ROCKY MOUNTAIN MINERAL LAW FOUNDATION

MINERAL LAW NEWSLETTER

Published by the Rocky Mountain Mineral Law Foundation www.rmmlf.org

Volume XXXVI, Number 4, 2019

FEDERAL — MINING

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— REPORTERS —

COMPLAINT FILED CHALLENGING BLM'S APPROVAL OF "NOTICE" EXPLORATION ACTIVITIES

On October 30, 2019, the Center for Biological Diversity (CBD) filed a complaint for declaratory and injunctive relief against the Bureau of Land Management (BLM), challenging the BLM's approval of two exploration projects in Nevada, one for lithium and one for boron, under the BLM's "notice" regulations. *See* Complaint for Declaratory and Injunctive Relief, *Ctr. for Biological Diversity v. BLM*, No. 2:19-cv-01915 (D. Nev. Oct. 30, 2019). The BLM's regulations allow operators to conduct mining exploration activities that cause five acres or less of surface disturbance through submittal of a "notice," which does not require affirmative agency approval. In contrast, exploration projects that will cause greater than five acres of surface disturbance require that the operator submit a "plan of operations" and have BLM conduct an environmental analysis pursuant to the National Environmental Policy Act (NEPA). *Id.* at 1 (citing 43 C.F.R. § 3809.21).

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FEDERAL — OIL & GAS

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— REPORTERS —

EIGHTH CIRCUIT FINDS THAT TRIBAL COURTS LACK JURISDICTION OVER DISPUTES ARISING UNDER ALLOTTED LEASES

In *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019), *aff'g* 303 F. Supp. 3d 964 (D.N.D. 2018), the U.S. Court of Appeals for the Eighth Circuit upheld a lower court decision finding that tribal courts lack jurisdiction over issues arising under allotted leases administered by the Bureau of Indian Affairs (BIA).

The case arose when four members of the Mandan, Hidatsa and Arikara Nation (also known as the Three Affiliated Tribes), on behalf of a proposed class of similarly situated plaintiffs, had sued several oil and gas companies in tribal court seeking royalties on natural gas flared from allotted leases administered by the BIA that the plaintiffs alleged constituted waste. Oil and gas operators that were defendants in the tribal court proceedings filed

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ENVIRONMENTAL ISSUES

RANDY DANN & ANDREA M. BRONSON
— REPORTERS —

DISTRICT OF COLORADO REMANDS CLIMATE SUIT TO STATE COURT, JOINING SEVERAL OTHER DISTRICTS, AND LEADING TO ANOTHER APPEAL OF THIS ISSUE

On September 5, 2019, the U.S. District Court for the District of Colorado remanded claims asserted by three local government entities to the Boulder County District Court. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (USA) Inc.*, No. 1:18-cv-01672, 2019 WL 4200398 (D. Colo. Sept. 5, 2019), *appeal docketed*, No. 19-1330 (10th Cir. Sept. 9, 2019). The plaintiffs, the Board of County Commissioners of Boulder County, Board of County Commissioners of San Miguel County, and City of Boulder, asserted six state law claims against the defendants, Suncor Energy (U.S.A) Inc., Suncor Energy Sales, Inc., Suncor Energy, Inc., and Exxon Mobil Corporation (Exxon): public nuisance, private nuisance, trespass, unjust enrichment, violation of the Colorado Consumer Protection Act, and civil conspiracy. *Id.* at *1. The plaintiffs alleged that they "face substantial and rising costs to protect people and property within their jurisdictions from the dangers of climate alteration" and that the defendants "substantially contributed to the harm through selling fossil fuels and promoting their unchecked use while concealing and misrepresenting their dangers." *Id.* The plaintiffs sought monetary damages requiring the defendants to "pay their *pro rata* share of the costs of abating the impacts on climate change they have allegedly caused through their tortious conduct," but did not seek injunctive relief or ask the court to regulate the defendants' emissions of fossil fuels. *Id.*

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The two exploration notices were sent by Paradigm Minerals USA (Paradigm) and relate to the Rhyolite Ridge Exploration Project (lithium) and the South Infill Exploration Project (boron), each of which are located within Paradigm's broader Rhyolite Ridge Project Area. *Id.* The Rhyolite Ridge Exploration Project notice contemplated 4.98 acres of surface disturbance, and the South Infill Exploration Project notice contemplated 4.04 acres of surface disturbance. *Id.* In its complaint, CBD asserted that the two projects were improperly "segmented" in order to avoid the need to conduct a NEPA analysis. *Id.* CBD alleged that the lands in question contain the world's only population of Tiehm's buckwheat, a critically endangered plant. *Id.* at 1–2. However, Tiehm's buckwheat is not currently listed under the Endangered Species Act. The complaint alleges that the two projects were improperly segmented into separate projects in order to (1) avoid the filing of a plan of operations in violation of 43 C.F.R. § 3809.21(b) and the Federal Land Policy and Management Act's prohibition on "unnecessary or undue degradation of the lands," 43 U.S.C. § 1732(b); and (2) avoid a potential "significance" determination that would have required the preparation of an environmental impact statement under NEPA's implementing regulations, 40 C.F.R. § 1508.27(b)(7). At the time of this report, the BLM had not yet filed an answer.

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suits in the U.S. District Court for the District of North Dakota contesting the tribal court's jurisdiction. Additionally, some of the oil and gas operators sought injunctive and declaratory relief against the tribal court plaintiffs and the chief judge and court clerk of the tribal court. The district court granted a preliminary injunction after finding that the tribal court lacked jurisdiction over the non-member oil and gas companies, and the tribal parties appealed to the Eight Circuit. *Id.* at 1130–31.

The central issue in this case was whether tribal courts can exercise jurisdiction over non-member oil and gas companies to hear claims related to allotted oil and gas leases approved and administered by the BIA. The Eighth Circuit held that tribal courts lack jurisdiction for two reasons: (1) allotted leases are governed by federal law, not tribal law; and (2) the exceptions articulated in *Montana v. United States*, 450 U.S. 544 (1981), that allow tribes to regulate non-members do not apply to parties to allotted oil and gas leases within the reservation.

As to the first holding, the tribal parties argued that, despite U.S. Supreme Court precedent that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997), tribal courts are not precluded from hearing federal causes of actions under certain circumstances. *Kodiak*, 932 F.3d at 1134. The Eighth Circuit rejected this argument, stating that "at least where non-members are concerned, tribal courts' adjudicative authority is limited (absent congressional authorization) to cases arising under tribal law." *Id.* at 1135. Because oil and gas leasing

The *Mineral Law Newsletter* is compiled by Professors John S. Lowe and Mark S. Squillace, and edited jointly with the Rocky Mountain Mineral Law Foundation. The Foundation distributes the *Newsletter* electronically on a complimentary basis to Foundation members and on a paid circulation basis, four issues per year (print version on request); 2019 price—$105.00 per year.

on Indian trust land and the system for paying royalties are both governed by federal law, the Eight Circuit held tribal courts cannot hear the tribal plaintiffs' contract claims arising under the allotted leases. *See id.* at 1135–37.

As to the second holding, the Eight Circuit held that neither of the *Montana* exceptions applied to allow the tribal court to hear the tribal plaintiffs' claims. *Id.* at 1138. In *Montana*, the U.S. Supreme Court held that tribes lack civil jurisdiction over nonmembers, with two exceptions. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 1137 (quoting *Montana*, 450 U.S. at 565). Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* (quoting *Montana*, 450 U.S. at 566).

With respect to the first *Montana* exception, although the Eight Circuit recognized that allotted leases involved "consensual relationships with tribal members," the court held that "[a] consensual relationship alone is not enough. . . . [T]he tribe may regulate non-member activities only where the regulation 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.'" *Id.* at 1138 (third alteration in original) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)). With respect to the second Montana exception, the court found that it "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations," *id.* (internal quotation marks omitted) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658–59 (2001)); the failure to pay royalties related to the flaring "does not 'imperil the subsistence of the tribal community,'" *id.* (internal quotation marks omitted) (quoting *Plains*, 554 U.S. at 341). Accordingly, the court held that the tribal court lacked jurisdiction over the oil and gas lessees. *Id.*

Finally, the Eight Circuit considered, and rejected, the tribal court officials' argument that the oil and gas operators' suit was barred by tribal sovereign immunity, citing *Ex Parte Young*, 209 U.S. 123 (1908). *Kodiak*, 932 F.3d at 1131–33.

By a November 12, 2019, order, the Eighth Circuit denied the plaintiffs' petition for en banc review. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, Nos. 18-1824, 18-1856, slip op. (8th Cir. Nov. 12, 2019).

2016 ONRR Valuation Rule Remains in Effect as to Federal Oil and Gas After Preliminary Injunction Denied

In *Cloud Peak Energy Inc. v. DOI*, No. 2:19-cv-00120, 2019 WL 5058582 (D. Wyo. Oct. 8, 2019), the U.S. District Court for the District of Wyoming declined to preliminarily enjoin provisions of an Office of Natural Resources Revenue (ONRR) rule governing the valuation of royalties on federal oil and gas production. *See* Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 81 Fed. Reg. 43,338 (July 1, 2016) (to be codified at 30 C.F.R. pts. 1202, 1206) (2016 Rule).

The 2016 Rule governed the valuation of royalties on both federal oil and gas and federal and Indian coal production. ONRR finalized this rule in 2016 but repealed it in 2017. *See* Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (Repeal Rule). The extensive history of the rule is detailed in Vol. XXXVI, No. 2 (2019) of this *Newsletter*. *See also Cloud Peak*, 2019 WL 5058582, at *1–2.

In March 2019, the U.S. District Court for the Northern District of California vacated the Repeal Rule and reinstated the 2016 Rule. *See State v. DOI*, 381 F. Supp. 3d 1153 (N.D. Cal. 2019). The American Petroleum Institute, coal producers, and mining trade associations filed lawsuits in the District of Wyoming, which were consolidated. These petitioners then collectively sought a preliminary injunction to enjoin implementation and enforcement of the 2016 Rule. *Cloud Peak*, 2019 WL 5058582, at *1.

At the outset, the court found that the petitioners had demonstrated that implementation and enforcement of the 2016 Rule would cause them irreparable harm in the form of unrecoverable monetary damages. *Id.* at *3–7. With respect to the federal oil and gas provisions of the 2016 Rule, however, the court held that the challenge to these provisions was not likely to succeed on its merits. *Id.* at *8.

The court declined to find the federal oil and gas provisions to be outside of the U.S. Department of the Interior's statutory authority. *Id.* at *8–9. Further, the court initially determined the federal oil and gas provisions of the rule were not arbitrary or capricious after considering several arguments advanced by the petitioners. *Id.* at *9–12.

First, in response to the petitioners' assertion that ONRR did not alter the proposed rule in response to comments, the court stated that "[t]here is no requirement that an agency adopt comments or suggestions during proposed rulemaking." *Id.* at *10. Second, the court was not persuaded by the petitioners' objections to a default provision in the 2016 Rule that allowed ONRR to determine royalty value, observing that the previous royalty regulations also allowed ONRR to determine royalty value in certain circumstances. *Id.* at *10–11.

Third, the court declined to find error in a provision of the 2016 Rule requiring that arm's-length contracts be in writing and signed by all parties or the default provision would allow ONRR to determine royalty value. *Id.* at *11. The court reasoned that "[w]hile this requirement may be unwieldy and problematic for lessees, ONRR has asserted good reasons underlying it." *Id.* Finally, the court found that ONRR "articulated a satisfactory

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

explanation" for its decision to eliminate deductions of certain transportation costs of subsea movement of offshore oil and gas. *Id.* For these reasons, the court found that, initially, it "is not convinced Petitioners are likely to succeed on their claim that the new oil and gas valuation provisions are arbitrary or capricious." *Id.* at *12.

Although the court found that the challenge to the federal oil and gas provisions of the 2016 Rule was not likely to succeed on its merits, the court granted a preliminary injunction preventing enforcement of the provisions of the 2016 Rule related to federal and Indian coal. *Id.* at *14.

Editor's Note: Reporter Kathleen Schroder notes that she, along with other attorneys at her law firm, represents Tri-State Generation and Transmission Association, Inc. in this litigation.

District of Wyoming Vacates ONRR Director's Decisions Disallowing Transportation Deductions from Federal Oil and Gas Royalty

In *Devon Energy Production Co. v. ONRR*, No. 2:16-cv-00161, slip op. (D. Wyo. Sept. 11, 2019), the U.S. District Court for the District of Wyoming addressed the Office of Natural Resources Revenue's (ONRR) efforts to require that lessees "unbundle" transportation fees charged by third parties before lessees may deduct the fee from royalty on federal oil and gas production. The court vacated decisions of the ONRR Director requiring that Devon Energy Production Company, L.P. (Devon) pay additional royalty under the theory that Devon improperly deducted transportation fees from federal royalty payments.

ONRR had issued two orders to pay to Devon covering royalties on gas from the Barrel Springs Unit paid between 2002 and 2004 (2002–2004 Order) and between 2005 and 2007 (2005–2007 Order). *Id.* at 3–4. Devon then appealed these orders to the ONRR Director, who affirmed them in separate decisions. *See Devon Energy Prod. Co.*, ONRR-11-0007-O&G, 2015 WL 5171080 (May 7, 2015) (2002–2004 Decision); *Devon Energy Prod. Co.*, ONRR-12-0083-O&G, 2015 WL 5171082 (May 7, 2015) (2005–2007 Decision). *Devon*, slip op. at 4–6. After Devon appealed to the Interior Board of Land Appeals (IBLA), the appeals were deemed to be resolved against Devon by operation of law because the IBLA did not issue a decision within the period prescribed by the Federal Oil and Gas Royalty Simplification and Fairness Act (RFSA). *Id.* at 6–7 (citing 30 U.S.C. § 1724(h)(2)(B)).

The court vacated the 2002–2004 Decision and 2005–2007 Decision on different grounds. With respect to the 2002–2004 Decision, the court held that ONRR had not issued a demand for improperly deducted transportation allowances as required by statute. RSFA requires that ONRR issue timely "demands" for royalty obligations that meet certain statutory criteria, including a requirement to specify "the reason or reasons such obligation is claimed to be due." *Id.* at 15 (quoting 30 U.S.C. § 1702(26)(B)). In the 2002–2004 Decision, the Director denied all of Devon's transportation allowances because Devon had not unbundled a transportation fee. *Id.* at 5. In the underlying 2002–2004 Order, however, ONRR had only demanded additional royalty for alleged volume misreporting and royalty reporting issues—not improper transportation deductions. *Id.* at 15–16. As a result, the court vacated the 2002–2004 Decision and held that ONRR is precluded from seeking additional royalties for improper transportation deductions for the period between 2002 and 2004. *Id.* at 46.

With respect to the 2005–2007 Decision, the court vacated and remanded the decision to the Director to consider which portion of a third-party transportation fee Devon could properly deduct. A longstanding ONRR regulation requires that lessees put gas into marketable condition at no cost to the federal lessor; thus, a lessee cannot deduct marketable condition costs from royalty. *Id.* at 11 (citing 30 C.F.R. § 1206.152(i)). In the 2005–2007 Decision, the ONRR Director determined that Devon could not deduct any of the transportation fee because Devon had not unbundled it to identify which charges were for transportation and which charges, if any, were for services to put the gas into marketable condition, such as dehydration and compression. *Id.* at 5.

Initially, the court determined that Devon, as the lessee, bore the burden to show it was entitled to claim a transportation deduction. *Id.* at 26. The court then addressed Devon's arguments that it properly deducted the transportation fee. First, the court rejected Devon's assertion that a prior agency decision determined that gas from the Barrel Springs Unit is in marketable condition when it reached the unit boundary. *Id.* at 32 (citing *Snyder Oil Corp.*, MMS-92-0500-O&G, 1996 WL 34565999 (July 12, 1996)). Second, the court rejected Devon's arguments that its gas was, in fact, in marketable condition when it left the Barrel Springs Unit. *Id.* at 35.

Devon had compared ranges of the carbon dioxide and water vapor levels and pressure of Devon's gas leaving the Barrel Springs Unit against specifications of the interstate pipeline that received Devon's gas and argued that "as long as some of its gas fell within a permissible range an across-the-board deduction is appropriate." *Id.* at 38. Some carbon dioxide and water vapor levels were within pipeline specifications but some fell outside of the pipeline specifications. *Id.* at 37–38. Further, Devon's gas was at pressures well below pipeline specifications. *Id.* The court rejected Devon's argument. It determined that "Devon's gas appears to have been at least partially unmarketable" and, further, that the court was "unable to say that Devon's gas was marketable at all times for each month." *Id.* at 40. Thus, the court held that Devon could not justify its deduction of the entire transportation fee. *Id.* at 40–41. The court remanded the 2005–2007 Decision to ONRR with direction that Devon

> substantiate to the ONRR why its gas was marketable for each time period within the 2005–2007 range, which gas went through which pipeline for those months, how large of a deduction it was entitled to for each separate month, and what effect, if any, commingling of gas with non-unit gas might have impacted these calculations.

Id. at 41.

Finally, the court rejected Devon's argument that ONRR's directive that it unbundle the transportation fee violated the U.S. Constitution. Devon had argued that this directive violated due process because Devon lacked information as to what portion of the transportation fee was allocated for transportation and what portion was allocated for nondeductible marketable condition costs; the third-party transporter had claimed the fee to be confidential and had not provided data explaining it. *Id.* at 42. The court cited ONRR's assertion that it "routinely" approves methodologies to unbundle fees that do not rely on third-party information. *Id.* The court recommended that, on remand, Devon attempt one of the methodologies identified by ONRR to unbundle the transportation fee. *Id.* at 43.

Issuance of Oil and Gas Leases in Nevada Upheld, Again

Vol. XXX, No. 1 (2019) of this *Newsletter* reported on the U.S. District Court for the District of Nevada's decision to uphold the Bureau of Land Management's (BLM) reliance on an environmental assessment (EA) to issue several federal oil and gas leases in northern Nevada during 2017. *See Ctr. for Biological Diversity v. BLM*, No. 3:17-cv-00553, 2019 WL 236727 (D. Nev. Jan. 15, 2019) (January Order). After the decision, the plaintiffs filed a motion for reconsideration, arguing that the National Environmental Policy Act (NEPA) required BLM to have prepared a more comprehensive environmental impact statement (EIS). *See Ctr. for Biological Diversity v. BLM*, No. 3:17-cv-00553, 2019 WL 3848788, at *1 (D. Nev. Aug. 15, 2019). Although the court recognized errors in the January Order, it denied the motion for reconsideration.

The court first held that its January Order was incorrect insofar as it concluded that BLM had not made an "irretrievable commitment of resources" when issuing leases because BLM retained the authority to deny applications to drill. *Id.* The court recognized longstanding case law from the U.S. Court of Appeals for the Ninth Circuit that requires BLM to analyze drilling impacts under NEPA at the leasing stage because BLM makes an irretrievable commitment of resources when issuing a lease. *Id.* (citing *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006)).

The court then turned to the plaintiffs' arguments that BLM must prepare an EIS prior to leasing because, after leasing, BLM can no longer prohibit all development. *Id.* at *2. The court disagreed. *Id.* The court found that NEPA allows BLM to first prepare a less detailed EA to determine whether preparation of an EIS is needed. *Id.* If, based on the EA, BLM concludes that the proposed action will not significantly affect the environment, BLM will complete its NEPA review by issuing a finding of no significant impact (FONSI). *Id.* If, however, BLM determines that the proposed action will have a significant impact on the environment, BLM must prepare an EIS. *Id.* Therefore, BLM is only required to prepare an EIS when it determines that a proposed lease will have a significant impact on the environment. *Id.* The court reasoned that finding otherwise would render the process of preparing an EIA and a FONSI meaningless. *Id.*

The court affirmed its January Order, finding that BLM sufficiently analyzed the impacts of oil and gas drilling in the EA prepared at the leasing stage. *Id.* at *3. The court determined that the plaintiffs' disagreement with BLM's analysis under the EA was not a sufficient reason to require BLM to prepare an EIS. *Id.*

Supreme Court Grants Certiorari in Atlantic Coast Pipeline Case

In December 2018, the U.S. Court of Appeals for the Fourth Circuit vacated U.S. Forest Service (Forest Service) authorizations for the Atlantic Coast Pipeline to cross national forest lands. *See Cowpasture River Pres. Ass'n v. U.S. Forest Serv.*, 911 F.3d 150 (4th Cir. 2018); *see also* Vol. XXXVI, No. 1 (2019) of this *Newsletter* (West Virginia O&G report). Among other holdings, the court found that the Forest Service lacked authority under the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181–263, to grant a pipeline right-of-way across the Appalachian National Scenic Trail (ANST). *Cowpasture*, 911 F.3d at 181. On October 4, 2019, the U.S. Supreme Court granted and consolidated petitions for writs of certiorari to consider the question of whether the Forest Service possesses authority under the MLA and National Trails System Act, 16 U.S.C. §§ 1241–1251, to grant rights-of-way through national forest lands that the ANST traverses. *See U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, No. 18-1584, 2019 WL 4889926 (U.S. Oct. 4, 2019) (mem.).

Court Amends Decision Regarding Royalty Valuation of Gas Sold to an Affiliate for Processing

Vol. XXXVI, No. 2 (2019) of this *Newsletter* reported on *Continental Resources, Inc. v. Gould*, 374 F. Supp. 3d 28 (D.D.C. 2019). On October 3, 2019, the U.S. District Court for the District of Columbia amended this opinion and order to adjust the entity that is the subject of the judicial remand—the Interior Board of Land Appeals rather than the Office of Natural Resources Revenue. *See Cont'l Res., Inc. v. Gould*, No. 1:14-cv-00065, 2019 WL 4889273 (D.D.C. Oct. 3, 2019).

Environmental Issues

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Following the filing of the complaint in the Boulder County District Court, the defendants filed a notice of removal asserting that jurisdiction was properly in federal court pursuant to numerous theories: (1) federal question jurisdiction, (2) complete preemption, (3) federal enclave jurisdiction, (4) jurisdiction because the allegations arise from action taken at the direction of federal officers, (5) jurisdiction under the Outer Continental Shelf Lands Act (OCSLA), and (6) jurisdiction under 28 U.S.C. § 1452(a) because the claims are related to bankruptcy proceedings. *Bd. of Cnty. Comm'rs*, 2019 WL 4200398, at *1. The plaintiffs then filed a motion to remand the case to state court pursuant to 28 U.S.C. § 1447(c), arguing that the court did not have subject matter jurisdiction because all the claims are state law claims governed by state law. *Bd. of Cnty. Comm'rs*, 2019 WL 4200398, at *2. The court first noted the lack of appellate decisions on the issue of whether federal courts have jurisdiction over state law claims related to climate change, and that federal district courts that have addressed the issue are divided. *Id.* (comparing *California v. BP p.l.c.*, No. 3:17-cv-06011, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018), and *City of N.Y. v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), with *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019), *Mayor & City Council of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), and *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018)). In both *California* and *City of Oakland*, the U.S. District Court for the Northern District of California found that the plaintiffs' state law nuisance claims were governed by federal common law because they related to the national and international issue of global warming, which required a uniform standard of decision. *Id.* at *5–6. In *City of New York*, the court similarly found that the City's claims were governed by federal common law, not state law, because they were "'based on the transboundary emission of greenhouse gases' which 'require a uniform standard of decision.'" *Id.* at *6 (internal quotation marks omitted) (quoting *City of N.Y.*, 325 F. Supp. 3d at 472).

The court in *Boulder County* disagreed with the finding of the California cases that removal jurisdiction was proper because the cases arose under federal common law, finding that the Northern District of California failed to note the significant of the difference between removal jurisdiction, including the implication of the well-pleaded complaint rule, and federal jurisdiction that is involved at the outset of a case. *Id.* at *7. The *Boulder County* complaint pled only state law claims.

> While Defendants argue that the Complaint raises inherently federal questions about energy, the environment, and national security, removal is not appropriate under the well-pleaded complaint rule because these federal issues are not raised or at issue in Plaintiffs' claims. A defendant cannot transform the action into one arising under federal law, thereby selecting the forum in which the claim will be litigated, as to do so would contradict the well-pleaded complaint rule.

