

# Oil and Gas, Natural Resources, and Energy Journal

---

Volume 4 | Number 2

---

July 2018

## Legal Developments in 2017 Affecting the Oil and Gas Exploration and Production Industry

Mark D. Christiansen, Editor

Follow this and additional works at: <https://digitalcommons.law.ou.edu/onej>



Part of the [Energy and Utilities Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

---

### Recommended Citation

Mark D. Christiansen, Editor, *Legal Developments in 2017 Affecting the Oil and Gas Exploration and Production Industry*, 4 OIL & GAS, NAT. RESOURCES & ENERGY J. 201 (2018), <https://digitalcommons.law.ou.edu/onej/vol4/iss2/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oil and Gas, Natural Resources, and Energy Journal by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [Law-LibraryDigitalCommons@ou.edu](mailto:Law-LibraryDigitalCommons@ou.edu).

# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

---

VOLUME 4

NUMBER 2

---

## LEGAL DEVELOPMENTS IN 2017 AFFECTING THE OIL AND GAS EXPLORATION AND PRODUCTION INDUSTRY

MARK D. CHRISTIANSEN, EDITOR \*

### *Table of Contents*

I. Alaska .....	203
A. Legislative Developments .....	203
B. Judicial Developments .....	203
C. Administrative Developments .....	203
II. Arkansas .....	204
A. Legislative Developments .....	204
B. Judicial Developments .....	205

---

\* The lead editor for this report is Mark D. Christiansen of McAfee & Taft, Oklahoma City, OK. The contributors of the state reports are: George R. Lyle and Adam D. Harki of Guess & Rudd P.C., Anchorage, AK; Thomas A. Daily of Daily & Woods, P.L.L.C., Fort Smith, AR; John J. Harris of Locke Lord LLP, Los Angeles, CA; Jean Feriancek of Holland & Hart LLP, Denver, CO; Charles C. Steincamp and Joseph A. Schremmer, Depew Gillen Rathbun & McInteer, LC, Wichita, KS; April L. Rolen-Ogden and Michael H. Ishee of Liskow & Lewis, Lafayette, LA; Andrew J. Cloutier, Hinkle Shanor LLP, Roswell, NM; Timothy J. Cole, Ilya Batikov and Gregory D. Russell of Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Mark D. Christiansen of McAfee & Taft, Oklahoma City, OK (Part A) and Susan Dennehy Conrad of the Oklahoma Corporation Commission, Oklahoma City, OK (Part B); Nicolle R. Snyder Bagnell, Kevin C. Abbott, Thomas J. Galligan, and Jennifer M. Thompson, Reed Smith LLP., Pittsburgh, PA; Jolisa Dobbs, Conrad Hester, Gaye Lentz and Arthur J. Wright of Thompson & Knight LLP, Dallas and Austin, TX; Matthew S. Tyree of Jackson Kelly PLLC, Morgantown, WV; and Walter F. Eggers, III and Sami Falzone of Holland & Hart LLP, Cheyenne, WY.

III. California .....	207
A. Legislative Developments .....	207
B. Judicial Developments .....	208
C. Administrative Developments .....	210
IV. Colorado.....	210
A. Judicial Developments.....	210
C. Administrative Developments .....	215
V. Kansas .....	215
A. Judicial Developments.....	215
VI. Louisiana.....	219
A. Judicial Developments .....	219
VII. New Mexico .....	223
A. Judicial Developments.....	223
B. Administrative Developments .....	225
VIII. Ohio.....	225
A. Judicial Developments.....	225
B. Administrative Developments .....	230
IX. Oklahoma.....	230
A. Judicial Developments.....	230
B. Administrative Developments .....	237
X. Pennsylvania .....	239
A. Legislative Developments .....	239
B. Judicial Developments.....	240
XI. Texas.....	245
A. Judicial Developments.....	245
XII. West Virginia.....	255
A. Legislative Developments .....	255
B. Judicial Developments.....	256
C. Administrative Developments .....	257
XIII. Wyoming.....	258
A. Legislative Developments.....	258
B. Judicial Developments.....	258
C. Administrative Developments.....	260

As a preliminary comment, the ongoing growth of legal challenges and activity in the oil and gas industry has led to a significant increase in the number of new legal developments occurring each year. In view of space limitations, the state updates included in this report are not exhaustive.

## I. Alaska

### A. Legislative Developments

The Alaska State Legislature enacted H.B. 111,<sup>1</sup> which builds on the passage of H.B. 247 in 2016. Among other things, this new legislation phases out cashable exploration tax credits to oil and gas companies operating in Alaska. It also retroactively ends cash payments from the State of Alaska to oil companies starting July 1, 2017, changes the interest rate on production taxes, allows oil companies to carry forward losses for either 10 or 7 years, and limits the time companies can hold deductions at full value. The legislation took effect on January 1, 2018.

### B. Judicial Developments

In *In re Aurora Gas, LLC*, a buyer sought approval from the Alaska Oil and Gas Conservation Committee (AOGCC) to purchase several of a bankruptcy debtor's oil and gas well leases. The AOGCC conditioned approval of the transfer on the buyer assuming the debtor's obligations to plug and abandon certain gas wells which were not being purchased. The United States Bankruptcy Court for the District of Alaska held that, by conditioning the approval of the lease sale upon the buyer's assumption of the debtor's obligations to plug and abandon wells, the AOGCC violated both the bankruptcy code's automatic stay and its prohibition against discriminatory treatment of bankruptcy debtors. The court struck down the AOGCC decision.<sup>2</sup>

### C. Administrative Developments

In April of 2017, President Trump signed an Executive Order<sup>3</sup> aimed at expanding offshore drilling in the Arctic and Atlantic Oceans and assessing whether energy exploration can take place in marine sanctuaries in the Pacific and Atlantic Oceans. These lands were made eligible for oil and gas leasing only four months after the prior administration issued both a Presidential Memorandum<sup>4</sup> withdrawing 125 million acres of the Arctic Ocean (and its estimated 27 billion barrels of oil) from disposition by

---

1. 2017 Alaska Adv. Legis. Serv. 3, 2017 Alaska HB 111.

2. 2017 Bankr. LEXIS 3278 (D. Alaska Sept. 26, 2017).

