); Safe Harbor Water Power Corp. v. Fed. Power Comm'n, 124 F.2d 800, 806–08 (3rd Cir. 1941)).

142 *Id.* at 827.

143 *Id.* at 828–29 (citing Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568, 569–70 (9th Cir. 1985)).

III. CITIZEN SUITS AND THE LIMITS OF FEDERAL COURT JURISDICTION

Environmental citizen suit provisions are in some ways Congress's clearest statements that the environment is everybody's business, because Congress allows private individuals and organizations to help ensure that regulated entities meet federal environmental requirements. Citizen suits first became important in connection with NEPA, which imposes duties—most notably the Environmental Impact Statement (EIS) requirement[144]—on federal agencies. Because NEPA apples to federal agencies, private individuals and entities can challenge federal agency compliance through the federal Administration Procedure Act's[145] (APA's) judicial review provisions.[146]

Beginning with the CAA in 1970,[147] Congress expanded the rights of private enforcers beyond the APA by including citizen suit provisions in most of the federal environmental statutes.[148] Although these provisions are all similar, the CWA's is one of the most typical—and the most used. It provides that:

> [A]ny citizen may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform any such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.[149]

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144 42 U.S.C. § 4332(C) (2012).

145 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

146 *Id.* §§ 701–706.

147 *See* 42 U.S.C. § 7604 (the CAA's citizen suit provision).

148 *See* Hallstrom v. Tillamook Cty., 493 U.S. 20, 23 n.1 (1989) (listing the following statutes as having similar citizen suit provisions as that in RCRA, 42 U.S.C. § 6972 (2012): Toxic Substances Control Act, 15 U.S.C. § 2619 (2012); ESA, 16 U.S.C. § 1540(g) (2012); SMCRA, 30 U.S.C. § 1270 (2012); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427 (2012); Deepwater Port Act, 33 U.S.C. § 1515 (2012); Act to Prevent Pollution from Ships, 33 U.S.C. § 1910 (2012); CWA, 33 U.S.C. § 1365 (2012); Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j–8 (2012); Noise Control Act, 42 U.S.C. § 4911 (2012); Energy Policy and Conservation Act, 42 U.S.C. § 6305 (2012); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124 (2012); CERCLA, 42 U.S.C. § 9659 (2012); Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046 (2012); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349 (2012); Natural Gas Pipeline Safety Act Amendments of 1976, 49 U.S.C. App. § 60121 (2012)).

149 33 U.S.C. § 1365(a) (2012).

A "citizen" entitled to bring such actions is "a person or persons having an interest which is or may be adversely affected."[150] Civil penalties assessed in a citizen suit are payable to the U.S. Treasury; however, to encourage citizen suits, Congress made litigation costs, "including reasonable attorney and expert witness fees," available to plaintiffs "whenever the court determines such award is appropriate."[151]

Citizen enforcement, it turns out, has significantly added to the effectiveness of environmental law. As Russell E. Train, the second Administrator of the EPA, observed, "[c]itizen concern and citizen action were key ingredients both of our nation's rapid development of environmental protection policies and of the effective implementation of those policies."[152] "[M]any established citizen environmental organizations played an active and effective role, indeed a crucial one, in monitoring and promoting the enforcement of environmental laws, especially in the early 1970s during initial implementation of the EIS process in federal decision making."[153] In 2003, Professor James R. May estimated that citizens had filed over 2,000 environmental citizen suits since 1970,[154] resulting in about 1,500 reported federal court decisions, which represented at that point "roughly 3 in 4 (75%) of all reported civil environmental decisions."[155] Between 1995 and 2002, citizens were responsible for "315 compliance-forcing judicial consent orders[] under the CWA and CAA alone,"[156] and "[d]uring the same period, under all environmental statutes, citizens . . . submitted more than 4,500 notices of intent to sue,"[157] about eight-ninths of which were directed at members of the regulated community and the rest directed at implementing agencies.[158]

However, citizen suits also raise constitutional issues related to the federal courts' jurisdiction to hear environmental lawsuits. For example, because citizen suit provisions allow private entities to sue governments, federal sovereign immunity and state Eleventh Amendment immunity become recurring issues.[159] Perhaps most importantly, however, environmental citizen suits test federal courts' Article III jurisdiction over "cases and controversies" and have been the primary driver of federal court standing jurisprudence since the 1970s.[160]

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150 *Id.* § 1365(g).

151 *Id.* § 1365(d).

152 RUSSELL E. TRAIN, POLITICS, POLLUTION, AND PANDAS: AN ENVIRONMENTAL MEMOIR 94 (2003).

153 *Id.* at 95.

154 James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, 33 Envtl. L. Rep. (Envtl. Law Inst.) 10,704, 10,704 (2003).

155 *Id.* at 10,706.

156 James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 4 (2003).

157 *Id.*

158 *See id.*

159 *See id.* at 4, 11.

160 *Id.* at 7–8, 33–34.

A. Federal Sovereign Immunity in the Context of Citizen Suits

As is true for state enforcement against federal facilities, when private citizens attempt to sue federal facilities and federal agencies, ordinary principles of federal sovereign immunity apply. Most environmental citizen suit provisions allow for at least some suits against at least some federal entities. Thus, for example, most citizen suit provisions in the federal pollution control statutes clearly waive the EPA's sovereign immunity in suits to compel the Administrator to complete his or her nondiscretionary duties under the relevant statute.[161] Most environmental citizen suit provisions also allow lawsuits against federal agencies that violate the relevant statute.[162]

The exact wording of an environmental citizen suit provision is critical to the scope of its waiver of sovereign immunity. For example, despite the U.S. Supreme Court's decision in *U.S. Department of Energy* with respect to civil penalties under the CWA and RCRA, the United States District Court for the Middle District of Tennessee nevertheless held that citizens could seek civil penalties against federal facilities under the CAA, distinguishing that statute's language.[163] The United States District Court for the Eastern District of California, through somewhat contorted reasoning, held that although the U.S. Army Corps of Engineers' (Army Corps' or Corps') violation of its Incidental Take Statement under the ESA would *not* fall within that Act's citizen suit provision's waiver of sovereign immunity, the Corps' taking of protected fish without Statement protection violated the Act itself and hence *did* fall within the waiver of sovereign immunity.[164]

Sovereign immunity challenges continue to block several kinds of citizen suits. The CWA's citizen suit provision, for example, does not mention the Army Corps, one of the two federal agencies that implement the Act.[165] As a result, the CWA's waiver of sovereign immunity does not extend to the Corps,[166] just the EPA, and it does not allow citizens to seek civil penalties for federal facilities' past violations of the Act.[167] More generally, compliance with a citizen suit provision's procedural requirements are part of the relevant waiver of sovereign immunity, and hence failure to comply with those requirements in a case against a federal

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161 Sierra Club v. U.S. Envtl. Prot. Agency, 850 F. Supp. 2d 300, 303 (D.D.C. 2012) (CAA); Sierra Club v. Johnson, 500 F. Supp. 2d 936, 940–41 (N.D. Ill. 2007) (CAA).

162 *See, e.g.*, 33 U.S.C. § 1365(a) (CWA); 42 U.S.C. § 6972(a) (RCRA); 42 U.S.C. § 7604(a)(1)–(2) (CAA); *see also Sierra Club*, 850 F. Supp. 2d at 303 (CAA citizen suit against the EPA).

163 United States v. Tenn. Air Pollution Control Bd., 967 F. Supp. 975, 978–82 (M.D. Tenn. 1997). *But see* Sierra Club v. Tenn. Valley Auth., 430 F.3d 1337, 1353–56 (11th Cir. 2005); City of Jacksonville v. U.S. Dep't of the Navy, 348 F.3d 1307, 1314–20 (11th Cir. 2003) (both holding that the CAA did *not* waive federal sovereign immunity from punitive penalties). Notably, at least one court has held that the waiver of immunity for environmental suits against the TVA comes from other places. Tenn. Clean Water Network v. Tenn. Valley Auth., 206 F. Supp. 3d 1280, 1297–98 (M.D. Tenn. 2016).

164 S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., 629 F. Supp. 2d 1123, 1131–35 (E.D. Cal. 2009).

165 33 U.S.C. § 1365(a) (2012).

166 Cascade Conservation League v. M.A. Segale, Inc., 921 F. Supp. 692, 696–98 (W.D. Wash. 1996); All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs, 515 F. Supp. 2d 1, 5–6 (D.D.C. 2007); Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs, 118 F. Supp. 2d 1115, 1120 (D. Or. 2000).

167 Sierra Club v. Lujan, 972 F.2d 312, 316 (10th Cir. 1992).

defendant gives rise to a sovereign immunity defense.[168] In addition, the issue of whether a federal agency has a nondiscretionary duty or not can be critical to whether Congress has waived its sovereign immunity from suit.[169] As such, federal sovereign immunity serves to preclude some citizen enforcement of federal environmental law, limiting full citizen participation in enforcement.

B. State Eleventh Amendment Immunity

As is true in the CWA language quoted in the introduction to this Part, most environmental citizen suit provisions allow citizen-plaintiffs to sue states for violations of the federal environmental statutes, so long as such lawsuits are consistent with the Eleventh Amendment.[170] That Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[171] On its face, the Eleventh Amendment only bars suits brought in federal court against a state by citizens of another state or of a foreign country.[172] However, the U.S. Supreme Court has long interpreted the Eleventh Amendment as also barring suits in federal court by citizens against their own state.[173] However, the Eleventh Amendment does not bar suits by the federal government against states in federal court[174] (allowing, in the environmental law context, federal enforcement against states), nor does it address the issue of states' vulnerability to suit in their own courts, which is a matter of state sovereign immunity law.[175]

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168 *See* Humane Soc'y of the U.S. v. McCarthy, 209 F. Supp. 3d 280, 287–88 (D.D.C. 2016); Envtl. Integrity Project v. U.S. Envtl. Prot. Agency, 160 F. Supp. 3d 50, 62 (D.D.C. 2015).

169 Sierra Club v. Wheeler, 330 F. Supp. 3d 407, 417–21 (D.D.C. 2018) (holding that the CAA's citizen suit provision does not waive sovereign immunity in lawsuits about discretionary actions); Friends of the Earth v. U.S. Envtl. Prot. Agency, 934 F. Supp. 2d 40, 48–49 (D.D.C. 2013) (holding that the EPA does not have a mandatory duty to make a determination as to whether lead emissions from general aviation aircraft engines using aviation gasoline endangered the public health or welfare under the CAA, and hence that the Act does not waive its sovereign immunity from suit); Am. Rd. & Transp. Builders Ass'n v. U.S. Envtl. Prot. Agency, 865 F. Supp. 2d 72, 81–82 (D.D.C. 2012) (holding that there was no waiver of sovereign immunity to review the EPA's CAA nonroad preemption rules); United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 332 (D.N.J. 2009) (holding that CERCLA's citizen suit provision does not waive the EPA's sovereign immunity if there is no nondiscretionary duty at issue).

170 *See supra* note 149 and accompanying text.

171 U.S. CONST., amend. XI.

172 *Id.*

173 *See, e.g.*, P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144–46 (1993).

174 *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 11 (1989) (citing Employees v. Mo. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285–86 (1973)); United States v. Mississippi, 380 U.S. 128, 140–41 (1965); Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934); Equal Emp't Opportunity Comm'n v. Bd. of Supervisors for the Univ. of. La. Sys., 559 F.3d 270, 272 (5th Cir. 2009); Chao v. Va. Dep't of Transp., 291 F.3d 276, 280 (4th Cir. 2002).

175 *E.g.*, Texas Comm'n on Envtl. Quality v. Bonser-Lain, 438 S.W.3d 887, 892–95 (Tex. Ct. App. 2014) (deciding that the Texas Water Code did not waive the TCEQ's sovereign immunity regarding greenhouse gas regulation); Dresser Indus., Inc. v. Commonwealth, Dept. Envtl. Res., 604 A.2d 1177, 1180–81 (Pa. Commw. Ct. 1992) (concluding that Pennsylvania's Clean Streams Law waived the Department's sovereign immunity).