Id.

The court further determined that the claims were not preempted by federal law, relying on the decisions in *Mayor & City Council of Baltimore*, *Rhode Island*, and *County of San Mateo* to find that the claims "do not necessarily raise or depend on issues of federal law." *Id.* at *10. Specifically, the court found that, like in *Mayor & City Council of Baltimore*, although climate change is "a matter of serious national and international concern," the defendants did not actually "identify any foreign policy that was implicated by the City's claims, much less one that is necessarily raised." *Id.* (quoting *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 559). Further, the defendants had not shown that any interpretation of foreign policy is an essential element of the plaintiffs' claims. *Id.* at *10–12 (citing *Mayor & City Council of Balt.*, 388 F. Supp. 3d at 559; *Rhode Island*, 393 F. Supp. 3d at 151; *Cnty. of San Mateo*, 294 F. Supp. 3d at 938).

The court also rejected the defendants' argument that the claims were completely preempted by the government's foreign affairs power and the Clean Air Act (CAA), again relying on *Mayor & City Council of Baltimore*, *County of San Mateo*, and *Rhode Island*. *Id.* at *13–16 (noting that the CAA and Clean Water Act both contain savings clauses that preserve state causes of action, suggesting that the federal causes of action under those statutes are not exclusive).

The court also rejected the defendants' assertion that removal to federal court was proper because the case was a cause of action arising from "incidents occurring in federal enclaves," *id.* at *17 (quoting *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998)), because the plaintiffs expressly sought relief only for injuries occurring "within their respective jurisdictions" and alleged that they "do not seek damages or abatement relief for injuries to or occurring on federal lands," *id.* Removal was also not appropriate based on federal officer jurisdiction. *Id.* at *18.

The defendants claimed that the conduct at issue in the plaintiffs' claims was undertaken, in part, while acting under the direction of federal officials through government leases issued to Exxon by the federal government, which Exxon contended required it to explore, develop, and produce fossil fuels. *Id.* at *19. The court found that, although the leases require Exxon to comply with federal law and regulations, "compliance with federal law is not enough for 'acting under' removal . . . ." *Id.* at *20 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007)). In addition, the defendants had not shown that a federal officer "instructed them how much fossil fuel to sell or to conceal or misrepresent the dangers of its use, as alleged in this case." *Id.*

The court next found that the case did not arise out of, or in connection with, the defendants' operations on the Outer Continental Shelf (OCS), which would be required to confer jurisdiction under OCSLA, because it did not directly involve OCS operations (such as an injury on an oil rig in the subsoil or seabed of the OCS, or an oil spill from such an oil rig). *Id.* at *21.

Finally, there was no removal jurisdiction based on relation to bankruptcy because none of the defendants had filed for bankruptcy, and it was speculative whether the action may affect other oil and gas producers who have filed for bankruptcy. *Id.* at *23.

Accordingly, although the plaintiffs' claims "implicate important issues involving global climate change caused in part by the burning of fossil fuels," the court found the defendants had not met their burden of showing that federal jurisdiction exists and remanded the case to the Boulder County District Court. *Id.* at *24.

The *Boulder County* order was appealed to the U.S. Court of Appeals for the Tenth Circuit on September 9, 2019. The defendants also filed a motion for a stay of the remand order pending appeal on September 13, 2019, seeking to stay the court's September 5, 2019, order. The District of Colorado denied the motion for stay on October 7, 2019. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 1:18-cv-01672, 2019 WL 4926764 (D. Colo. Oct. 7, 2019).

Similarly, appeals have been filed in the *California*, *City of Oakland*, *City of New York*, *Mayor & City Council of Baltimore*, and *County of San Mateo* decisions discussed by the court in *Boulder County*. On September 4, 2018, an appeal was filed in the U.S. Court of Appeals for the Ninth Circuit to the court's orders in *California* and *City of Oakland*. *See City of Oakland v. BP P.L.C.*, No. 18-16663 (9th Cir. filed Sept. 4, 2018). Oral argument has not yet been scheduled in that appeal. An appeal to the *City of New York* decision was filed in the U.S. Court of Appeals for the Second Circuit on July 26, 2018. *See City of N.Y. v. BP P.L.C.*, No. 18-2188 (2d Cir. filed July 26, 2018). Oral argument in that case is scheduled to take place on November 22, 2019. An appeal was filed to the *Mayor & City Council of Baltimore* decision in the U.S. Court of Appeals for the Fourth Circuit on June 18, 2019. *See Mayor & City Council of Balt. v. BP P.L.C.*, No. 19-1644 (4th Cir. filed June 18, 2019). Oral argument in that case is scheduled to take place on December 11, 2019. Finally, an appeal was filed in the Ninth Circuit to the *County of San Mateo* decision on

March 27, 2018. *See Cnty. of Marin v. Chevron Corp.*, No. 18-15503 (9th Cir. filed Mar. 27, 2018). Oral argument has not yet been scheduled in that appeal. Resolution of this issue is accordingly far from certain and will continue to unfold through the pending appeals, and as additional climate change cases continue to be filed.

FIFTH CIRCUIT FINDS LACK OF ASSOCIATIONAL STANDING TO CHALLENGE EPA'S ISSUANCE OF CWA GENERAL PERMIT FOR OIL AND GAS OPERATIONS TO DISCHARGE INTO GULF OF MEXICO

Pursuant to section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342(a), the U.S. Environmental Protection Agency (EPA) issued a general permit (authorizing discharges for "a whole category or subcategory of point sources") for oil and gas operations "located in and discharging to Federal waters . . . in the Central to Western portions of the Gulf of Mexico." *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 535–36 (5th Cir. 2019) (quoting *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 929 (5th Cir. 1998)). The general permit "establishe[d] effluent limitations, prohibitions, reporting requirements, and other conditions on discharge." *Id.* at 536. Environmental nonprofit organizations petitioned the U.S. Court of Appeals for the Fifth Circuit to review EPA's issuance of the general permit, claiming that EPA (1) violated the National Environmental Policy Act (NEPA) by failing to prepare an adequate environmental impact statement (EIS), (2) violated the CWA by issuing the general permit without adequate consideration of certain factors established by regulation, and (3) violated the CWA by omitting certain monitoring requirements from the general permit. *Id.*

The court declined to evaluate any of the petitioners' challenges, however, finding that the petitioners failed to prove associational standing and dismissing the petition. Although EPA had initially agreed that the petitioners had standing, standing was challenged by the American Petroleum Institute, which had intervened. *Id.*

The court first evaluated whether the members of the petitioners could independently meet Article III standing requirements, which require that a member must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). The court found that the petitioners could not show that one of their members could independently satisfy the "injury-in-fact" requirement. *Id.* at 536–37. "In environmental cases, courts must carefully distinguish between injury to the petitioner and injury to the environment" because "Article III standing requires injury to the petitioner." *Id.* at 537. The court found that the petitioners' members' alleged injury depends on four conditions: (1) discharge of pollutants as authorized by the general permit, (2) the discharges reach geographic areas in which the petitioners' members have interests, (3) the discharges were present at a time relevant to the petitioners' members' interests, and (4) the discharges negatively affected the petitioners' members' interests. *Id.* The court found that the declarations of three of the members "plainly fail[ed] to satisfy the geographic-nexus requirement" because their declarations lacked specificity of where their interests were, *id.* at 538, instead referencing the discharges would be in the "Western and Central portions of the Gulf of Mexico," *id.* at 539. The court determined that a geographic area this large cannot support standing. *Id.* The court included more analysis on the fourth member's declaration, but reached the same result. The fourth member claimed he had "spent a considerable amount of time in boats and planes . . . tracking oil spills" and searching for oil leaks. *Id.* at 540. This was insufficient because there was no evidence that the flyovers would coincide with the timing of the discharges and because the declarant could not show adverse effect. *Id.* at 540–41. "[S]omeone who goes looking for pollution cannot claim an aesthetic injury in fact from seeing it," *id.* at 540, and accordingly, "standing cannot be conferred by a self-inflicted injury," *id.* at 541 (quoting *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018)). Finally, the court found that the petitioners could not meet the traceability requirement to meet standing, rejecting the petitioners' "procedural-rights" argument that the court should relax causation requirements because the case was a procedural-rights case challenging the agency's failure to satisfy a procedural requirement—the NEPA EIS requirement. *Id.* at 543–45.

> Whether a court can infer a causal link between a source of pollution and at least some portion of a petitioner's injury is a fact-specific inquiry that turns on many factors, including the size of the waterway, the proximity of the source and the injury, forces like water currents, and whether discharges will evaporate or become diluted.

Id. at 545. The court found that the only statement in the petitioners' members' declarations that related to a causal connection did not allege a causal connection sufficient to meeting standing requirements: "I spend time in the western Gulf of Mexico in the same areas that will be directly affected by wastewater discharges from offshore oil and gas activities." *Id.*

EPA AND CORPS PUBLISH FINAL RULE REPEALING 2015 CLEAN WATER RULE

On October 22, 2019, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) published a final rule repealing the 2015 definition of "waters of the United States" (2015 Rule) under the Clean Water Act (CWA). *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328 and scattered sections of 40 C.F.R.) (Repeal Rule). The repeal will be effective 60 days after publication, on December 23, 2019. The repeal is part of the agencies' two-part plan to repeal and replace the 2015 Rule, with publication of the final replacement rule expected in the near future.

Pursuant to the summary of the Repeal Rule, the agencies are repealing the 2015 Rule for four primary reasons:

> First, the agencies conclude that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the [CWA] as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos*. Second, the agencies conclude that in promulgating the 2015 Rule the agencies failed to adequately

> consider and accord due weight to the policy of the Congress in CWA section 101(b) to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." 33 U.S.C. 1251(b). Third, the agencies repeal the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies conclude that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support.

Id. at 56,626. With the repeal of the 2015 Rule, the agencies will implement the preexisting 1986 regulations "informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice." *Id.*

Two challenges have already been filed to the Repeal Rule. On October 22, 2019, the New Mexico Cattle Growers' Association filed a lawsuit challenging the Repeal Rule in the U.S. District Court for the District of New Mexico. *See* Complaint, *N.M. Cattle Growers' Ass'n v. EPA*, No. 1:19-cv-00988 (D.N.M. Oct. 22, 2019). On October 23, 2019, environmental groups, including the South Carolina Coastal Conservation League, Natural Resources Defense Council, and National Wildlife Federation, filed a challenge to the Repeal Rule in the U.S. District Court for the District of South Carolina. *See* Complaint, *S.C. Coastal Conservation League v. Wheeler*, No. 2:19-cv-03006 (D.S.C. Oct. 23, 2019).

Meanwhile, oral argument was held in the U.S. Supreme Court on November 6, 2019, in *County of Maui v. Hawaii Wildlife Fund* on the issue of whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater. *See* Transcript of Oral Argument, *Cnty. of Maui v. Haw. Wildlife Fund*, No. 18-260 (U.S. Nov. 6, 2019). Although the Maui County Council approved a settlement, the Mayor of Maui would not agree to the settlement, requiring the case to move forward. *See* Colleen Uechi, "Mayor Will Not Withdraw the Injection Wells Case," *Maui News* (Oct. 19, 2019).

CONGRESS / FEDERAL AGENCIES — GENERAL

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— REPORTERS —

DISTRICT COURT FINDS REESTABLISHMENT OF ROYALTY POLICY COMMITTEE TAINTED UNDER FACA

The U.S. District Court for the District of Montana on August 13, 2019, found the U.S. Department of the Interior's (DOI) reestablishment of the Royalty Policy Committee (RPC) in 2017 violated the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 §§ 1–16, and enjoined DOI's use of its recommendations or work product. *W. Org. of Res. Councils v. Bernhardt*, No. 9:18-cv-00139, 2019 WL 3805125 (D. Mont. Aug. 13, 2019).

As previously reported in Vol. XXXVI, No. 1 (2019) of this *Newsletter*, the RPC was re-formed by DOI in 2017 after its prior charter lapsed in 2014. The Western Organization of Resource Councils (Western) challenged the RPC's reestablishment and operations in 2018. The court dismissed two of Western's four claims in an order dated January 24, 2019, but allowed its other two claims to proceed. *See W. Org. of Res. Councils v. Bernhardt*, 362 F. Supp. 3d 900 (D. Mont. 2019). Three months later, in April 2019, the RPC's charter lapsed once again.

The August 13 decision, ruling on cross-motions for summary judgment, addresses Western's claims that the RPC (1) was improperly established under FACA and (2) failed to make meetings and materials of its subcommittees and working groups publicly available.

As to the second claim, the court granted the federal defendants' motion for summary judgment, finding that the public notice and material publication requirements under FACA do not apply to subcommittees and working groups. *W. Org. of Res. Councils*, 2019 WL 3805125, at *8. The court found, however, that Western's first claim had merit. The court explained that, in establishing an advisory committee under FACA and the implementing regulations promulgated by the General Services Administration (GSA), the agency charged with administering FACA compliance, a federal agency must (1) consult with the GSA prior to establishing or reestablishing an advisory committee, (2) propose a membership balance plan, (3) provide a "justification statement" explaining why the committee's functions cannot be performed by other means, and (4) determine the committee is in the public interest. *Id.* at *4–7. Western claimed DOI violated each requirement in re-forming the RPC and also claimed DOI violated its departmental manual and did not properly file the RPC's charter.

The court rejected the claim that DOI violated its departmental manual, finding the manual does not carry the force and effect of law. *Id.* at *5. The court also found DOI properly filed the RPC's charter. *Id.* The court agreed with Western, however, that DOI failed to properly consult with the GSA prior to reestablishing the RPC, noting that DOI "ignored the only feedback it got from the GSA." *Id.* The court also found that DOI's membership balance plan, justification statement, and public interest determination violated section 706(2)(A) of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) (authorizing a court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The membership balance plan and public interest determination, according to the court, contained no explanation or rationale for the membership composition of the RPC or DOI's public interest finding, respectively. *W. Org. of Res. Councils*, 2019 WL 3805125, at *6–7. The justification statement, meanwhile, explained the RPC's functions but did not justify the committee's existence by, for example, explaining why those functions could not be performed elsewhere in the agency or otherwise. *Id.* Given these findings, the court found DOI failed to adequately explain its decision, rendering the decision arbitrary and capricious in violation of section 706(2)(A) of the APA. *Id.* at *7.

Finding the RPC's reestablishment in 2017 violated FACA, the court enjoined DOI from utilizing the recommendations or work product of the RPC. *Id.* at *10. The federal defendants had not appealed the decision as of the time of this report.

FWS/NMFS Finalize ESA Regulations

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, Services) published final rules on August 27, 2019, modifying the Services' regulations under the Endangered Species Act (ESA). *See* Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 17) (revising FWS's regulations governing prohibitions related to threatened species); Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 402) (revising the Services' ESA § 7 consultation regulations); Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45,020 (Aug. 27, 2019) (to be codified at 50 C.F.R. pt. 424) (revising the Services' listing and critical habitat regulations). For a report on the Services' initial proposals for these rules, see Vol. XXXV, No. 3 (2018) of this *Newsletter*.

The three rules appear to largely track with the proposals the Services published in 2018. Certain key changes are noted below.

Threatened Species Protections

The first rule modifies FWS's regulations governing protections for threatened species. *See* 84 Fed. Reg. 44,753. As previously explained in this *Newsletter*, the ESA expressly prohibits certain conduct, including "take," with respect to endangered species. 16 U.S.C. § 1538(a). With respect to threatened species, however, the ESA does not include any specific prohibitions. Instead, the statute requires the Services to fashion "necessary and advisable" protections for threatened species, *id.* § 1533(d), making application of endangered species-level protections to threatened species optional. FWS's regulations (unlike NMFS's regulations) had previously applied endangered species-level protections to all threatened species in the absence of species-specific rules. The final rule discontinues this default rule for species classified as threatened after September 26, 2019, *see* 50 C.F.R. §§ 17.31, .71, aligning FWS's regulations more closely with NMFS's.

Interagency Consultation Definitions and Procedures

The second rule modifies the Services' regulations regarding interagency consultation. *See* 84 Fed. Reg. 44,976. Section 7 of the ESA requires that federal agencies consult with the Services to ensure their actions are not "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat . . . ." 16 U.S.C. § 1536(a)(2). Federal agency actions, from approval of drilling permits to promulgation of land use plans, must comply with section 7's procedures, and section 7 consultation regularly delays projects requiring such approvals.

The final rule revises several definitions that could impact the scope of section 7 consultation going forward. For example, the term "effects of the action," which describes the scope of impacts the Services must assess, was previously defined to include direct and indirect effects as well as effects arising from interrelated and interdependent actions. The term now includes only those consequences that would not occur "but for" the proposed action and that are reasonably certain to occur. 50 C.F.R. § 402.02. The definition of "destruction or adverse modification" was also modified to require the Services to focus on alterations to critical habitat as a whole, rather than specific parcels or segments, as reflected in the proposed rule. *Id.* In addition, the definition of the term "environmental baseline," which defines existing conditions against which the Services consider effects on an action, was modified to, among other things, include the continuing consequences of ongoing agency activities and facilities, as opposed to deeming those consequences part of the "effects of the action." *Id.*

The final rule also requires the Services to provide a concurrence or non-concurrence in informal consultation within 60 days of receiving an agency's request, *id.* § 402.13(c)(2); clarifies the information required to initiate consultation, *id.* § 402.14(c); and establishes an expedited consultation framework in certain cases, *id.* § 402.14(*l*).

Listing and Designation of Critical Habitat

The third rule modifies the Services' regulations for listing species and designating critical habitat. *See* 84 Fed. Reg. 45,020. Perhaps the most controversial changes to these regulations allow the Services to conduct and publish analyses of economic impacts of a listing decision and clarify the extent of the Services' determination that a species is likely to become endangered in the "foreseeable future."

Section 4 of the ESA requires the Services to make listing determinations "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Courts have construed this language to mean that consideration of economic factors by the Services is prohibited in making listing determinations, unlike critical habitat designations in which such consideration is required. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010); *N.M. Cattle Growers Ass'n v. FWS*, 248 F.3d 1277, 1284 (10th Cir. 2001). The Services' regulations previously reflected this requirement by requiring that listing decisions be made "without reference to possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b) (2018). The final rule removes that language, though both the proposed and final rules acknowledge the statutory requirement that listing decisions must focus solely on scientific factors. The Services argue that the regulatory change allows the Services to compile economic information and present it to the public but that they will not use such information in making listing decisions. *See* 84 Fed. Reg. at 45,024–25.

The final rule also clarifies that the Services, in determining whether a species is likely to become endangered within the foreseeable future (the definition of a threatened species), may only look as far into the future "as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely." 50 C.F.R. § 424.11(d). The Services argue this language is consistent with the interpretation set forth in a 2009 solicitor's opinion that the Services have followed over the past decade. *See* 84 Fed. Reg. at 45,027 (citing Solicitor's Opinion M-37021 (Jan. 16, 2009)).

Litigation

The Services' three final rules have been challenged by environmental groups and separately by a coalition of states led by California. *See Ctr. for Biological Diversity v. Bernhardt*, No. 4:19-cv-05206 (N.D. Cal. filed Aug. 21, 2019); *State v. Bernhardt*, No. 4:19-cv-06013 (N.D. Cal. filed Sept. 25, 2019). Each action is brought pursuant to the Administrative Procedure Act (APA) and claims violations of the APA, ESA, and National Environmental Policy Act.

DOI Positions Confirmed and Extended

On September 24, 2019, the Senate confirmed Daniel Jorjani as Solicitor of the U.S. Department of the Interior (DOI) on a partisan 51-43 vote. Jorjani has been serving as the Principal Deputy Solicitor since May 2017 and has been managing the Office of the Solicitor since that time. As Solicitor, Jorjani will manage almost 400 attorneys and will serve as the chief legal counsel for DOI.

On September 30, 2019, Secretary of the Interior David Bernhardt issued Secretarial Order No. 3345 Amendment No. 29, redelegating authority for several positions within DOI. The order included the following delegations: Kate MacGregor—Deputy Secretary; Daniel Jorjani—Solicitor; William Perry Pendley—Director of the Bureau of Land Management; Jerold Gidner—Special Trustee for American Indians; David Vela—Director of the National Park Service; Lanny Erdos—Director of the Office of Surface Mining Reclamation and Enforcement; and Margaret Everson—Director of the U.S. Fish and Wildlife Service.

BLM Continues Planning Effort for Grand Staircase-Escalante National Monument

The Bureau of Land Management (BLM) in August 2019 released a final environmental impact statement and proposed resource management plan (RMP) for the Grand Staircase, Kaiparowits, and Escalante Canyons Units and the lands excluded from the boundaries of the original Grand Staircase-Escalante National Monument. *See* 84 Fed. Reg. 44,326 (Aug. 23, 2019). The planning effort will replace the August 2019 RMP with four separate new RMPs.

The BLM was required to prepare a new land use plan for the national monument after President Trump significantly decreased the size of the monument via a Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017). Protests against the proposed plan were due in late October 2019. The BLM Director will resolve protests and is required to issue a final RMP thereafter. *See* 43 C.F.R. § 1610.5-2.

Meanwhile, as previously reported in Vol. XXXV, No. 4 (2018) of this *Newsletter*, litigation regarding the president's ability to modify the boundaries of an existing national monument remains pending before the U.S. District Court for the District of Columbia after several nongovernmental organizations and Native American tribes, nations, and organizations filed several lawsuits challenging both the Grand Staircase-Escalante and Bears Ears National Monument modifications. *See Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017); *Wilderness Soc'y v. Trump*, No. 1:17-cv-02587 (D.D.C. filed Dec. 4, 2017). On September 30, 2019, the district court issued an order allowing the litigation to continue after determining several environmental organizations and Native American tribes and nations had standing to challenge the reduction of the monuments. *See Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C Sept. 30, 2019) (order denying federal defendants' motion to dismiss); *Wilderness Soc'y v. Trump*, No. 1:17-cv-02587 (D.D.C. Sept. 30, 2019) (same).

Trump Administration Proposes to Exempt Tongass National Forest from Roadless Rule

In a continuation of the controversy over the 2001 Roadless Area Conservation Rule's (Roadless Rule) application to the Tongass National Forest in Alaska, dating back nearly 20 years now, the Trump administration has proposed rules exempting approximately nine million acres of the Tongass from the Roadless Rule. *See* Special Areas; Roadless Area Conservation; National Forest System Lands in Alaska, 84 Fed. Reg. 55,522 (proposed Oct. 17, 2019) (to be codified at 36 C.F.R. pt. 294).

On January 12, 2001, the U.S. Forest Service (Forest Service) issued the Roadless Rule that generally prohibited logging and road construction in inventoried roadless areas, including large portions of the Tongass. *See* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294). The State of Alaska, among many parties, filed challenges to the Roadless Rule. *See State v. U.S. Dep't of Agric.*, No. 3:01-cv-00039 (D. Alaska dismissed July 23, 2003). In 2003, under the Bush administration, the Forest Service and the State of Alaska reached a settlement and the agency issued a rule temporarily exempting the Tongass from the Roadless Rule. *See* Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, 68 Fed. Reg. 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294). That exemption was abrogated by a court in 2011, and while that decision was initially overruled by a panel of the U.S. Court of Appeals for the Ninth Circuit, it was ultimately upheld in an en banc decision from the Ninth Circuit. *See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956 (9th Cir. 2015) (detailing the history of the Roadless Rule in Alaska).

In 2018, the Governor of Alaska submitted a petition pursuant to the Administrative Procedure Act to consider a state-specific rule to exempt the Tongass from the Roadless Rule. The Trump administration responded with the new proposed rule, which would remove portions of the Tongass from application of the Roadless Rule as outlined in an environmental impact statement. A final rule is expected in the next several months and litigation is almost certain to follow.