3. Exec. Order No. 13,795, 82 FR 20815 (Apr. 28, 2017).

4. Memorandum from President Barack Obama to the Secretary of the Interior (Dec. 20, 2016) (available through the Obama White House Archives) <https://obamawhitehouse.archives.gov/the-press-office/2016/12/20/presidential-memorandum-withdrawal-certain-portions-united-states-arctic>.

leasing for an indefinite period and an Executive Order<sup>5</sup> creating the Northern Bering Sea Climate Resilience Area and withdrawing 112,300 square miles in Norton Sound, Alaska and near St. Lawrence Island, Alaska from future oil and gas leasing.

In May of 2017, the Secretary of the Interior signed a secretarial order requiring, among other things, a review of the Obama Administration's plan for managing the National Petroleum Reserve – Alaska (NPR-A). The order is intended to revitalize energy production in the NPR-A and to update resource assessments for portions of Alaska's North Slope, including part of the Arctic National Wildlife Refuge (ANWR).

In December of 2017, President Trump signed into law the national Tax Cuts and Jobs Act of 2017. The bill opens a portion of ANWR to oil drilling and other energy development which had been closed to exploration for over 40 years, and requires the federal government to hold two lease sales within seven years.

## *II. Arkansas*

### *A. Legislative Developments*

Act No. 514 of 2017<sup>6</sup> changed a portion of Arkansas' procedure for collection of delinquent ad valorem taxes on mineral interests. Under prior law, each county collector was required to publish a list of delinquencies in a legal newspaper as a prerequisite of the forfeiture process. Act No. 514 removed that requirement with respect to tax-delinquent severed mineral interests, substituting the posting of notice of delinquencies as to those interests on a web site to be created and maintained by the Association of Arkansas Counties. The collector is now merely required to publish a legal notice referring mineral taxpayers to that website. It appears likely that this procedural change will be challenged as providing insufficient due process prior to forfeiture of a property right.<sup>7</sup>

---

5. Executive Order, *Northern Bearing Sea Climate Resilience* (Dec. 9, 2016) (available at <https://obamawhitehouse.archives.gov/the-press-office/2016/12/09/executive-order-northern-bering-sea-climate-resilience>).

6. Amending ARK. CODE ANN. § 26-23-204.

7. See *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L.Ed.2d 415.

### B. Judicial Developments

In *JS Interests, Inc. v. Hafner*<sup>8</sup> the court twice interpreted the parties' 1982 A.A.P.L. Form 610 Operating Agreement to require a unit's operator to pay overriding royalties to parties burdening a non-operating owner who was non-consent in the wells in question. Such interests appear to be "subsequently created interests" under the agreement's Article III.D and would thus be required to be borne by the party whom the interests burdened, regardless of its non-consent status. However, the court held that since the assignments creating the overriding royalties had been recorded prior to execution of the operating agreement, they were thus disclosed in writing to all parties, causing them to then burden the consenting parties who had acquired the non-consenting interest. The court first so held in an order denying the operator's motion to dismiss and again denying its summary judgment motion. The second of those opinions was subsequently withdrawn by the court pursuant to a settlement agreement which terminated the litigation.<sup>9</sup> The court's conclusion is highly questionable and, if correct, effectively guts the agreement's Article III.D, since virtually all assignments of overriding royalty interests are recorded, long before execution of the operating agreement.

*Lipsey v. SEECO, Inc.*<sup>10</sup> was a putative federal class action seeking to certify a class of royalty owners who allegedly suffered damages due to belated post-period price adjustments correcting BTU mismeasurements at the wellhead. Plaintiffs offered a wide array of theories why they should be permitted to pursue such claims. However, in a detailed opinion, the district court granted summary judgment to the defendants on all such claims and denied plaintiffs leave to amend holding that no amended complaint could survive a similar summary judgment motion.

In *Ouachita Watch League v. United States Forest Service*<sup>11</sup> the federal appeals court dismissed an appeal prosecuted by the plaintiff society and several individuals challenging the Forest Service's resource management plan which permitted oil and gas drilling within portions of the Ozark National Forest. The district court had entered summary judgment for the Forest Service. However, rather than dealing with the district court's ruling,

---

8. 2017 WL 5653873 (E.D. Ark. Feb. 10, 2017); 2017 WL 3612857 (E.D. Ark. Aug. 22, 2017).

9. 2017 WL 6459566 (E.D. Ark. Oct. 27, 2017).

10. 2017 WL 2662977 (E.D. Ark. June 20, 2017).

11. 858 F.3d 539 (8th Cir. 2017)

the appeals court dismissed the appeal, holding that the society lacked standing to challenge the Forest Service's management plan.

In *Hill v. Southwestern Energy Company*<sup>12</sup> the federal appeals court reversed a district court's ruling granting summary judgment to Southwestern. Plaintiffs had sued, alleging underground trespass, claiming that Southwestern's hydraulic fracturing of wells caused waste material to encroach beneath their unleased tracts. A skeptical Court of Appeals held that there was possible evidence upon which a jury could find that trespass occurred, thus precluding summary judgment.

*Talley v. Peedin*<sup>13</sup> involved a complex dispute between the children of the former wife of a mineral owner and the mineral owner's widow. While married to the appellants' mother, Veta Poff Moon, Dr. Nathan Poff, Sr. acquired, in his name alone, the surface and fractional mineral interest within approximately 300 acres in the heart of the Fayetteville Shale area. Dr. Poff later conveyed that land by warranty deed which Veta joined, purporting to reserve to the Grantors one-half of all oil, gas and minerals rights which they own. Appellants contended that the above reservation language vested Veta with a fee interest in the reserved minerals. In affirming the trial court's ruling favoring Dr. Poff's widow, Carolyn Peedin, the appeals court avoided holding whether the purported reservation in favor of Veta was a void stranger reservation, and whether Arkansas recognizes the spousal exception to the rule that a reservation in favor of a stranger is void.<sup>14</sup> The court instead held that the above language only reserved minerals "owned" by the grantors and that Veta owned only an inchoate dower interest at the time of the reservation.

*Duvall v. Carr-Pool*<sup>15</sup> came about through a complex set of facts. Here is the sequence of deeds at issue: (1) Hawkins and wife deeded to Cargile, reserving all oil, gas and other minerals. (2) Cargile deeded the surface back to Hawkins. That deed stated that all oil, gas and other minerals were reserved by Cargile, but Cargile never owned any minerals in the first place, since they were reserved by Hawkins and wife in deed 1. (3) Hawkins deeded to Duvall, predecessor to the Plaintiff, Carr-Pool. That deed stated that it was understood that all oil, gas, and minerals in or under or that may be produced from said land have been previously reserved or conveyed. (4) After numerous conveyances within the Hawkins family, any

---

12. 858 F.3d 481 (8th Cir. 2017)

13. 2017 Ark. App. 80, 515 S.W.3d 611.