The Eleventh Amendment preserves states' sovereign immunity.[176] However, because under the U.S. Constitution's Supremacy Clause federal law can displace state law, it is sometimes possible for Congress to abrogate states' Eleventh Amendment sovereign immunity. Congress has most clearly exercised this power pursuant to the Fourteenth Amendment,[177] which was added to the Constitution after the Civil War. However, in 1996, in *Seminole Tribe of Florida v. Florida*, the U.S. Supreme Court held that Congress could not abrogate states' Eleventh Amendment sovereign immunity through the Indian Commerce Clause,[178] which also eliminated abrogation through the Interstate Commerce Clause,[179] the basis of most of the federal environmental statutes. As a result, environmental citizen suits against states or state agencies in federal court must either find a waiver of Eleventh Amendment immunity or make use of an exception,[180] such as the Ex parte *Young* doctrine.[181] Otherwise, the suit is barred.[182]

Like federal sovereign immunity, therefore, Eleventh Amendment immunity can limit citizen enforcement of the federal environmental statutes.[183] However, it is also important to remember that citizens may have an alternative option to file an environmental lawsuit against a state in the state courts,[184] an option that does not exist for citizen suits against the federal government.[185]

C. Standing

Article III of the U.S. Constitution gives federal courts the power to hear only "Cases" or "Controversies."[186] Thus, as a constitutional matter, federal courts are courts of limited jurisdiction. The standing requirement helps these courts to comply with this limitation by requiring that the plaintiff have a real and personal stake in the outcome of the litigation.[187] Because standing is a matter of

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176 *United States v. Mississippi*, 380 U.S. at 140.

177 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59–60 (1996) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (Fourteenth Amendment)).

178 *See id.* at 72–73.

179 *Id.*

180 *See* Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289, 292–97 (2d Cir. 1996) (holding that the N.Y. State Thruway Authority was not a state agency under the "arm of the state" analysis).

181 In Ex parte *Young*, 209 U.S. 123 (1908), the U.S. Supreme Court held that the Eleventh Amendment permitted suits against state officers, rather than against the state itself, so long as the plaintiff sought only prospective (injunctive) relief. This exception has applied in several environmental citizen suits. *See, e.g.*, Cox v. City of Dallas, 256 F.3d 281, 307–09 (5th Cir. 2001) (allowing a RCRA citizen claim against a state official for injunctive relief).

182 *See* Burnette v. Carothers, 192 F.3d 52, 56–60 (2d Cir. 1999) (dismissing a CERCLA citizen suit); Martaugh v. New York, 810 F. Supp. 2d 446, 470 (N.D.N.Y. 2011) (dismissing CWA, RCRA, and CERCLA claims).

183 *Martaugh*, 810 F. Supp. 2d at 470.

184 *E.g.*, Boise Cascade Corp. v. State *ex rel.* Or. State Bd. of Forestry, 991 P.2d 563, 566–70, 573–74 (Or. Ct. App. 1999) (allowing that the State of Oregon could be hauled into state court for ESA-related constitutional takings claims, but holding that this particular claim was not yet ripe).

185 Federal sovereign immunity still applies in state court. *E.g.*, O'Neal v. Dep't of the Army of the U.S., 742 A.2d 1095, 1099–1101 (Pa. Super. 1999) (dismissing a CERCLA claim against the United States on sovereign immunity grounds).

186 U.S. CONST. art. III, § 2.

187 Baker v. Carr, 369 U.S. 186, 204 (1962).

constitutional jurisdiction, moreover, failure to meet the standing requirement results in dismissal of the plaintiff's suit.[188]

The citizen suit provisions in federal environmental statutes and Section 702 of the federal APA potentially allow "random" unrelated third parties with no direct stake in the litigation—any person or any citizen—to sue federal agencies and regulated entities for violations of federal environmental laws, raising standing concerns.[189] The U.S. Supreme Court began addressing constitutional environmental standing in 1972, in *Sierra Club v. Morton*.[190] In that case, it concluded that the Constitution allowed neither "public interest" standing[191] nor standing based on the interest of the natural resource itself.[192] Instead, the plaintiff or its members must be directly injured by the action being challenged.[193] The Court further refined standing jurisprudence in its 1992 decision in *Lujan v. Defenders of Wildlife*,[194] articulating the three-element "irreducible constitutional minimum"[195] test that continues to control citizen access to the federal courts. "First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not "conjectural" or "hypothetical"' . . . ."[196] "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'"[197] "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[198]

Environmental citizen suits and environmental lawsuits pursuant to the APA have created a significant and not always wholly reconcilable body of constitutional environmental law,[199] prompting an equally significant body of

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188 *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

189 5 U.S.C. § 702 (1946); 16 U.S.C. § 1540(g) (2012).

190 405 U.S. 727, 734–41 (1972).

191 *Id.* at 739–40.

192 *See id.* at 741–44 (Douglas J., dissenting) (arguing in dissent that organizations like the Sierra Club should be able to speak on behalf of endangered places and resources). Relatedly, species lack standing to sue in their own right, and the U.S. Court of Appeals for the Ninth Circuit dismissed an Endangered Species Act case because the named plaintiffs—the cetacean community, a group of whales—lacked standing under both the Endangered Species Act and the APA. Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171 (9th Cir. 2004).

193 *Sierra Club*, 405 U.S. at 739.

194 504 U.S. 555, 558 (1992).

195 *Id.* at 560–61.

196 *Id.* (quoting and citing Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–41, n. 16 (1972); Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983))).

197 *Id.* (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

198 *Id.* at 561 (quoting *E. Ky. Welfare Rights Org.*, 426 U.S. at 38).

199 In just the U.S. Supreme Court, the environmental standing decisions since *Sierra Club v. Morton* include: Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 368 n.1 (2018) (Endangered Species Act); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224–28 (2012) (APA); Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 420 (2011) (Clean Air Act); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149–156 (2010) (NEPA); Summers v. Earth Island Inst., 555 U.S. 488, 492–501 (2009) (APA challenge to Forest Service regulations); Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 516–26 (2007) (Clean Air Act);

standing scholarship.[200] However, standing jurisprudence also imposes basic cognitive framings on how the environment can exist within the law. Specifically, the federal court standing decisions test and articulate the kinds of interests in the environment that can find voice in the federal courts, which now range from aesthetic and recreational interests to economic and property interests.[201] Since *Sierra Club v. Morton*, however, environmental standing doctrine effectively forces environmental plaintiffs to frame environmental issues in terms of personal, concrete, and immediate anthropocentric values, eliding the public interest in and benefits resulting from basic protection of general ecosystem health and function.[202] Instead, particular environmental amenities must be valuable *to a specific someone* who is willing to go to court to protect them. While such persons are often easy to find, their absence means that public environmental values may never get their day in court.

IV. CONSTITUTIONAL TAKINGS CLAIMS ARISING BECAUSE THE "ENVIRONMENT" INCLUDES PRIVATE PROPERTY

Federal environmental law is applied administrative law, and, as a result, it can raise all of the general constitutional issues that all federal administrative regimes can raise. These include individual constitutional rights and civil liberties,

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Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–88 (2000) (Clean Water Act); Bennett v. Spear, 520 U.S. 154, 161–66 (1997) (prudential standing under the Endangered Species Act and APA); *Defenders of Wildlife*, 504 U.S. at 560–61 (1992) (Endangered Species Act); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990) (APA action about overseas injuries to species); Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16–17 (1981) (Clean Water Act and Marine Protection, Research, & Sanctuaries Act); Maryland v. Louisiana, 451 U.S. 725, 735–39 (1981) (natural gas tax); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 683–90 (1973) (NEPA).

200 Westlaw calls up well over 2,000 law review articles with "standing" in the title. For a representative range of environmental standing scholarship, see generally, Alexander Tom, Note, *Standing in a Federal Agency's Shoes: Should Third-Party Action Affect Redressability under the National Environmental Policy Act?*, 43 ECOLOGY L.Q. 337 (2016); Dru Stevenson & Sonny Eckhart, *Standing as Channeling in the Administrative Age*, 53 BOSTON COL. L. REV. 1357 (2012); Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289 (2011); Bradford Mank, *Revisiting the Lyons Den:* Summers v. Earth Island Institute*'s Misuse of* Lyons*'s "Realistic Threat" of Harm Standing Test*, 42 ARIZ. ST. L.J. 837 (2010); Bradford Mank, *Standing in* Monsanto Co. v. Geertson Seed Farms*: Using Economic Injury as a Basis for Standing When Environmental Harm Is Difficult to Prove*, 115 PENN. ST. L. REV. 307 (2010); Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1 (2007); Robin Kundis Craig, *Removing "the Cloak of a Standing Inquiry": Pollution Regulation, Public Health, and Private Risk in the Injury-in-Fact Analysis*, 29 CARDOZO L. REV. 149 (2007); Randall S. Abate & Michael J. Meyers, *Broadening the Scope of Environmental Standing: Procedural and Informational Injury in Fact After* Lujan v. Defenders of Wildlife, 12 UCLA J. ENVTL. L. & POL'Y 345 (1994); Jeffery W. Ring & Andrew F. Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. ENVTL. L. & LITIG. 345 (1993); Bruce B. Varney & George J. Ward, Jr., *Who Can Stand Up for the Environment? Standing to Challenge Administrative Agency Actions*, 7 ST. JOHNS J. LEGAL COMMENT 443 (1991); Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

201 *See* Abate & Myers, *supra* note 200, at 357–58, 379.

202 *Id.* at 732, 740.

especially in the enforcement context. Thus, for example, federal environmental enforcement has contributed to Fourth Amendment "administrative search" jurisprudence[203] and provided the first prompt to the U.S. Supreme Court to define the Seventh Amendment right to a jury trial in the context of federal regulatory requirements.[204]

Unlike most federal regulatory regimes, however, environmental law routinely incorporates private property to fulfill its goals. Private land provides habitat for endangered and threatened species,[205] while water rights can interfere with the needs of aquatic species, especially in the West during drought.[206] The filling of wetlands on private land can also eliminate important habitat as well as degrade water quality.[207] Building along the coast may have to be limited in light of coastal erosion, sea-level rise, and other coastal hazards.[208] Water quality protection may require temporary moratoria on new development to bring runoff under control.[209]

As was true for standing jurisprudence, federal environmental law (especially in combination with environment-related land use law) has provided the occasions to develop a substantial proportion of federal regulatory takings jurisprudence.[210] The Fifth Amendment to the U.S. Constitution establishes that the United States shall not take "private property . . . for public use, without just compensation."[211] This prohibition applies to the state and local governments by way of the Fourteenth Amendment's Due Process Clause.[212] For most of U.S. history, the "takings" clause applied to the government's physical occupation of real property.[213] In 1922, however, the U.S. Supreme Court concluded that governments could also effect unconstitutional takings of private property through regulation.[214] Under the test that the Court eventually announced, courts evaluating a regulatory

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203 *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 229, 234–39 (1986) (upholding the EPA's use of aerial photography in CAA enforcement against a Fourth Amendment challenge).

204 Tull v. United States, 481 U.S. 412, 417–20, 427 (1987) (holding that enforcement actions under the CWA for penalties require a jury trial).

205 *See, e.g.*, Boise Cascade Corp. v. United States, 296 F.3d 1339, 1357 (Fed. Cir. 2002).

206 *See, e.g.*, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1284 (Fed. Cir. 2008).

207 *See, e.g.*, Cooley v. United States, 324 F.3d 1297, 1307 (Fed. Cir. 2003).

208 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1008–09, 1019 (1992) (holding that when coastal building restrictions deprive a property owner of all economic use of the property, "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking").

209 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 308, 321–24 (2002).

210 Beckett G. Cantley, *Environmental Preservation and the Fifth Amendment: The Use and Limits of Conservation Easements by Regulatory Taking and Eminent Domain*, 20 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 215, 217–18 (2014).

211 U.S. CONST. amend. V.

212 Dolan v. City of Tigard, 512 U.S. 374, 383–84 (1994); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978); Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

213 Josh Patashnik, *Physical Takings, Regulatory Takings, and Water Rights*, 51 SANTA CLARA L. REV. 365, 365 (2011) (discussing how traditional takings were seen as a physical appropriation of real property that carried a "categorical duty to compensate" the landowner).

214 Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

taking claim balance three factors.[215] First, "[t]he economic impact of the regulation on the claimant and, [second], the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."[216] The effect on actual property rights is critical, and no taking would be found if the plaintiff did not have a cognizable property interest at stake.[217] Finally, the "character of the governmental action" is also important, with the explanation that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[218] As such, the Court has generally upheld land use and zoning regulations,[219] but "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'"[220]

While the regulatory takings doctrine has had a complex history in the U.S. Supreme Court, it potentially limits any environmental regulatory scheme that can interfere with private land use.[221] Section 404 of the CWA,[222] which requires

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215 *Penn Cent. Transp. Co.*, 438 U.S. at 124 (discussing factors that are involved in the court's fact-based inquiry on takings).

216 *Id.* (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

217 *See id.* at 124–25 (citing United States v. Willow River Power Co., 324 U.S. 499, 511 (1945)); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 60 (1913); Demorest v. City Bank Co., 321 U.S. 36, 42 (1944); Muhlker v. Harlem R.R. Co., 197 U.S. 544, 552 (1905); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964) (discussing the "multitude of existing interests" associated with property).