BLM's Move to Colorado Continues Despite Congressional Opposition

The Bureau of Land Management (BLM) continues to advance the move of its headquarters in Washington, D.C., to Grand Junction, Colorado, despite a lack of support in Congress. The BLM intends to move over 200 employees from Washington, D.C., to various offices in the western United States, including several key employees to Grand Junction. *See* Vol. XXXVI, No. 3 (2019) of this *Newsletter*.

The BLM recently signed a lease for a building in Grand Junction and, on September 3, 2019, Acting BLM Director

William Pendley indicated in an email memo to employees that positions in Colorado and the other offices would be identified. *See* Scott Streater, "Pendley: BLM to Begin Notifying Transferred Employees," *E&E News* (Sept. 4, 2019). Pendley later announced that some employees would be eligible for bonuses to move. *See* Scott Streater, "BLM Offers Cash Bonuses for Employees Who Move West," *E&E News* (Sept. 12, 2019). Meanwhile, support for the move in Congress is limited. The House passed a proposed budget bill that would block the move in addition to providing no fiscal support for the move. *See* Commerce, Justice, Science, Agriculture, Rural Development, Food and Drug Administration, Interior, Environment, Transportation, and Housing and Urban Development Appropriations Act, 2020, H.R. 3055, 116th Cong., div. C, tit. IV, § 423 (as passed by House of Representatives, June 25, 2019). The Senate passed an amended version of the House's proposed bill on October 31, 2019, that removed this provision. *See* H.R. 3055, 116th Cong. (as passed by Senate, Oct. 31, 2019). The Senate proposed a budget bill that does not directly block the move but, as proposed, it would not fund the move either. *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2020, S. 2580, 116th Cong. (2019). A final appropriation compromise between the two chambers has yet to emerge.

PRESIDENT TRUMP ISSUES EXECUTIVE ORDER REGARDING INFORMAL RULES OR POLICIES

On October 9, 2019, President Trump issued an executive order limiting informal guidance documents issued by federal agencies, especially those not promulgated through normal notice-and-comment procedures. *See* Exec. Order No. 13,892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication," 84 Fed. Reg. 55,239 (Oct. 9, 2019). The order indicates that informal guidance documents may not be used to impose new standards of conduct on persons outside of the executive branch unless otherwise authorized by law or contract. *Id.* § 3. Agencies may cite guidance documents in an enforcement action only if the relevant agencies have notified the public of such document in advance through publication in the *Federal Register* or on the agencies' websites in a single, searchable, indexed database. *Id.* The order also limits agencies' abilities to develop and rely upon litigation and associated documents as sources of agency jurisdiction unless such positions are announced in the *Federal Register*. *Id.* § 5.

ARKANSAS — OIL & GAS

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REORGANIZATION OF ARKANSAS STATE GOVERNMENT BRINGS ITS OIL AND GAS COMMISSION INTO THE DEPARTMENT OF ENERGY AND ENVIRONMENT

In its 2019 regular session, the Arkansas legislature enacted the Transformation and Efficiencies Act of 2019, H.R. 1763, 2019 Ark. Laws Act 901 (effective July 1, 2019), which reorganized the state's former 42 separate independent administrative agencies into 15 cabinet-level departments, whose directors report directly to the governor. The formerly independent Arkansas Oil and Gas Commission is now a subagency within the Arkansas Department of Energy and Environment, which also now contains the Arkansas Department of Environmental Quality (now called the Division of Environmental Quality), the Arkansas Pollution Control and Ecology Commission, and four other smaller, formerly independent agencies. *See* Ark. Code Ann. § 25-43-602(a).

OIL AND GAS COMMISSION ADOPTS RULE RESTRICTING TRANSFER OF MARGINAL WELLS

In an effort to prevent well operators from transferring marginal wells to avoid plugging liability, the Arkansas Oil and Gas Commission (AOGC) promulgated General Rule B-4, effective November 19, 2018, regulating transfers of well operations. The rule sets forth a detailed procedure that must be followed in order to transfer an Arkansas oil or gas well to a new operator. Particularly impacted are marginal gas wells (producing less than 25 Mcf per day) and shut-in gas wells that have been granted "temporarily abandoned" status by the AOGC. As a prerequisite to the transfer of any such well, the successor operator is required to post a well-specific plugging bond in the amount of $35,000, and the new and former operators must also secure AOGC approval of the transfer, after notice and hearing of an application brought for that purpose.

ARKANSAS SUPREME COURT PERMITS CERTIFICATION OF ROYALTY CLASS CONTAINING ONLY 36 MEMBERS

In *Stephens Production Co. v. Mainer*, 571 S.W.3d 905 (Ark. 2019), a four-to-three majority of the justices of the Arkansas Supreme Court affirmed a trial court's order certifying a class of royalty owners suing Stephens Production Co. (Stephens), alleging improper deduction of post-production expenses from their royalties. It was shown at the certification hearing that the class would consist of approximately 36 members. Stephens appealed, contending that the proposed class failed to satisfy the numerosity requirement of Arkansas's class action rule, Ark. R. Civ. P. 23(a), which requires a finding that joinder of all individual class members is impractical.

The majority opinion relied upon the supreme court's strong deference to trial courts on issues of class certification, distinguishing a prior case where the court had disallowed a 17-member class. *Mainer*, 571 S.W.3d at 908 (citing *N. Little Rock v. Vogelgesang*, 619 S.W.2d 652 (Ark. 1981)). The majority observed that, unlike the case before it, the *Vogelgesang* trial court order had denied class certification. *Id.* According to the majority, neither trial court order constituted abuse of discretion, which the supreme court has established as its standard for reviewing such orders. *Id.*

FEDERAL DISTRICT COURT DENIES CERTIFICATION OF PROPOSED ROYALTY CLASS AS UNASCERTAINABLE

The Arkansas Oil and Gas Commission's (AOGC) integration (force pooling) orders provide that an integrated unleased mineral owner who fails to participate in the proposed drilling operation will be deemed to have leased his or her interest to the participating parties on a form of oil and gas lease published by the AOGC.

See Hicks v. Sw. Energy Co., 330 F.R.D. 183, 187 (E.D. Ark. 2018). That lease form contains the following language in its royalty clause:

> In the event that the sale [of gas] is to an Affiliate ("Affiliate" being defined as having a ten percent (10%) common ownership), then the proceeds derived form [sic] the sale of all gas shall be a price no less than that received from any other purchaser within the governmental township and range in which the lease is situated.

Id. (alterations in original).

In *Hicks*, the plaintiff complained that he was a previously unleased owner whose interest had been integrated into wells operated by Southwestern Energy Co.'s affiliate, SEECO, Inc. (SEECO), and that SEECO's gas sales were to an affiliate, thus triggering that affiliate sales provision, which he contended SEECO had violated. He sought certification of a class of all persons similarly situated. The U.S. District Court for the Eastern District of Arkansas denied certification, observing that SEECO had obtained at least 700 integration orders throughout the development of its Fayetteville Shale assets, covering numerous wells in numerous township-and-range combinations. *Id.* at 190–91. Moreover, the plaintiff's requested class included heirs, successors, and assigns of originally integrated parties whose identity could only be determined through time-consuming searches of public records. *Id.* Thus the court concluded that the members of the proposed class were not reasonably ascertainable and denied class certification. *Id.*

A comparison of *Hicks* with *Stephens Production Co. v. Mainer* (also commented upon in this report) reveals a critical difference in the class action certification procedure between Arkansas's state and federal courts. Federal courts are required to conduct a "rigorous analysis" to confirm that each class action requirement has been met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 157, 161 (1982). Arkansas state trial courts have "broad discretion" regarding class certification. *Stephens Prod. Co. v. Mainer*, 571 S.W.3d 905, 908 (Ark. 2019). No such "rigorous analysis" is required. *Beverly Enters.-Ark., Inc. v. Thomas*, 259 S.W.3d 445, 453 (Ark. 2007) (quoting *Tay-Tay, Inc. v. Young*, 80 S.W.3d 365, 368 (Ark. 2002)).

Federal District Court Dismisses Case Alleging Conversion Through Illegal Commingling of Gas Within Wellbore, then Opines upon Other Arkansas Oil and Gas Law Issues

J.B. Turner is a mineral owner within a drilling unit containing the Turner No. 1 Well. XTO Energy Inc. (XTO) is the unit operator. When the well was originally drilled, it was XTO's predecessor's intent to explore the relatively shallow Hale Formation. Since Turner refused to lease, his interest was integrated in an Arkansas Oil and Gas Commission application. Pursuant to that integration order, Turner elected to be carried in the well as a non-consenting owner, pending recovery of recoupment of 400% of costs. *See Turner v. XTO Energy Inc.*, No. 2:18-cv-02171, 2019 WL 3577676, at *1 (W.D. Ark. Aug. 6, 2019), *appeal docketed*, No. 19-2867 (8th Cir. Aug. 30, 2019).

Subsequently, XTO's predecessor elected to deepen the well to explore the Viola Formation and again integrated Turner's unleased interest. That time, Turner elected to participate in the deepening operation, making him a working interest owner in the Viola Formation while still non-consent in the shallower Hale Formation. *Id.*

The Viola Formation produced only minimally and briefly. No Viola Formation production has been reported since 1982. However, the wellbore's Viola Formation completion was never actually plugged. In 2018, Turner sued XTO, contending that the Viola Formation did, in fact, produce gas that became commingled with and was reported as production of Hale Formation gas, thus depriving him of his interest therein. *Id.* at *2.

The U.S. District Court for the Western District of Arkansas, applying Arkansas law, granted XTO's motion for summary judgment, dismissing Turner's complaint. *Id.* at *5. The primary reason for the dismissal was that XTO submitted unrebutted affidavits from a geologist and engineer explaining that Turner's commingling thesis was physically impossible. *See id.* at *4. However, in its opinion, the district court commented upon other issues of interest to the mineral bar.

Among those is the application of the statute of limitations to Turner's claim. Under Arkansas law, actions on written contracts are subject to a five-year limitation period, Ark. Code Ann. § 16-56-111, while a three-year period applies to implied contracts, *id.* § 16-56-105. 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. *See Turner*, 2019 WL 3577676, at *3.

Turner argued that limitations should not apply because he was unaware of the "commingling." *Id.* However, Arkansas has consistently rejected the "discovery rule" in its application of the statute of limitations. A plaintiff's mere ignorance of his cause of action will not toll the statute. Active concealment is required. *Id.* (citing *Atlanta Exploration, Inc. v. Ethyl Corp.*, 784 S.W.2d 150, 154 (Ark. 1990)).

The court also rejected Turner's claim under Ark. Code Ann. §§ 15-74-601 to -604, statutes permitting a person wrongfully denied "proceeds" of oil and gas sales to recover penalties and attorney's fees. According to the court, since Turner never executed an operating agreement he was, at best, only entitled to his share of Viola Formation gas in kind, not its proceeds. *Turner*, 2019 WL 3577676, at *4.

Finally, the court rejected Turner's attempt to assert a cause of action under Ark. Code Ann. § 15-73-207, a statute that defines an oil and gas lessee's "prudent operator" standard. Joining a number of other recent decisions the court held that the prudent operator standard is a measure of the lessee's duty, not a separate cause of action. *Turner*, 2019 WL 3577676, at *4 (citing *Wallace v. XTO Energy, Inc.*, No. 4:13-cv-00608, 2014 WL 4202536 (E.D. Ark. Aug. 22, 2014); *Collins v. SEECO, Inc.*, No. 4:11-cv-00761, 2012 WL 2309080 (E.D. Ark. June 18, 2012)).

The *Turner* decision is currently on appeal to the U.S. Court of Appeals for the Eighth Circuit.

Editor's Note: The author of this report is a member of Daily & Woods, P.L.L.C., which served as counsel for XTO Energy Inc. in *Turner*.

California — Oil & Gas

Tracy K. Hunckler
Ryan P. Mahoney
— Reporters —

New Laws Target California's State Oil and Gas Agency and Address Liability Concerns

Governor Gavin Newsom signed Assembly Bill 1057 (AB 1057) and Senate Bill 551 (SB 551) into law on October 12, 2019. *See* A. 1057, 2019 Cal. Legis. Serv. ch. 771; S. 551, 2019 Cal. Legis. Serv. ch. 774. AB 1057 and SB 551 include four significant changes to California's regulation of oil and gas, which will go into effect on January 1, 2020.

First, AB 1057 renames California's state oil and gas regulator, the Division of Oil, Gas, and Geothermal Resources (DOGGR). DOGGR will be renamed the Geologic Energy Management Division (GEM Division). AB 1057 § 6 (amending Cal. Pub. Res. Code § 607(b)).

Second, AB 1057 includes a significant change in the purpose of the GEM Division. The GEM Division's purpose includes "protecting public health and safety and environmental quality, including reduction and mitigation of greenhouse gas emissions associated with the development of hydrocarbon and geothermal resources in a manner that meets the energy needs of the state." *Id.* § 9 (adding Cal. Pub. Res. Code § 3011). This new purpose arguably could conflict with other statutory mandates that apply to the GEM Division, including a law that requires the supervisor of the GEM Division to "encourage the wise development of oil and gas resources." Cal. Pub. Res. Code § 3106(d).

Third, AB 1057 gives the GEM Division new authority to require additional bonding to cover operations related to wells. Existing law requires specific bonding amounts based on well depths and the number of wells. *See id.* §§ 3204, 3205. AB 1057 allows the GEM Division to require additional bonding that does not exceed "the division's estimation of the reasonable costs of properly plugging and abandoning all of the operator's wells and decommissioning any attendant production facilities in accordance with Section 3208, or thirty million dollars ($30,000,000)." AB 1057 § 13 (adding Cal. Pub. Res. Code § 3205.3).

Fourth, SB 551 requires oil and gas operators to submit a report to the supervisor of the GEM Division detailing the value of the "total liability to plug and abandon all wells and to decommission all attendant production facilities, including any needed site remediation . . . ." SB 551 § 1 (adding Cal. Pub. Res. Code § 3205.7). These reports will be required to be submitted beginning on July 1, 2022. *Id.*

New Laws Modify the California State Lands Commission's Authority Related to State Oil and Gas Leases and Federal Lands

Governor Gavin Newsom signed Assembly Bill 342 (AB 342) into law on October 12, 2019, and it will go into effect on January 1, 2020. *See* A. 342, 2019 Cal. Legis. Serv. ch. 769. AB 342 prohibits the California State Lands Commission from entering into leases or other conveyances for state public lands that authorize "new construction of oil- and gas-related infrastructure . . . to support production of oil and natural gas upon federal lands that are designated as, or were at any time designated as, federally protected lands." *Id.* § 1 (adding Cal. Pub. Res. Code § 6827.5).

Governor Newsom signed Assembly Bill 585 (AB 585) into law on July 30, 2019. *See* A. 585, 2019 Cal. Legis. Serv. ch. 123. AB 585 codifies the criteria the California State Lands Commission uses to consider whether to approve a transfer of an oil or gas lease located on state land and will go into effect on January 1, 2020. *Id.* § 1 (amending Cal. Pub. Res. Code § 6804). The new criteria include a review of (1) an assignee's experience with oil and gas production, (2) financial considerations affecting an assignee's ability to comply with a lease, (3) an assignee's record of noncompliance with contracts with government entities, and (4) an assignee's record of noncompliance with other laws in general. *Id.* (adding Cal. Pub. Res. Code § 6804(b)(1)). Further, the new law sets forth that an assignor, transferor, or sublessor will remain liable for obligations under the lease unless the California State Lands Commission specifically releases the assignor, transferor, or sublessor from liability. *Id.* (adding Cal. Pub. Res. Code § 6804(d)). In certain circumstances, a release may be granted if the assignor, transferor, or sublessor posts a security to fulfill outstanding lease obligations. *Id.* (adding Cal. Pub. Res. Code § 6804(d)(2)(A)).

Colorado — Oil & Gas

Sarah Sorum
Kristine Roach
— Reporters —

Senate Bill 181 Rollout Continues

As reported in Vol. XXXVI, No. 3 (2019) of this *Newsletter*, the Colorado Oil and Gas Conservation Commission (COGCC) continues the daunting task of implementing the overhauled regulatory regime mandated by Senate Bill 19-181 (SB 181), 2019 Colo. Legis. Serv. ch. 120.

Public Commenting Becomes Easier

As part of its response to SB 181, the COGCC has opened an online portal to facilitate public comments on its rulemaking process. *See* COGCC, "Senate Bill 19-181 Public Comments," https://cogcc.state.co.us/sb19181.html#/public_comments.

Flowline Rulemaking Ready for Finalization

In October 2019 the COGCC issued its draft flowline rules. The COGCC held a final prehearing conference on November 14, followed by a public comment hearing on November 19 and the rulemaking hearing on November 20–22 at the University of Northern Colorado. The flowline rules primarily impact the 1100 Series; however, there are a few proposed revisions to the 100–300, 600, and 700 Series.

In the prehearing statements filed with the COGCC, a few points recurred across the public comments. First, many parties advocated for revisions to the draft rules making the regulation applicable to all flowlines rather than specific types. Second, parties are divided on the inclusion of gathering lines in the flowline rules. Third, commenters have focused on the scope of preemption of the regulations already in place under the Colorado Public Utility Commission and the federal Pipeline and Hazardous Materials Safety Administration, and whether the COGCC has or should have a role in gathering line regulation.

Another frequently discussed topic was the extent to which precise flowline geolocation data should be available to the public. Some parties advocated for a publicly available map showing the precise location of all segments of a flowline system. Others support the COGCC's draft rule that provides a roughly accurate map to the public on its website, but will make precise locations provided by operators available only to local governments that sign a confidentiality agreement. The difference in opinion on this topic comes from the competing concerns of public transparency, trade secrets, and infrastructure protection from vandalism and terrorism.

Upcoming Rulemaking Timelines on SB 181 Mandated Topics

The COGCC set forth a timeline for their rulemakings in an August 1 presentation. Upcoming timelines for the next six months:

- Mission change from "fostering" development to "regulating" development: stakeholder outreach has begun and draft rules are expected in December 2019; rulemaking hearing is scheduled for February 26–27, 2020.
- Addressing cumulative impacts with the Colorado Department of Public Health and Environment: stakeholder outreach has begun, draft rules expected February 2020; rulemaking March 15–26, 2020.
- Alternative location analysis for proposed oil and gas developments near populated areas: stakeholder outreach begins January 2020; rulemaking hearing is scheduled for April 22–23, 2020.

New Local Control Measures Allowed by SB 181 Begin to Take Shape

Adams County passed new regulations doubling the state-mandated setback of 500 feet between occupied structures and new wells to 1,000 feet and adding new restrictions on emissions and noise. *See* John Aguilar, "Adams County Tightens Oil and Gas Rules, First to Do So Since Colorado Senate Bill 181 Passed," *Denv. Post* (Sept. 3, 2019). These are the first rules passed by a locality under the new authority granted by SB 181. Boulder County passed a temporary moratorium on accepting and processing new applications for permits to drill. *See* Sam Lounsberry, "Boulder County Adopts Moratorium on New Oil and Gas Drilling Permits," *Denv. Post* (June 28, 2019). Weld County, on the other hand, seems headed in the opposite direction. On September 3, 2019, the Weld County Board of County Commissioners entered a memorandum of understanding with the COGCC that establishes a coordination of efforts between the permitting processes of each body. *See* Press Release, COGCC, "COGCC Establishes Permitting Protocol for 1041 Areas Designated of State Special Interest for Oil and Gas Development" (Sept. 4, 2019).

IDAHO — MINING

PRESTON N. CARTER
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— REPORTERS —

AMENDMENTS TO IDAHO SURFACE MINING ACT GO INTO EFFECT; IDAHO DEPARTMENT OF LANDS CONDUCTS NEGOTIATED RULEMAKING TO IMPLEMENT AMENDMENTS

On July 1, 2019, significant amendments to the Idaho Surface Mining Act, Idaho Code Ann. §§ 47-1501 to -1519, went into effect. *See* H.R. 141, 2019 Idaho Laws ch. 226. The amendments, passed during the 2019 legislative session and signed by the governor on March 26, 2019, change the name of the Idaho Surface Mining Act to the Idaho Mined Land Reclamation Act, make it easier for mining operations to establish reclamation plans, and require underground mines, not just surface mines, to establish plans for surface reclamation (i.e., tailings ponds, waste rock piles, and polluted wastewater discharges).

The amendments also update a number of bond/financial assurance requirements, including (1) broadening, beyond bonds, the way that mining companies may provide financial assurance that they will reclaim lands impacted by mining operations, *see* Idaho Code Ann. § 47-1512(k); (2) eliminating the cap on financial assurance amounts for mines greater than five acres in size, instead requiring that financial assurances for such mines be "based on the estimated reasonable costs of completing reclamation . . . using standard estimating techniques, including indirect costs, developed by the [State Board of Land Commissioners]," *id.* § 47-1512(c); (3) permitting a reduction in financial assurance amounts in incremental steps as reclamation is completed, *see id.* § 47-1512(h); and (4) eliminating the requirement that companies post financial assurance in an amount 10% higher than the estimated costs of reclamation, bringing the required financial assurance down to only the estimated cost of reclamation, *see id.* § 47-1512(a)(1). Finally, the amendments require that reclamation plans be reviewed every five years, and, if necessary, that the corresponding financial assurances be revised to reflect any material changes made to the plan. *See id.* § 47-1508(e).

On October 2, 2019, the Idaho Department of Lands (IDL) issued a second notice of intent to initiate a negotiated rulemaking to implement the Idaho Mined Land Reclamation Act. *See* (Second) Notice of Intent to Promulgate Rules – Negotiated Rulemaking, Docket No. 20-0302-1901, 19-10 *Idaho Admin. Bull.* 220 (Oct. 2, 2019). The negotiated rulemaking will address, among other things, surface impacts of underground mines, application fees for reclamation plans, application requirements for reclamation plans and post-closure activities, methods for calculating and types of financial assurances, and fees for reviews of reclamation plans and operations. *Id.*

The IDL previously issued temporary rules effective July 16, 2019, *see* Notice of Rulemaking – Adoption of Temporary Rule, Docket No. 20-0302-1902, 19-9 *Idaho Admin. Bull.* 317 (Sept. 4, 2019) (amending Idaho Admin. Code r. 20.03.02), as was required by the Idaho Mined Land Reclamation Act, *see* Idaho Code Ann. § 47-1518(f). The rulemaking initiated in October

2019 will determine the content of the permanent rules. More information can be found on the IDL website at https://www.idl.idaho.gov/rulemaking/20.03.02-2019/index.html.

KANSAS — OIL & GAS

DAVID E. PIERCE
— REPORTER —

KANSAS SUPREME COURT MAKES SENSE OUT OF ITS PRIOR GAS STORAGE RULINGS

Northern Natural Gas Co. v. ONEOK Field Services Co. (*ONEOK II*), 448 P.3d 383 (Kan. 2019), is another round in the saga of Kan. Stat. Ann. § 55-1210 and determining rights in Northern Natural Gas Co.'s (Northern) injected storage gas in the Cunningham Storage Field. In the words of the Kansas Supreme Court, it is "yet another round in that high-dollar subsurface prize fight." *ONEOK II*, 448 P.3d at 386; *see* Vol. XXXIV, No. 3 (2017); Vol. XXXI, No. 2 (2014); Vol. XXX, No. 3 (2013); Vol. XXVIII, No. 4 (2011); Vol. XXVII, No. 4 (2010) of this *Newsletter*.

The story begins with *Anderson v. Beech Aircraft Corp.*, 699 P.2d 1023, 1031 (Kan. 1985). Beech Aircraft Corp. (Beech) established an underground gas storage facility to ensure it had a supply of natural gas for its manufacturing operations. Beech, however, erred in identifying the area encompassed by the storage reservoir and failed to obtain rights to store its gas in portions of the reservoir underlying Lowell and Aileen Anderson's land. The Andersons drilled a well into the storage reservoir beneath their land and began producing Beech's storage gas. The Kansas Supreme Court had a simple solution: the Andersons could exercise capture rights and produce any gas that migrated into their land. *Id.* at 1031.