14. An issue discussed but left undecided by the Arkansas Supreme Court in *Haynes v. Metcalf*, 759 S.W.2d 542 (Ark. 1988).

15. 2016 Ark. App. 466, 509 S.W.3d 661.

interest which was effectively reserved by Hawkins passed to Carr-Pool. The court of appeals held that Carr-Pool owned a disputed mineral interest because the above quoted language was an effective mineral reservation. The court found that there are no magic words needed for a mineral reservation to become effective. Its result was reached by simply construing the “four corners” of the instrument. However, this writer suggests that perhaps a better reason for the same result could have been that the language was ambiguous, thus permitting inquiry into the parties’ subjective intent. Facts recited by the appeals court indicated both sides had previously behaved consistent with the court’s interpretation.

### *III. California*

#### *A. Legislative Developments*

The California Legislature made a number of amendments in 2017 to the California Public Resources Code regarding the regulation of oil and gas operations by the Division of Gas and Geothermal Resources of the California Department of Conservation (DOGGR). Senate Bill No. 724<sup>16</sup> extended the period to commence well operations after DOGGR approval from one to two years.<sup>17</sup> The bill also amended the idle well requirements under Public Resources Code section 3206. Public Resources section 3237, which had previously had only specifically authorized DOGGR to order the plugging and abandonment “deserted wells,” was amended to authorize DOGGR to also order the decommissioning of a “production facility.”<sup>18</sup> Public Resources section 3237 was further amended to allow an abandonment or decommissioning order to issue whether or not any damage is occurring or threatened by reason of that deserted well or production facility. The bill also increased funding for DOGGR to abandon “idle-deserted” and “hazardous wells”<sup>19</sup> and directed DOGGR to provide a report on such wells to the Legislature.

---

16. Senate Bill No. 724; Stats. 2017, Chapter 652. [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB724](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB724)

17. CALIFORNIA PUB. RESOURCES CODE, § 3203(a).

18. “Production facility” is defined in CALIFORNIA PUB. RESOURCES CODE, § 3010 as “any equipment attendant to oil and gas production or injection operations including, but not limited to, tanks, flowlines, headers, gathering lines, wellheads, heater treaters, pumps, valves, compressors, injection equipment, and pipelines that are not under the jurisdiction of the State Fire Marshal pursuant to Section 51010 of the Government Code.”

19. CALIFORNIA PUB. RESOURCES CODE, § 3258.



Public Resources Code section 3100 was amended by Senate Bill No. 809<sup>20</sup> to give the Director of the Department of Conservation and DOGGR's Supervisor the authority to redefine DOGGR's districts as needed to ensure efficient administration after soliciting public input. The bill also amended Public Resources Code section 3008 to clarify that an "idle well" does not include an "active observation well".

The California State Water Resources Control Board and the Regional Water Quality Control Boards were authorized by new Water Code section 13267.5 to require an operator or its supplier to furnish information relating to all chemicals in discharged wastewater when one of the board conducts a water quality investigation regarding the discharge of wastewater produced from an oil or gas field.<sup>21</sup>

Section 38592.5 was added to the Health and Safety Code<sup>22</sup>, to require the California Air Resources Board in its implementation of the California Global Warming Solutions Act of 2006 to update its scoping plan to achieve the greenhouse gas emissions reductions to designate a market-based compliance mechanism as the rule for petroleum refineries and oil and gas production facilities.

#### *B. Judicial Developments*

In *Southern California Gas Co. v. Superior Court*,<sup>23</sup> the court held that the operator of a natural gas storage facility did not owe a duty to prevent economic losses to local businesses based on alleged negligent conduct related to the leak of natural gas the facility. The ruling reinforces California's "economic loss rule," which bars plaintiffs from recovering pure economic losses under a negligence theory without personal injury, property damage or a special relationship. Although the decision may not affect claims for actual personal injuries or physical damage to property directly resulting from a leak at a gas storage facility or other oil and gas production, transportation or storage facilities, the court's affirmation of the bar on the recovery of solely economic damages may limit the scope of potential negligence claims by persons and businesses whose only injury

---

20. Senate Bill No. 809, Stats. 2017, Chapter 521. [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB809](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB809)

21. Assembly Bill No. 1328, Stats. 2017, Chapter 758. [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB1328](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1328)

22. Assembly Bill No. 398; Stats. 2017, Chapter 135. [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB398](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB398)

23. \_\_ Cal.App.5th \_\_; \_\_ Cal.Rptr.3d \_\_; 2017 WL 6398546 (Cal. Ct. App. Dec. 15, 2017).

resulting from a leak or spill was economic, such as lost revenues or a decrease in property value.

The court in *Association of Irrigated Residents v. Department of Conservation*,<sup>24</sup> reversed the sustaining of a demurrer on *res judicata* grounds in a lawsuit filed by environmental groups challenging the challenging DOGGR's issuance of drilling permits for new wells on the basis of a categorical exemption or negative declarations under the California Environmental Quality Act (CEQA),<sup>25</sup> since the prior judgment of dismissal was not based on the merits, but on mootness and un-ripeness.

The district court in *State of California v. United States Bureau of Land Management*,<sup>26</sup> held that the Bureau of Land Management violated the federal Administrative Procedures Act<sup>27</sup> when, as part of the Department of Interior's implementation<sup>28</sup> of the President Trump's March 28, 2017 Executive Order No. 13783,<sup>29</sup> the BLM postponed the compliance dates for certain sections of the Bureau's Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule relating to the venting, flaring, and royalty-free use of gas, after the rule's effective date had already passed.<sup>30</sup>

The court in *Committee to Protect our Agricultural Water v. Occidental Oil And Gas Corporation*<sup>31</sup> dismissed a complaint alleging that large California oil and production companies had conspired with Governor Edmund G. Brown, Kern County and DOGGR to "illegally increase oil production and maximize profits and tax revenue by allowing oil companies to inject salt water into fresh water in violation of the SDWA."<sup>32</sup> The court concluded that the claims against the government official-defendants were barred by the Eleventh Amendment of the U.S. Constitution, that the plaintiffs did not have standing to assert their RICO claims and that the plaintiffs failed to properly allege either a RICO enterprise or conspiracy or a pattern of racketeering activity under RICO or federal civil rights claims.