218 *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citing United States v. Causby, 328 U.S. 256, 270–71 (1946)).

219 *Id.* at 125–26 (citing Euclid v. Amber Realty Co., 272 U.S. 365, 397 (1926); Gorieb v. Fox, 274 U.S. 603, 608 (1927); Welch v. Swasey, 214 U.S. 91 (1909); *Goldblatt*, 369 U.S. at 592–93; Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 674 n.8 (1976); Miller v. Schoene, 276 U.S. 272 (1928)).

220 *Id.* at 128.

221 For discussions of regulatory takings in the environmental law context, see John D. Echeverria & Michael C. Blumm, Horne v. Department of Agriculture*: Expanding per se Takings While Endorsing State Sovereign Ownership of Wildlife*, 75 MD. L. REV. 657, 658 (2016) (discussing regulatory takings in the context of wildlife regulation under the ESA); Richard J. Roddewig & W. James Hughes, *Underbalanced Drilling: Can it Solve the Economic, Environmental and Regulatory Taking Problems Associated with Fracking?*, 49 J. MARSHALL L. REV. 511, 527–28 (2015) (discussing the controversial regulations on land use for fracking); Cantley, *supra* note 210, at 223; Robin Kundis Craig, *Using a Public Health Perspective to Insulate Land-Use Related Coastal Climate Change Adaptation Measures from Constitutional Takings Challenges*, 66 PLAN. & ENVTL. L. 4, 4 (2014) (discussing a 2010 U.S. Supreme Court decision which held that a Florida beach project did not amount to an unconstitutional regulatory taking); Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012) (discussing the various levels of protection against government activity that are given to differing land uses); Robin Kundis Craig, *Defining Riparian Rights as "Property" Through Takings Litigation: Is There a Property Right to Environmental Quality?*, 42 ENVTL. L. 115, 131–32 (2012) (discussing environmental regulation's impacts on riparian rights); Patashnik, *supra* note 213, at 366 (discussing the importance of the *Tahoe-Sierra Pres. Council* U.S. Supreme Court decision in takings jurisprudence); Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Response to Professor Huffman*, 37 ECOLOGY L.Q. 805, 816–19 (2010) (providing insight into background principles used in takings analyses); James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years after* Lucas, 35 ECOLOGY L.Q. 1, 4–5 (2008); James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813, 816 (2008) (discussing environmental regulatory takings in light of recent U.S. Supreme

permits when people dredge or fill waters on private property,[223] and the ESA's critical habitat[224] and species take prohibitions[225] have been particularly productive at generating constitutional takings cases.[226]

Regulatory takings claims nevertheless remain difficult to prove, and in the environmental law context the courts have articulated several ameliorating principles of law. For example, "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."[227] Under this rule, the Army Corps' designation of property as wetlands subject to CWA regulation does not constitute a "taking," regardless of whether the designation immediately affects the property's value.[228] In addition, the courts apply a "whole parcel" rule, under which they evaluate loss of value against the entire legal parcel at issue, not just the part where development

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Court precedent); Hannah Jacobs Wiseman, *Partial Regulatory Takings: Stifling Community Participation Under the Guise of* Kelo *Reform*, 117 YALE L.J. POCKET PART 60 (2007) (discussing government interference of property in the *Kelo* U.S. Supreme Court decision); Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005) (discussing the importance of the *Lucas* decision in regulatory takings jurisprudence); Steven J. Eagle, *Regulatory Takings, Public Use, and Just Compensation After* Brown, 33 Envtl. L. Rep. (Envtl. Law Inst.) 10,807 (2003); J. David Breemer, *Of Nominal Value: The Impact of* Tahoe-Sierra *on* Lucas *and the Fundamental Right to Use Private Property*, 33 Envtl. L. Rep. (Envtl. Law Inst.) 10,331 (2003); Michael C. Blumm, Palazzolo *and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137 139–40 (2002); David K. Brooks, *Regulatory Takings—Where Environmental Protection and Private Property Collide*, 17 NAT. RESOURCES & ENVT. 10, 10 (2002); Courtney Harrington, Penn Central *to* Palazzolo*: Regulatory Takings Decisions and Their Implications for the Future of Environmental Regulation*, 15 TUL. ENVTL. L.J. 383 384–86 (2002); Nicholas J. Johnson, *Regulatory Takings and Environmental Regulatory Evolution: Toward a Macro Perspective*, 6 FORDHAM ENVTL. L.J. 557, 558–59 (1995); James L. Huffman, *A Coherent Takings Theory at Last: Comments on Richard Epstein's* "Takings: Private Property and the Power of Eminent Domain", 17 ENVTL. L. 153 (1986).

222 33 U.S.C. § 1344(a) (2012).

223 *Id.*

224 16 U.S.C. § 1533(a)(3) (2012).

225 *Id.* § 1538(a).

226 For § 404 of the CWA, see generally for example Cooley v. United States, 324 F.3d 1297, 1299–1300 (Fed. Cir. 2003); Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 455, 457 (2009); Norman v. United States, 63 Fed. Cl. 231, 233 (2004); Pax Christi Mem'l Gardens, Inc. v. United States, 52 Fed. Cl. 318, 319 (2002); Formanek v. United States, 18 Cl. Ct. 785, 786 (1989). For the ESA, see generally for example Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1279–82 (Fed. Cir. 2008); Gordon v. Norton, 322 F.3d 1213, 2015 (10th Cir. 2003); *Boise Cascade Corp.*, 296 F.3d at 1341; Ideker Farms, Inc. v. United States, 136 Fed. Cl. 654, 659, 666 (2018); Klamath Irrigation v. United States, 129 Fed. Cl. 722, 724–25 (2016); Doyle v. United States, 129 Fed. Cl. 147, 149 (2016).

227 United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985); *see also Cooley*, 324 F.3d at 1301–04 (holding that a taking claim was ripe if the Corps issued a final permit decision, even if the Corps later reconsidered that decision); Rybachek v. U.S. Envtl. Prot. Agency, 904 F.2d 1276, 1300 (9th Cir. 1990) (holding that a "takings" claim was not ripe when EPA had not yet applied its regulations to the parcel in question); Moore v. United States, 943 F. Supp. 603, 611–12 (E.D. Va. 1996) (holding that a "takings" claim was not ripe until there was a permit denial); United States v. Robinson, 570 F. Supp. 1157, 1166 (M.D. Fla. 1983) ("As defendants have never had a permit denied, their taking claim is not ripe for judicial relief." (citing United States v. Byrd, 609 F.2d 1204, 1211 (7th Cir. 1979)); *see* Robert Meltz, *Wetlands Regulation and the Law of Regulatory Taking*, 30 Envtl. L. Rep. (Envtl. Law Inst.) 10468 (Jun. 2000).

228 Robbins v. United States, 40 Fed. Cl. 381, 385–86 (1998).

cannot occur.[229] Relatedly, mere diminution in value is not enough to prove a regulatory taking.[230] Finally, the existence of a federal regulatory scheme prior to purchase is relevant in evaluating the reasonableness of the property owner's investment-backed expectations.[231]

As a matter of adjudicated reality, the Takings Clauses have imposed only limited checks on environmental law. Takings jurisprudence, however, creates hesitations in governments contemplating new regulation—an unwillingness to exercise their full constitutional authority with respect to private property out of fear of expensive litigation, public backlash, or both. For example, only two states have taken on section 404 permitting authority under the CWA, in part because of the fears of takings liability from regulating the dredging and filling of wetlands and other waters[232]—activities generally associated with construction. Jurisprudential complexity (one might even say confusion) in specific subsets of takings cases, such as permit conditions/exactions or water rights, only increase the regulatory hesitation. While the "proper" balance between private rights and public needs is of course always subject to debate, the regulatory takings doctrine has contributed disproportionately to constitutional environmental law compared to its actual legal impact.

V. CONCLUSION: WILL THERE BE A FEDERAL CONSTITUTIONAL ENVIRONMENTAL *RIGHT*?

Despite the breadth and pervasiveness of constitutional environmental law, the U.S. Constitution itself provides no environmental rights.[233] Indeed, it does not even mention the environment. Moreover, although many other countries have found a penumbral constitutional environmental right in various constitutional protections such as the right to life,[234] the history of constitutional environmental

229 Forest Props., Inc. v. United States, 177 F.3d 1360, 1365 (Fed. Cir. 1999); *see also Formanek*, 18 Cl. Ct. at 794–95 (holding that the "taking" claim applied to the whole parcel when the Corps recognized throughout the permitting process that the plaintiff's development project involved the entire parcel, not just the wetlands). *But see* Fla. Rock Indus. v. United States, 8 Cl. Ct. 160, 164–65 (1985), *aff'd*, 791 F.2d 893, 904–05 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (holding that the relevant property for the "taking" analysis was the nighty-eight acres out of 1,560 acres involved in the permit denial, even though the claimant eventually intended to mine the whole property).

230 *See* Jentgen v. United States, 657 F.2d 1210, 1213–14 (Fed. Cir. 1981); Deltona Corp. v. United States, 657 F.2d 1184, 1193 (Fed. Cir. 1981), *cert. denied*, 445 U.S. 1017 (1982); 1902 Atl. Ltd. v. Hudson, 574 F. Supp. 1381, 1404–05 (E.D. Va. 1983); Walcek v. United States, 49 Fed. Cl. 248, 267, 272 (finding no "taking" despite a 59.8% diminution in value); *Robinson*, 570 F. Supp. at 1166 (citing *Deltona Corp.*, 657 F.2d at 1193).

231 *E.g.*, Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154, 156–57 (1999); Brace v. United States, 48 Fed. Cl. 272, 282–83 (2000) (both holding that the claimant's investment-backed expectations were mitigated by his being on notice of the CWA's requirements).

232 *State or Tribal Assumption of the Section 404 Permit Program*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/89F9-HJD8 (last visited July 13, 2019).

233 *Nat'l Ass'n of Home Builders*, 130 F.3d 1041, 1065–66 (D.C. Cir. 1997).

234 Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 Envtl. L. Rep. (Envtl. Law Inst.) 11,013, 11,018 (2004).

jurisprudence in the United States stands squarely against the finding of such a right within the U.S. Constitution.[235]

First, federal judges emphasize the U.S. Constitution's failure to mention the environment whenever plaintiffs have suggested that the federal courts should recognize a penumbral constitutional right to a clean and healthy environment,[236] which plaintiffs have done since at least 1971 through a variety of strategies.[237] Second, decades of attempts to extend the Fifth and Fourteenth Amendment rights to life,[238] the Ninth Amendment protection of other fundamental rights,[239] Fifth[240] and Fourteenth[241] Amendment Due Process, and Fifth and Fourteenth Amendment Equal Protection[242] to the environment had—at least until 2016[243]—universally failed. In 1971, for example, the U.S. Court of Appeals for the Fourth Circuit dismissively refused to recognize a constitutional right to environmental protection to reinforce the newly enacted NEPA, concluding that "[w]hile a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so."[244] Over two decades later, and despite dozens of intervening cases, the United States Court of Appeals for the Eighth Circuit could with even more assurance conclude that citizens of the United States do not "have a fundamental

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235 I first discussed the issue of a constitutional right to a clean and healthy environment in 2003 and 2004. ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT 238–259 (2004); *see* Craig, *supra* note 234, at 11,013, 11,018. The discussion here both updates and recasts that earlier work.

236 *See, e.g.*, *National Ass'n of Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting) ("[T]he Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.' The Framers of the Constitution extended that power to Congress, concededly without knowing the word 'ecosystems,' but certainly knowing as much about the dependence of humans on other species and each of them on the land as any ecologist today. An ecosystem is an ecosystem, and commerce is commerce.").

237 Craig, *supra* note 234, at 11,020–21.

238 *See* Gasper v. La. Stadium & Exposition Dist., 577 F.2d 897, 898–99 (5th Cir. 1978); *In re* "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928, 933–34 (E.D.N.Y. 1979); Fed. Emps. for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 184–85 (D.D.C. 1978); Gasper v. La. Stadium & Exposition Dist., 418 F. Supp. 716, 718–21 (E.D. La. 1976).