In *Union Gas System, Inc. v. Carnahan*, 774 P.2d 962 (Kan. 1989), the court applied the *Anderson* capture remedy to a storage facility owned by Union Gas System, Inc. (Union), a public utility. Union responded by commencing the condemnation process to acquire the necessary storage rights from Glen Carnahan. Once Union acquired a certificate from the Kansas Corporation Commission authorizing it to pursue condemnation, the court held Carnahan's capture rights were at an end. *Id.* at 967. The second major ruling held that when valuing the gas in place beneath Carnahan's property for condemnation, no value would be attributed to the storage gas that had migrated into Carnahan's portion of the reservoir.

Responding to the *Anderson* and *Union* cases, the gas storage industry sought a legislative fix resulting in section 55-1210. The fix consisted of a declaration that gas injected for storage purposes remained the personal property of the injector. Kan. Stat. Ann. § 55-1210(a). However, section 55-1210 also provides: "With regard to natural gas that has migrated to *adjoining property* . . . which has not been condemned as allowed by law or otherwise purchased," the injector retains title to the gas it can prove is storage gas and the landowner is compensated for use of its reservoir space. *Id.* § 55-1210(c). Two decisions by the court held that section 55-1210 did not apply to all instances of gas migration. The first was *Northern Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.*, 217 P.3d 966 (Kan. 2009), where the court held the statute had only prospective application and therefore did not apply to storage gas that migrated beneath land prior to the July 1, 1993, effective date of section 55-1210. The second decision, *Northern Natural Gas Co. v. ONEOK Field Services Co.* (*ONEOK I*), 296 P.3d 1106 (Kan. 2013), held that for portions of a reservoir that are not "adjoining property," section 55-1210 would not apply. In the *Martin* and *ONEOK I* cases, the issue was whether the *Anderson* rule of capture remedy applied to situations that had been held not to be encompassed by section 55-1210. It did.

ONEOK II focused on the rights of the parties regarding injected gas that had migrated into non-adjoining lands once Northern commenced condemnation proceedings. The court turned to *Union* for guidance on the parties' rights when the gas is not subject to section 55-1210 and the landowners have been exercising their *Anderson* capture rights. The court resolved the issues applying *Union*. First, all capture rights ended on the date (June 2, 2010) the Federal Energy Regulatory Commission issued a certificate authorizing commencement of condemnation proceedings. *ONEOK II*, 448 P.3d at 395. This was almost two years before the condemnation and taking were completed (March 30, 2012). Second, the landowners would not be compensated for the value of Northern's storage gas under their property at the time of the condemnation. *Id.* at 398–99.

The court's holding in *ONEOK I* created the necessity for its holding in *ONEOK II*. In *ONEOK I* the court's interpretation of "adjoining property" was artificial because all property in a highly porous and permeable rock structure is "adjoining." Operations anywhere within the storage reservoir have the capacity to impact all other parts of the reservoir. Despite the physical realities of the reservoir, the *ONEOK I* court applied a surface boundary-line analysis to find that lands separated by surface boundary lines can be non-adjoining to other lands overlying a connected reservoir. This reading of the statute prompted the court to revisit *Anderson* in *ONEOK I* and *Union* in *ONEOK II*.

MICHIGAN — MINING

DENNIS J. DONOHUE
— REPORTER —

BACK FORTY MINE PROJECT ADVANCES

Aquila Resources, Inc.'s (Aquila) Back Forty Mine project (Project) advances closer to construction because of two recent legal rulings involving challenges to the Project led by the Menominee Indian Tribe of Wisconsin (Menominee). The proposed Project is an 83-acre open pit gold and zinc mine with on-site ore processing facilities located along the Menominee River in Michigan's western Upper Peninsula. The Menominee River comprises the border between Michigan and Wisconsin. The Menominee are a federally recognized Indian tribe. Although the Menominee reservation is located in Wisconsin about 75 miles southwest of the Project, the Tribe has cultural ties to Michigan and Wisconsin lands along both sides of the river.

Over the past several years, the Project has applied for and obtained several permits from Michigan needed to construct and operate the Project. These permits include a National Pollutant Discharge Elimination System (NPDES) permit, an air pollution control permit, a mining permit, and a wetlands fill permit. The Michigan Department of Environment, Great Lakes, and Energy (EGLE) issued each of these permits under various parts of the Michigan Natural Resources and Environmental Protection Act (NREPA), Mich. Comp. Laws §§ 324.101–.90106. (Prior to 2019 and at the time of issuance of these permits, EGLE was known as the Michigan Department of Environmental Quality.) EGLE issued the NPDES and wetlands permits under federal Clean Water Act (CWA) authorities delegated to the state. (Michigan is one of only two states along with New Jersey with delegated authority to operate the CWA § 404 wetlands permitting program.) No federal permits are needed for the Project.

In December 2016, EGLE issued mining permit number MP-01-2016 for the Project under part 632 of NREPA, Mich. Comp. Laws §§ 324.63201–.63223. Part 632 is Michigan's nonferrous metallic and mineral mining statute adopted in 2004 to regulate mining operations in sulfide-containing ore bodies. The Menominee, along with Tom Boerner (an adjacent land owner), filed an administrative contested case challenge to the permit in February 2017. No parties have challenged the NPDES or air permits for the Project. An administrative law judge (ALJ) presided over a several-weeks-long evidentiary hearing in 2018, issuing an opinion and order upholding the permit in May 2019. *See In re Petitions of Tom Boerner & Menominee Indian Tribe of Wis. on the Permit Issued to Aquila Res.*, Docket No. 17-005710 (Mich. Office of Admin. Hearings & Rules May 3, 2019). The ALJ's 109-page opinion addressed myriad technical and legal issues raised by both petitioners. The Menominee appealed the ALJ's ruling on the contested case to an internal EGLE permit review panel. The panel adopted the ALJ's decision and affirmed the permit on November 12, 2019.

EGLE issued a wetlands fill permit for the Project in June 2018 under part 303 of NREPA, Mich. Comp. Laws §§ 324.30301–.30328. The Menominee and Boerner have also initiated an administrative contested challenge against the wetlands permit, this time joined by the Wisconsin-based nongovernmental advocacy group Coalition to SAVE the Menominee River, Inc. (Coalition). That hearing is currently in process. Even before completion of the state wetlands permitting process, however, the Menominee filed a federal lawsuit in the U.S. District Court for the Eastern District of Wisconsin in January 2018, bringing novel claims under the CWA and Administrative Procedure Act (APA) seeking to compel the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to take over the Michigan wetlands permitting process for the Project. "Federalizing" the process in this matter would result in additional federal reviews of the Project under the National Environmental Policy Act and section 106 of the National Historic Preservation Act (NHPA) that would substantively duplicate state reviews and extend the permitting process.

In its January 2018 complaint, the Menominee articulated two bases for a federal takeover of the Michigan wetlands permitting process for the Project. *See* Complaint for Declaratory and Injunctive Relief, *Menominee Indian Tribe of Wis. v. EPA*, 360 F. Supp. 3d 847 (E.D. Wis. 2018) (No. 1:18-cv-00108), 2018 WL 514626. Both claims were rooted in CWA § 404(g)(1), which prohibits the federal government from allowing states to assume wetlands permit authority for "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto." 33 U.S.C. § 1344(g)(1). This provision has been interpreted to prohibit assumption of wetlands permitting authority for traditionally navigable waterways, such as oceans, the Great Lakes, and navigable portions of major rivers. In 1984, the Corps determined that the Menominee River was traditionally navigable for a certain limited distance upstream from its river mouth in Lake Michigan, but not where the Project is located. *See* Michigan Department of Natural Resources Section 404 Permit Program Approval, 49 Fed. Reg. 38,947 (Oct. 2, 1984). In response to an August 2017 letter from the Menominee requesting that the Corps revisit the issue, the Corps declined to do so, affirming its earlier determinations. The Menominee claimed that, under the citizen suit provision contained in section 505 of the CWA, 33 U.S.C. § 1365, EPA and the Corps had a nondiscretionary duty to make a jurisdictional determination that the Menominee River at the Project site location was navigable and assert federal jurisdiction. The Menominee also claimed that the Corps' response to its 2017 letter request to revisit earlier determinations on Menominee River navigability was an arbitrary and capricious final agency action in violation of the APA.

After EGLE issued the wetlands permit to the Project, on September 11, 2018, the Menominee sought leave to amend their complaint to add an APA claim rooted in section 404(j) of the CWA, 33 U.S.C. § 1344(j), which governs EPA oversight of assumed wetlands programs. *See* Motion to Amend Complaint, *Menominee Indian Tribe of Wis. v. EPA*, 360 F. Supp. 3d 847 (E.D. Wis. 2018) (No. 1:18-cv-00108), ECF No. 34. This provision requires states with assumed section 404 permitting authority to provide EPA with a copy of wetlands permit applications it receives. EPA then provides a copy of the permit application to the Corps and the U.S. Fish and Wildlife Service (FWS) and must notify the state within 30 days if it intends to provide comments on the application. EPA must submit its comments (which reflect any input from the Corps and the FWS) to the state within 90 days of receipt of the application. If EPA's comments include objections to issuance of the permit, the state has 90 days from the date of such objections to resolve the objections to EPA's satisfaction. If the objections are not resolved within that time frame, permitting authority transfers to the Corps. The Menominee argued that EPA, after initially filing objections to the Project permit, arbitrarily withdrew those objections and allowed the state to move forward without NHPA review and ultimately issued the permit in violation of the APA.

After extensive briefing and a hearing, in December 2018 the court denied the Menominee's motion to amend its complaint and granted the United States' and Aquila's motions to dismiss the claims. *See Menominee Indian Tribe of Wis. v. EPA*, 360 F. Supp. 3d 847 (E.D. Wis. 2018), *appeal docketed*, No. 19-1130 (7th Cir. Jan. 17, 2019). With respect to the CWA citizen suit claims, the court held that the Corps could not be sued under CWA § 505 and that, in any event, the Menominee failed to identify a nondiscretionary duty imposed on either EPA or the Corps to assume authority over Michigan's delegated program. *Id.* at 858–59. The court also dismissed all of the Menominee's APA claims, concluding that the Corps' refusal to revisit long-past decisions on the navigability of the upper reaches of the Menominee River was not final agency action reviewable under the APA. *Id.* at 860. In addition, EPA's decision to withdraw its objections to the state wetlands permits was committed to the agency's discretion and not reviewable under the APA, and since there was no federal undertaking, EPA was not required to consult the Menominee under the NHPA, also leaving the withdrawal of the objections unreviewable under the APA. *Id.* at 855–56. The Menominee have appealed the ruling to the U.S. Court of Appeals for the Seventh Circuit. In addition, shortly before the federal district court issued its decision in December 2018, the Coalition filed its own lawsuit with the same court, making essentially identical claims as the Menominee. On October 21, 2019, the district court dismissed these claims for essentially the same reasons it dismissed the Menominee's claims. *See Coal. to SAVE the Menominee River, Inc. v. EPA*, No. 1:18-cv-01798, 2019 WL 5394202 (E.D. Wis. Oct. 21, 2019). It is not clear whether the Coalition will file an appeal.

Editor's Note: The reporter represented Aquila in the *Menominee Tribe* litigation and the reporter's law firm represented Aquila in the *SAVE the Menominee River* litigation.

NEW MEXICO — MINING

CHRISTINA SHEEHAN
— REPORTER —

WATER QUALITY CONTROL COMMISSION UNANIMOUSLY APPROVES MINE'S PROPOSED REGULATORY AMENDMENTS TO SURFACE WATER STANDARDS

On October 8, 2019, following a public hearing, the New Mexico Water Quality Control Commission (WQCC) unanimously approved Peabody Natural Resources Company's (Peabody) proposed amendments to the WQCC's regulations governing standards for interstate and intrastate surface waters codified at N.M. Code R. § 20.6.4. The approved amendments reclassify and assign new use designations to portions of San Isidro Arroyo, Mulatto Canyon, Arroyo Tinaja, and Doctor Arroyo including tributaries to these waters. The approved regulatory amendments reclassify these waters as ephemeral, from intermittent or perennial, which changes the highest attainable aquatic life and recreational use for these waters from "marginal warm water aquatic life" and "primary contact" to "limited aquatic life" and "secondary contact." The WQCC's proposed regulatory changes are subject to final approval from the U.S. Environmental Protection Agency.

In order to demonstrate the stream segments are unable to attain their currently designated use due to natural, ephemeral low flow conditions that prevent the attainment of the use, Peabody conducted a use attainability analysis (UAA), as required and in accordance with 40 C.F.R. § 131.10(g) and N.M. Code R. § 20.6.4.15. The UAA implemented the New Mexico Environment Department's (NMED) approved hydrology protocol (HP) to support its findings.

Peabody is the first third party to conduct a UAA and implement NMED's HP to reclassify stream segments within New Mexico. The WQCC complimented Peabody on working with NMED, and for its clear and thorough presentation of evidence and above-and-beyond approach to applying the HP for the watersheds analyzed.

Peabody's proposed regulatory amendments based on its UAA are likely the first of many to come, given the number of ephemeral streams in New Mexico that are currently classified as intermittent or perennial with the highest attainable aquatic life and recreational use for these waters as warm water aquatic life and primary contact.

Editor's Note: The reporter represented Peabody in this matter.

NORTH DAKOTA — OIL & GAS

KEN G. HEDGE
— REPORTER —

COSTS NOT DEDUCTIBLE UNDER "GROSS PROCEEDS" ROYALTY PROVISION

The North Dakota Supreme Court ruled that an oil and gas operator, Newfield Exploration Company and its affiliate entities, Newfield Production Company and Newfield RMI LLC (collectively, Newfield), could not deduct from royalty payments any post-production costs required to make the gas marketable. *Newfield Exploration Co. v. State*, 2019 ND 193, ¶ 12, 931 N.W.2d 478. There, the State of North Dakota, ex rel. the North Dakota Board of University and School Lands, and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands (collectively, State), granted oil and gas leases to Newfield that provide that "[l]essee agrees to pay lessor the royalty on any gas, produced and marketed, based on gross production or the market value thereof, at the option of the lessor, such value to be based on gross proceeds of sale where such sale constitutes an arm's length transaction." *Id.* ¶ 7. Elsewhere, subpart (f) of the leases provides that "[a]ll royalties on . . . gas . . . shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee." *Id.*

Newfield contracted to sell the gas produced from its wells to Oneok Rockies Midstream LLC (ONEOK). *Id.* ¶ 3. Although title to the gas passed to ONEOK when it received the gas from Newfield, the court held that payment was "delayed" until ONEOK processed the gas "into a marketable form" and sold the gas. *Id.* Newfield received 70%–80% of the amount received by ONEOK when ONEOK sold the gas, the 20%–30% reduction reflecting "Oneok's cost to process the gas into a marketable form and profit." *Id.* After the State audited Newfield and claimed that Newfield was inappropriately deducting post-production costs required to make the gas marketable, Newfield sued the State seeking a declaratory judgment that the royalty payments were proper. *Id.* ¶¶ 2, 4. On cross-motions for summary judgment, the district court sided with Newfield, finding that the leases required royalty payments to be made based on the gross amount Newfield received from ONEOK. *Id.* ¶ 4. The North Dakota Supreme Court reversed. *Id.* ¶ 12.

As an initial matter, the supreme court found that, upon extraction, natural gas "typically" contains hydrogen sulfide that must be removed in order to make the gas marketable. *Id.* ¶ 6 (citing *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 487 (N.D. 1980)). Although the "general rule" is that the lessor and lessee "share the costs of making the product marketable," the parties are free to contract around that general rule. *Id.* When they do, "the term 'gross proceeds' indicates a lessor's royalty is calculated based on the total amount received for the product without deductions for making the product marketable. 'Net proceeds' indicates the lessor will share in the costs of making the product marketable—thus reducing the royalty payment." *Id.* (citations omitted). The supreme court noted that Newfield and the State agreed that, if Newfield, itself, directly incurred the costs of making the gas marketable or directly paid ONEOK the amount of costs required to make the gas marketable for sale, "the State would be compensated based on the price received from the sale of the gas after it was made marketable and without reduction for the costs required to make the product marketable." *Id.* ¶ 9. However, the court found subpart (f) of the leases, quoted above, controlling. *Id.* ¶ 11. It held:

> While title to the gas passes at the well, the transaction is not complete, and full value of the consideration paid to Newfield is not determined until Oneok has incurred the cost of making the gas marketable and subsequently sold the marketable gas. Newfield's compensation is calculated based on the amount Oneok receives for the marketable gas. This amount, from which Newfield attempts to base the State's royalties, is reduced to account for the expenses Oneok incurred to make the gas marketable. Newfield directly benefits, or at the very least indirectly benefits, from the expenses Oneok incurs to make the gas marketable. Subpart (f) of the lease unambiguously provides the State's royalty must include the value of any consideration, in whatever form, that directly or indirectly compensates, credits, or benefits Newfield.

Id. In reversing the district court, the supreme court found that Newfield benefited from ONEOK's efforts, and the court went on to broadly proclaim that "[g]ross proceeds from which the royalty payments under the leases are calculated may not be reduced by an amount that either directly or indirectly accounts for post-production costs incurred to make the gas marketable." *Id.* ¶ 12.

It is unclear whether the record supports a finding that the Newfield gas at issue contained hydrogen sulfide or other impurities limiting the potential sale and marketability of the gas. The supreme court did not expressly find that the gas at issue contained any such impurities but seemed to assume as much. Moreover, it did not further expand on what types of "post-production costs" are included within the spirit of its holding, and it is unclear whether the court's holding was intended to be limited to those deductions directly relating to impurities that limit or restrict the sale of the gas or whether it also included within its scope those post-production costs that are aimed at further enhancing the value of the gas. In addition, the court did not define what it meant by marketability, and it is unclear whether the district court was even presented any evidence regarding marketability considerations. Overall, the opinion, while setting forth broad principles of law, is short on defining the parameters in which its rule applies. Future case law will need to clarify the scope of the court's decision.

COURT INVALIDATES LEASES ISSUED IN VIOLATION OF PUBLIC BIDDING REQUIREMENTS

In *Twin City Technical LLC v. Williams County*, 2019 ND 128, 927 N.W.2d 467, the North Dakota Supreme Court found that oil and gas leases issued by Williams County, North Dakota, were void because the County failed to comply with statutory notice and bidding requirements and none of the enumerated exceptions applied. *Id.* ¶ 14. There, for consideration in excess of $1.3 million, Williams County issued four oil and gas leases to Twin City Technical LLC and Irish Oil & Gas Inc. after the county auditor received bids from various oil and gas lessees. *Id.* ¶ 2. Approximately three years after discovering that the County may not own all of the mineral interests that it purported to own, the lessees and their assigns (collectively, Twin City) sued the County, seeking rescission of the leases on the basis of mistake of fact, fraud, and failure of consideration. *Id.* ¶ 3. It later amended the complaint, seeking declaratory relief on the grounds that the County did not properly advertise the sale, and hence, a valid contract was not formed. *Id.*

The supreme court found that, while a county or political subdivision has the authority to lease its mineral interests, N.D. Cent. Code § 38-09-16 requires the county or political subdivision to advertise the same as provided in N.D. Cent. Code § 38-09-15. *Twin City*, 2019 ND 128, ¶ 6. That statute, in turn, requires notice to be given as provided by the rules of the Board of University and School Lands, which rules require notice of the lease to be published in the official newspaper of the county where the leased lands are located. *Id.* (citing N.D. Cent. Code § 38-09-15; N.D. Admin. Code § 85-06-06-03). Williams County did not publish notice of the lease sale. *Id.*

N.D. Cent. Code § 38-09-19 provides that no lease of public land for oil and gas development is valid unless advertised and leased (as provided in section 38-09-16), except under certain circumstances detailed therein. The sole exception at issue in the case provides that "'[w]here the acreage or mineral rights owned by the state or its . . . political subdivisions is less than the minimum drilling unit under well spacing regulations, non-operative oil and gas leases may be executed through private negotiation . . . .'" *Twin City*, 2019 ND 128, ¶ 7 (quoting N.D. Cent. Code § 38-09-19(1)). Thus, the lease must be "nonoperative" and it must be "less than the minimum drilling unit under well spacing regulations." *Id.* If the exceptions do not apply, any lease issued without compliance with the advertising and bidding statutes is invalid. *Id.*

The supreme court dealt only with the issue of whether the leases were nonoperative. The court followed a 1953 Attorney General opinion that found a nonoperative lease "has a commonly accepted definition in the oil and gas industry and this is synonymous with non-drilling or non-development." *Id.* ¶ 10 (quoting N.D. Att'y Gen. No. 53-96 (Sept. 29, 1953)). Further, it found that a non-development lease is one that expressly prohibits the use of the surface estate for drilling and drilling-related activities. *Id.* ¶ 11 (citing 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law, Manual of Terms* 665 (2018)). Because the leases issued to Twin City did not contain any such express restrictions, they were not nonoperative leases. *Id.* As such, the leases were invalid as a matter of law and the supreme court affirmed that part of the district court's judgment holding the leases invalid. *Id.* ¶ 14. The supreme court did find, however, that there were genuine issues of material fact regarding the County's claim that the doctrine of laches applies to bar Twin City's claim for repayment of bonus consideration, and the court reversed the district court and remanded for further proceedings on that issue. *Id.* ¶ 18.

The court did not address, or provide any insight into the meaning of, the second prong of the exception; namely, what constitutes a minimum drilling unit under the well spacing regulations. The 1953 Attorney General's opinion, which the court cited in its nonoperative lease discussion, also found that the leased land must be "smaller than the minimum forty-acre drilling unit.'" *Id.* ¶ 10 (quoting N.D. Att'y Gen. No. 53-96 (Sept. 29, 1953)). However, that issue was not central to the supreme court's decision in *Twin City*, and the court did not further address the issue. The North Dakota Industrial Commission (NDIC) has been charged with establishing spacing units for pools and they generally must be of uniform size and shape for the entire pool. *See* N.D. Cent. Code § 38-08-07(1). Under current NDIC regulations, absent an order setting spacing units for a pool, the smallest, and thus arguably "minimum," drilling unit is a 40-acre drilling unit for vertical or directional oil wells with a projected depth not deeper than the Mission Canyon formation. *See* N.D. Admin. Code § 43-02-03-18(1)(a). However, different "minimum" drilling unit sizes exist for other types of wells and projected depths. *See, e.g.*, *id.* § 43-02-03-18(1)(b) (160-acre drilling units for vertical or directional wells projected to a depth deeper than the Mission Canyon formation), (2)(b) (640-acre drilling units for horizontal wells projected to a depth deeper than the Mission Canyon formation). Moreover, temporary or proper spacing orders for productive pools may have other "minimum" spacing unit sizes for the pool, notably 640-acre or 1,280-acre spacing requirements for horizontal Bakken pool wells, depending on the field. It is reasonable to assume that "minimum" means just that, the smallest potential drilling unit size, or 40 acres under the NDIC regulations then in effect; however, a lease that is nonoperative and limited to the development of certain depths or formations by its terms may, arguably, be subject to larger "minimum" acreage thresholds.

Force Majeure Clause May Extend Primary Term of Oil and Gas Lease

The North Dakota Supreme Court found that a force majeure provision in oil and gas leases applied both during the primary and secondary terms of the leases, but that factual issues as to whether the lessee acted with diligence and good faith in obtaining drilling permits precluded summary judgment on the issue of whether the force majeure provision had the effect of extending the primary terms. *See Pennington v. Cont'l Res., Inc.*, 2019 ND 228, 932 N.W.2d 897. Rhonda Pennington and others (collectively, Pennington) granted oil and gas leases, dated October 25, 2011, providing four-year primary terms (as extended pursuant to options to extend). *Id.* ¶ 2. Continental Resources, Inc. (Continental) acquired the leases in September 2014. In May 2012, Continental applied for a drilling permit on a 2,560-acre spacing unit that included the leased lands and other unleased lands inhabited by the Dakota skipper butterfly, a threatened species under the Endangered Species Act. *Id.* ¶ 3. In August 2015, the U.S. Fish and Wildlife Service issued a biological opinion pertaining to the potential impact of drilling operations on the land. On October 1, 2015, Continental proposed measures to minimize any impact on the threatened species. Thereafter, on October 21, 2015, Continental recorded an affidavit stating that the primary terms of the leases were extended under the force majeure provision contained in the leases, and, on the next day, Continental applied to the North Dakota Industrial Commission (NDIC) to terminate the 2,560-acre spacing unit and create a 1,920-acre spacing unit that did not include the lands inhabited by the Dakota Skipper butterfly. The NDIC granted the application in November 2015, and, following the pooling of all oil and gas interests in the new unit in January 2016, Continental commenced drilling operations. *Id.* ¶ 4. Pennington sued Continental, alleging that the primary terms of the leases expired on October 25, 2015. The district court granted Continental's motion for summary judgment, finding that the force majeure provision extended the leases until regulatory approval could be obtained. *Id.* ¶ 5.