---

24. 11 Cal.App.5th 1202; 218 Cal.Rptr.3d 517 (Cal. Ct. App. 2017).

25. CALIFORNIA PUB. RESOURCES CODE, § 21000 et seq.

26. 277 F.Supp.3d 1106; 2017 WL 4416409 (N.D. Cal. 2017).

27. 5 USC §§ 551, et seq.

28. Secretarial Order No. 3349. [https://www.doi.gov/sites/doi.gov/files/uploads/so\\_3349\\_american\\_energy\\_independence.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_american_energy_independence.pdf).

29. 82 Fed. Reg. 16,093 (March 28, 2017).

30. 82 Fed. Reg. 27,430-01 (June 15, 2017) ("Waste Prevention, Production Subject to Royalties, and Resource Conservation; Postponement of Certain Compliance Dates.") <https://www.gpo.gov/fdsys/pkg/FR-2017-06-15/pdf/2017-12325.pdf>.

31. 235 F.Supp.3d 1132 (E.D. Cal. 2017).

32. Racketeer Influence and Corrupt Organizations Act. 18 U.S.C. § 1962(c).

*C. Administrative Developments*

Although not completed in 2017, DOGGR pursued a number of substantial rulemaking initiatives, including updating its Idle Wells Regulations<sup>33</sup>, as required by AB 2729,<sup>34</sup> its gas pipeline regulations,<sup>35</sup> as required by Assembly Bill No. 1420.<sup>36</sup> DOGGR's most significant current effort is its permanent rulemaking to modify its regulations implementing the Division's Underground Injection Control (UIC) Program<sup>37</sup> to cover not only water injection and disposal wells, but also steam injection wells, which are essential for the production of the heavy crude oil produced in the Central Valley. In response to the gas leak at the 2015 Aliso Canyon gas storage facility, DOGGR adopted emergency regulations in 2016 requiring that gas storage facilities in California meet new safety and reliability measures. DOGGR is developing permanent regulations to build on the emergency regulations.<sup>38</sup>

*IV. Colorado**A. Judicial Developments*

*Martinez v. Colorado Oil & Gas Conservation Commission*<sup>39</sup> potentially could change the focus of the Colorado Oil and Gas Conservation Commission (COGCC). In that case, the court rejected the COGCC's assertion that its role under Colorado's Oil and Gas Conservation Act<sup>40</sup> is to balance oil and gas development with other public interests such as public health, safety and welfare. In 2013, members of Earth Guardians petitioned for a rulemaking, proposing that the COGCC

not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land

---

33. [http://www.conservation.ca.gov/dog/general\\_information/Pages/IdleWells.aspx](http://www.conservation.ca.gov/dog/general_information/Pages/IdleWells.aspx)

34. Stats. 2016, Chapter 272. [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB2729](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2729)

35. [http://www.conservation.ca.gov/dog/general\\_information/Pages/Pipelines.aspx](http://www.conservation.ca.gov/dog/general_information/Pages/Pipelines.aspx)

36. Stats. 2015, Chapter 601 [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1420](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1420)

37. [http://www.conservation.ca.gov/dog/general\\_information/Pages/UICupdate.aspx](http://www.conservation.ca.gov/dog/general_information/Pages/UICupdate.aspx)

38. [http://www.conservation.ca.gov/dog/general\\_information/Pages/UGSRules.aspx](http://www.conservation.ca.gov/dog/general_information/Pages/UGSRules.aspx)

39. No. 16CA0564, 2017 WL 1089556 (Colo. Ct. App. Mar. 23, 2017).

40. COLO. REV. STAT. §§ 34-60-101, *et seq.*

resources, does not adversely impact human health and does not contribute to climate change.<sup>41</sup>

After receiving written comments and holding a hearing, the COGCC denied the petition, finding that the proposed rule mandated action that was beyond the limited statutory authority delegated to the COGCC in the Act. Petitioners appealed to district court, which affirmed the COGCC's denial of the petition. The appellate court reversed in a split 2-1 decision. The court cited language in the Act stating that it is in the public interest to "[f]oster the responsible, balanced development, production, and utilization of ... oil and gas ... in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources."<sup>42</sup> Focusing on the phrase "in a manner consistent with" and modifications to the Act over time, the court concluded that the Act does not establish a test under which the COGCC is to *balance* oil and gas production with other public interests, but instead sets out a condition that must be fulfilled. The court held that "the clear language of the Act ... mandates that the development of oil and gas in Colorado be regulated subject to the protection of public health, safety and welfare, including protection of the environment and wildlife resources."<sup>43</sup> The Colorado Attorney General appealed this decision to the Colorado Supreme Court over the objection of Colorado's governor. As of the date of this writing, the court has not determined whether to accept certiorari.

*Bill Barrett Corporation v. YMC Royalty Company, LP*<sup>44</sup> involved a suit by the operator to recover a non-operator's share of the cost of drilling two oil and gas wells in Weld County. A representative of the non-operator had signed AFE proposal letters electing to participate in each of the wells and had signed and initialed the AFEs. However, the parties had not agreed on the terms of, and thus had not executed, a joint operating agreement. In the context of cross motions for summary judgment by the parties, the federal district court rejected the non-operator's claim that, absent a joint operating agreement, the operator can recover its drilling costs only from production from the wells. The court rejected the claim that AFEs cannot form a binding contract as a matter of law, and that the proposal letters and AFEs were fatally incomplete as contracts because they are silent regarding when the obligation to pay arises, how and when payment is to be made, and the

---

41. *Martinez*, 2017 WL 1089556, at \*2.

42. COLO. REV. STAT. § 34-60-102(1)(a)(I).

43. *Martinez*, 2017 WL 1089556, at \*7.

44. 301 F.Supp.3d 976 (D. Colo. Dec. 23, 2016).

terms of payment. Since the wells already had been drilled, the court found those payment terms to be “of no apparent consequence” to the lawsuit.