239 Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n, 970 F.2d 421, 426–27 (8th Cir. 1992); *In re* "Agent Orange" Prod. Liab. Litig., 475 F. Supp. at 933–34; *Gasper*, 418 F. Supp. at 721–22; Pinkney v. Ohio Envtl. Prot. Agency, 375 F. Supp. 305, 309–10 (N.D. Ohio 1974); Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061, 1064–65 (N.D. W. Va. 1973); James River & Kanawha Canal Parks, Inc. v. Richmond Metro. Auth., 359 F. Supp. 611, 640–41 (E.D. Va. 1973); Tanner v. Armco Steel Corp., 340 F. Supp. 532, 535 (S.D. Tex. 1972); Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 325 F. Supp. 728, 739 (E.D. Ark. 1971).

240 *In re* "Agent Orange" Prod. Liab. Litig., 475 F. Supp. at 933–34; *Union Carbide Corp.*, 363 F. Supp. at 1064–65; *Richmond Metro. Auth*., 359 F. Supp. at 640–41; *Envtl. Def. Fund, Inc.*, 325 F. Supp. at 739.

241 Valero Terrestrial Corp. v. McCoy, 36 F. Supp. 2d 724, 752–53 (N.D. W. Va. 1997); MacNamara v. Cty. Council of Sussex Cty., 738 F. Supp. 134, 142 (D. Del. 1990); *In re* "Agent Orange" Product Liability Litigation, 475 F. Supp. at 933–34; *Pinkney*, 375 F. Supp. at 310–11; *Union Carbide*, 363 F. Supp. at 1064–65; *Richmond Metro. Auth*., 359 F. Supp. at 640–41; *Tanner*, 340 F. Supp. at 535–37; *Envtl. Def. Fund*, 325 F. Supp. at 739.

242 *Concerned Citizens of Neb.*, 970 F.2d at 427; Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1429–30 (9th Cir. 1989).

243 Juliana v. United States, 217 F. Supp. 3d 1224, 1271–72 (D. Or. 2016).

244 Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

right to an environment free of non-natural radiation."[245] Most recently, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit have made clear that constitutional environmental rights arising under *state* constitutions do not create rights under the U.S. Constitution.[246]

Despite this legal wall of decisions that federal constitutional environmental rights do not exist, in 2016 the United States District Court for the District of Oregon held in *Juliana v. United States* that there is a fundamental due process right to a stable climate system, because "a stable climate system is a necessary condition to exercising other rights to life, liberty, and property."[247] The court was careful to limit this newfound constitutional environmental right:

> In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase "capable of sustaining human life" should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation. In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation, To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.[248]

Nevertheless, and despite the fact that the district court was deciding only a motion to dismiss, the *Juliana* decision has been subject to three years of legal maneuvering, with the net result that the district court's initial legal decisions are now on appeal to the United States Court of Appeals for the Ninth Circuit.[249] After the District of Oregon denied the government's motion for interlocutory appeal in June 2017,[250] the federal government sought mandamus orders to dismiss twice from the U.S. Court of Appeals for the Ninth Circuit[251] and once from the U.S. Supreme Court,[252] only to be denied in all three instances.[253] In October 2018, the

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245 *Concerned Citizens of Neb.*, 970 F.2d at 426.

246 Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n, 243 F. Supp. 3d 141, 152–53 (D.D.C. 2017) (holding that environmental rights created under the Pennsylvania Constitution do not create federal due process rights), *aff'd*, 895 F.3d 102, 108–10 (D.C. Cir. 2018).

247 *See Juliana*, 217 F. Supp. 3d at 1250.

248 *Id.*

249 Juliana v. United States, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018).

250 *Id.* at *2.

251 *In re* United States, 884 F.3d 830, 837–38 (9th Cir. 2018); *In re* United States, 895 F.3d 1101, 1106 (9th Cir. 2018).

252 United States v. U.S. Dist. Court for Dist. of Or., 139 S. Ct. 1, 1 (2018).

253 *Id.*; *In re* United States, 884 F.3d at 837–38; *In re* United States, 895 F.3d at 1106.

Oregon District Court agreed to dismiss the President as a defendant and concluded that material issues of fact precluded summary judgment on standing; however, it refused to reconsider separation of powers issues and concluded that strict scrutiny would apply to the due process claim.[254] The court again refused to certify its decision for an interlocutory appeal.[255] In response to this new decision, the United States again appealed to the U.S. Supreme Court, which first stayed the case[256] and then vacated its own order three weeks later.[257] The Ninth Circuit then stepped in and stayed the case, inviting the Oregon District Court to revisit its decisions regarding an interlocutory appeal, and the district court certified the appeal.[258] Oral argument in the Ninth Circuit took place on June 4, 2019.[259]

One can only conclude from these procedural shenanigans and the federal government's clear unwillingness to let the normal trial and appeal processes play themselves out that the prospect of fundamental constitutional rights in the environment terrifies the Trump Administration—even though the *Juliana* case might well fail Article III standing. *Juliana* may well open a new chapter in constitutional environmental law. Even if it does not, however, constitutional environmental law will continue to generate litigation and scholarship for the foreseeable future, helping to articulate the constitutional relationships between and among the federal and state governments and their citizens.

254 *Juliana*, 339 F. Supp. 3d 1062, 1076–80, 1084–96 (D. Or. 2018) (dismissing the President as a defendant, refusing to reconsider the separation of powers issues, and precluding summary judgment on the standing issue).

255 *Id.* at 1104–05.

256 *In re* United States, 139 S. Ct. 16, 16 (2018).

257 *In re* United States, 139 S. Ct. 452, 453 (2018).

258 *Juliana*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018) (referencing United States v. U.S. Dist. Court for Dist. of Or., Case No. 18-73014, Order Dated Nov. 8, 2018 (9th Cir. 2018)).

259 Unusually, the oral argument was recorded and the broadcast and can be viewed here: https://perma.cc/QZ29-UX7X.

Taming America's Rogue Roads: Unsolved R.S. 2477 Claims in Utah and Beyond

by Evan Baylor[1]

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Introduction

The United States boasts some of the world's most stunning vistas, picturesque landscapes, and diverse sceneries. From the Green Mountains in Vermont to the mesas of Utah, the federal government carefully manages and protects many of the most pristine examples of America's beauty.[2] However, these lands are under attack. In the West, local governments are

1. Juris Doctor 2019, Vermont Law School; Bachelor of Arts 2012, Centre College. Special thanks to Vermont Law School Professor Hillary Hoffmann for sparking my interest in the topic. And many thanks to my supportive friends and family for their constant encouragement.

2. *See* Quoctrung Bui & Margot Sanger-Katz, *Why the Government Owns So Much Land in the West*, N.Y. TIMES (Jan. 5, 2016), https://www.nytimes.com/2016/01/06/upshot/why-the-government-owns-so-much-land-in-the-west.html?_r=0 (noting the federal government owns and manages 47% of all land in the West).

forging roads across federal public lands.[3] In Utah, well-over 12,000 roads traverse the public's land.[4] Utilizing rights-of-way created under a statute enacted over 150 years ago and repealed over 40 years ago, these rogue roads are causing serious problems as they wind through protected federal lands.[5] Congress, land management agencies, and the judicial system have failed to resolve the growing issue.[6] Now, as the Utah Federal District Court moves forward in yet another suit to resolve such claims, the court has a chance to put into motion a real solution.[7] A solution could not be timelier as President Trump's administration aims to open public lands to private development.[8]

This Note will provide a brief history of Revised Statute 2477 (R.S. 2477), explore the relevant case law surrounding the issue in Utah, and survey solutions to resolve the numerous R.S. 2477 claims across the American West. Part I will explore the origin of R.S. 2477, its eventual repeal, and explain why it is the root of so much trouble today.[9] Part II will recount the relevant Tenth Circuit case law, which is representative of the broader, national issue. Specifically, this section will examine how the case law has created a legal framework for resolving claims, and scrutinize the validity of that method. Further, Part II will examine the most recent case law to provide a view of where R.S. 2477 claims stand today.[10] The Utah

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3. Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *3–5 (D. Utah Apr. 17, 2015), certified question answered sub nom. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46 ("The litigation encompasses more than 20 different cases ('R.S. 2477 Road Cases') now pending in federal court, involves approximately 12,000 roads, and impacts most areas of the State.").

4. *See id.*

5. R.S. 2477, 43 U.S.C. § 932 (1938) *repealed by* Federal Lands Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (2018).

6. *See, e.g.,* Omnibus Consolidated Appropriations Act, Pub L. No. 104-208, 110 Stat. 3009-200, § 108 (1996) ("No final rule or regulation of any agency of the Federal Government pertaining to the . . . validity of a right-of-way pursuant to Revised Statute 2477 . . . shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.").

7. *See Garfield Cty.*, 2015 WL 1757194, at *5, *10.

8. Juliet Eilperin, *Shrink at Least 4 National Monuments and Modify a Half-Dozen Others, Zinke Tells Trump*, WASH. POST (Sept. 17, 2017), https://www.washingtonpost.com/national/health-science/shrink-at-least-4-national-monuments-and-modify-a-half-dozen-others-zinke-tells-trump/2017/09/17/a0df45cc-9b48-11e7-82e4-f1076f6d6152_story.html?utm_term=.012d060a77fd; Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html.

9. *See* 43 U.S.C. § 1769(a) (2018) (reporting that the repeal of R.S. 2477 did not terminate existing rights-of-way issued prior to the act); U.S. Dep't of the Interior Gen. Land Office, *Regulations Governing Rights-of-Way for Canals, Ditches, Reservoirs, Water Pipe Lines, Telephone and Telegraph Lines, Tramroads, Roads and Highways, Oil and Gas Pipe Lines, Etc.*, 56 Interior Dec. 533, 533-35, 551 (1938) [hereinafter Regulations Governing Rights-of-Way] (showing that, without any sort of recordation of claims, it is incredibly difficult to determine what rights were established prior to the 1976 repeal); *see infra* Part I (discussing the creation and repeal of R.S. 2477).

10. *See generally* Wilderness Soc'y v. Kane Cty. (*Kane I*), 560 F. Supp. 2d 1147 (D. Utah 2008) (determining whether county had R.S. 2477 rights); Wilderness Soc'y v. Kane Cty. (*Kane II*), 581 F.3d

Supreme Court's answer to the Tenth Circuit's certified question places the ball back in District Court.[11] Part III will explore how the Federal District Court should continue to pursue a clear legal framework to effectively and efficiently deal with unresolved claims.[12] Lastly, this Note will briefly survey various proposed solutions—direct or indirect—beyond the courts and advocate for Congressional action through reauthorization of federal agencies to address the claims.[13] After years of uncertainty, the time has come to resolve the R.S. 2477 claims crisscrossing the American West and protect our public lands.

I. BACKGROUND: R.S. 2477 ORIGINS

R.S. 2477 is contextualized by a suite of government actions facilitating the disposal of federal public lands in the western United States.[14] As the United States spread to span the width of the continent, the federal government enacted numerous pieces of legislation to divvy up the new territory.[15] Pieces of the disposal era's legislative legacy, like the 1862 Homestead Act, aimed to settle the West.[16] Still others encouraged the development of the West's wealth of natural resources, including the necessary infrastructure for resource extraction.[17] Maintaining the broad policy of disposition, the Mining Act of 1866 legalized prospecting on

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1198 (10th Cir. 2009) (determining whether county could manage an R.S. 2477 claim without alerting federal government); Wilderness Soc'y. v. Kane Cty. (*Kane III*), 632 F.3d 1162 (10th Cir. 2011) (determining whether county could manage an R.S. 2477 claim without alerting federal government); Kane Cty. v. United States (*Kane IV*), 772 F.3d 1205 (10th Cir. 2014) (determining whether county had existing R.S. 2477 claim and if it could manage it without alerting federal government)*; see infra* Part II (discussing how federal courts have failed to create a legal framework for resolving Utah's R.S. 2477 claims).

11. *See Garfield Cty.*, 2015 WL 1757194, at *5 (certifying question to Utah Supreme Court); *see also* Garfield Cty. v. United States, 2017 UT 41, ¶ 38, 424 P.3d 46, 63 (answering district court's certified question and leaving district court to analyze).

12. *See infra* Part III (discussing how the District Court should proceed, and alternative solutions to remedy the R.S. 2477 quagmire).

13. *Id.* (discussing remedies outside of court and focusing on Congressional action as most promising solution).

14. *See generally* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW, 58–61 (Robert C. Clark et al. eds., 7th ed. 2014) (reviewing various disposal statutes encouraging the settlement of the West).

15. *Id.*; S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 740 (10th Cir. 2005), *as amended* (Oct. 12, 2005) ("During that time congressional policy promoted the development of the unreserved public lands and their passage into private productive hands . . . .").

16. *See* COGGINS, *supra* note 14, at 95–96 (discussing various homestead legislation); Homestead Act, 43 U.S.C. § 161, *repealed by* 43 U.S.C. § 1701–1782 (2018) (allowing citizens to purchase up to 160 acres of land if they met residency and cultivation requirements).