The oil and gas leases each provided for a primary term of four years (as extended through an option to extend the primary term) and so long thereafter as oil and gas was produced in paying quantities from the land or land pooled therewith "or this lease is otherwise maintained in effect pursuant to the provisions hereof." *Id.* ¶ 10. The leases also provided:

> 12. Regulation and Delay. Lessee's obligations under this lease, whether express or implied, shall be subject to all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction, including restrictions on the drilling and production of wells, and regulation of the price or transportation of oil, gas and other substances covered hereby. When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, . . . or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, . . . this lease shall not terminate because of such prevention or delay, and, at Lessee's option, the period of such prevention or delay shall be added to the term hereof. Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production, or other operations are so prevented or delayed.

Id. ¶ 11. The supreme court deemed paragraph 12—referred to by the parties as the "regulation and delay" clause—a force majeure clause, which is "[a] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled." *Id.* ¶ 12 (alterations in original) (quoting *Entzel v. Moritz Sport & Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774).

Focusing on the specific language used by the parties in the particular leases at issue, the supreme court rejected Pennington's argument that paragraph 12 only applies when there has been production to extend the leases past the primary terms and that a "limitations clause" added to the leases in Exhibit A modified the paragraph. *Id.* ¶ 13. That limitations clause provides:

> (p) Operations sufficient to hold this lease beyond the primary term shall not include obtaining permits, surveying a drill site, staking a well, building roads, hauling equipment or supplies, construction of a road or drill site nor any other surface work in preparation for drilling or reworking.

Id. The court noted that this limitations clause relates to the provision of the leases dealing with operations conduced over the primary term of the leases, specifically:

> 4. Operations. . . . If after the primary term this lease is not otherwise being maintained in force, but Lessee is then engaged in Operations, as defined below, then this lease shall remain in force so long as any one or more Operations are prosecuted with no interruption of more than 180 consecutive days. . . . As used herein, the term "Operations" shall mean any activity conducted on . . . the leased premises, or the lands pooled or unitized therewith, that is reasonably calculated to obtain or restore production, including without limitation, (i) drilling ~~or any act preparatory to drilling (such as obtaining permits, surveying a drill site, staking a drill site, building roads, clearing a drill site, or hauling equipment or supplies~~)."

Id. (strikethrough in original). The court noted that both provisions—paragraph (p) to Exhibit A and paragraph 4—expressly indicate that they both only apply after the primary terms and that the former is directly related to the stricken language in the latter. *Id.* ¶ 14. Therefore, the court found, "those provisions only limit Paragraph 12's language relating to obtaining permits during the secondary term of the leases." *Id.* In contrast, there is nothing contained in the force majeure provision of the leases that limits its application to activities after the primary term. *Id.* ¶ 15. Construing the leases as a whole, the force majeure clause applied to activities both during and after the primary terms. *Id.*

Nevertheless, while the claimed force majeure potentially applied to extend the primary term, the supreme court went on to note that factual questions still existed. Specifically, a force majeure clause "must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive." *Id.* ¶ 18 (quoting *Entzel*, 2014 ND 12, ¶ 7). Factual questions surrounding Continental's diligence and good faith in "pursuing a permit to drill the 2,560-acre spacing unit for more than three years" prevented entry of summary judgment in the case. *Id.* ¶ 21.

OHIO — OIL & GAS

J. RICHARD EMENS
SEAN JACOBS
CODY SMITH
— REPORTERS —

APPELLATE COURT SPECIFICALLY HOLDS THAT OHIO MARKETABLE TITLE ACT AND OHIO DORMANT MINERAL ACT MAY TERMINATE SEVERED OIL AND GAS INTERESTS CONCURRENTLY

In *West v. Bode*, 2019-Ohio-4092 (7th Dist.), the Court of Appeals for the Seventh District of Ohio held that the Ohio Marketable Title Act (MTA), Ohio Rev. Code Ann. §§ 5301.47–.55, and the Ohio Dormant Mineral Act (DMA), *id.* § 5301.56, are not irreconcilable and may both be applied to terminate historical severances of oil and gas.

In 1902, George L. Parks transferred "1/2 part of his royalty of all of the oil and gas in an[d] under" his land in Monroe County, Ohio, to C.J. Bode and George T. Nalley. *Bode*, 2019-Ohio-4092, ¶ 3. Through successive conveyances, the surface and one-half of the oil and gas in and under the land was transferred to Wayne West and Rusty West. *Id.* ¶¶ 4–7. In 2017, the Wests filed a lawsuit for declaratory judgment alleging that the severance was extinguished under the MTA. *Id.* ¶ 8. Heirs to the holders of the severance (the Bodes) filed a motion to intervene in the Wests' suit by alleging, in part, that historical severances are not capable of termination by the MTA because a more specific statute, the DMA, was subsequently enacted to apply with respect to oil and gas interests to the exclusion of the MTA. *See id.* ¶ 14.

The MTA was enacted in 1961 to provide any person who has an unbroken chain of title of record to any interest in land for 40 or more years from the person's root of title with marketable record title to the interest in land claimed. *See id.* ¶¶ 21, 29; *see also* Ohio Rev. Code Ann. § 5301.48. The MTA "operates to extinguish" all interests prior to the person's root of title. *See Bode*, 2019-Ohio-4092, ¶ 29; *see also* Ohio Rev. Code Ann. §§ 5301.47(A), .50. Conversely, the DMA, which was enacted in 1989 as part of the MTA, was enacted to provide a surface owner with the means to have a severed interest in oil and gas "deemed abandoned" after 20 years in which the severed interest was not the subject of any of the six savings events enumerated in the act. *See Bode*, 2019-Ohio-4092, ¶¶ 29, 31–32; *see also* Ohio Rev. Code Ann. § 5301.56(B)(3).

Under Ohio law, "[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision . . . ." *Bode*, 2019-Ohio-4092, ¶ 44 (quoting Ohio Rev. Code Ann. § 1.51). Thus, one statute will apply to the exclusion of another *only if* the two statutes present an irreconcilable conflict with each other. *Id.* ¶ 45. Based upon the Supreme Court of Ohio's interpretation of the MTA in *Blackstone v. Moore*, 2018-Ohio-4959, 122 N.E.3d 132, and of the DMA in *Corban v. Chesapeake Exploration, L.L.C.*, 2016-Ohio-5796, 76

N.E.3d 1089, the Seventh District held that both statutes may be used to terminate severed oil and gas interests in Ohio. *See Bode*, 2019-Ohio-4092, ¶ 47 ("They are co-extensive alternatives whose applicability in a particular case depends on the time passed and the nature of the items existing in the pertinent records."); *see also* Vol. XXXVI, No. 1 (2019); Vol. XXXIV, No. 2 (2017) of this *Newsletter*. For example, the MTA involves *extinguishment* of a severed oil and gas interest after 40 years resulting in a "null and void interest" that cannot be revived, while the DMA provides an *abandonment process* that may be used after a 20-year period with no savings event while allowing the severed oil and gas holder to file a post-notice claim to preserve. *See Bode*, 2019-Ohio-4092, ¶ 46. Thus, the Seventh District held that each statute may be applied independently and harmoniously with the other.

Bode appears to be the first appellate-level decision in Ohio to squarely address whether the MTA can continue to be used to terminate severed oil and gas interests after the enactment of the DMA, a more specific statute. The decision is a significant win for surface owners in Ohio who own property encumbered by a severed oil and gas interest. Because the MTA may operate to extinguish a severed oil and gas interest even if the surface owner takes no action (i.e., it is a "self-executing" statute), surface owners often prefer to attempt to use the MTA (as opposed to the DMA) as it is often easier to use successfully to claim the oil and gas underlying their land.

Northern District of Ohio Holds that Revenue May Be Realized At or Near the Wellhead for Leases with Net Royalty Provisions

In *Henceroth v. Chesapeake Exploration, L.L.C.*, No. 4:15-cv-02591, 2019 WL 4750661 (N.D. Ohio Sept. 30, 2019), *appeal docketed*, No. 19-3942 (6th Cir. Oct. 2, 2019) the U.S. District Court for the Northern District of Ohio granted summary judgment in favor Chesapeake Exploration, L.L.C. and Chesapeake Operating, L.L.C. (collectively, CELLC) against a class of landowners in Ohio by holding that CELLC was permitted to deduct costs from the landowners' royalty payments incurred by CELLC's marketing subsidiary, Chesapeake Energy Marketing, L.L.C. (CEMLLC), prior to making such payments.

A group of landowners owning property from which CELLC was producing natural gas filed a class action lawsuit against CELLC claiming that CELLC was paying the landowners on the incorrect price when making royalty payments to such landowners. *Id.* at *1. The landowners' leases provide that "Lessee covenants to pay Lessor, proportionate to Lessor's percentage of ownership, . . . an amount equal to one-eighth of the net proceeds realized by Lessee from the sale of all gas and the constituents thereof produced and marketed from the Leasehold." *Id.* The parties to the suit stipulated that CELLC produces the gas from the wells and CEMLLC transports the gas and enters into contracts with third-party purchasers for the sale of gas. *Id.* at *2–3. The landowners alleged that CELLC was improperly paying the landowners royalties on a price that included costs that were incurred by CEMLLC for transporting and marketing the gas produced (i.e., royalties were paid after "netting back" the price received by CELLC). *See id.* at *3.

According to the landowners, CELLC must pay the landowners royalties on the downstream price received by CEMLLC from third-party purchasers (which cannot be netted back to include the transportation and marketing costs incurred by CEMLLC). *See id.* at *6. "According to [the landowners], the royalties must be paid on revenue actually realized on a marketed product. It cannot be a debt. In other words, it cannot be money owed. And the only revenue realized is the real cash paid by the third-party buyers to CEMLLC." *Id.* The district court disagreed, however, finding that the landowners received royalties based on the language negotiated in their leases. *Id.* at *7. The court stated "CELLC sells the oil and gas at the wellhead to CEMLLC . . . , receives a netback price from CEMLLC for those sales, and paid [the landowners] 1/8th of those proceeds, without taking any deductions from the proceeds realized from CEMLLC." *Id.* (footnote omitted). Thus, the court concluded that the prices on which the landowners were paid royalties were proper and granted summary judgment in favor of CELLC. *Id.* at *8.

Henceroth is a significant win for oil and gas producers in the state of Ohio who are paying royalties to landowners who have a net royalty provision in their leases. The Northern District of Ohio's decision holds that an oil and gas company may "realize" the revenue from the sale of gas at or near the wellhead. This allows the oil and gas company to "net back" certain costs incurred by a marketing affiliate prior to paying royalties to the landowners, allowing the company to pay on a significantly lower price than if the revenue was realized at the point of sale to a third-party purchaser.

Oklahoma — Oil & Gas

James C.T. Hardwick
— Reporter —

Owner of Vested Remainder Not Entitled to Compensation for Surface Damages Under the Surface Damages Act

In *Hobson v. Cimarex Energy Co.*, 2019 OK 58, Timothy Hobson was the owner of a present life estate in the surface rights of certain property in Canadian County, Oklahoma, and Taylen Hobson, son of Timothy, held a vested remainder in that same property subject to his father's life estate. Cimarex Energy Co. (Cimarex) was a mineral lessee in the same property. Prior to drilling, Cimarex reached an agreement with the life tenant regarding surface damages under the Surface Damages Act (SDA), Okla. Stat. tit. 52, §§ 318.2–.9, and paid the compensation agreed upon to the life tenant. Taylen, the remainderman, then sued Cimarex claiming entitlement to compensation under the SDA, asserting that as a surface owner of a remainder interest, Cimarex should also have negotiated with him for surface damages. However, Cimarex claimed that a future interest owner does not qualify as a surface owner under the SDA. Alternatively, even if the owner of a future interest did so qualify, his proper cause of action is against the life tenant. *Hobson*, 2019 OK 58, ¶¶ 2–3.

The trial court held that a vested remainderman did not qualify as a surface owner under the SDA. *Id.* ¶ 3. However, the court of civil appeals disagreed, reasoning that the SDA focuses on ownership rather than possession, and thus reversed and remanded the case to the trial court. *Id.* Cimarex filed a petition for writ of certiorari to the Oklahoma Supreme Court, and it was granted. *Id.* ¶ 4.

The issue was the interpretation of "surface owner" under the SDA. "The SDA provides that '[p]rior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation.'" *Id.* ¶ 7 (alteration in original) (quoting Okla. Stat. tit. 52, § 318.5(A)). "The 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.'" *Id.* (quoting Okla. Stat. tit. 52, § 318.2(2)).

The majority then looked to *Black's Law Dictionary* to give meaning to the term "owner," selecting the definition "[s]omeone who has the right to possess, use, *and* convey something." *Id.* ¶ 9 (alteration in original) (quoting *Black's Law Dictionary* (10th ed. 2010)). The court then examined *Merriam-Webster's Dictionary*, defining "own" as "to have or hold as property: possess." *Id.* The court further relied upon authority that "ownership" includes "absolute dominion." *Id.* (citing *Marsh v. Alabama*, 326 U.S. 501, 506 (1946)). Thus, reasoning that a vested remainder is not a possessory interest until the life estate terminates, the court concluded that "[t]he lessee . . . is statutorily required to negotiate [only] with the person or persons holding a current possessory interest in the surface of the land." *Id.* ¶ 10. Because a remainder is not a possessory interest, a remainderman is not an owner under the SDA.

The court also claimed its conclusion requiring a current possessory interest gave effect to legislative intent and promoted justice. *Id.* ¶ 12. It reasoned that a life tenant entering into a new mineral lease "must still seek the remainderman's consent because removal of minerals [would] affect the corpus of the property." *Id.* "[I]f the life tenant's transactions with the mineral leaseholder constitute an unreasonable injury to the remainderman's estate, the remainderman may bring a waste claim." *Id.* Thus, a remainderman has recourse for potential waste from actions by a life tenant. *Id.* In conclusion, the court held that "[t]he SDA's definition of surface owner is ambiguous" and that it was "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*," and thus a remainderman is not a "surface owner" under the Act. *Id.* ¶ 13 (emphasis added).

Four justices dissented. First they noted that the SDA was enacted in 1982. *Id.* ¶ 4 (Darby, V.C.J., dissenting). They criticized the majority as "relying on a definition of *owner* from the tenth edition of *Black's Law Dictionary*, which did not exist until 2014." *Id.* ¶ 3. The dissent, examining a version of *Black's Law Dictionary* that was most recent at the time of enactment of the SDA (1982), noted that "owner" was defined as "[t]he person in whom is vested the ownership, dominion, or title of property . . . ." *Id.* ¶ 4 (quoting *Black's Law Dictionary* (5th ed. 1979)). It was further noted that the term "owner" indicates "a person in whom one or more interests are vested for his own benefit." *Id.* (quoting *Black's Law Dictionary* (5th ed. 1979)). Further, the court found support in *Webster's New International Dictionary* defining "owner" as "one who has legal or rightful title, whether the possessor or not." *Id.* ¶ 5 (quoting *Webster's New Int'l Dictionary* (2d ed. 1959)). It also noted that in *Black's Law Dictionary*, "[o]wnership of property is either absolute or qualified" and that it may be described as qualified "when the time of enjoyment is deferred or limited." *Id.* (quoting *Black's Law Dictionary* (5th ed. 1979)).

Moving beyond the duel of the dictionaries arguments, the dissent noted that "[t]he SDA was established to promptly compensate surface owners for damages which may result from oil and gas exploration." *Id.* ¶ 8. It, therefore, followed that "the SDA aims to compensate *all owners* with an interest in the surface estate—specifically to provide compensation when a drilling operation directly threatens to deplete a surface owner's interest." *Id.* The dissent stated a vested remainder fits the criteria as a damageable interest in the surface that has market value. *Id.* The dissent then examined the types of damage that drilling operations could cause to the surface estate, arguing therefrom that "a vested remainderman possesses a right to compensation for the diminution in value of the corpus of the estate." *Id.* ¶ 11.

Finally, concluding that "[w]hile the majority opinion upholds the SDA's purpose of promoting prompt compensation to the life tenant, it prevents that purpose for the vested remainderman." *Id.* ¶ 13. However, that result "could have been avoided by simply allowing [the] remainderman his statutorily granted seat at the negotiation table." *Id.*

One point to note is that because of two vacancies on the Oklahoma Supreme Court and two recusals, four additional judges were assigned to serve as special justices in this case: two judges from the Oklahoma Court of Criminal Appeals and two judges from the Oklahoma Court of Civil Appeals. Further note that the majority's reliance on the interplay between a life tenant and a remainderman regarding the remainderman's consent to leasing and removal of minerals and a remainderman's recourse for potential waste from the life tenant's action fails to consider that the majority's illustration of a remainderman's remedies applies to the ownership of such rights in the mineral estate, whereas the SDA is concerned with the surface estate.

First Purchaser's Payment to Operator Discharged First Purchaser's Obligation to Carried Working Interest Owner

In the case of *Abraham v. Palm Operating, LLC*, 2019 OK CIV APP 46, 447 P.3d 486, Tim Abraham was the owner of a 1/32 carried working interest in production from the Elias-Kerns #2 well. During the relevant time period, Palm Operating, LLC (Palm) was the operator of the well and Pacer Energy Marketing, LLC (Pacer) was the first purchaser of production from the well. Abraham sued Palm and Pacer claiming violation of the Production Revenue Standards Act (PRSA), Okla. Stat. tit. 52, §§ 570.1–.15, conversion, and restitution for failure to properly pay proceeds from the well to him. During the relevant time period, Pacer was the first purchaser of crude oil and paid 100% of the proceeds from production to Palm, the operator. All parties filed motions for summary judgment and the trial court granted summary judgment to Abraham against Pacer as first purchaser for $22,859.52 for production through December 31, 2016, plus 12% interest from January 1, 2017. *Abraham*, 2019 OK CIV APP 46, ¶ 4. Pacer appealed claiming that since it had paid production proceeds to the operator, Palm, it had discharged its obligation for Abraham's share of proceeds pursuant to the PRSA. *Id.* ¶¶ 5, 7.

The dispute centered around application of section 10 of the PRSA, which provides that

> [a] first purchaser that pays or causes to be paid proceeds from production to the producing owner of such production or, at the direction of the producing owner, pays or causes to be paid royalty proceeds from production to:
>
> a. the royalty interest owners legally entitled thereto, or
>
> b. the operator of the well,
>
> shall not thereafter be liable for such proceeds so paid and shall have thereby discharged its duty to pay those proceeds on such production.

Id. ¶ 7 (quoting Okla. Stat. tit. 52, § 570.10(C)(1)).

The court in part saw this as a dispute over whether Palm was the producing owner. *Id.* Abraham argued that the cited section of the PRSA did not apply to him because "while Palm may have been the producing owner of *some* of the production, it was not the producing owner of the portion of production attributable to Abraham's interest because Abraham was the owner of that production." *Id.* ¶ 8. However, the court rejected Abraham's argument that a first purchaser is required to directly pay each owner, concluding that it "would render certain parts of the PRSA superfluous." *Id.* The court stated that "[t]he PRSA provides that an owner is one who has 'a legal interest in the mineral acreage under a well which entitles that person or entity to oil or gas production or the proceeds or revenues therefrom.'" *Id.* (quoting Okla. Stat. tit. 52, § 570.2(1)). The court continued that under the PRSA, "producing means 'the physical act of severance of oil and gas from a well by an owner . . . .'" *Id.* (quoting Okla. Stat. tit. 52, § 570.2(2)). Finally, "[t]he PRSA defines 'producing owner' as 'an owner entitled to produce who during a given month produces oil or gas for its own account or the account of subsequently created interests as they burden his interest.'" *Id.* (quoting Okla. Stat. tit. 52, § 570.2(3)). The court then stated that under the assignment granting Abraham a "carried working interest," Abraham was not to bear any of the costs of drilling or operations and that Abraham was to have no control over the leased premises or operations carried out thereon. *Id.*

The court concluded that the evidence "show[ed] that Abraham was not the operator or producing owner and that Palm was the operator and producing owner." *Id.* ¶ 9. Therefore, Pacer's payment of proceeds to Palm "discharged its liability [as first purchaser] for payment of proceeds of production." *Id.* Thus, the court reversed the holding of the trial court as to the first purchaser. *Id.* In a footnote, the court stated that "[t]he type of ownership interest Abraham has [was] not material to [the] dispute." *Id.* ¶ 6 n.2.

It is unclear to this reporter the basis for the court's finding that "the evidence" showed that Abraham was not a "producing owner." Possibly, it was some provision of the assignment granting the "carried working interest." However, it would seem that under the PRSA, an "owner" of a "working interest" is nevertheless a producing owner even if the costs of production and operations have been shifted by assignment or contract to another such as the operator. In other words, the right to produce oil and gas is inherent in the rights of an owner of a working interest, even if such owner has delegated to an "operator" the physical act of bringing the hydrocarbons to the surface. This case was ordered published by the court of civil appeals. As such, by Okla. Sup. Ct. R. 1.200(d), the decision has only "persuasive effect." It would have "precedential value" only if it had been approved for publication by the Oklahoma Supreme Court.

INTEREST-ONLY CLASS CERTIFIED WITHOUT CLASS CERTIFICATION HEARING

In *Cline v. Sunoco, Inc. (R&M)*, No. 6:17-cv-00313, 2019 WL 4879187 (E.D. Okla. Oct. 3, 2019), Perry Cline owned a royalty interest in one or more oil wells in Oklahoma. Sunoco, Inc. (R&M) and Sunoco Partners Marketing & Terminals, L.P. (collectively, Sunoco) purchased and resold oil from Cline's wells. The Production Revenue Standards Act (PRSA), Okla. Stat. tit. 52, §§ 570.1–.15, governs payment of proceeds from oil and gas production. It requires the first person who buys oil or gas from an interest owner (the "first purchaser") or the person holding proceeds from the sale of oil and gas to pay the interest owners their proceeds within specified time periods (with certain exceptions). *Cline*, 2019 WL 4879187, at *1. The first purchaser must pay statutory interest if it does not pay the proceeds within a certain specified time period. *Id.* That interest is 12% per annum compounded annually unless the reason for late payment falls within certain specified exceptions having to do with lack of marketable title. *Id.* (citing Okla. Stat. tit. 52, § 570.10).

Sunoco purchases oil as first purchaser from over 20,000 properties, paying over 100,000 well owners royalty proceeds. *Id.*

> Sunoco sends division orders to owners and suspends payment until the owner returns a signed and completed division order. If an owner does not want to sign a division order, Sunoco says that it will remove the account from suspension and pay the owner, but that the owner must first tell Sunoco that he or she refuses to sign the division order. When Sunoco pays proceeds late, it often waits until an owner makes a request for interest before investigating the request and paying any necessary interest.