In *Maralex Resources, Inc. v. Jewell*,<sup>45</sup> the court held that the Interior Board of Land Appeals’ (IBLA) finding that the Federal Oil and Gas Management Act of 1982 (FOGRMA)<sup>46</sup> authorizes Bureau of Land Management (BLM) representatives to conduct warrantless, unannounced inspections of oil wells on the plaintiffs’ fee land was not arbitrary, capricious or otherwise contrary to law. The fee oil and gas leases covering plaintiffs’ land had been committed by the lessee to a communitization agreement, and the IBLA had concluded that nothing in FOGRMA “precludes BLM ... from inspecting non-Federal/non-Indian lease sites, for the purpose of determining whether oil or gas production from ... [said] lands is being accurately recorded and reported ... when that production is properly attributable to Federal or Indian lands, under ... communitization agreements.”<sup>47</sup> While the inspection directive in FOGRMA<sup>48</sup> refers only to “lease sites on Federal or Indian lands,” the court cited the fact that production from any lease site subject to a communitization agreement is deemed to occur on each lease site within the communitization agreement. The court also concluded that the BLM’s access did not violate plaintiffs’ right to be free from unreasonable searches and seizure, given the limited purposes for which BLM was granted access to their land.<sup>49</sup>

*A-W Land Co., LLC v. Anadarko E&P Company LP*<sup>50</sup> addressed issues relating to the surface use reservation in deeds to surface owners by Union Pacific Railroad Company. After Anadarko acquired Union Pacific’s reserved mineral interest and the Colorado Supreme Court decided *McCormick v. Union Pacific Resources Co.*,<sup>51</sup> Anadarko discontinued Union Pacific’s practice of negotiating surface owner’s agreements under which surface owners received royalty payments on minerals extracted under their lands. Plaintiffs, which represented a class of surface owners within the Wattenberg oil field in northeastern Colorado, sued alleging that Anadarko’s use of the surface of their lands to access the subsurface minerals exceeds the scope of the surface reservation in the underlying

---

45. No. 15-cv-01893, 2017 WL 6033694 (D. Colo. Oct. 19, 2017).

46. 30 U.S.C. § 1701, *et seq.*

47. *Maralex*, 2016 WL 8310098, at \*4.

48. 30 U.S.C. § 1718(b).

49. *Maralex*, 2016 WL 8310098, at \*6.

50. No. 09-cv-02293-MSK-MJW, 2017 WL 1023375 (D. Colo. Mar. 16, 2017).

51. 14 P.3d 346 (Colo. 2000) (holding that a reservation “all coal and other minerals” contained in the Union Pacific deeds included oil and gas).

deeds, and thus constitutes trespass under Colorado law. The court ruled that the language “convenient or necessary” contained in the deed clause relating to use of the land was to be construed from the mineral owner’s point of view only.<sup>52</sup> The court indicated that it had resolved the issues that are capable of resolution on a class-wide basis and dissolved the plaintiff class but did not grant summary judgment; thus, the various plaintiffs could proceed to trial on liability and damages individually. In advance of a jury trial involving the claims of surface owners Marvin and Mildred Bay, the court addressed in a separate opinion objections by the parties to anticipated expert testimony.<sup>53</sup> The case is now on appeal to the Tenth Circuit.

Two cases involved claims that a producer failed to comply with the terms of a prior settlement of a royalty class action. The dispute in *EnCana Oil & Gas (USA), Inc. v. Miller*<sup>54</sup> arose out of a 2008 settlement of a royalty class action<sup>55</sup> which, among other things, established the methodology the producer would use for future royalty payments and included an arbitration clause. After approving the settlement agreement, the district court had dismissed the suit with prejudice. In 2016, certain royalty owners filed a demand for arbitration alleging that the producer had underpaid royalties owed to members of the class in violation of the 2008 settlement agreement. The producer filed suit, asserting that the class had ceased to exist when the prior case was dismissed with prejudice in 2008, and that the settlement agreement did not authorize arbitration on a class-wide basis. The district court ruled for the royalty owners, and the court of appeals affirmed. The court determined that the class survived the 2008 dismissal, since compliance with the settlement order became part of the order of dismissal and the district court retains jurisdiction to give effect to it, and because the settlement agreement continues for the lives of the applicable leases.<sup>56</sup> Analyzing the language of the settlement agreement as a whole, the court also concluded that the producer’s claim that the settlement agreement should be interpreted to require bilateral, as opposed to class-wide, arbitration was contrary to the plain meaning of that agreement.

---

52. *A-W Land Co.*, 2017 WL 10233375, at \*6.

53. *A-W Land Co., LLC v. Anadarko E&P Co.*, No. 09-cv-02293-MSK-MJW, 2017 WL 4161278 (D. Colo. Sept. 20, 2017).

54. 16CA1979, 2017 WL 3431822 (Colo. Ct. App. Aug. 10, 2017).

55. *Miller v. EnCana Oil & Gas (USA), Inc.*, No. 05CV2753 (City & Cty. of Denver Dist. Ct. Aug. 26, 2008).

56. *EnCana*, 2017 WL 3831822, at \*4.

The second case, *Phelps Oil & Gas, LLC v. Noble Energy, Inc.*,<sup>57</sup> arose after the producer audited DCP Midstream, LP (DCP), which provides post-wellhead services for the producer under percentage of proceeds (POP) agreements. In the audit, the producer initially identified \$34 million of potential underpayments, then entered into a settlement agreement with DCP that modified the terms of the POP agreements and included DCP's agreement to commit \$17.5 million to make improvements to its gas processing and transportation infrastructure. A party to a 2007 royalty class action settlement with the producer sued on behalf of the class claiming that it was entitled to royalties on the full amount claimed by the producer in the DCP audit. The court held that there was no basis to conclude that the royalty owner was entitled to a royalty on the full \$34 million asserted by the producer in the DCP audit but not paid to it by DCP. However, the court refused to grant the producer's summary judgment motion on the royalty owner's breach of contract claim that related to DCP's promise to invest \$17.5 million in infrastructure primarily for the benefit of the producer, concluding that genuine issues of fact remain as to whether that is the basis for a payment of royalties to the royalty owner.

In *Crichton v. Augustus Energy Resources, L.L.C.*,<sup>58</sup> the court rejected a producer's motion to dismiss a royalty class action against it on the grounds that the plaintiffs had failed to exhaust administrative remedies before the COGCC prior to filing the case. The court found that the dispute was contractual in nature, and cited language in the Act providing that the COGCC is precluding from exercising jurisdiction over any controversy involving bona fide dispute regarding contract interpretation.<sup>59</sup> The court also affirmed that language in the Act stating that the COGCC must make a determination of whether a bona fide contract dispute exists before exercising jurisdiction does not require a COGCC determination that the dispute is contractual in nature before a dispute may be filed in district court.<sup>60</sup>

Finally, there were two oil and gas tax cases. In *Kinder Morgan Co<sub>2</sub> Co., L.P. v. Montezuma County Board of Commissioners*,<sup>61</sup> the Colorado Supreme Court held that the Colorado statute authorizing retroactive taxation of oil and gas leaseholds when "taxable property has been omitted

---

57. No. 14-cv-2604-REB-CBS, 2017 WL 4333298 (D. Colo. Sept. 26, 2017).

58. No. 15-cv-00835-KLM, 2017 WL 4838735 (D. Colo. Oct. 26, 2017).

59. *Id.* at \*2.