17. *See* COGGINS, *supra* note 14, at 97–100 (discussing federal land policy toward timber, mining, and railroads).

federal land.[18] The law opened federal lands to miner exploration and occupancy.[19] And the statute included a simple, one-line statement giving the right-of-way to construct roads across public lands.[20]

This is R.S. 2477. One judge characterized the statute as "a standing offer of a free right of way over the public domain."[21] These rights-of-way became effective upon construction of a road.[22] Claims required no additional formalities: "no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested."[23] For decades after its passage, R.S. 2477 garnered praise for successfully furthering United States policy.[24] The roads facilitated settlement and increased the value of public lands.[25]

In the 1970s, the United States shifted to a policy of public land preservation and conservation. Legislation such as the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Federal Land Management and Policy Act of 1976 (FLPMA), marked the end of the disposal era and its statutes.[26] In particular, FLPMA officially repealed R.S. 2477.[27] Thus, Congress would no longer recognize new R.S. 2477 claims.[28] However, FLPMA did not terminate existing rights-of-way issued prior to the Act.[29] The statute froze R.S. 2477 claims as they were in 1976.[30] Rights established prior to the 1976 repeal are incredibly difficult to determine without prior recording.[31]

Combining the questionable validity of R.S. 2477 claims with the resentful—even hostile—attitude of the arid West creates the problems we

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18. Mining Act of 1866, ch. 262, 14 Stat. 251, *repealed by* 43 U.S.C. §§ 1701-1782.

19. *Id.*

20. *Id.*; R.S. 2477, *supra* note 5.

21. Streeter v. Stalnaker, 85 N.W. 47, 48 (Neb. 1901).

22. Regulations Governing Rights-of-Way, *supra* note 9, at 551.

23. S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005), *as amended* (Oct. 12, 2005)

24. *See, e.g.,* Flint & P.M. Ry. Co. v. Gordon, 2 N.W. 648, 653 (Mich. 1879) (discussing policy of R.S. 2477 and other disposal statutes).

25. *Id.*

26. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370a (2018); National Forest Management Act, 16 U.S.C. §§ 1600–1614 (2018); 43 U.S.C. §§ 1701–1782.

27. 43 U.S.C. § 1761.

28. *Id.*

29. *Id*. at § 1769(a).

30. Sierra Club v. Hodel, 848 F.2d 1068, 1078 (10th Cir. 1988), *overruled on other grounds en banc by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

31. *See* S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005), *as amended* (Oct. 12, 2005) ("[N]o entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.").

see today. There are many instances where citizens of western states have clashed with the federal government over federal land ownership and management.[32] In the 1970s, the "Sagebrush Rebellion" embodied the Western preoccupation by promoting traditional and local economic interests over federal controls.[33] In the 1990s, the "County Supremacy" movement echoed this hostility toward federal agencies managing large swaths of western lands.[34] These attitudes live on. In 2016, militant ranchers made headlines for taking control of the Malheur National Wildlife Refuge in Oregon.[35] The armed ranchers and militiamen illegally held the refuge in protest of federal regulation of grazing permits.[36]

This resentment runs through western populations and is felt in their representative bodies.[37] A good example of this attitude is the action of the Utah Legislature.[38] Utah's rural communities are continually "dissatisfied with federal land management decisions, blaming environmental regulation, litigious advocacy groups, and recreational users of public lands for stifling local economies long dependent on ranching, logging, and mining."[39] As a result, the Utah Legislature passed the Utah Transfer of Public Lands Act of 2012.[40] The Act unsuccessfully demanded that the federal government cede federally owned lands to the State of Utah by 2014, despite consistent studies proving Utah administratively and financially incapable of managing those lands.[41]

A long-held resentment fuels continued action by citizens of these states and local governments against federal control of Western lands.[42] As shown, citizens and governments are willing to act at the fringe of legality, if not through means entirely illegal, to protest federal land ownership and

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32. *See* Robert L. Fischman & Jeremiah I. Williamson, *The Story of* Kleppe v. New Mexico: *The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 125–26 (2011) (discussing Westerners' resistance to and frustration with federal land ownership and management, as exemplified through the Sagebrush Rebellion); Michael C. Blumm & James A. Fraser, *"Coordinating" with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands*, *in* 2017 PUB. LAND & RESOURCES L. REV. 1 (outlining the various expressions western hostility toward federal land management has taken over the years).

33. Fischman & Williamson, *supra* note 32, at 160, 162.

34. Blumm & Fraser, *supra* note 32, at 2.

35. *Id.* at 3.

36. *Id.*

37. *Id.*; *see, e.g.,* H.B. 148, 59th Leg., Reg. Sess. (Utah 2012) (demanding that federal lands within Utah be ceded to the State).

38. H.B. 148.

39. Blumm & Fraser, *supra* note 32, at 4–5.

40. H.B. 148.

41. Blumm & Fraser, *supra* note 32, at 4–5.

42. *Id.*

management.[43] In the context of this Note, the rebellious spirit of Utah's counties and citizens certainly animate the continued assertion and defense of R.S. 2477 claims across federal lands.[44] Each R.S. 2477 claim is a step toward reclaiming lands from the federal government. However, the courts are now left to determine whether this latest incarnation of Western rebelliousness is within the bounds of the law.

II. THE PROBLEM: R.S. 2477 AND POST-FLPMA CASE LAW

A. R.S. 2477 Claims Before and After FLPMA

Prior to 1976, when Congress enacted FLPMA, state courts largely decided R.S. 2477 claims based on state law.[45] Further, most pre-FLPMA litigation focused on disputes between private landowners.[46] The passage of FLPMA marked a change to more contentious litigation, more narrow interpretations of R.S. 2477, and ultimately, more claims.[47] In light of this, the Department of the Interior (DOI) made an effort to consolidate records of claims through regulation of local and state governments.[48] However, by the 1980s, the effort fizzled.[49] With it, the opportunity for efficient resolution of claims faded.[50] Without an efficient, nationally applicable framework for resolution, states have struggled to resolve these claims.

Now, over 150 years after Congress enacted the Mining Law of 1866, local governments are claiming and fighting to validate R.S. 2477 rights-of-way.[51] In Utah alone, county governments claim over 12,000 roads.[52] This vast web of claims traverses thousands of miles of Utah's federally owned

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43. *See* Fischman & Williamson, *supra* note 32, at 162 (discussing hostility toward federal land management and "uncooperative federalism" movement); Blumm & Fraser, *supra* note 32, at 2–3 (discussing manifestations of western hostility).

44. Blumm & Fraser, *supra* note 32, at 2–3.

45. James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005, 1026 (2005).

46. *Id.* at 1028.

47. *Id.*; Tova Wolking, *From Blazing Trails to Building Highways:* SUWA v. BLM *& Ancient Easements Over Federal Public Lands*, 34 ECOLOGY L. Q. 1067, 1075–76 (2007).

48. Management of Rights-of-Way and Related Facilities on Public Lands and Reimbursement of Costs, 44 Fed. Reg. 58,106, 58,106 (proposed Oct. 9, 1979) (proposed rulemaking).

49. Rights-of-Way, Principles and Procedures; Amendment, 47 Fed. Reg. 12,568, 12,568–70 (proposed Mar. 23, 1982) (codified at 43 C.F.R. pt. 2800, subsequently repealed); Wolking, *supra* note 47, at 1076.

50. Wolking, *supra* note 47, at 1076.

51. Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *3 (D. Utah Apr. 17, 2015), certified question answered sub nom. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46

52. *Id.* ("The litigation encompasses more than 20 different cases ('R.S. 2477 Road Cases') now pending in federal court, involves approximately 12,000 roads, and impacts most areas of the State.").

landscapes.[53] These are not ordinary roads and highways. The majority of R.S. 2477 roads do not lead to schools, businesses, or even neighboring communities.[54] Instead, many R.S. 2477 roads are simply ruts in the dirt—even cow paths—rather than paved roads or highways.[55] Thus, the practical value of such roads may be unclear. But R.S. 2477 claims still pose a certain threat.

B. The Impact of R.S. 2477 Roads

Many R.S. 2477 roads bisect some of the country's most precious and sensitive environments, like the Grand Staircase-Escalante National Monument (Monument).[56] President Clinton established the Monument via Proclamation in 1996.[57] The 1.9 million-acre monument encompasses a large portion of southern Utah's landscape.[58] The water-scarce region hosts life zones ranging from "low-lying desert to coniferous forests."[59] President Clinton aimed to preserve the area's remote, primitive, and unspoiled character by designating the lands as a monument.[60] In doing so, President Clinton noted the area was the last portion of the continental United States to be mapped.[61] Nearly half of the Monument consists of 16 Wilderness Study Areas (WSAs), which speaks to the remote, primitive, and unspoiled character of the Monument.[62]

While historical, archeological, and cultural aspects of the land are cited as reasons for monument status, the land is also an "outstanding biological resource."[63] The designation aimed to protect many endemic species near the Monument.[64] The Proclamation notes that "[m]ost of the

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53. *Id.*

54. Hoax Highways (RS 2477), S. UTAH WILDERNESS ALL., https://suwa.org/issues/phantom-roads-r-s-2477/ (last visited Oct. 29, 2019) ("[T]he overwhelming majority of these routes are not 'roads' that lead to schools, stores, or towns. Rather, they are wash bottoms, cowpaths [sic], and two-tracks in the desert . . . .").

55. *Id.*

56. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT APPROVED MANAGEMENT PLAN ix, 46–47 (2000) (discussing the presence of R.S. 2477 claims within the monument's boundaries) [hereinafter GSENM MANAGEMENT PLAN].

57. Proclamation No. 6290, 61 Fed. Reg. 50,223, 50,223 (Sept. 8, 1996) [hereinafter Proclamation 6920]. President Trump's Proclamation on December 4, 2017 effectively destroys the Monument as established by President Clinton. However, roughly half of the area of the original monument will retain its designation as monument land, including much of the Wilderness Study Areas. Proclamation No. 9682, 82 Fed. Reg. 58,089, 58,089 (Dec. 4, 2017) [hereinafter Proclamation 9682].

58. GSENM MANAGEMENT PLAN, *supra* note 56, at iii.

59. Proclamation 6920, *supra* note 57, at 50,224.

60. *Id.* at 50,223.

61. *Id.*

62. GSENM MANAGEMENT PLAN, *supra* note 56, at 62.

63. Proclamation 6920, *supra* note 57, at 50, 224.

64. *Id.*

ecological communities contained in the Monument have low resistance to, and slow recovery from, disturbance," which makes the ecosystem particularly vulnerable.[65] Additionally, the Monument is home to a number of species listed as threatened or endangered under the Endangered Species Act.[66] Thus, any threat to the remote ecosystem must not be considered lightly.

While the R.S. 2477 claims remain unresolved, the Monument is damaged by the roads' existence and use in several ways. First, the R.S. 2477 claims threaten the overall undisturbed and primitive character of the land, as Clinton intended to protect and Trump intends to protect, in part.[67] Second, motorized access via R.S. 2477 roads threatens unique ecological communities, which are unlikely to recover from damaging disturbance even if claims are later invalidated.[68] Third, the existence of roads in WSAs will likely preclude their eventual designation as Wilderness Areas.[69]

The Grand Staircase-Escalante National Monument provides an apt example of the threats created by R.S. 2477 claims. Yet, the Monument is only one of numerous public resources in Utah facing such threats.[70] The need for resolution is clear. With a flood of claims, no true legislative guidance, and no federal agency authority, courts are left only with a confusing body of case law to determine the validity of these claims.[71]

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65. *Id.*

66. *Fauna of the Grand Staircase-Escalante National Monument, Utah*, http://www.zionnational-park.com/gsfauna.htm (last visited Oct. 29, 2018).

67. *See* Proclamation 6920, *supra* note 5757, at 50,244 (describing historical importance); Proclamation 9682, *supra* note 57, at 58,089-90 (modifying the monument to the smallest area possible needed to protect the historic and ecological importance).

68. *See* Proclamation 6920, *supra* note 57, at 50,244 (describing the ecological importance of the monument).

69. *See* GSENM MANAGEMENT PLAN, supra note 56, at 62 (noting land must have certain characteristics to qualify for WSA status). According to the monument management plan, no action may be taken to impair a wilderness study areas future designation as wilderness. *Id*. Thus, the plan bans any surface-disturbance or placement of permanent structures within study areas, in accordance with the Wilderness Act of 1964, 16 U.S.C. § 1131(a). *Id.*

70. *See Utah – List View*, NAT'L PARK SERV., https://www.nps.gov/state/ut/list.htm?program=parks (last visited Oct. 29, 2019) (listing the thirteen national parks within Utah); *see also National Monuments & Landmarks*, UTAH.COM, https://utah.com/national-monuments-landmarks (last visited Oct. 29, 2019) (listing nine national monuments and other protected landmarks of the Utah landscape).