Id. Cline contends that Sunoco engages in an ongoing scheme to avoid paying the required interest. *Id.* at *2. Cline sued Sunoco in the U.S. District Court for the Eastern District of Oklahoma for paying his production proceeds late without paying interest. *Id.* Cline sought to maintain a class action on behalf of all other owners who were paid late and not paid interest, claiming a violation of the PRSA and fraud. *Id.* Cline proposes a class composed of all persons who received untimely payments from Sunoco for oil proceeds from Oklahoma wells and who have not already been paid statutory interest on the untimely payments (with untimely payments being defined in accordance with payment requirements of the PRSA). *Id.* The typical exclusions were made for governmental agencies, publicly traded companies, and the like. *Id.* "Cline relies on the expert reports of Barbara Ley, a certified public accountant, to establish that Cline can identify the putative class members and calculate damages class-wide with common proof." *Id.* at *2 n.3. The court, in a separate opinion (*see infra*), denied Sunoco's motion to exclude Ley's expert testimony, and considered her conclusions to decide the motion to certify the class.

The court repeated the requirements for class certification, to wit: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. *Id.* at *3 (citing Fed. R. Civ. P. 23(a)). The court easily found numerosity based on a proposed class comprising thousands of interest owners. *Id.* As for commonality, the court claims to have been governed by the *Wal-Mart* test requiring Cline to "show that 'the class members have suffered the same injury,' and that the 'common contention . . . is capable of classwide resolution . . . [and] will resolve an issue that is central to the validity of each . . . claim[] in one stroke.'" *Id.* (alterations in original) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "Cline argue[d] that Sunoco's business records and employee testimony will confirm its 'uniform policy of not paying statutory interest unless requested by an owner.'" *Id.* Cline further claimed that "the proposed class will use common evidence of Sunoco's unlawful actions, and that if the Court finds Sunoco had a duty to pay that interest without a request and Sunoco breached that duty, every class member will prevail." *Id.* Based thereon, the court found that "Cline allege[d] that Sunoco did not pay statutory interest on late payments to the proposed class members based on Sunoco's single, uniform practice" and that "Cline present[ed] discrete legal questions both about whether Sunoco violated the PRSA pursuant to its policy and about the injuries the proposed class members suffered as a result," concluding that "[i]f [it] holds Sunoco liable, all the class members prevail." *Id.* at *4. Thus, the court found commonality existed. *Id.*

As for typicality, the court reasoned that "[t]o succeed on his PRSA claims, Cline must show that Sunoco (1) owed Cline payments; (2) made the payments to Cline late; and (3) did not pay interest on the late payments." *Id.* "To succeed on his fraud claim, Cline must show that Sunoco made '1) a material representation, 2) knowingly or recklessly . . . , 3) with intent that it be relied upon, and 4) the party relying on the false statement suffer[ed] damages.'" *Id.* (alteration in original) (quoting *Silver v. Slusher*, 770 P.2d 878, 881 n.8 (Okla. 1988)). "Cline plan[ned] to rely on facts related to Sunoco's process for paying statutory interest to prove his PRSA claim" and to "rely on facts related to Sunoco's check stubs to show that Sunoco concealed the interest it owed him," thus claiming that "[t]hose same facts would also prove—or disprove—the PRSA and fraud claims of the absent class members." *Id.* The court stated that "Sunoco admit[ted] to using the same process for remitting *most payments* during the class period, and Sunoco used the same check stub format across the class." *Id.* (emphasis added).

Sunoco attempted to defeat typicality on the basis that Cline had been paid the amount he seeks in interest; thus Cline lacked standing to bring the action either individually or on behalf of the class. *Id.* The court stated that it was going to dismiss Sunoco's argument in a separate opinion explaining its reasoning, and thus treated Sunoco's argument as moot. *Id.*

Sunoco also argued that there was a "deep and significant adversity" between Cline as a royalty owner and the working interest owners who were also included in the class because the class claims "could trigger an obligation on behalf of many of those same working interest owners to indemnify Sunoco." *Id.* The court rejected that argument, concluding the putative class members have the same statutory rights as Cline and "[t]he contracts between Sunoco and [the] working interest owners, or between Cline and his lessees, do not affect Sunoco's obligations under the PRSA." *Id.* at *5.

As for adequacy, the court rejected Sunoco's argument of an interclass conflict asserted in Sunoco's typicality argument, concluding that "Cline has suffered the same injuries and has the same interests and incentives as the putative class to 'fairly and adequately' protect the class' interests." *Id.* at *6.

As for predominance, the court acknowledged that common questions of law and fact must predominate. *Id.* The court stated it was required to

> evaluate Sunoco's practice for paying interest and determine (1) whether Sunoco owed interest to the class for making late payments, (2) whether Sunoco could wait for owners to make a demand before paying that interest, (3) whether Sunoco's failure to pay interest or delays in paying interest pursuant to its practice violated the PRSA, and (4) whether Sunoco defrauded the class by knowing withholding the interest.

Id. at *7. The court concluded that "[t]he claims will rise or fall on common evidence." *Id.* The court rejected Sunoco's argument that "myriad individualized factors" defeated predominance on the basis that it adopted Cline's modified class definition and accepted Ley's methodology for identifying the class members and calculating damages. *Id.* The court further stated that "Sunoco may vigorously contest Ley's conclusions, but Ley's model can determine damages on a class-wide basis sufficient for this stage of the proceedings." *Id.* The court stated that Ley has said she can exclude from her model payments excluded from interest under the PRSA and "Ley has also explained the method by which she intends to identify marketable title issues using Sunoco's codes, even if Sunoco contends its own coding system is unreliable for these purposes." *Id.*

"Sunoco also challenge[d] Cline's fraud claim as too individualized." *Id.* However, the court noted that "Cline intend[ed] to establish fraud through the check stubs Sunoco issued uniformly to the putative class members," concluding that "Cline had adequately refuted Sunoco's challenge to the fraud claim and established that the fraud claim 'is susceptible to general and classwide proof.'" *Id.* (internal quotation marks omitted) (quoting *Naylor Farms, Inc. v. Chaparral Energy, LLC*, No. 5:11-cv-00634, 2017 WL 187542, at *8 (W.D. Okla. Jan. 17, 2017)); *see also* Vol. XXXIV, No. 1 (2017) of this *Newsletter*.

At this point, the court easily found superiority was met, concluding that "[l]itigating the claims together serves the interests of economy, efficiency, and uniformity of decisions . . . ." *Cline*, 2019 WL 4879187, at *8.

The court then noted that "the class description [must be] sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." *Id.* (alteration in original) (quoting 7A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1760 (3d ed. 2019)). This required "first, that the class be defined with reference to objective criteria; and second, a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at *9 (quoting *Braver v. Northstar Alarm Servs. LLC*, 329 F.R.D. 320, 334 (W.D. Okla. 2018)). The court found that "Cline's class definition align[ed] with the exceptions outlined in the PRSA, establishing that 'the class [can] be defined with reference to objective criteria.'" *Id.* (second alteration in original) (quoting *Braver*, 329 F.R.D. at 334). Further, it found that "Ley's proposed model provide[d] a reliable and administratively feasible mechanism for determining class membership." *Id.* Thus the court could ascertain the proposed class. *Id.*

The court then concluded that because Cline met the requirements for class certification, the court would grant the motion without holding a hearing because a hearing would not aid the decisional process. *Id.*

In a separate opinion, issued simultaneously with the primary opinion, the court dealt with Sunoco's motion to exclude Ley's reports and testimony arguing that Ley's model was inaccurate and unreliable by failing to reliably identify untimely payments and to properly calculate statutory interest. *See Cline v. Sunoco, Inc. (R&M)*, No. 6:17-cv-00313, 2019 WL 4879186 (E.D. Okla. Oct. 3, 2019). The court acknowledged that Ley admitted her model would have to be changed to be accurate on those issues. *Id.* at *2. However, the court concluded that "Ley's testimony and expert reports demonstrate that [her] model, although not fully developed, provides a reliable way to identify untimely payments and calculate damages sufficient to satisfy the *Daubert* standard." *Id.*; *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)). The court concluded that "Sunoco's arguments ultimately challenge[d] the weight the Court should give to Ley's reports and testimony," *Cline*, 2019 WL 4879186, at *3, but that "[t]hat [did] not make the testimony and reports inadmissible," *id.*, further finding that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence," *id.* (alteration in original) (quoting *Daubert*, 509 U.S. at 596). Thus, the court ruled Ley's testimony was admissible and would consider it when making its class certification decision. *Id.* Sunoco's motion was denied. *Id.*

On October 8, 2019, Sunoco filed a motion to stay the case pending appeal of the court's class certification ruling to the U.S. Court of Appeals for the Tenth Circuit, which motion was denied. *See Cline v. Sunoco, Inc. (R&M)*, No. 6:17-cv-00313, 2019 WL 5589047 (E.D. Okla. Oct. 30, 2019). On October 17, 2019, Sunoco filed its petition with the Tenth Circuit seeking permission to appeal the district court's certification of the class, which petition was denied on November 13, 2019. *See Sunoco, Inc. (R&M) v. Cline*, No. 19-608 (10th Cir. Nov. 13, 2019) (order denying petition for permission to appeal). In the meantime, on October 18, 2019, Cline, as class representative on behalf of himself and the certified class, filed a motion for partial summary judgment asserting Cline and the class were entitled to partial summary judgment on the issue of liability as a matter of law because (1) Sunoco's practice of not paying statutory interest on late payments unless and until an owner demands violates the PRSA, and (2) Sunoco's interpretation of the PRSA that interest accrues but need not be paid is incorrect. At the time of submission of this report, that motion has been fully briefed and awaits the decision of the district court.

It should be noted that Judge James H. Payne of the Eastern District of Oklahoma, to whom this case was reassigned after Judge Ronald A. White of the Eastern District of Oklahoma recused himself, also recused himself. Typically, cases from the Eastern District of Oklahoma are reassigned to judges from the Western District or the Northern District of Oklahoma. However, this case was reassigned to Judge John A. Gibney, Jr., of the U.S. District Court for the Eastern District of Virginia.

PENNSYLVANIA — MINING

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TEMPORARY CESSATION PROVISIONS OF COAL REFUSE DISPOSAL CONTROL ACT AMENDED

On October 4, 2019, Governor Tom Wolf signed Act 74 into law, amending the 1968 Coal Refuse Disposal Control Act (CRDCA), 52 Pa. Stat. §§ 30.51–.66. *See* H.R. 1557, 2019 Pa. Legis. Serv. Act 2019-74 (effective Dec. 3, 2019). Act 74 was introduced by Representative Matt Gabler (R-Clearfield/Elk) on June 4, 2019, as House Bill 1557 (HB 1557), which was approved 192-0 by the House on June 20, 2019, and 46-3 by the Senate on September 25, 2019.

As reported in Vol. XXXVI, No. 3 (2019) of this *Newsletter*, Act 74 amends section 6.1(i) of the CRDCA, 52 Pa. Stat. § 30.56a(i). Prior to the Act 74 amendments, section 6.1(i) required operators to install a system for preventing precipitation from coming into contact with coal refuse disposal areas that have reached capacity, permanently ceased operation, or temporarily ceased operation for more than 90 days. The statute previously allowed the Pennsylvania Department of Environmental Protection (PADEP) to approve a period of temporary cessation longer than 90 days, but required that the extended period not exceed one year and be for reasons of a labor strike or business necessity.

The provisions of HB 1557 previously described in this *Newsletter* remained unchanged in Act 74. Thus, Act 74 makes two key changes to section 6.1(i). First, it removes the one-year limitation on temporary cessation. Second, it removes the condition that an extension of temporary cessation beyond 90 days may only be granted for reasons of a labor strike or business necessity. Finally, Act 74 adds a new subsection (j), which provides that PADEP may promulgate future regulations "to provide for the connection of coal refuse or related material to the coal refuse disposal area."

Act 74 will take effect on December 3, 2019, 60 days after the Governor's signature. The requirements of section 6.1(i) are further reflected in 25 Pa. Code § 90.167(d), which will therefore require amendment to conform to the new section 6.1(i).

Proposed Changes to Water Supply Replacement Regulations Published

On November 2, 2019, the Pennsylvania Department of Environmental Protection's (PADEP) Environmental Quality Board published a proposed rulemaking revising the water supply replacement regulations for surface and anthracite coal mines under 25 Pa. Code chs. 87–90. *See* Water Supply Replacement for Coal Surface Mining, 49 *Pa. Bull.* 6524 (proposed Nov. 2, 2019).

The proposed revisions are based on (1) federal Office of Surface Mining Reclamation and Enforcement program recommendations provided to PADEP in 2005, (2) current practices reflected in existing guidance documents, and (3) recent Pennsylvania Environmental Hearing Board decisions. This rulemaking package has been subject to extensive discussions among the members of PADEP's Mining and Reclamation Advisory Board (MRAB). Previous redline versions of the proposed regulations and other explanatory documents can be found on the MRAB webpage. *See* MRAB, "Agendas/Handouts for 2018," https://www.dep.pa.gov/PublicParticipation/AdvisoryCommittees/Mining/MiningReclamation/Pages/2018.aspx.

One notable change codified existing policy requiring PADEP to notify the water supply owner of any potentially affected supply. *See* Proposed 25 Pa. Code §§ 87.47, 88.27. The bulk of the proposed revisions, however, are to 25 Pa. Code §§ 87.119 and 88.107, entitled "Hydrologic balance: water rights and replacement." Due to the extensive reorganization of these sections under the proposed regulations, PADEP has proposed that sections 87.119 and 88.107 will be reserved and new sections 87.119a and 88.107a, respectively, will be adopted. Proposed changes include an expanded explanation of the terms "reliability" and "quality" in the context of adequacy of restored or replaced water supplies under the proposed regulations, *see* Proposed 25 Pa. Code §§ 87.119a(f), 88.107a(f), which are two of the more significant recommended departures from the prior regulations. Under the proposed requirements for demonstrating reliability, PADEP has proposed to remove language from sections 87.119(a)(1)(iv) and 88.107(a)(1)(iv) that states that a connection to a public water supply as a replacement water supply satisfies the adequacy requirement if the public water supply "provides the owner and the user adequate control and accessibility." *See* Proposed 25 Pa. Code §§ 87.119a(f)(1)(iv), 88.107(f)(1)(iv).

The addition of a "quality" section in the proposed regulations imposes new restrictions and qualifiers on what constitutes adequate water quality in restored or replaced supply. Under the current regulations, the alternate water source must be "adequate in water quantity and water quality, for the purpose served by the water supply." 25 Pa. Code §§ 87.119(a), 88.107(a). The proposed revisions would require that domestic supplies meet Pennsylvania Safe Drinking Water Act, 35 Pa. Stat. §§ 721.1–.17, standards or a quality comparable to the premining supply if that premining supply quality did not meet those standards. *See* Proposed 25 Pa. Code §§ 87.119a(f)(2)(i), 88.107a(f)(2)(i). Furthermore, the proposed revisions could require operators to provide a water quality that is more stringent than the Pennsylvania Safe Drinking Water Act if the water demonstrated higher quality in the premining supply, provided that the higher quality is necessary for the purposes of the current supply. *See* Proposed 25 Pa. Code §§ 87.119a(f)(2)(i), 88.107a(f)(2)(i). The testing requirements for premining water surveys were also changed in PADEP's proposal. In addition to other changes, testing for coliform and hardness may now be required where local conditions warrant. *See* Proposed 25 Pa. Code §§ 87.119a(a)(1)(iii), 88.107a(a)(1)(iii).

Also of note is the proposed removal of "de minimis cost increase" from the definitions sections of both chapters 87 and 88, *see* 25 Pa. Code §§ 87.1, 88.1, along with any and all usage of the term from the regulations. Under the current regulations, "de minimis cost increase" modifies an operator's obligation to provide for increased operating and maintenance costs, *see id.* §§ 87.119(a)(2), 88.107(a)(2), and qualifies the requirement that an alternate water source provided by an operator result in no more than a de minimis cost increase, *see id.* §§ 87.119(a)(1)(v), 88.107(a)(1)(v). Under PADEP's proposed regulations, if the alternate source has resulted in any increase in costs of operation and maintenance to the water user, the operator must provide for the payment for increased costs as prescribed in the new subsection (g). *See* Proposed §§ 87.119a(f)(1)(v), (g), 88.107a(f)(1)(v), (g).

Under PADEP's proposed revisions, if there is any increase in costs of operation or maintenance to the water user, an operator would be required to follow a procedure that includes analyzing 6–12 months of operating and maintenance data for the water supply (during which period the operator pays all operation and maintenance costs, not just the increased costs). The operator would then be required to submit this data, with calculations of the increased costs, to PADEP and the water user for review and comment. Additionally, an operator would be required to post a collateral bond that adheres to the requirements of subsection (g)(3). *See* Proposed 25 Pa. Code §§ 87.119a(g), 88.107a(g).

The bond requirements under subsection (g)(3) are also new to the regulations and appear to be similar to those included in PADEP's technical guidance document "Increased Operation and Maintenance Costs of Replacement Water Supplies (on All Coal and Surface Noncoal Sites)," No. 562-4000-102 (Dec. 2, 2006).

Comments on the proposed changes must be received by December 2, 2019. *See* 49 *Pa. Bull.* at 6531.

Executive Action on Climate Change, Carbon Emissions

On October 3, 2019, Governor Tom Wolf issued an executive order instructing the Pennsylvania Department of Environmental Protection (PADEP) to "develop and present to the Pennsylvania Environmental Quality Board a proposed rulemaking package to abate, control, or limit carbon dioxide emissions from fossil-fuel-fired electric power generators" by no later than July 31, 2020. Exec. Order No. 2019-07, "Commonwealth Leadership in Addressing Climate Change Through Electric Sector Emissions Reductions," 49 *Pa. Bull.* 6376 (Oct. 26, 2019). The proposed rulemaking must also be sufficiently consistent with the Regional Greenhouse Gas Initiative (RGGI) Model Rule, such that allowances may be traded with holders of allowances from other RGGI states. *Id.* Under the executive order, PADEP must also conduct a "robust public outreach" process ensuring the program "results in reduced emissions, economic gains, and consumer savings," and must consult with PJM Interconnection LLC (PJM), the regional transmission organization that coordinates the movement of wholesale electricity within Pennsylvania and 12 other states, to promote the integration of the program "in a manner that preserves orderly and competitive economic dispatch within PJM and minimizes emissions leakage." *Id.*

RGGI is a market-based collaboration among nine Northeast and Mid-Atlantic states to reduce greenhouse gas emissions. *See* RGGI, "Elements of RGGI," https://www.rggi.org/program-overview-and-design/elements. Participating states have agreed, either through regulation or legislation, to implement RGGI through a regional cap-and-trade program involving carbon dioxide (CO_2) emitting electric power plants. These states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) set a cap on total CO_2 emissions from electric power generators in their states. To show compliance with the cap, power plants must purchase a credit or "allowance" for each ton of CO_2 they emit. These purchases are made at quarterly auctions conducted by RGGI. The most recent RGGI auction held September 4, 2019, resulted in an allowance price of $5.20 per ton. *See* RGGI, "Auction Results," https://www.rggi.org/auctions/auction-results. The proceeds from the auctions are allocated back to the participating states in proportion to the amount of carbon subject to regulation in each state. The memorandum of understanding (MOU) signed by the participating states requires each signatory state to allocate 25% of its allowances to a consumer benefit or strategic energy purpose, which includes measures promoting energy efficiency, directly mitigating electricity ratepayer impacts, promoting renewable or non-carbon-emitting technologies, and funding the administration of the program itself. Other than a provision in the 2017 Model Rule stating that the regional organization must be funded, at least in part, by the signatory states, nothing in the MOU or Model Rule specifically restricts how additional RGGI revenue can be spent.

PADEP Secretary Patrick McDonnell was joined by Chris Hoagland, Program Manager of the Climate Change Program at the Maryland Department of the Environment, to provide an overview of RGGI to the Senate Environmental Resources and Energy Committee on October 22, 2019. A video of the hearing is available on the committee's website. *See* Pa. Senate Envtl. Res. & Energy Comm., "Meeting to Consider Bills, Followed by Briefing on RGGI (Regional Greenhouse Gas Initiative)," https://environmental.pasenategop.com/102219/.

As reported in Vol. XXXVI, No. 3 (2019) of this *Newsletter*, Pennsylvania is also considering another cap-and-trade initiative resulting from a petition for rulemaking submitted by a group of nonprofit organizations and individuals in November 2018. *See* Rulemaking Petition from Clean Air Council et al. to PADEP (updated Feb. 28, 2019). On April 16, 2019, PADEP's Environmental Quality Board (EQB) voted 14-5 in favor of directing PADEP to develop a report and recommendation on the cap-and-trade petition. The petition borrows heavily from the California cap-and-trade program and is far broader than RGGI cap-and-trade programs, covering multiple sectors of the economy, not just electricity generators. On June 18, 2019, PADEP reported to the EQB that it expects to present it with an outside consultant's evaluation of the costs and benefits of the petition in early 2020.

Following the governor's executive order on RGGI, PADEP must draft a regulation to present to the EQB for approval. The proposed regulation will be subject to a public comment process after publication. PADEP has created a section of its website for RGGI, which at the time of this report consists of an overview of the program, a promotional video, and a link to Executive Order 2019-07. *See* PADEP, "Regional Greenhouse Gas Initiative," https://www.dep.pa.gov/Citizens/climate/Pages/RGGI.aspx.

PENNSYLVANIA — OIL & GAS

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COMMONWEALTH COURT HOLDS THAT ZONING BOARD HAS DUTY TO PROTECT PRIVATE LANDS UNDER ENVIRONMENTAL RIGHTS AMENDMENT

In the latest decision by the Commonwealth Court of Pennsylvania related to Andover Homeowners' Association, Inc.'s (Andover) challenges to Sunoco Pipeline L.P.'s (Sunoco) Mariner East 2 pipeline project in Thornbury Township, Pennsylvania, the court affirmed a decision by the Court of Common Pleas of Delaware County (trial court) affirming the grant of permits by the Zoning Hearing Board of Thornbury Township (Zoning Board). *See In re Andover Homeowners' Ass'n*, No. 1214 C.D. 2018, 2019 WL 4007577 (Pa. Commw. Ct. Aug. 26, 2019). Andover previously objected to Sunoco's declaration of taking to condemn easements for the Mariner East 2 pipeline project. *See In re Condemnation by Sunoco Pipeline L.P.*, No. 1780 C.D. 2016, 2017 WL 4783584 (Pa. Commw. Ct. Oct. 24, 2017) (unreported); *see also* Vol. XXXIV, No. 4 (2017) of this *Newsletter*. This action relates to the same pipeline project, but here Andover objected to permits obtained by Sunoco to construct the pipeline facilities.

Sunoco applied for zoning, building, and electrical permits and a grading permit related to the pipeline project. *Andover*, 2019 WL 4007577, at *1. Thornbury Township issued the permits and Andover appealed to the Zoning Board. *Id.* Andover appealed the zoning, building, and electrical permits on the basis that Sunoco's work was being performed outside of Sunoco's easements. *Id.* Andover appealed the grading permit as violative of a 100-meter setback requirement set forth in section 1511(b)(1)(i) of the Business Corporation Law, 15 Pa. Cons. Stat. § 1511(b)(1)(i), and the township's trusteeship duties under the Environmental Rights Amendment (ERA) to the Pennsylvania Constitution, Pa. Const. art. I, § 27. *Andover*, 2019 WL 4007577, at *4. The Zoning Board denied the appeals, finding that (1) the work performed was within Sunoco's easement, (2) the construction within the 100-meter setback was not a zoning issue (but an eminent domain issue), and (3) the township did not violate the ERA because the land was privately held and—even if not privately held—the township fulfilled its duties as a trustee by placing conditions on the permit. *Id.* at *3, 5. Andover appealed to the trial court, which affirmed the Zoning Board and held that the issues raised by Andover were barred by collateral estoppel because they were litigated in the prior eminent domain proceeding. Likewise, the trial court affirmed the Zoning Board's holding that the township did not violate its duties under the ERA. *Id.* at *5.

Andover raised three issues on appeal to the commonwealth court: (1) whether the Zoning Board erred because the township violated its duties as trustee under the ERA in issuing the grading permit; (2) whether the Zoning Board erred because the grading permit violated section 1511(b)(1) of the Business Corporation Law; and (3) whether the Zoning Board erred in upholding the zoning, building, and electrical permits because Sunoco did not prove that its proposed construction work was being performed within the easement. *Id.* While the commonwealth court affirmed the Zoning Board on all three issues, the error ascribed to the ERA warrants comment in this report.