60. *Id.* at \*4.

61. 396 P.3d 657 (Colo. 2017).

from the assessment roll”<sup>62</sup> allows retroactive taxation when a leaseholder correctly reported the volume of oil or gas sold but underreported the wellhead selling price of the oil or gas. In an unpublished decision in *Oxy USA Inc. v. Mesa County Board of Commissioners*,<sup>63</sup> the Colorado Supreme Court held that the statute authorizing abatement of taxes for any overvaluation<sup>64</sup> allows abatement even when the overvaluation is caused by taxpayer error.

### C. Administrative Developments

Following a home explosion in April 2017 caused by an abandoned oil and gas flowline connected to an active well that killed two people and injured a third person, COGCC issued a notice requiring operators to inspect systematically their inventory of existing flowlines and verify that any existing flowline not in active use is abandoned.<sup>65</sup> The notice also required operators to document the location of all existing flowlines located within 1000 feet of a building unit and ensure and document that those lines have integrity.<sup>66</sup> At the request of Governor Hickenlooper, COGCC undertook a three-month review of oil and gas operations in Colorado after the home explosion. On August 22, 2017, the Governor announced seven policy initiatives growing out of this review.<sup>67</sup> Two of these initiatives (strengthening COGCC’s flowline regulations and enhancing the 8-1-1 “one call” program) are to be implemented through a COGCC rulemaking. COGCC is in the process of a rulemaking to implement changes to its flowline and safety rules.

## V. Kansas

### A. Judicial Developments

A long-running dispute in *Northern Natural Gas Company v. L.D. Drilling, Inc.*<sup>68</sup> has clarified Kansas rules relating to gas storage. This case

---

62. COLO. REV. STAT. § 39-5-125(1).

63. No. 16SC51, 2017 WL 5248199 (Colo. Nov. 13, 2017).

64. COLO. REV. STAT. § 39-10-114(1)(a)(I)(A).

65. Colo. Oil & Gas Conservation Comm’n, Notice to Operators Statewide, Flowlines or Pipelines (May 2, 2017).

66. *Id.*

67. Gov. Hickenlooper announces State’s response following review of oil and gas operations, <https://www.colorado.gov/governor/news/gov-hickenlooper-announces-state%E2%80%99s-response-following-review-oil-and-gas-operations>.

68. 862 F.3d 1221 (10th Cir. 2017).



arises out of Northern Natural's condemnation pursuant to the federal Natural Gas Act,<sup>69</sup> of approximately 9,000 acres for its natural gas storage operation. The court appointed a commission to determine the compensation due to the owners of rights in the condemned subsurface area. The court directed the commission that K.S.A. 55-1210 vested the subsurface owners with title to gas that Northern Natural placed in storage beneath their land as of the time of the condemnation.<sup>70</sup> The Tenth Circuit, in reviewing the district court's ruling adopting the compensation report of the commission, reversed the decision. The Circuit Court awarded compensation to surface owners for Northern Natural's gas in place beneath their land as of the date of the taking which was March 30, 2012, and for any right to produce the gas from their land after the "date of certification" of the area for gas storage, which was June 2, 2010. This decision is consistent with the holding in *Union Gas Systems Inc. v. Carnahan*.<sup>71</sup> The district court did not follow the *Union Gas* case because the decision predated the enactment of K.S.A. 55-1210. The court in *Union Gas* noted that prior to the certification of an area for gas storage, the subsurface owners' basic property right is the exercise of its right to capture and extract migrating storage gas. Once the area is certified as a gas storage area, the capture rights end and the gas storage condemnation statutes—as interpreted by the *Union Gas* court—do not require compensation for the migrating storage gas. The court confirmed the award for the acreage acquired as a storage area buffer zone for Northern Natural's existing gas storage and also affirmed the district court's refusal to award attorneys' fees finding that the tendered statutory basis for fees did not apply.

The case of *LCL, LLC v. Falen*,<sup>72</sup> Falen had in June 2007 listed land for sale with Rice Abstract instructing that the seller would retain all mineral rights. The land was subject to a producing oil and gas lease. In November of that year, Falen entered into a contract to sell the land which provided that the seller would retain all mineral rights for twenty years after production ceases. Rice Abstract issued a title commitment to the buyer that did not list the excepted mineral interest. In January 2008, Rice Abstract drafted and filed the deed of record to complete the sale. The deed did not contain the mineral exception. Because Falen continued to receive royalties under the existing oil and gas lease, the error was not discovered

---

69. 15 U.S.C. § 717 *et seq.*

70. *N. Natural Gas Co. v. Approximately 9,117 in Pratt, Kingman, and Reno Counties, Kansas*, 2 Supp. 3d 1174 (D. Kan. 2014).

71. 774 P.2d 962 (Kan. 1989).

72. 390 P.3d 571 (Kan. Ct. App. 2017).

immediately. Falen made purported conveyances of the minerals to others in 2008, 2010 and 2012. In 2014, the grantee sold its interest in the land to LCL. A member of LCL stated that they understood the mineral rights did not go with the property. Rice Abstract provided title insurance and acted as the closing agent for the sale. When the sale was closed, there was no mention of the mineral interests in the deed or the title commitment. LCL later inquired about the minerals and Rice Abstract discovered its errors. In 2014, LCL asserted a right to the mineral rights under its title insurance policy. Falen did not discover the failure to except the mineral interests in the 2008 conveyance until 2014. LCL sued to quiet title to the mineral interests. Falen counterclaimed to quiet its title to the mineral interests and also filed a third-party suit against Rice Abstract for negligence, breach of implied contract and breach of fiduciary duty. LCL and Falen reached a settlement. The district court found that all claims against Rice Abstract were barred by the statute of limitations. In a set of findings too lengthy to describe in this brief case summary, the court of appeals concluded that certain of the claims against Rice Abstract were not barred by statutes of limitation.