71. Omnibus Consolidated Appropriations Act, *supra* note 6 ("No final rule or regulation of any agency of the Federal Government pertaining to the . . . validity of a right-of-way pursuant to Revised Statute 2477 . . . shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.")

C. Confusing Kane County Cases

While R.S. 2477 claims significantly impact several states, this Note focuses on recently developed case law in Utah.[72] The federal government owns the majority of Utah's land—approximately 65%— thus explaining the large volume of claims made there.[73] Because of the prior and developing case law and the number of claims, Utah exemplifies the issues surrounding R.S. 2477—in particular Kane and Garfield Counties. Over the past decades, R.S. 2477 issues have plagued the Tenth Circuit Court of Appeals, federal district courts, and Utah's state courts.[74] Despite their frequent interactions, even the most recent case law remains confusing. This is largely because these cases have failed to adequately or substantially address R.S. 2477 claims. In 1988, environmental groups sought to enjoin the widening of an R.S. 2477 highway traversing Garfield County, Utah.[75] Avoiding the broader issues surrounding R.S. 2477, the court focused on the text of the Statute.[76] It concluded the widening of the highway fell within the existing right-of-way and failed to address how future courts could assess the validity of such claims.[77] This case is exemplary of courts' continued reluctance to tackle claims head on.

The first of the confusing Kane County cases began when the Kane County Commissioner asserted ownership of numerous R.S. 2477 claims.[78] A letter by the Commissioner proclaimed the Kane County claims valid.[79] The County passed an ordinance to remove signs from federal lands and put up their own—indicating the roads were open to off-road vehicles.[80] The

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72. *See, e.g.,* Mark Udall, *There's a Way to End the RS 2477 Road Mess*, HIGH COUNTRY NEWS (June 9, 2003), https://www.hcn.org/wotr/14049 (describing potential RS 2477 conflicts in various states).

73. David Johnson & Pratheek Rebala, *Here's Where the Federal Government Owns the Most Land*, TIME (Jan. 5, 2016), http://time.com/4167983/federal-government-land-oregon/ (noting that the federal government owns 64.9% of Utah's land).

74. *See, e.g.,* Sierra Club v. Hodel, 848 F.2d 1068, 1073 (10th Cir. 1988), *overruled on other grounds en banc by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992). (determining whether R.S. 2477 right allowed county road developments through federal land); S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 740-42 (10th Cir. 2005), *as amended* (Oct. 12, 2005) (discussing the vexing problem of R.S. 2477); Utah v. United States, No. 2:05-CV-714-TC, 2008 WL 4170017, at *1 (D. Utah Sept. 3, 2008) (allowing intervention in an R.S. 2477 quiet-title action).

75. *Hodel*, 848 F.2d at 1073.

76. *Id.* at 1084.

77. *Id.*

78. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008).

79. *Id.* at 1155-56.

80. *Id.*

Wilderness Society, a conservation organization, sued the County.[81] The organization claimed that federal law preempted the County's actions—in other words, the County violated the Supremacy Clause.[82]

First, the court noted a presumption of ownership and management of federal land lies with the federal government and that Kane County "is not entitled to win title or exercise unilateral management authority until it successfully has carried its burden of proof in a court of law."[83] The court ruled the ordinance violated the Supremacy Clause and enjoined the County from encouraging use of federal lands without first validating its R.S. 2477 claims.[84] However, the court did not determine the validity of those claims and instead avoided the issue of property rights altogether.[85] By doing so, the court avoided the heart of the R.S. 2477 issue.

On appeal, the County argued that the Wilderness Society lacked standing to bring the Supremacy Clause claim.[86] However, the court disagreed.[87] The Tenth Circuit affirmed the lower court and determined the County had not successfully validated its claims.[88] The County could defend the preemption claim, but only if the court validated the R.S. 2477 claims.[89] Until that happened, the County had no right to take actions on those claims.[90] Again, the court avoided an actual assessment of the R.S. 2477 claims' validity.

Finally, the court granted the County's petition for a rehearing en banc.[91] The panel vacated the District Court's decision and remanded the case with instructions to dismiss.[92] In doing so, the decision reversed the burden of proof that the County must validate its claim before taking any action.[93] The dissent criticized the majority's opinion, explaining the negative impact it would have upon future R.S. 2477 litigation.[94] As one

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81. *Id.*; *see also About Us*, THE WILDERNESS SOC'Y, http://wilderness.org/about-us (last visited Oct. 29, 2019) ("The Wilderness Society has led the effort to permanently protect 109 million acres of wilderness in 44 states. We have been at the forefront of nearly every major public lands victory.").

82. *Kane I*, 560 F. Supp. 2d at 1149.

83. *Id.* at 1151 (quoting Wilderness Soc'y v. Kane Cty., 470 F. Supp. 2d 1300, 1306 (D. Utah 2006)).

84. *Id*. at 1165.

85. *Id.* at 1165-66; *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting) (noting lower court did not decide the County's property rights).

86. *Kane II*, 581 F.3d 1198, 1209 (10th Cir. 2009).

87. *Id.* at 1212.

88. *Id*. at 1226.

89. *Id.* at 1221.

90. *Id.*

91. *Kane III*, 632 F.3d 1162, 1164-65 (10th Cir. 2011).

92. *Id.* at 1174.

93. *Id.* at 1171.

94. *See id*. at 1180 (Lucero, J., dissenting) ("This is a pivotal case which, unless reversed or modified, will have long-term deleterious effects on the use and management of federal public lands.").

commenter aptly noted, the majority missed an opportunity to create a legal framework for resolving these complex issues, and instead only added to the confusion.[95] After three passes at the County's claims, the courts missed the opportunity.

In a new action, brought several years later, Kane County sought to quiet title on several R.S. 2477 claims using the Quiet Title Act (QTA), resulting in two district court decisions.[96] Kane County appealed those district court decisions to the Tenth Circuit.[97] In order to have a disputed title, as the QTA requires, the County must show that the United States explicitly or implicitly disputed the claims.[98] Ultimately, the court concluded the United States did not dispute the title.[99] The Supreme Court of the United States denied the petition for writ of certiorari, passing on an opportunity to set a standard for lower courts to resolve R.S. 2477 claims.[100] For a final time, the Tenth Circuit avoided addressing the numerous R.S. 2477 claims and failed to resolve any claims.[101] While Kane County did set a legal standard for resolution under the QTA, there remains little progress in resolving the growing R.S. 2477 issues.[102] Further, despite years of litigation and a legal standard, no clear, overarching policy concerning R.S. 2477 roads has been developed. Now, the District Court, with the help of the Utah Supreme Court, attempts once more to apply the legal standard to resolve only a fraction of the total number of claims.[103]

Currently, most of the R.S. 2477 cases have been stayed due to a comprehensive case management order.[104] However some remain active.[105] Among them is the consolidated action by Garfield County, including claims on over 700 R.S. 2477 roads.[106] As a permissive intervener, the Southern Utah Wilderness Alliance (SUWA) asserted, through a

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95. *See* Hillary M. Hoffmann, *Signs, Signs, Everywhere Signs:* The Wilderness Society v. Kane County *Leaves Everyone Confused About Navigating A Right-of-Way Claim Under Revised Statute 2477*, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 3, 31 (2012) (noting the Tenth Circuit's failure to clarify RS 2477 claims "muddied an already very murky body of law").

96. Kane Cty. v. United States, 934 F. Supp. 2d 1344, 1346 (D. Utah 2013); Kane Cty. v. United States, No. 2:08–cv–00315, 2013 WL 1180764, at *3-4 (D. Utah Mar. 20, 2013).

97. *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014).

98. *Id.*

99. *Id.* at 1212–15.

100. Kane Cty. v. United States, 136 S. Ct. 318 (2015) (mem.).

101. *Kane IV*, 772 F.3d at 1225 (remanding to determine the scope of the R.S. 2477 rights).

102. *See, e.g.,* Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *3, *10 (D. Utah Apr. 17, 2015), certified question answered sub nom. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46 (concerning additional quiet title actions resulting in a certified question to the Utah Supreme Court).

103. *See id.* at *10 (certifying question to the Utah Supreme Court due to uncertainty in law).

104. *Id.*

105. *Id.* at *6.

106. *Id.* at *1.

memorandum in support of the United States, that a Utah statute bars the pending cases.[107] Thus, the District Court certified a question to the Utah Supreme Court to interpret the state statute before proceeding.[108]

III. MAINTAINING A CLEAR LEGAL FRAMEWORK AND UTILIZING ALTERNATIVE SOLUTIONS

In the summer of 2017, the Supreme Court of Utah offered its opinion on the question certified by the District Court.[109] The court determined that the Utah statute at issue was not a statute of repose, but a statute of limitation.[110] The Utah Supreme Court's decision allows the District Court to proceed in addressing Garfield County's R.S. 2477 claims. Next this Note will walk through the court's analysis and application of the absurdity doctrine on which it bases this conclusion.[111] This Note will then address the lengthy dissent, which characterizes the majority's application of the absurdity doctrine as unprecedented and over-expansive.[112] Finally, this Note will discuss why the majority got it right and helped defend the use of the QTA as the legal method for R.S. 2477 resolution.

A. Utah Supreme Court Answers

In order to determine if state statutes barred the current action to quiet title on R.S. 2477 claims, the Utah Federal District Court certified the following question to the Utah Supreme Court: whether Utah Code § 78B-2-201(1) and its predecessor are statutes of limitations or statutes of repose.[113] If statutes of repose, the current action in the Court of Appeals would be time-barred.[114] However, if statutes of limitations, the action could proceed.[115] The court concluded "section 201 and its predecessor are, by their plain language, statutes of repose. But applying these statutes to the State's R.S. 2477 claims leads to an overwhelmingly absurd result not

107. *Id*. at *8.
108. *Id*. at *10.
109. Garfield Cty v. United States., 2017 UT 41, ¶ 1, 424 P.3d 46, 49.
110. *Id.* ¶ 1, 424 P.3d at 49; UTAH CODE ANN. § 78B-2-201 (West 2019).
111. *Garfield Cty.*, 2017 UT 41, ¶ 1, 424 P.3d 46, 49.
112. *Id.* ¶ 40, 424 P.3d at 64 (Voros, J., dissenting).
113. *Id.* ¶ 1, 424 P.3d at 49. The court notes that its interpretation is limited only to Utah Code § 78B-2-201(1) as it existed in 2008—not as amended in 2015. *Id.* ¶ 1, n. 1. The amended statute refers to itself explicitly as a "statute of limitations." UTAH CODE ANN. § 78B-2-201 (West 2019). Thus, further litigation challenging this court's characterization of the statute may likely be mooted by the amendment.
114. *Garfield Cty.*, 2017 UT 41, ¶ 1, 424 P.3d at 49; Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *8 (D. Utah Apr. 17, 2015).
115. *Garfield Cty.*, 2017 UT 41, ¶ 1, 424 P.3d at 49.

intended by the legislature."[116] Thus, the majority found the statutes must be interpreted as statues of limitations.[117]

The absurdity doctrine, a tool of statutory interpretation, allows a court to depart from the literal meaning of a statute.[118] However, this tool is limited for use only when a literal reading would yield an absurd result.[119] The tool is premised on the idea that a court should recognize legislative intent and assumes that legislators would not intend an absurd result.[120] Thus, when an absurd result is apparent, the court may avoid it by departing from a literal reading of the text.[121]

The court determined the plain language created statutes of repose, not limitations.[122] As a statute of limitation, the Utah statute bars the State from bringing a suit, except within seven years after the accrual of the cause of action.[123] However, as a statute of repose, "the State cannot assert a cause of action related to real property except within the first seven years after the accrual of its right or title to the property."[124] The court concluded the language of the statutes clearly created the latter.[125] Despite unambiguous statutory language, the court rightly decided such a characterization of the statutes yielded absurd results.[126] Thus, the court held the Utah statute to be a statute of repose according to the plain language.[127] However, the court avoided this absurd result by characterizing the law as a statute of limitations.[128]

For R.S. 2477 claims, a statute of limitations would have created only "ephemeral property rights."[129] The court stated that "[p]rior to the enactment of the [QTA] in 1972, the State had no legal mechanism to protect its vested rights of way."[130] Thus, any road claim under the Mining Law would have lapsed, unless claimed after 1965—seven years prior to the introduction of the QTA.[131] The court concluded the lack of a legal mechanism to protect R.S. 2477 claims to be an absurd result and

116. *Id.* ¶¶ 1, 38, 424 P.3d at 49, 63.
117. *Id*.
118. *Id.* ¶ 22, 424 P.3d at 58.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* ¶ 15, 424 P.3d at 56.
123. *Id.* ¶ 14, 424 P.3d at 55–56.
124. *Id.* ¶ 15, 424 P.3d at 56.
125. *Id.* ¶ 14, 424 P.3d at 55–56.
126. *Id.* ¶¶ 23–24, 424 P.3d at 58–59.
127. *Id.* ¶ 37, 424 P.3d at 63.
128. *Id.* ¶¶ 1, 38, 424 P.3d at 49, 63.
129. *Id.* ¶ 27, 424 P.3d at 60.
130. *Id.* ¶ 25, 424 P.3d at 59.
131. *Id.*

determined the intent of the legislature must have been to create a statute of limitation.[132]

In his dissent, Justice Voros refuted the majority's conclusion.[133] Justice Voros found the majority's conclusion of absurdity flawed for two reasons: (1) the Utah statute stood for over one hundred years; and (2) an alternative administrative remedy exists for R.S. 2477 claims.[134] The majority effectively dismissed Justice Voros's first criticism, stating that the longevity of a law is not an issue on a case of first impression.[135] Second, Justice Voros claimed that FLPMA provides an alternative avenue for settling R.S. 2477 claims.[136] However, Title V of FLPMA does not settle existing claims; rather it simply allows or denies new property rights.[137] Ultimately, both the majority and dissent failed to consider the absurdity of interpreting the law as a statute of repose in light of Congress's broader intent for R.S. 2477.