Andover argued that the township violated its duties as trustee under the ERA by improperly relying upon the Pennsylvania Department of Environmental Protection (PADEP) and its erosion and sedimentation control permitting process. The Zoning Board argued that it had no duty to preserve and protect *private* land under the ERA. Furthermore, the Zoning Board argued that it fulfilled its duties as trustee by imposing permit conditions that considered potential environmental harms. The court held that the township did have a duty as trustee, but that it fulfilled the duties within its power to act. *Id.* at *6.

The court disagreed that the township had no trustee duties related to privately owned lands. The Zoning Board held that the properties owned by Andover were not part of the "corpus of public trust" contemplated under the ERA. *Id.* at *7. The court looked at its recent decision in *Marcellus Shale Coalition v. Department of Environmental Protection*, 193 A.3d 447 (Pa. Commw. Ct. 2018), where it held the public trust to be more expansive and flexible:

> "The concept of public natural resources [is] flexible to capture the full array of resources implicating the public interest, as these may be defined by statute or at common law." Here, the Association contends that Sunoco's construction activities will disturb the contaminated soils, which will be "discharged into stormwater" and "ambient air." "Clean air" and "pure water" are among the values expressly addressed in the first clause of the [ERA].

Andover, 2019 WL 4007577, at *7 (first alteration in original) (alteration omitted) (citations omitted) (quoting *Marcellus*, 193 A.3d at 470).

Finding that the township did have trusteeship duties, the court found, however, that the township did not violate those duties. The township placed conditions on the permit and required Sunoco to follow PADEP permitting requirements. These actions satisfied the township's duties. *Id.* at *8. Relying on its decision in *Frederick v. Allegheny Township Zoning Hearing Board*, 196 A.3d 677 (Pa. Commw. Ct. 2018), the court noted that the ERA "does not impose express duties on the political branches *to enact specific affirmative measures* to promote clean air, pure water, and the preservation of the different values of our environment." *Andover*, 2019 WL 4007577, at *8 (emphasis added) (quoting *Frederick*, 196 A.3d at 694). The ERA does not give municipal entities the power to act beyond their enabling statutes and replicate the environmental oversight given to PADEP by the Pennsylvania General Assembly. *Id.* (citing *Frederick*, 196 A.3d at 697). Instead, the municipality "must reasonably account for the environmental features of the affected locale." *Id.* (quoting *Frederick*, 196 A.3d at 695). Here, as in *Frederick*, the record demonstrated that the township reasonably accounted for the environmental features of the affected property and satisfied its duties under the ERA. *Id.*; *see also* Vol. XXXV, No. 4 (2018) of this *Newsletter*.

SUPERIOR COURT UPHOLDS FINDING OF ABANDONMENT DUE TO LESSEE'S FAILURE TO PRODUCE

The Superior Court of Pennsylvania affirmed an order granting summary judgment in favor of the lessors of oil and gas rights where the trial court determined the leases were abandoned pursuant to their terms due to the lessee's failure to produce oil and gas. *See SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, No. 542 WDA 2018, 2019 WL 3980188 (Pa. Super. Ct. Aug. 23, 2019). The abandonment extinguished all of the lessee's contractual rights under the leases. Therefore, the lessee forfeited acreage retained by wells capable of producing oil and gas and had no interest in the oil or oil tanks existing on the surface of the leased premises.

The leases at issue covered two parcels of land located in Warren County, Pennsylvania. Each included a provision requiring the lessee to drill a certain number of wells on the two parcels and make minimum payments to the lessors each year if the royalties from oil and gas production did not exceed the minimum payment amount. The leases also contained an earned acreage provision that would retain 20 acres surrounding wells drilled and capable of production if the lease terminated due to the lessee's failure to meet the drilling obligations. The lessors could terminate the lease upon the lessee's default but were required to follow certain conditions precedent before availing themselves of that remedy. From 1996 to 2013, the leased premises did not produce oil and gas and the lessee made no royalty or minimum payments to the lessors. *Id.* at *1–2.

SLT Holdings, LLC (SLT), one of the lessors, argued that Mitch-Well Energy, Inc. (Mitch-Well), the lessee, failed to meet the drilling commitment or remit delay rental payments. SLT sought a judgment declaring that Mitch-Well had no rights to the leases. The trial court found the leases abandoned. Mitch-Well appealed. *Id.* at *2–3.

The superior court affirmed, resting on well-settled principles of contract law applicable to oil and gas leases. *Id.* at *3 (citing *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012) (lease is in the nature of a contract and controlled by principles of contract law); *Jacobs v. CNG Transmission Corp.*, 332 F. Supp. 2d 759, 772–73 (W.D. Pa. 2004)). Citing *Aye v. Philadelphia Co.*, 44 A. 555 (Pa. 1899), the court noted that abandonment may occur where an oil and gas lessee has an obligation to diligently develop the leased property and fails to do so. *SLT Holdings*, 2019 WL 3980188, at *7. "The *Aye* court specifically found that *four years of inaction by a lessee gives rise to a presumption of abandonment*. If the lessee fails to present a valid explanation for the inaction then judgment as a matter of law is appropriate." *Id.* (quoting Trial Court Opinion at 5–7). The court found the trial court's determination of abandonment supported by the record since Mitch-Well seemingly abandoned the leasehold for a period of 16 years without a valid explanation. *Id.* Because Mitch-Well abandoned the lease, it had no right to remove oil or any appurtenances from the leasehold premises. *Id.* at *8. Summary judgment was appropriate.

Federal District Court Considers Who, Among Oil and Gas Owners on a Parcel of Property, Are Necessary Parties to an Oil and Gas Lease Dispute

In *Kave Consulting, LLC v. Chesapeake Appalachia, LLC*, No. 4:19-cv-00196, 2019 WL 4687765 (M.D. Pa. Sept. 26, 2019), the U.S. District Court for the Middle District of Pennsylvania considered whether the plaintiff-lessors' action for an accounting on an oil and gas lease should be dismissed for failure to join non-parties who have separate leases on the same tracts of land. The court denied the motion, holding that the interests of the non-parties could not be impeded. The court allowed the claim for accounting to move forward with less than all owners of the oil and gas interests underlying the tracts of land.

The plaintiffs own a 50% interest in the oil and gas underlying two tracts of land, and the non-parties own the balance of the oil and gas on the two tracts. The non-parties executed leases with the defendant-lessees in 2006. The plaintiffs executed leases with the defendant-lessees in 2017 and sought an accounting of their unpaid share of royalties owed on the production from 2006 to 2017. The defendants moved to dismiss the complaint for failure to join the non-party lessors under Fed. R. Civ. P. 19. *Id.* at *1.

Rule 19 provides a bifurcated inquiry: the court first determines whether the absent party is "necessary" under Rule 19(a) and, if so, then asks if the absent party is "indispensable" under Rule 19(b). *Id.* A necessary party must be joined to the action if feasible. *Id.* Here, the defendants argued that the non-parties were necessary because a determination of the plaintiffs' rights would impede the non-parties' ability to protect their interest in the leasehold interest on the pre-2017 production. *Id.* at *2. Furthermore, the defendants argued that allowing the action to proceed without the non-parties could expose the defendants to competing claims to the royalties in dispute. *Id.* The court disagreed with both premises. First, the court noted that the defendants had already conceded that the royalties attributable to the non-parties had already been paid to the non-parties. *Id.* Therefore, the non-parties' interest in the royalties could not be "impeded" if they are not joined. *Id.* Second, the court determined that the defendants are not at risk of a "double" obligation or even inconsistent outcomes in different forums because the claim before the court relates to unpaid royalties that may be due to the plaintiffs and the potential "inconsistent" outcomes did not rise to a level that makes the non-parties necessary to the action. *Id.* at *2–3.

Third Circuit Holds that NGA Does Not Abrogate States' Eleventh Amendment Immunities and Does Not Delegate the Federal Government's Exemption to Private Parties

In *In re PennEast Pipeline Co.*, 938 F.3d 96 (3d Cir. 2019), *vacating* No. 3:18-cv-01585, 2018 WL 6584893 (D.N.J. Dec. 14, 2018), the U.S. Court of Appeals for the Third Circuit held that the Natural Gas Act (NGA), 15 U.S.C. §§ 717–717z, does not abrogate states' Eleventh Amendment immunities and does not delegate the federal government's exemption from the Eleventh Amendment immunity to private parties. The court considered whether the NGA, which allows private gas companies to exercise the federal government's power of eminent domain, allows gas companies to condemn unconsenting states' property interests in federal court. The court held that it does not.

PennEast Pipeline Company (PennEast) commenced condemnation actions under the NGA to acquire properties for a natural gas pipeline through Pennsylvania and New Jersey. Forty-two of the properties are owned by the state of New Jersey or "various arms of the State." *PennEast*, 938 F.3d at 99. PennEast sued New Jersey in federal court seeking to condemn the properties and gain immediate access. New Jersey did not consent to the suits. New Jersey moved to dismiss the actions for lack of jurisdiction pursuant to Eleventh Amendment sovereign immunity from suits commenced by private parties in federal court. The district court held that the condemnation actions were not barred by the state's immunity and granted relief in favor of PennEast. New Jersey appealed to the Third Circuit. *Id.* at 100–03.

The Third Circuit vacated, holding that Eleventh Amendment sovereign immunity is not abrogated by the NGA. *Id.* at 104–05. Moreover, the court held that the federal government's exemption from the state's sovereign immunity has not been delegated to PennEast. *Id.* at 108–09. Finding that "[t]he federal government's power of eminent domain and its power to hale sovereign States into federal court are separate and distinct," the court concluded that "[i]n the NGA, Congress has delegated the former" and not the latter. *Id.* at 100.

Texas— Oil & Gas

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— Reporter —

Lease's Continuous Development Clause Held to Require Commencement of Successive New Wells to Avoid Partial Termination

The court in *HJSA No. 3, Limited Partnership v. Sundown Energy LP*, No. 08-18-00113-CV, 2019 WL 3852677 (Tex. App.—El Paso Aug. 16, 2019, no pet. h.), construed an oil and gas lease covering over 30,000 acres in Ward County, Texas. The lease, dated as of August 4, 2000, provided that the lessee must reassign its rights under the lease to the lessor at the end of six years but that, according to its paragraph 7(b), the reassignment obligation would be delayed for so long as the lessee was engaged in a "continuous drilling program." *Id.* at *2 (emphasis omitted). Paragraph 7(b) further provided: "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." *Id.* (emphasis omitted). Paragraph 18 of the lease defined "drilling operations":

> Whenever used in this lease the term "drilling operations" shall mean: actual operations for drilling, testing, com-

> pleting 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.

Id.

Sundown Energy LP (Sundown), the lessee, began drilling the first well in February 2006 and drilled 14 wells between then and March 2015. In 2016 HJSA No. 3, Limited Partnership (HJSA), the lessor, asserted that on several occasions beginning in July 2007, Sundown had allowed more than 120 days to elapse between the completion of operations on one well and commencement of operations on the next ensuing well, so that the lessee had become obligated to reassign nonproducing acreage to the lessor. Sundown countered that although more than 120 days had gone by without its spudding a new well, it had on each occasion conducted reworking and reconditioning operations on existing wells. Under the lease's broad definition of "drilling operations," it contended, its actions had maintained the lease. *Id.* HJSA filed suit, and the trial court granted summary judgment to Sundown, finding that its reworking and reconditioning of existing wells had delayed the reassignment obligation under paragraph 7(b). *Id.* at *3.

The court of appeals reversed, agreeing with HJSA that the lessee could avoid the reassignment obligation only if it commenced the drilling of a new well within 120 days of the completion of operations on the previous one. Paragraph 7(b), the court explained, described what the required "continuous drilling program" was, beginning with the spudding-in of the first "such" well by a certain date and continuing so long as no more than 120 days elapsed between completion or abandonment of one well and commencement of drilling operations on the "next ensuing well." *Id.* at *6. The use of the word "such," according to the court, necessarily meant that all wells must be of the same type, i.e., a well newly spudded-in. *Id.* It rejected Sundown's argument that the lease's definition of "drilling operations" must be read into paragraph 7(b) to give it the intended meaning. *Id.* at *7. Such a reading would, in the court's view, render the "spudded-in" language of paragraph 7(b) meaningless. *Id.* If the parties had desired to require only a single well to be spudded-in and then allow operations on any well to maintain the lease, they would not have used "next ensuing well" in the context of the first and any subsequent "continuous drilling well," the court concluded. *Id.*

A dissenting justice was persuaded by the mandatory wording of paragraph 18 that "drilling operations" must be broadly construed to include reworking "whenever" used in the lease, including paragraph 7(b). *Id.* at *9 (Palafox, J., dissenting). Because the lease's definition of drilling operations included operations that the lessee had timely conducted, that justice would have given effect to those operations in determining whether the lessee had complied with the requirements of a continuous drilling program, observing that where a contract expressly defines a term, the parties' agreed definition must prevail over others. *Id.*

Editor's Note: The reporter's law firm is involved in this case on behalf of the lessees.

State Comptroller Held Not Obligated to Pay Unclaimed Royalty Proceeds to Owner's Purchaser

In 2013 Enerlex, Inc. (Enerlex) acquired the mineral interest of William Wilson III in a certain tract located in Texas. *See Enerlex, Inc. v. Hegar*, No. 03-18-00238-CV, 2019 WL 3680134 (Tex. App.—Austin Aug. 7, 2019, pet. denied) (mem. op.). The deed vested in Enerlex "all royalties, accruals and other benefits, if any, from all Oil and Gas heretofore or hereafter run." *Id.* at *1. Enerlex then sent to Glenn Hegar, Texas Comptroller of Public Accounts, a claim for $4,652.91 in unclaimed royalty payments attributable to Wilson's interest that had been sent to the state between 2001 and 2010. Enerlex sued the comptroller after its claim was denied. *Id.* The court of appeals affirmed summary judgment for the comptroller.

The comptroller is required to pay unclaimed property to the property's reported owner, the court noted, but is expressly prohibited by Tex. Prop. Code § 74.501(e)(1) from paying such a claim to "an assignee of the reported owner." *Enerlex*, 2019 WL 3680134, at *1. Notwithstanding that Wilson had assigned his right to the unclaimed funds to Enerlex, the statute's plain language barred the comptroller from paying them to the assignee. *Id.* at *2. The comptroller was not bound to continue the agency's prior policy of paying similar claims made by assignees. *Id.* at *3. And, the court pointed out, the comptroller's changed interpretation of the statute in no way interfered with Enerlex's contractual rights with Wilson or Wilson's ability to sell and assign his right to unclaimed property. *Id.* The assignee, however, "must look to its contract with the property owner rather than the Comptroller's unclaimed-property process." *Id.*

Trade Secrets Suit Held Not Subject to Texas Citizens Participation Act

Gravitas Resources Corporation (Gravitas) allegedly spent years studying certain oil and gas assets in Utah and eventually became engaged in serious negotiations to acquire them. Seeking investors to fund the acquisition, it assembled detailed information concerning the available reserves, infrastructure, and acquisition and development plans. One of the prospective investors it met with was Pearl Energy Investment Management, LLC (Pearl), from which Gravitas requested a non-disclosure agreement that Pearl never signed. Not long after the meeting between representatives of Gravitas and Pearl, during which Gravitas shared a great deal of the information with Pearl, and after Pearl advised Gravitas that the project did not fit Pearl's investment parameters, Gravitas learned that the owner of the Utah assets had agreed to sell them to AVAD Energy Partners, LLC (AVAD), a portfolio company of Pearl's. Gravitas sued Pearl and AVAD, as well as a principal and another affiliate of Pearl, alleging they had used Gravitas's confidential information to structure a bid for the property and asserting causes of action for breach of the non-disclosure agreement, violations of the Texas Uniform Trade Secrets Act, unfair competition by misappropriation, tortious interference with contractual relations, tortious interference with prospective business relations, fraud, aiding and abetting fraud, and unjust enrichment. The defendants filed motions to dismiss the claims under the Texas Citizens Participation Act (TCPA), Tex. Civ. Prac. & Rem. Code §§ 27.001–.011, which allows dismissal of legal actions shown to be based on, relate to, or be in response to a party's exercise of the right of free speech, right to petition, or right of association. In *Pearl Energy Investment Management, LLC v. Gravitas Resources Corp.*, No. 05-18-01012-CV, 2019 WL 3729501 (Tex. App.— Dallas Aug. 7, 2019, no pet.) (mem. op.), the court of appeals affirmed the trial court's denial of the motions.

Pearl and its affiliates argued that all of Gravitas's claims were based on allegations that Pearl had improperly communicated confidential information to AVAD and that the communications fit the TCPA's definitions of the exercise of the right of association—"a communication between individuals who join together to collectively express, promote, pursue, pursue, or defend common interests," *id.* at *5 (quoting Tex. Civ. Prac. & Rem. Code § 27.001(2))—and of the exercise of the right of free speech—"a communication made in connection with a matter of public concern," *id.* (quoting Tex. Civ. Prac. & Rem. Code § 27.001(3)). Their communications were in furtherance of their business enterprises, which were common interests, they pointed out, and were made "in connection with" a number of matters of public concern, including the efficient use and full development of natural resources, as well as safety, environmental, and economic interests. *Id.*

"Construing the TCPA to find a right of association simply because there are communications between parties with a shared interest in a private business transaction does not further the TCPA's purpose to curb strategic lawsuits against public participation," the court remarked. *Id.* Because the defendants had not shown that their communications involved any public or citizen participation, they had failed to establish that their claims were based on, related to, or were in response to their exercise of a right of association. *Id.* at *6. Similarly, the court could not, it said, conclude that the communications were related to a matter of public concern simply because the information belonged to a company in the business of oil and gas production or because the defendants hoped to profit from their conduct. *Id.*

PURCHASE AND SALE AGREEMENT'S ALLOCATION OF PRE-SALE COSTS TO SELLER UPHELD

Sundance Energy, Inc. v. NRP Oil & Gas LLP, No. 01-18-00340-CV, 2019 WL 3819523 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, pet. filed) (mem. op.), involved a purchase and sale agreement under which Sundance Energy, Inc. (Sundance) sold its interests in oil and gas leases in three North Dakota counties to NRP Oil & Gas LLP (NRP) for approximately $35 million. The agreement provided that Sundance would retain certain pre-sale liabilities, specifically including all its liabilities for

> capital expenses, joint interest billings, lease operating expenses, lease rentals, shut-in payments, drilling and completion expenses, workover expenses, geological costs, and other exploration or development expenditures and costs . . . that are assessed for or attributable to periods of time or operations during Seller's ownership of the Assets prior to the Effective Time . . . , including all costs and expenses relating to drilling and completion of wells proposed to and approved by Seller prior to the Effective Time . . . .

Id. at *1 (emphasis omitted). It also required Sundance to indemnify NRP for losses arising from the retained liabilities. *Id.*

There were ongoing operations for the completion of wells on the leases shortly before the sale's effective date. NRP requested reimbursement for those from Sundance. Sundance paid NRP $146,304.85 in response to NRP's first request but refused to pay another $988,254 that NRP later requested. *Id.* at *3. In the context of Sundance's appeal of attorney's fees awarded to NRP after a jury trial that resulted in a judgment for the full amount NRP had requested, Sundance claimed to be entitled to offset the sum awarded by $382,000. *Id.* at *6.

The court of appeals was not persuaded by Sundance's assertion that there was uncontroverted evidence that the $382,000 was for items that were not actually part of Sundance's retained liabilities. *Id.* at *10. Sundance had not—allegedly by mistake—included a request for an adjustment of the purchase price in a post-closing statement it had prepared, as it could have. *Id.* Moreover, the jury had found that Sundance had breached the agreement and was liable for the full amount NRP requested. The jury's award included the $382,000 and was based on evidence NRP presented, refuting Sundance's assertion that its claim to a right of offset was uncontroverted. *Id.*

COURT LACKED AUTHORITY TO GRANT TEMPORARY INJUNCTION AGAINST ENFORCEMENT OF LOCAL ORDINANCE

In *Town of Flower Mound v. EagleRidge Operating, LLC*, No. 02-18-00392-CV, 2019 WL 3955197 (Tex. App.—Fort Worth Aug. 22, 2019, no pet. h.) (mem. op.), the court reversed the trial court's temporary injunction, granted to EagleRidge Operating, LLC (EagleRidge), the operator of gas wells within Flower Mound, Texas, enjoining the town from enforcing its ordinance limiting truck traffic to and from well sites to certain hours.

EagleRidge had sought a variance from the ordinance to allow it to haul wastewater from its gas wells and a determination by the town that the ordinance did not apply to that activity or that it was preempted by Texas statutes. After those requests were denied, EagleRidge proceeded to haul wastewater after hours and on Sundays in violation of the ordinance. When the town issued a citation, EagleRidge filed suit and was granted a temporary injunction against the enforcement of any ordinance restricting the hours during which it could haul wastewater from its wells. *Id.* at *2–3.

Addressing the town's sole argument that the trial court lacked subject matter jurisdiction to grant the injunction, the court of appeals noted that civil courts lack jurisdiction to enjoin the enforcement of penal ordinances such as this one "unless the movant establishes that 1) the ordinance is unconstitutional or otherwise void, and 2) enforcement of the ordinance will result in an irreparable injury to vested property rights." *Id.* at *3. The injunction must be reversed, the court held, because there was no competent evidence of irreparable injury. *Id.* at *4.

EagleRidge argued, and the town conceded, that it would suffer "hefty" fines under the ordinance. *Id.* at *5. The record did not show, however, that the fines "would be so great as to destroy [EagleRidge's] business before it could test the Ordinance's constitutionality in a criminal proceeding," the court observed. *Id.* Moreover, EagleRidge's assertions that it would suffer increased costs to comply with the ordinance and economic loss if the wells had to be shut down might show harm to EagleRidge's profits, but they did not show irreparable harm to its vested property rights, its mineral interests. *Id.* If the ordinance would drive the cost of production so high that EagleRidge would be unable to continue production, as it contended, that in essence is a claim for a regulatory taking for which EagleRidge could claim the value of the mineral estate of which it had been deprived. *Id.* In any event, EagleRidge had offered no evidence of that value. *Id.*

Mineral Lien Claimant Is Required to Establish that Labor or Materials Furnished Were "Used in" Mineral Activities

The court in *ELG Oil, LLC v. Stranco Services, LLC*, No. 04-19-00088-CV, 2019 WL 5030260 (Tex. App.—San Antonio Oct. 9, 2019, no pet. h.) (mem. op.), reversed the trial court's summary judgment in favor of Stranco Services, LLC (Stranco), a subcontractor that had added gas storage tanks to a central treatment facility, for foreclosure of the lien it claimed against ELG Oil, LLC's (ELG) property interest in the facility after the original contractor's failure to pay Stranco for the tanks.

Texas law affords a lien to a "mineral subcontractor," defined as one who provides, under a contract with a contractor, material, machinery, supplies, or labor "used in mineral activities." *Id.* at *1 (quoting Tex. Prop. Code § 56.002). "Mineral activities" are defined to include, in pertinent part, "digging, drilling, torpedoing, operating, completing, maintaining, or repairing . . . an oil or gas pipeline." *Id.* at *2 (quoting Tex. Prop. Code § 56.001(2)). Stranco's summary judgment evidence included its project manager's affidavits that the work it performed was toadd bullet storage tanks to ELG's facility. *Id.* The affidavits also disclosed, however, that the facility to which the tanks were added was segregated from the pipelines that led to it. *Id.* The affidavits did not provide any facts showing how the materials, machinery, and supplies Stranco furnished or the labor it performed on the storage tanks was connected to the oil and gas pipelines such that the work was "used in" mineral activities. *Id.* at *3. Although the court agreed with Stranco that its work did not have to be performed "on" the pipelines to establish that it was "used in" mineral activities, the summary judgment evidence did not establish the link between the storage tanks and the pipelines. *Id.*

Railroad Commission's Rescission of No-Harm Letter Did Not Preclude TCEQ's Issuance of Injection Permit

In *Dyer v. Texas Commission on Environmental Quality*, No. 03-17-00499-CV, 2019 WL 5090568 (Tex. App.—Austin Oct. 11, 2019, no pet. h.) (mem. op.), the court upheld the Texas Commission on Environmental Quality's (TCEQ) granting of a permit to TexCom Gulf Disposal, LLC (TexCom) for the operation of an industrial wastewater disposal facility in Montgomery County, Texas.