In *In re Protest of Barker*<sup>73</sup> the issue was whether ad valorem tax may be assessed on oil and gas equipment that is associated with a lease that is exempt from tax under Kansas' low-production exemption. In Kansas, oil and gas leases are classified as personal property for the purpose of ad valorem tax.<sup>74</sup> K.S.A. 79-201t(a) provides an exemption from ad valorem taxes for all oil leases, other than royalty interests therein, the average daily production from which is three barrels or less per producing well or five barrels or less per producing well which has a completion depth of 2,000 feet or more. Kansas construes exemptions from taxation strictly against the taxpayer. The court of appeals found that ad valorem taxation seeks to value the oil and gas lease by determining the present worth of the lease's future production. Therefore, the issue of first impression was whether equipment used in the production of oil is considered part of an "oil lease" for purposes of tax exemption. The court found that there is nothing in the statutory scheme or case law expressly stating that equipment is included in the definition of "oil lease" for the purposes of tax exemption. Instead, various statutes suggest that equipment is not included in that definition. The court concluded that the equipment is not considered part of an "oil lease" as that term is used in K.S.A. 2016, Supp. 79-201t.

---

73. 398 P.3d 870 (Kan. Ct. App. 2017).

74. K.S.A. 79-329.

The case of *In re Estate of Bush*<sup>75</sup> considered the effect of K.S.A. 58-2202 which provides “every conveyance of real estate shall pass all estate of the grantor therein, unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.” In this case, one daughter, Debbie, inherited eighty acres in fee from her father. In order to carry out her father’s wishes, Debbie conveyed forty acres to her sister, Judy, and also conveyed an undivided one-half interest in the oil and gas in the entire eighty acres while retaining a one-half interest in herself. The producing wells were not distributed equally throughout the eighty-acre tract. The intent was to allow both daughters to share equally in the production from the eighty acres. Debbie later gifted her interest in the land to Bush using a deed that conveyed the entire eighty acres but excepted the forty-acre tract previously conveyed to Judy. There was no mention of Debbie’s undivided one-half interest in the eighty acres. Bush then conveyed the property to himself and Debbie as joint tenants using the same deed language. Bush survived Debbie, however, Judy, as her sole heir, asserted that the one-half mineral interest in the eighty-acre tract was not affected by the conveyance to Bush. The district court found that once the one-half mineral interest had been created in the eighty-acre tract, a conveyance would not encompass the mineral interest unless it was expressly referenced in the deed. The court of appeals reversed holding that the settled rule in Kansas states that severed mineral interests are transferred with the land unless they have been specifically identified in the deed and excluded from the transfer. Therefore, the deeds included all of Debbie’s ownership in the eighty-acre tract excluding the forty acres owned by Judy.

The case of *Lewis v. Kansas Production Company*<sup>76</sup> involved a 1972 oil and gas lease. In 1994, the lessee, Roberts, assigned the rights below the then producing formation to McCann with the lessee retaining the shallow rights. In 2005, the lessor sued McCann, the owner of the deep rights, to terminate McCann’s rights to the lease. In 2009, the court gave McCann the option to explore the deep rights or terminate the lease. In 2010, McCann drilled the required well which did not produce. In 2013, the lessors filed the lawsuit at issue in this matter asserting a breach of the implied covenant to explore and develop, a claim the lease was not maintained by Roberts’ production and for attorneys’ fees under K.S.A. 55-201 and 55-202. Prior to 2015, Roberts ceased producing and relinquished his leasehold interest in

---

75. No. 115,850 & No. 115,851, 2017 WL 1105397 (Kan. Ct. App. March 24, 2017).

76. No. 115,174, 2017 WL 3575551 (Kan. Ct. App. August 18, 2017).

the upper formations. At trial in 2015, the Court held that McCann had breached the implied covenant to develop and explore, that the lease terminated and that the lessors were entitled to statutory attorney fees. The parties had stipulated that the Deep Horizons Act<sup>77</sup> applied and that McCann, as the holder of the deep rights, had the burden of proving reasonable exploration and development by a preponderance of the evidence. In analyzing the implied covenant to explore or develop, the court found that compliance could only relate to the time frame from the district court's July 2009, order to the time the suit was filed in November 2013.<sup>78</sup> The court held that the lessee's obligation to develop would be suspended since the lessor had filed suit to challenge its lease. The court was not impressed by the actions of McCann, the owner of the deep rights, who waited until demand was made by the lessors to cause the well drilled in 2010, to be logged and analyzed by an expert. The court found that this was "too little, too late to satisfy the implied covenant to explore and develop as imposed in the Deep Horizons Act."<sup>79</sup> The court of appeals found that the district court had the discretionary authority to terminate the assigned portion of the lease under K.S.A. 55-226.

In the case of *Jenkins v. Chi. Pac. Corp.*<sup>80</sup>, the court affirmed the rule which has existed in Kansas since approximately 1905, that when a railroad company acquires a strip of land for a right-of-way, it generally takes only an easement. This is the rule whether the strip is acquired by condemnation or by deed. When the railroad abandons the right-of-way, the estate reverts to the original landowners. This rule applies when the deed shows that the property was conveyed for use as right-of-way for a railroad.

## VI. Louisiana

### A. Judicial Developments

Louisiana law defines a mineral servitude as "the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."<sup>81</sup> In *Smith, et al. v. Andrews, et al.*, there is an in-depth discussion about the nature of

---

77. K.S.A. 55-223 to 55-229.

78. This is likely to be incorrect. The last appropriate time frame would be from the date the last well was drilled exploring the deep rights which was in 2010, until the suit was filed in November 2013.

79. K.S.A. 55-223.

80. 403 P.3d 1213 (Kan. 2017).

81. See LA. R.S. 31:21.

mineral servitudes, and what kind of factual evidence will be sufficient to find that a mineral servitude has not prescribed for non-use.<sup>82</sup> While the facts are somewhat complicated, the basic dispute revolved around a claim by the Andrews parties to be the mineral owners of the subject property in the wake of the Haynesville Shale boom. After a bench trial, the district court concluded that the testimony of Mr. Andrews was “completely lacking in credibility and ruled in favor of the servitude owners (the Smith parties).”<sup>83</sup> This ruling was upheld on appeal, and the Louisiana Supreme Court denied review of the matter. The court explained that “Mr. Andrews gave several inconsistent versions of what he contended happened to Rogers No. 1 Well.”<sup>84</sup> In ruling on various issues, the court confirmed that the servitude owners bore the burden of establishing maintenance of the servitude. The court concluded the servitude owners met their burden of proof that the servitude had been maintained. The court found the servitude owners met this burden by virtue of the assignee’s testimony that any actions he undertook on the property were done with the intent to act not only for himself, but also for the servitude owners.