The court could have—and likely should have—characterized that result within the broader context of R.S. 2477. Interpreting the Utah law as a statute of repose undermines the very purpose Congress intended R.S. 2477 to serve.[138] As mentioned, Congress established the Mining Law and R.S. 2477 with a specific goal: to establish roadways across the western United States.[139] By encouraging the construction of basic infrastructure, Congress intended to promote the settlement and development of the region.[140] If R.S. 2477 was a statute of repose, the claims and the roads themselves would prove "ephemeral."[141] Yet Congress intended the network of highways across the West to be permanent fixtures of the landscape.[142] Only as permanent fixtures could the roads facilitate the development and population of the region.[143] There is no indication that the Utah legislature desired to undermine the federal government's objective to connect the West.[144] In fact, if the current battle over the claims is an

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132. *Id.* ¶ 26, 424 P.3d at 59–60.

133. *Id.* ¶ 39, 424 P.3d at 64 (Voros, J., dissenting).

134. *Id.* ¶¶ 54, 60, 424 P.3d at 67, 68 (Voros, J., dissenting).

135. *Id.* ¶ 30, 424 P.3d at 61.

136. *Id.* ¶ 61, 424 P.3d at 68 (Voros, J., dissenting).

137. 43 U.S.C. § 1761(a) (2018); *see infra* Part III (exploring the use of Title V of FLPMA in resolving R.S. 2477 claims).

138. Mining Act of 1866, *supra* note 18.

139. *Id.*

140. Flint v. Gordon, 2 N.W. 648, 653 (Mich. 1879) (noting the success of R.S. 2477 in facilitating western settlement).

141. *Garfield Cty*, 2017 UT 41, ¶ 27, 424 P.3d at 60.

142. *Flint*, 2 N.W. at 653 (discussing the success of R.S. 2477 in establishing a network of road to facilitate development of the western United States).

143. *Id.*

144. *Id.*

indication, surely the Utah legislature does not wish to destroy those claims.[145] Thus, interpreting the Utah law as a statute of repose undermines the congressional intent for enacting R.S. 2477 and generates an absurd result. This broader perspective only bolsters the majority's opinion and reasoning.

Further, Justice Voros's opinion would undermine the resolution of Utah's R.S. 2477 claims. If the court read the statute according to Voros's interpretation, the unresolved R.S. 2477 claims would be time-barred from resolution under the QTA.[146] Given that the QTA is the standard for resolution, the Act would effectively halt all progress towards resolution.[147] This would only perpetuate the problem, as claimants would likely continue to insist R.S. 2477 roads valid and seek resolution through different channels—like FLPMA's Title V, as Voros suggested.[148] Ultimately, such a decision would only protract the R.S. 2477 issue. In the meantime, these roads would continue to complicate land management and threaten protected environments.[149]

The majority correctly interpreted the law as a statute of repose.[150] This interpretation means that "[Utah] has seven years to bring its QTA cause of action from the date the federal government begins to dispute an R.S. 2477 right of way—the date the State's cause of action under the QTA accrues."[151] Thus, the court answered the question certified in a manner that would allow the pending case in Utah's Federal District Court to proceed.[152] Essentially, the Utah Supreme Court successfully defended the QTA as the legal method for resolving R.S. 2477 claims. This decision gives the federal court an opportunity to resolve the R.S. 2477 claims under the QTA.[153]

The Utah Supreme Court's certified answer successfully maintains the life of this case. The District Court should keep this momentum going by resolving the claims before it in a way that will inform other courts and be the first step in creating a policy for resolution.

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145. *See supra* Part I (discussing western resentment of federal land management in Utah).

146. *Garfield Cty.*, 2017 UT 41, ¶ 25, 424 P.3d at 59.

147. *Id.* ¶ 26, 424 P.3d at 59–60 (discussing the use of the QTA as tool for protecting and validating claims).

148. *Id.* ¶ 61, 424 P.3d at 68 (Voros, J., dissenting).

149. *See* Proclamation 6920, *supra* note 57 (discussing the fragile ecosystems of Grand Staircase-Escalante National Monument, negatively impacted by any disturbance).

150. *Garfield Cty.*, 2017 UT 41, ¶¶ 1, 38, 424 P.3d at 49, 63.

151. *Id.* ¶ 37, 424 P.3d at 63.

152. *Id.* ¶ 26, 424 P.3d at 59–60 (answering avoids creating ephemeral property rights).

153. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014); Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015) (noting 12,000+ claims in Utah).

B. The District Court Should Take the Opportunity to Maintain and Dictate a Clear Legal Framework

The District Court, now bound by the Utah Supreme Court's answer, must apply it to the facts and issues at hand.[154] As a statute of repose, the claims before the court stand and the litigation must continue.[155] The District Court must utilize this opportunity to offer a clear legal framework under the QTA for the resolution of all outstanding claims and determine the role of third parties in R.S. 2477 litigation.[156]

First, the District Court must maintain a clear path for counties to settle unresolved claims. The most obvious route is through the QTA, which is already an established legal standard.[157] The court should endorse the approach taken in this litigation to quiet the title for the claims against the federal government's interest.[158] Bringing an action under the QTA forces the claimant to prove the validity of the R.S. 2477 claim.[159] Thus, this gives the court an opportunity to assess and establish a clear burden of proof for validating R.S. 2477 claims.

Second, the court must evaluate the burden of proof to validate R.S. 2477 claims. In doing so, the court must answer the question of whether a presumption of federal ownership over the disputed land exists.[160] And if so, whether claimants may rebut that presumption.[161] Given the past avoidance of resolving the property issue at the core of R.S. 2477 claims, which burden of proof the court may require is unclear.[162] A stricter burden of proof may please environmentalists and federal land management

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154. *Garfield Cty.*, 2017 UT 41, ¶ 6, 424 P.3d at 50–51.

155. *Id.* ¶ 1, 424 P.3d at 49.

156. Hoffmann, *supra* note 95, at 33 ("When the next R.S. 2477 case reaches the Tenth Circuit, the court should address the issues raised above - the burdens of proof, the nature of an R.S. 2477 claim or defense, and how R.S. 2477 factors into agency management decisions under statutes like FLPMA - and address challenges on the merits of the parties' pleadings."); Andrew Stone, *The Road Ahead: R.S. 2477 Right-of-Way Claims After* Wilderness Society v. Kane County*,* Utah, 12 VT. J. ENVTL. L. 193, 209 (2010) ("If there is a flood of legal actions to quiet title in R.S. 2477 rights-of-way, the courts will also be faced with the additional dilemma of determining how much public or third-party participation should be allowed.").

157. 28 U.S.C. § 2409a (2018).

158. *Garfield Cty*., 2015 WL 1757194, at *1 (Garfield County "seek[s] to quiet title rights in certain roads crossing federal land.").

159. *Id*.

160. Hoffmann, *supra* note 95, at 32.

161. *Id.*

162. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014).

agencies[163] while a lesser burden of proof will quickly resolve claims and may please Utahans.[164] The court must carefully balance an interest in timely resolution of claims with the risk of placing too low a burden. As R.S. 2477 roads were established without any sort of documentation, a high burden may limit the number of successful claims.[165]

Third, the court should dictate how valid R.S. 2477 roads will coexist with agency land management plans.[166] In Utah, for example, R.S. 2477 roads traverse Bureau of Land Management (BLM) lands (like the Grand Staircase-Escalante National Monument), National Forests, and National Parks.[167] If claims are validated, they may potentially and significantly impact how each of these agencies manages their portion of federal public land.[168] The court should signal just how much control these land managers may have over valid claims through federal lands. According to the case law, land managing agencies have some authority to regulate private property within or adjacent to public lands.[169] However, the court could delineate the extent of this authority which may also clarify the role of management over unresolved claims. If land managing agencies have clear bounds on their authority to regulate valid, and even unresolved claims, clearly delineated authority may reduce the number of disputed claims. Further, clearly delineated authority may encourage Utah counties to bargain with agencies—perhaps giving up pursuit of some claims for the

163. Denying claims would preserve lands, like those of Grand Staircase, from degradation from road use. *See* GSENM MANAGEMENT PLAN, *supra* note 56, at 62 (discussing R.S. 2477 roads in Wilderness Study Areas).

164. Given the resentment Utahans hold against the federal government, reclaiming some of Utah's land would likely be seen as a victory. *See* Fischman & Williamson, *supra* note 32, at 162 (discussing hostility toward federal land management); *see also* Blumm & Fraser, *supra* note 32, at 2 (discussing manifestations of western hostility).

165. S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005), *as amended* (Oct. 12, 2005) ("[N]o entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.").

166. Hoffmann, *supra* note 95, at 34.

167. Jodi Peterson, *First Settlement Reached in Utah's Contentious Road Claims*, HIGH COUNTRY NEWS (Aug. 21, 2013), http://www.hcn.org/blogs/goat/first-settlement-reached-in-utahs-contentious-road-claims.

168. GSENM MANAGEMENT PLAN, *supra* note 56, at ix, 46–47.

169. The Supreme Court of the United States stated that "the power over the public lands thus entrusted to Congress is without limitations." Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). Further, the Court stated that "it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control." *Id.* at 546; *see* State of Minn. by Alexander v. Block, 660 F.2d 1240, 1244 (8th Cir. 1981) ("Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands."); United States v. Vogler, 859 F.2d 638, 639 (9th Cir. 1988) (concluding the government maintains authority regulate use of an R.S. 2477 right-of-way—regardless of its validity); Wilkenson v. Dep't of Interior of U.S., 634 F. Supp. 1265, 1268 (D. Colo. 1986) (concluding that an established R.S. 2477 could still be regulated).

validation (maybe under FLPMA, Title V) of others with more limited regulation.[170]

Finally, the court must determine and limit the role of the public and third parties in R.S. 2477 litigation. In the present case before the District Court, the SUWA intervened and prompted the District Court to certify a question of Utah's statutory interpretation to the Utah Supreme Court.[171] While the role of public interest groups—in this case conservation groups—and individuals may be helpful, they may also harm a court's ability to efficiently resolve the flood of claims still pending.[172] Intervention by and participation of third parties may only complicate and protract already complex legal disputes.[173] Thus, the court should balance the benefits and disadvantages of allowing a greater or lesser role for such non-parties in future litigation. In order to efficiently resolve the claims and minimize the impact of prolonged uncertainty on land management and the environment, the court may find it best to lessen non-parties' role.

Ideally, the District Court will finally bring order to the chaos of R.S. 2477 litigation. However, it remains a likely possibility that the District Court will fail to maintain and dictate a clear framework for federal courts. Perhaps this is not just because the task is daunting. Instead, the attitudes of western Americans toward federal ownership of local lands may permeate, influence, and undermine the effectiveness of the federal courts.[174] In the matter of R.S. 2477, the complex legal disputes reflect a broader issue of local governance and federal lands in the West.[175] Given the track record of federal courts dealing with R.S. 2477 in Utah, the stalemate may continue.[176] However, additional remedies to the R.S. 2477 issue exist beyond the courtroom and are worth exploring.