Tex. Water Code § 27.015(a) requires that any applicant for such a permit, before the application for such a permit may be considered, must submit to the TCEQ a letter from the Texas Railroad Commission (RRC) concluding that the proposed injection will not endanger or injure any known oil or gas reservoir. *Dyer*, 2019 WL 5090568, at *2. Shortly after filing its application in 2005, TexCom provided such a "no-harm" letter to the TCEQ, and the TCEQ proceeded over the next several years, without objection from the operator of mineral interests underlying the proposed injection site, with hearings on TexCom's application. *Id.* at *2–3. After Denbury Onshore, LLC became the lessee-operator of the mineral interests in late 2009, however, it sought to intervene in the TCEQ proceeding and obtained from the RRC rescission of its no-harm letter. *Id.* at *3. By the time the RRC's order rescinding the no-harm letter became final, the TCEQ, contrary to the negative recommendation of the administrative law judges who had considered it, granted TexCom's injection permit. *Id.* at *4. Montgomery County, the City of Conroe, and various individuals filed suit for judicial review of the permitting, asserting, among other things, that the permit should not have been issued without a "valid and subsisting" no-harm letter from the RRC. *Id.* at *6.

In upholding the TCEQ's order, the court concluded that TexCom had in fact complied with the express statutory requirement for a no-harm letter, having submitted one as part of its application in 2005. *Id.* The appellants' interpretation would go beyond what the statute required, in the court's view. *Id.* Indeed, it remarked, it would mean that the RRC's rescission of a no-harm letter even years after completion of the TCEQ's administrative proceeding would void the TCEQ's corresponding order granting the injection permit. *Id.* The court also could not conclude that the TCEQ had acted arbitrarily and capriciously or abused its discretion by refusing to reopen its proceeding to consider the RRC's decision to rescind its no-harm letter. *Id.* at *7.

Adverse Possession Title to Oil and Gas Leasehold Upheld Against Contention that Possessors Acknowledged Record Owner's Title

Scribner v. Wineinger, No. 02-19-00208-CV, 2019 WL 5251134 (Tex. App.—Fort Worth Oct. 17, 2019, no pet. h.) (mem. op.), affirmed the trial court's summary judgment in favor of Parra Oil and Gas, Inc. (Parra), which claimed title to an oil and gas lease covering land in Archer County, Texas, and Randal Wineinger, Parra's immediate predecessor-in-title, against Kevin Scribner.

Scribner's father, apparently unbeknownst to Scribner for years thereafter, assigned the working interest in the lease to Scribner in 2002. On March 29, 2010, Louise Daniel, acting under the father's will, executed an assignment of the lease to Latigo Drilling, LLC (Latigo). Between then and June 13, 2016, there were a series of assignments, following which the interest assigned in 2010 became vested in Wineinger and David Park, who assigned it to Parra, a company in which they owned interests, on October 1, 2016. *Id.* at *1–2.

In June 2018 Scribner filed suit against Wineinger and Parra, asserting claims in trespass to try title, trespass, and conversion, asserting superior title to the working interest and seeking an accounting. *Id.* at *2. Wineinger and Parra responded with the affirmative defense of title by adverse possession under Texas's five-year statute of limitations and moved for summary judgment. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 16.025). Parra and each of its predecessors, they argued, had exclusively operated the lease, received all revenue (less royalty) from it, and paid all taxes attributable to it, while Scriber had not participated in any operations of the lease, had made no expenditures for it, had not received any revenues from it, and had paid no taxes. *Id.* They and their predecessors-in-interest had therefore matured their title by adverse possession by April 2015, terminating Scribner's claimed ownership. *Id.* The trial court granted the motion and entered judgment that Scribner take nothing, awarding Parra title to 100% of the working interest and declaring it to be the sole owner of the lease. *Id.* at *4.

Scribner appealed solely on the ground that there was a genuine issue of material fact because Wineinger and Parra had acknowledged title in Scribner by offering to purchase the lease from him. An attorney representing Parra had contacted Scribner in June 2016, he alleged. The attorney notified him of the 2002 assignment by his father, of which Scribner had been unaware, and of the "problem" brought about by that assignment and the 2010 assignment to Latigo, concluding by asking Scribner to "clear this up" by executing an assignment to the current owners. *Id.* at *3. Park and then the attorney had followed up with inquiries about the proposed assignment shortly thereafter. These contacts, according to Scribner, precluded Parra's claim to title by limitations. *Id.*

The court noted that uncontroverted proof of actual possession, including that of a mineral estate by drilling and production, may be conclusively established as a matter of law so as to warrant summary judgment. *Id.* at *6. A possessor's acknowledgment of title in another when made before the completion of the limitations period, it went on, will defeat the limitation title. *Id.* And an acknowledgment of title may occur if a possessor's offer to purchase the property from the record owner involves an admission of that owner's title. *Id.* "A possessor's acknowledgment of title in another after the limitation title has been completed, however, does not destroy the limitation title," although it may tend to show that the possession was actually not intended to be adverse. *Id.*

Even assuming without deciding that the requests to Scribner for his assignment constituted acknowledgments of his title, the court held, they could not have precluded limitations from running in favor of Wineinger's and Parra's predecessors-in-title because all of the contacts took place over a year after title matured by limitations in April 2015. *Id.* at *7. Nor could the 2016 contacts have any bearing on those predecessors' intent to appropriate Scribner's title, given that there was no evidence that those making the inquiries had any affiliation with the prior owners in whom the limitation title had already matured. *Id.* at *9.

Suit Against State of Texas over Canadian River Riverbed Leasing Held Not Barred by Sovereign Immunity

The court in *State v. Signal Drilling, LLC*, No. 07-17-00412-CV, 2019 WL 5609648 (Tex. App.—Amarillo Oct. 30, 2019, no pet. h.) (mem. op.), affirmed the trial court's denial of a plea to the jurisdiction filed by the State of Texas, the Texas General Land Office, and the Texas Land Commissioner (Commissioner) asserting sovereign immunity.

The court traced the suit's genesis to the Canadian River Mineral Boundary Agreement entered into effective January 1, 2002, between the State and various landowners and oil and gas leasehold owners along the Canadian River through the Texas Panhandle. The agreement was an effort to avoid protracted disputes after the decision in *Brainard v. State*, 12 S.W.3d 6 (Tex. 1999), in which the court held that reduction of the river's flow brought about by its damming had resulted in changes in the boundaries between the State's ownership of the riverbed and that of riparian owners. Among other things, the agreement replaced existing oil and gas leases with a new lease with a fixed term expiring on December 31, 2011, and provided that the State would convey its minerals to the riparian owners, retaining a nonparticipating royalty interest. *Signal Drilling*, 2019 WL 5609648, at *1–2.

Signal Drilling, LLC filed the underlying suit in 2015, claiming to hold a top lease from a riparian landowner after the original term of the State's replacement oil and gas lease expired at the end of 2011, and the suit was subsequently joined by two riparian owners. The State had executed a purported renewal of the prior oil and gas lease at some point after the end of 2011, and the plaintiffs asserted trespass to try title and constitutional takings claims on the basis that mineral title had vested in them free of the lease renewal. The State, claiming sovereign immunity, characterized the plaintiffs' claims as nothing more than "contract claims masquerading as something else." *Id.* at *3.

The court began its analysis by observing that "[t]he State and its agencies are generally immune from suit in the absence of an express waiver of its sovereign immunity" and that it is "well settled that [they] are immune from suits seeking to construe or enforce contracts to which the State is a party." *Id.* at *3–4. A plaintiff may maintain a suit, however, if it alleges that a state officer acted ultra vires, that is, that the officer exceeded his or her authority or acted in conflict with the law. *Id.* at *5. Here, the plaintiffs contended that the contested minerals had reverted to them so that the Commissioner had no authority to execute a renewal of the prior lease. *Id.* Because the pleadings set forth a claim alleging the Commissioner's action was ultra vires, the trial court did not err in denying the plea to the jurisdiction as to the Commissioner. *Id.*

Devise of "Personal Effects" Held Not to Include Mineral Interests

The court in *In re Estate of Ethridge*, No. 11-17-00291-CV, 2019 WL 5617630 (Tex. App.—Eastland Oct. 31, 2019, no pet. h.), construed the will of Mildred Ethridge, who died in 1994. In the will, drafted without the assistance of an attorney, she appointed Fred D. Davis, Jr., a nephew by marriage, as independent executor and, after reciting the purpose of distribution of her entire estate, real, personal, or mixed, devised all of her "personal effects" to Davis and her residence (conveyed by gift before her death) to another person. The will contained no residuary clause. On appeal of a 2017 trial court judgment that Ethridge had died intestate as to her interests in oil, gas, and other minerals (and removing him as executor), Davis contended that the term "personal effects" referred to all property of any kind owned by Ethridge and that he was entitled to her mineral interests. *Id.* at *1–2.

Not surprisingly, the court of appeals was unpersuaded. "Personal effects," it observed, "has customarily been defined narrowly as a subset of personal property" generally referring to "articles bearing intimate relation or association to the person of the testator." *Id.* at *3. "Mineral interests do not fall within the typical definition of personal effects." *Id.* at *4. Notwithstanding the will's declaration of the intention to dispose of all the testator's property, she specifically gave Davis only her personal effects. *Id.* Although the mere making of a will creates a presumption that the testator intended to dispose of her entire estate, the court concluded, that presumption "is not strong enough to empower a court to write a residuary clause into a will where none previously existed." *Id.* Since Ethridge "failed to provide for the disposition of any property other than her personal effects," the court held, the trial court was correct that she died intestate as to any other property, including her minerals. *Id.*

Utah— Oil & Gas

Chris LeCates
— Reporter —

Some Quiet Title Actions Can Be Barred by Laches

The Court of Appeals of Utah recently held that under some circumstances a quiet title action can be barred under the doctrine of laches. *See Estate of Price v. Hodkin*, 2019 UT App 137, 447 P.3d 1285. In *Hodkin*, two sisters acquired property as joint tenants. The underlying title issue concerned whether, at the time of the first sister's death, the two sisters continued to own the property as joint tenants or the joint tenancy had been severed. *Id.* ¶¶ 2–3. At the time of the first sister's death, her heirs and the surviving sister treated her estate as retaining one-half of the mineral rights in the property, and apparently, no one at the time questioned whether the deceased sister's one-half interest passed to the surviving joint tenant. *Id.* ¶ 4. For 47 years, the surviving sister and her successors continued to treat the heirs/successors of the predeceased sister as owning half the minerals. The successors of the surviving sister then brought an action to quiet title, and the trial court entered summary judgment in their favor. *Id.* ¶ 7.

The court of appeals reversed and remanded, stating that "[the plaintiff] and her predecessors appear to have unreasonably delayed by waiting 47 years to challenge" and that the defendants "seemingly were injured by [the plaintiff's] lack of diligence because all known witnesses to the Sisters' joint tenancy have long since died and any evidence of severance has been lost." *Id.* ¶ 30.

The plaintiff argued that because the defendants were on record, constructive notice—to the same extent the plaintiff was—as to who owned mineral rights in the property, "they were equally derelict in failing to seek clarification by the court." *Id.* ¶ 22 (internal quotation marks omitted). Although each of the parties was on constructive notice of the issues, the court differentiated between the two claimants, stating that the defendants "did not have the same duty . . . to bring a timely action to quiet title in the mineral rights." *Id.*

> [A] property owner who has record notice of possible problems with the owner's title may, but is not required to, bring an action to eliminate those problems. When a property interest is actually repudiated or challenged, or an adverse claim is asserted against that interest, the property owner is obligated to act within a reasonable time to protect the owner's interests. In the face of such a challenge, an action unreasonably delayed is time barred, because to allow it would result in injury, prejudice or disadvantage to the party against whom the action is brought.

Id. (quoting *Ass'n of Unit Owners v. Far W. Fed. Bank*, 852 P.2d 218, 222 (Or. Ct. App. 1993)). In this respect, the court seemingly reasoned that, because the defendants were in possession or because their rights were not invaded or their title attacked (they were the apparent owners and were collecting proceeds allocated to the disputed interest from oil and gas leases), they were not under an obligation to vindicate it, and a mere lapse of time will not bar an action or claim by them. *Id.* (citing 74 C.J.S. *Quieting Title* § 55, at 50 (2002)).

It appears the court of appeals in *Hodkin* has created an exception to an earlier decision by the Supreme Court of Utah. In that case, the supreme court addressed whether the action was a "true" quiet title action, not subject to a statute of limitations, as opposed to an action wherein it is necessary for the court to grant other relief in favor of the party, such as cancelling a deed on the basis of fraud, in order to rule on the quiet title claim. *See In re Hoopiiaina Trust*, 2006 UT 53, ¶ 27, 144 P.3d 1129. The *Hoopiiaina* court stated that a "true" quiet title action, defined by the court as those "brought 'to quiet an *existing* title against an adverse or hostile claim of another,'" *id.* ¶ 26 (quoting *Dep't of Social Servs. v. Santiago*, 590 P.2d 335, 337 (Utah 1979)), is "not subject to a statute of limitations," *id.* The supreme court did not specify whether any exceptions might apply to this general rule. Thus, if a similar scenario to *Hodkin* is addressed by the supreme court in the future, it is unclear whether the court would agree with this decision by the court of appeals. Under the *Hoopiiaina* court's reasoning, the claim in *Hodkin* would apparently qualify as a "true" quiet title action without a statute of limitations, because *Hodkin* was brought by one having a colorable title claim (and likely a claim to *perfect* as opposed to *vest* title). *See id.* ("the effect of a decree quieting title is not to *vest* title but rather is to *perfect* an existing title as against other claimants" (quoting *Santiago*, 590 P.2d at 338)). Nevertheless, the supreme court could agree with the court of appeals' reasoning that laches bars claims in situations where the quiet title action is brought by one who is not in possession and has not otherwise asserted an adverse claim within a reasonable time period. We note that the supreme court did subsequently examine the *Hoopiiaina* decision, but only to conclude that no statute of limitations applies when a party in possession asserts an action to quiet title. *See Bangerter v. Petty*, 2009 UT 67, ¶ 18, 225 P.3d 874.

WEST VIRGINIA — OIL & GAS

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— REPORTER —

FEDERAL DISTRICT COURT AFFIRMS THAT ROYALTY PAYMENTS MAY NOT INCLUDE DEDUCTIONS FOR SEVERANCE TAXES ABSENT EXPRESS AGREEMENTS WITH MINERAL OWNERS

In *Cather v. EQT Production Co.*, No. 1:17-cv-00208, 2019 WL 3806629 (N.D. W. Va. Aug. 13, 2019), the U.S. District Court for the Northern District of West Virginia granted summary judgment to the royalty owners and held that royalty deductions for severance taxes were improper under West Virginia law. Additionally, the court also granted the royalty owners' motion for prejudgment interest based on the past severance tax deductions.

On February 20, 1963, the plaintiffs signed a lease agreement with Equitable Gas Company (Equitable) for 504 acres in Taylor County, West Virginia. The lease was silent on whether the lessee could deduct severance taxes from the royalty payments. In 2012, EQT Production Company (EQT), Equitable's successor, drilled a producing Marcellus Shale well. EQT took the position that the subtraction of severances taxes from royalty payments is not a deduction, but rather an allocation of expenses since the lessors are responsible for their proportionate shares of expenses. *Id.* at *1–2.

The court noted that, since 2001, the West Virginia Supreme Court of Appeals has clearly articulated that leases silent on the issue of post-production expenses do not permit reductions of royalty payments for post-production expenses. *Id.* at *3; *see Estate of Tawney v. Columbia Natural Res., L.L.C.*, 633 S.E.2d 22, 30 (W. Va. 2006) (lease must "identify with particularity" specific deductions to be taken); *Wellman v. Energy Res., Inc.*, 557 S.E.2d 254, 265 (W. Va. 2001) (lessee must bear all costs "unless the lease provides otherwise"). *But see Leggett v. EQT Prod. Co.*, 800 S.E.2d 850, 863 (W. Va. 2017) (criticizing *Tawney* and *Wellman* as "under-developed or inadequately reasoned"); *see also* Vol. XXXIV, No. 3 (2017) of this *Newsletter*. Since the plaintiffs' lease was silent as to the deduction or allocation of severance taxes, the court held that such deduction or allocation was not permitted. *Cather*, 2019 WL 3806629, at *6.

More recently, in another case regarding deductions for severance taxes from royalty payments, the court granted the royalty owners' motion for directed verdict where the lease was silent on severance tax deductions. *See id.* at *5–6 (citing *Richards v. EQT Prod. Co.*, No. 1:17-cv-00050, 2018 WL 3321441 (N.D. W. Va. July 5, 2018)). While the lease at issue in *Richards*, like the one in *Cather*, had no language that permitted the lessee to make deductions in royalty calculations for severance taxes, EQT deducted the royalty owners' share of severance taxes from royalty payments—memorialized in monthly remittance statements—arguing that W. Va. Code § 11-13A-3a(c) provides that the severance tax applies "to all persons severing gas or oil in this state . . . ." *Cather*, 2019 WL 3806629, at *5. The *Cather* court disagreed. *Id.* at *6.

It held that the tax is only applicable to those "engaged in the business of severing or processing (or both severing and processing) natural resources" and not applicable to those who merely receive an arm's-length royalty. *Id.* (quoting W. Va. Code § 11-13A-2(c)(13)). Ultimately, the court noted that royalty deductions, allocations, post-production expenses, and any other phrase that refers to severance taxes being subtracted from royalty payments not only run afoul of both *Wellman* and *Tawney*, but also of the statute governing severance taxes. *Id.* Accordingly, the court ruled in favor of the royalty owners. *Id.*

CANADA — OIL & GAS

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— REPORTERS —

TRANS MOUNTAIN: DID THE CROWN ADEQUATELY DISCHARGE ITS DUTY TO CONSULT?

On September 4, 2019, the Federal Court of Appeal released its reasoned decision to partly grant leave to start applications for judicial review of the Governor in Council's approval of the Trans Mountain Pipeline expansion project. *See Raincoast Conservation Found. v. Canada (Att'y Gen.)*, 2019 FCA 224. Order in Council P.C. 2019-0820, dated June 18, 2019, was the Governor in Council's second attempt to approve the project. The first approval was struck down by the Federal Court of Appeal in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

Background

On November 29, 2016, the Governor in Council issued Order in Council P.C. 2016-1069 accepting the National Energy Board's (NEB) recommendation to approve the Trans Mountain Pipeline expansion project and directed the NEB to issue a certificate of public convenience and necessity to Trans Mountain.

On August 30, 2018, in *Tsleil-Waututh* the Federal Court of Appeal quashed the Order in Council, which rendered the certificate of public convenience and necessity null. The court held that the NEB failed to assess the effects of project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, and that Canada did not fulfill its duty to consult and accommodate. The Crown's duty to consult Indigenous peoples arises when the government has real or constructive knowledge of an Indigenous right or title that may be adversely affected by a contemplated government decision. The court remitted the matter to the Governor in Council for redetermination. Later that day, the shareholders of Kinder Morgan Canada Inc., then the project's proponent, voted to approve the sale of the project to the Government of Canada.

On June 18, 2019, after reviewing the NEB's marine reconsideration report and further consultation, the Governor in Council once again approved the project and directed the NEB to issue a certificate of public convenience and necessity to Trans Mountain.

The September 4, 2019, *Raincoast* decision is unique because the court's standing practice is not to issue reasons in disposing of leave applications. However, in this decision, the respondents, who have a direct interest in the matter, took no position for or against the leave applications. In response to these exceptional circumstances, the Chief Justice of the court issued a direction to the presiding judge to use his discretion to issue reasons in support of the orders dismissing the leave motions, which he did.

The Decision

Twelve motions for leave to start applications for judicial review of Order in Council P.C. 2019-0820 were brought to challenge the second approval. Six were allowed and six were dismissed. The applicable standard for a party seeking leave is one of a "fairly arguable case." *Raincoast*, 2019 FCA 224, para. 14 (quoting *Lukács v. Swoop Inc.*, 2019 FCA 145, para. 19). When applying this standard to section 55 of the *National Energy Board Act* (*NEB Act*), R.S.C. 1985, c. N-7, Justice Stratas warned that three ideas must be kept in mind: the fulfillment of the gatekeeping function, the role of deference, and the importance of practicality. *Raincoast*, 2019 FCA 224, para. 16.

In order to meet the fairly arguable standard, the arguments must be able to get past the high level of deference afforded to the Governor in Council's decision. *Id.* para. 19. The arguments must also go beyond the leeway given to decision makers on the adequacy of consultation with First Nations and not present any fatal legal bars and objections such as res judicata. *Id.* paras. 23, 29.

The motions for leave raised four sets of questions:

Alleged Conflict of Interest and Bias. Some applicants argued that the decision of the Governor in Council was vitiated by bias and conflict of interest because the Government of Canada acquired the Trans Mountain project. *Id.* para. 31. This argument failed to meet the fairly arguable standard because it suffered from a fatal flaw: the Governor in Council is not the government and does not own the project. *Id.* para. 33. Additionally, nothing in the *NEB Act* disqualified the Governor in Council from discharging its responsibility based on the ownership of the project and no evidence was submitted to support the allegations of bias and conflict of interest, rendering them mere speculations. *Id.* paras. 34–35.

Environmental Issues and Substantive Reasonableness. The applicants once again raised a number of environmental issues. However, these arguments could not meet the fairly arguable standard because most of them were barred by res judicata. *Id.* para. 37. The applicants also asserted that the new report on marine shipping lacked the legal prerequisite of a report under section 54 of the *NEB Act*. *Id.* para. 43. This argument also did not meet the fairly arguable standard because it was impossible for the applicants to overcome the high deference afforded to the Governor in Council and they also failed to show that their argument could change the outcome of the decision. *Id.* paras. 43–45.

Issues Relating to the Adequacy of the Consultation with Indigenous Peoples. While some of the arguments were simple dissatisfaction with the outcome of the consultation process and others were barred by res judicata, this argument met the fairly arguable standard. *Id.* paras. 46–49. In fact, many Indigenous applicants alleged that the poor quality and hurried nature of the consultation rendered it inadequate. *Id.* para. 52. The respondents exercised their discretion not to comment on the claimed deficiencies in the circumstances. *Id.* para. 59. Based on the evidence before it, the court concluded that the fairly arguable standard had been met and granted leave. *Id.* para. 64.

Remaining Miscellaneous Issues. The remaining issues relating to Charter claims and procedural fairness did not meet the fairly arguable standard and were dismissed. *Id.* paras. 69–70.

Questions Left to Answer

Going forward, the court directed the parties to make submissions on three questions. First, from August 30, 2018, to June 18, 2019, "was the consultation with Indigenous peoples and First Nations adequate in law to address the shortcomings in the earlier consultation process . . . ?" *Id.* para. 65. Second, "do any defences or bars to the application for judicial review apply?" *Id.* para. 66. And finally, "if the answers to the [previous] questions are negative, should a remedy be granted and, if so, what remedy and on what terms?" *Id.* para. 67. On this last point, Justice Stratas reiterated the importance of practicality and noted that sometimes a decision should not be quashed and sent back for redetermination despite its defects. *Id.*

Implications of the Decision

The decision of the respondents in this case to not take a position for or against the leave motions led the court to step away from its traditional practice of not issuing reasons for disposing of leave applications. The court mandated that the adequacy of consultation be assessed on an expedited basis. *Id.* para. 76.

Volume XXXVI, Number 4, 2019
ISSN 0897-6694