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170. 43 U.S.C. § 1761(a) (2018).

171. Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015), certified question answered sub nom. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46.

172. Stone, *supra* note 156, at 209 (discussing potential issues created by third parties and public participation in litigation of R.S. 2477 cases).

173. *Id.*

174. *See supra* Part I(discussing resentment toward federal government control of western lands).

175. *Id.*

176. *Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014); *see also Garfield Cty.*, 2015 WL 1757194 at *1 (noting 12,000+ claims in Utah).

C. Surveying Alternative Solutions Beyond the Federal Courts

Should the federal courts fail to pursue a clear framework for claim resolution, scholars offer many additional solutions that are worth careful consideration in crafting a broader policy for effective R.S. 2477 resolutions.[177] Of the many solutions offered by scholars, those suggesting congressional action to reauthorize the DOI to make rules concerning R.S. 2477 claims hold the most promise.[178] However, any combination of solutions—whether they require Congressional action or not—could help form a cohesive policy for the efficient resolution of R.S. 2477 claims.[179]

To begin, there are a number of largely inadequate solutions that only partially resolve the R.S. 2477 quagmire. First, road maintenance agreements between the BLM and claimants fail to resolve the problem.[180] Instead, these informal agreements merely "maintain the status quo of the road."[181] Thus, the agreements are severely limited to use only for roads the federal government does not wish to contest.[182] All other R.S. 2477 claims would remain contested, as they are now.[183] Further, the agreements are informal and thus not a permanent solution.[184] The agreements offer only an indefinite delay of ultimate resolution. For these reasons, the agreements alone offer little in the way of progress towards resolution.

Second, nonbinding administrative agency decisions do not impact or establish any enforceable property rights.[185] Again, their use would be limited to situations where the federal government only desired a small

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177. *See* Wolking, *supra* note 47, at 1101–03, 1097–98 (discussing the use of road maintenance agreements, the Quite Title Act, and FLPMA, Title V to resolve claims); Lucas Satterlee, *Pristine Solitude or Equal Footing?* San Juan County v. United States *and Utah's Larger Bid to Assert Control Over Public Lands in the Western United States*, 92 DENV. U. L. REV. 641, 667 (2015) (discussing tiered agency arbitration); Stone, *supra* note 156, at 214 (discussing the potential role of the Supreme Court of the United States in resolving claims).

178. Lindsay Houseal, Wilderness Society v. Kane County, Utah*: A Welcome Change for the Tenth Circuit and Environmental Groups*, 87 DENV. U. L. REV. 725, 743 (2010) (discussing the use of national, unified standards for resolving claims); Jacob Macfarlane, *How Many Cooks Does It Take to Spoil a Soup?:* San Juan County v. U.S. *and Interventions in R.S. 2477 Land Disputes*, 29 J. LAND RESOURCES & ENVTL. L. 227, 252 (2009) (suggesting Congress remove moratorium on agency rulemaking in regard to R.S. 2477); Wolking, *supra* note 47, at 1104 (discussing uniform Congressional standards and allowing agency rulemaking).

179. *See* Houseal, *supra* note 178, at 743 (discussing the use of national, unified standards for resolving claims); Macfarlane, *supra* note 178, at 252 (suggesting Congress remove moratorium on agency rulemaking in regard to R.S. 2477); Wolking, *supra* note 47, at 1104 (discussing uniform Congressional standards and allowing agency rulemaking).

180. Wolking, *supra* note 47, at 1097-98.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1098.

degree of control over roads, but not title.[186] Similar to road maintenance agreements, the application of these nonbinding decisions would be limited only to lesser-contested claims and offer a temporary solution. Third, a tiered agency arbitration only addresses the least contentious road claims.[187] While practical for lesser-disputed claims the solution on its own would have too little impact overall.[188] More hotly contested claims would still require the case-by-case review of a court.[189]

Finally, working within the existing legal framework, the coordination of federal government agencies and local governments is unlikely to succeed.[190] As discussed above and exemplified by the numerous contentious claims, tension between agencies and local governments will likely remain too high to allow for productive discourse.[191] Only if the circumstances change, motivating one party or the other to seek a better outcome through cooperation, will coordination be a viable option.

Several other approaches address the resolution of more claims, but each have their own significant drawbacks. As Utah Supreme Court Justice Voros mentioned, FLPMA's Title V offers a solution.[192] Under FLPMA, the BLM may grant rights-of-way for R.S. 2477 roads.[193] FLPMA guides the BLM as its organic act.[194] According to FLPMA, the BLM has the authority to create rights-of-way over the land it manages.[195] However, like any management decision, it must not violate the legal mandates for management, nor an individual management plan for a specific piece of BLM land—like the Grand Staircase-Escalante National Monument Management Plan.[196] The bottom line is that the BLM can authorize a right-of-way, and that right-of-way could be an unresolved R.S. 2477 claim. A decision like this would still be open for public comment.[197] Thus, the R.S. 2477 debate simply finds a new forum within BLM management decisions,

186. *Id.*
187. Satterlee, *supra* note 177, at 667.
188. *Id.*
189. *Id.*
190. Blumm & Fraser, *supra* note 33, at 49.
191. *See supra* Part I (discussing resentment toward federal government control of western lands).
192. Garfield Cty. v. United States, 2017 UT 41, ¶ 60, 424 P.3d 46, 68 (Voros, J., dissenting); 43 U.S.C. § 1761(a) (2018).
193. 43 U.S.C. § 1761(a).
194. *Id.* § 1732 (FLMPA requires the BLM "manage the public lands under principles of multiple use and sustained yield" and "take any action necessary to prevent unnecessary or undue degradation of the lands.").
195. *Id.*
196. GSENM MANAGEMENT PLAN, *supra* note 56, at x.
197. 43 U.S.C. § 1761(a).

rather than the courts.[198] Further opportunity for public comment will likely slow the resolution process.[199]

There are also opportunities for resolving claims under the QTA.[200] While binding, the process is more time consuming and costly than any other option.[201] The previously discussed case concerns approximately 700 roads in Garfield County.[202] Even if the lengthy litigation successfully resolves each of the Garfield County roads, over 11,000 unresolved claims would persist throughout Utah, which is proof of the slow pace of resolution under this method.[203]

Alternatively, a United States Supreme Court opinion could offer some sort of resolution to the controversy.[204] However, no R.S. 2477 claim has reached the Supreme Court since the 1976 passage of FLMPA.[205] Should the Supreme Court find itself a R.S. 2477 case, as one scholar said, "any purely judicial resolution of this situation will be incomplete and imperfect."[206]

Finally, many scholars agree that an ultimate resolution lies with the source of the problem: Congress. Yet those same scholars disagree on what form of congressional actions best deals with R.S. 2477 claims.[207] Some scholars have urged for Congress to establish national unified standards for resolving claims.[208] The standards must include some sort of time limitation and a clear evidentiary burden for claimants.[209] As with any comprehensive piece of legislation, no matter the subject, it is unlikely to find success. Further, such comprehensive legislation is unlikely to overcome a Republican Congress and White House, nor the vocal opposition of states like Utah, which stand to lose more land and control to the federal government.[210] In light of unlikely comprehensive legislation, proposed congressional action must come in the form of a smaller stroke of the pen.

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198. Wolking, *supra* note 47, at 1101.

199. 43 U.S.C. § 1761(a).

200. Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015), certified question answered sub nom. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46.

201. Wolking, *supra* note 47, at 1103.

202. *Garfield Cty.*, 2015 WL 1757194, at *1.

203. *Id.*

204. Stone, *supra* note 156, at 214.

205. *Id.*

206. *Id.*

207. *Compare* Stone, *supra* note 156, at 214 (discussing legislation establishing clear standards for resolved R.S. 2477 claims), *with* Wolking, supra note 47, at 1104 (discussing the solution of removing the moratorium on agency rulemaking), *and* Macfarlane, *supra* note 178, at 252 (discussing the reauthorization of the DOI as a solution to resolve the R.S. 2477 issue).

208. Stone, *supra* note 156, at 212.

209. Wolking, *supra* note 47, at 1104; Houseal, *supra* note 178, at 743.

210. Houseal, *supra* note 178, at 743.

One congressional solution stands out from the crowd: reauthorizing the Department of Interior to promulgate rules on R.S. 2477.[211] Reauthorization is a simple solution with a profound effect. Far less complex than comprehensive legislation, reauthorization has a much better chance of becoming a reality. Agencies may make rules to eliminate frivolous and less-contested claims.[212] For more contentious claims, the agency could expedite resolution, ensure agency public accountability, and maintain an option for judicial review.[213] Removing the moratorium on agency rulemaking will alleviate judicial pressure and lead to a swift resolution of R.S. 2477 claims.

Further, reauthorization could be combined with a number of non-congressional actions. Cumulatively, these solutions could swiftly resolve a large number of claims in Utah and beyond. The judicial system would be left with the most contentious claims, rather than the current sea of claims. Together, these solutions would empower federal agencies and courts to effectively resolve claims and protect publicly held lands from degradation resulting from invalid R.S. 2477 claims.

CONCLUSION

As the number of R.S. 2477 claims grows, so does the threat to federally owned public lands in the West.[214] Recent case law in Utah exemplifies the confusing and unresolved state of the R.S. 2477 problem.[215] The scale of R.S. 2477 has only grown in the decades since the repeal of the law.[216] Further, the issue encompasses a broader battle for local governance in Western states dominated by federally held lands like Utah.[217] The

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211. Wolking, *supra* note 47, at 1104; Macfarlane, *supra* note 178, at 252.

212. Macfarlane, *supra* note 178, at 252.

213. *Id.*

214. Garfield Cty. v. United States, No. 2:10-CV-1073, 2015 WL 1757194, at *1 (D. Utah Apr. 17, 2015), certified question answered sub nom. Garfield Cty. v. United States, 2017 UT 41, 424 P.3d 46.

215. *See, e.g., Kane I*, 560 F. Supp. 2d 1147, 1154-55 (D. Utah 2008) (noting changing laws created conflict with local government); *Kane II*, 581 F.3d 1198, 1210 (10th Cir. 2009) (deciding whether local government can manage R.S. 2477 rights without alerting federal government); *Kane III*, 632 F.3d 1162, 1183 (10th Cir. 2011) (Lucero, J., dissenting) (deciding whether local government can manage R.S. 2477 right without alerting federal government); *Kane IV*, 772 F.3d 1205, 1209 (10th Cir. 2014) (determining whether local government has R.S. 2477 right and if it can manage it without alerting federal government).

216. Garfield Cty. v. United States, 2017 UT 41, ¶ 4, 424 P.3d 46, 50 ("There are accordingly now multiple cases pending before multiple judges of the Utah federal district court regarding at least 12,000 claimed R.S. 2477 rights of way, with each right of way claim involving unique facts.").

217. *See supra* Part I (discussing resentment toward federal government control of western lands and offering examples of how that tension manifests itself into actions).

absence of resolution undermines land management and threatens the delicate environment found on the public's land.[218]

Following the certified answer of the Utah Supreme Court, the Federal District Court must make the most of the opportunity to maintain a clear legal framework for resolving claims under the QTA. Additionally, Congress must not wait to act to protect public lands from these rogue roads and should reauthorize the DOI to promulgate rules on R.S. 2477.[219] Combined with any number of non-congressional solutions, it may be possible to finally address R.S. 2477 en masse.

A solution to protect our public lands is more needed than ever. According to leaked documents, previous Secretary of Interior Zinke recommended that President Trump reduce the size of at least 10 national monuments, which cover a significant portion of Utah and contain numerous R.S. 2477 claims.[220] On Dec. 4, 2017, President Trump followed Zinke's advice, dramatically reducing the size of two Utah monuments: Bears Ears and Grand Staircase-Escalante. [221] In light of this Administration's intent to open up federal public lands to business and undermine conservation efforts, Congress must act.[222] Finally resolving R.S. 2477 claims would set a precedent for the continued conservation of public lands in the face of ever-growing threats.

218. *See supra* Part II (discussing how even unresolved R.S. 2477 claims are complicating land management of Grand Staircase-Escalante National Monument.).

219. Wolking, *supra* note 47, at 1104; Macfarlane, *supra* note 178, at 252.

220. Eilperin, *supra* note 8.

221. Turkewitz, *supra* note 8.

222. *Id.*

ROCKY MOUNTAIN MINERAL LAW FOUNDATION JOURNAL

PART IV

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Coverage:
Selected materials from law reviews, law journals, and trade journals.

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