In *Gladney v. Anglo-Dutch Energy, L.L.C.*,<sup>85</sup> the court examined how a lease royalty should be paid after the conditional allowable was granted but before the effective date of the Commissioner of Conservation’s unitization order granting such an allowable. The lease at issue provided for a 1/5 royalty. The lessee drilled a well and then applied for the creation of a compulsory unit with Office of Conservation, along with a conditional allowable. The conditional allowable was granted on May 17, 2012. Pursuant to the allowable, revenue from first production, subject to the outcome of the unit application, was to be disbursed based upon the results of the unitization proceeding. The unit order was also issued “effective on and after October 30, 2012.”<sup>86</sup> The Third Circuit concluded that the lessee was obligated to pay the 1/5 lease-basis royalty on all production, as opposed to paying the royalty on production from a unit-tract basis, from the date of first production to the effective date of the unit. The court cited testimony from the presiding officer of the unitization hearing who expressly stated that a conditional allowable does not prejudice the

---

82. 215 So. 3d 868 (La. App. 2 Cir. 2/15/17), *writ denied*, 220 So. 3d 749 (La. 5/19/17).

83. *Id.* at 874.

84. *Id.*

85. 210 So. 3d 903 (La. Ct. App. December 21, 2016), *writ denied*, 218 So. 3d 120 (La. April 13, 2017).

86. *Id.*

contractual rights as between the lessor and lessee. The trial court decision was reversed in favor of the lessor.

Multiple courts have recently interpreted Louisiana Revised Statutes 30:103.1 *et seq.*, which is a reporting statute with an accompanying penalty. That statutory regime creates rights and obligations as between an operator of a unit well and certain unleased interests included within a “force pooled” oil and gas unit. Specifically, in *TDX Energy* the court held that La. R.S. 30:103.1 *et seq.* applies only to tracts included in a unit that are not subject to an oil and gas lease, whether by the operator of the well or any other third party.<sup>87</sup> However, Louisiana’s Third Circuit court of appeal in *XXI Oil & Gas* found that other working-interest owners were “unleased” vis-a-vis the operator of the unit well and thus, have a right to make demand under La. R.S. 30:103.1 *et seq.*<sup>88</sup> Both of these decisions were the subject of appeal. Writ of Certiorari was denied by the Louisiana Supreme Court in *XXI Oil & Gas*.<sup>89</sup> In *TDX Energy*, the Fifth Circuit reviewed the Western District’s earlier decision in light of the Louisiana Supreme Court’s writ denial in *XXI Oil & Gas*. Initially, the Fifth Circuit noted the absence of a controlling decision from the Supreme Court of Louisiana. Accordingly, the court attempted to determine how the highest court of the state would resolve the issue by deferring to the intermediate Louisiana courts. In an opinion that embraced the rationale in *XXI Oil & Gas*, the court concluded that the only logical reading of the statute’s plain language provides rights under La. R.S. 30:103.1 *et seq.* to any oil and gas interest owners that do not have a lease with the operator.

In *Guilbeau v. Hess Corporation*,<sup>90</sup> the Fifth Circuit had occasion to examine the subsequent purchaser doctrine in the context of an oilfield legacy case. The defendants conducted oil and gas operations on the plaintiff’s property until 1971, and the oil and gas lease at issue expired in 1973. Subsequently, in 2007, plaintiff purchased the property at issue, and the sale did not contain any express assignment of the personal rights to sue for pre-purchase damages. Plaintiff filed suit, alleging claims of environmental contamination from historic oil and gas operations. In response, defendant filed a motion for summary judgment, claiming that plaintiff’s claims were barred by the subsequent purchaser doctrine. The

---

87. *TDX Energy, LLC v. Chesapeake Operating, Inc.*, 2016 WL 1179206 (W.D. La. March 24, 2016).

88. *XXI Oil & Gas, LLC v. Hilcorp Energy Co.*, 206 So. 3d 885 (La. Ct. App. September 28, 2016).

89. *XXI Oil & Gas, LLC v. Hilcorp Energy Co.*, 216 So. 3d 814 (La. March 24, 2017).

90. 854 F.3d 310 (5th Cir. April 18, 2017).

court rejected plaintiff's argument that the Louisiana Supreme Court decision in *Eagle Pipe & Supply Inc. v. Amerada Hess Corp.* and its progeny created any uncertainty in the law.<sup>91</sup> Instead, the Fifth Circuit found there was a clear consensus among Louisiana appellate courts applying *Eagle Pipe* to expired mineral leases. Thus, pursuant to *Eagle Pipe* and Louisiana appellate court decisions, the subsequent purchaser doctrine barred plaintiff's claims for damages related to conduct prior to the assignment in favor of plaintiff.

Res nova issues relating to the interpretation of La. R.S. 30:29, commonly referred to as "Act 312," in an oilfield legacy suit were addressed in *The Sweet Lake Land and Oil Co., et al. v. Oleum Operating Co., L.C.*,<sup>92</sup> This decision resulted from a supervisory writ application by the defendants who were cast in judgment for remediation by an earlier jury verdict. After the judgment ordered the defendants to submit a remedial plan to the regulatory agency, Louisiana Department of Natural Resources (LDNR), the LDNR held a public hearing and issued what it considered to be the Most Feasible Plan (the LDNR Most Feasible Plan). The defendants moved to adopt the LDNR Most Feasible Plan as the final plan under Act 312. The trial court, however, rejected the LDNR Most Feasible Plan and instead ordered LDNR to perform additional work because the plan was only partially a remediation plan. The issue on appeal was whether the trial court can order LDNR to re-submit a plan for remediation when the judgment called for such a plan and the originally submitted plan still requires evaluation. This required interpretation of Act 312 and consideration of "several *res nova* issues regarding the authority and roles of the trial court and LDNR after LDNR files its most feasible plan in the trial court record."<sup>93</sup> The court held there was no error in the trial court's order requiring LDNR to submit a plan for remediation of issues instead of further testing where the judgment called for a remediation plan. The court relied on *dicta* from a Louisiana Supreme Court decision which indicated that "[t]hroughout the remediation process, the court remains the gatekeeper to ensure the purpose of the Act is accomplished – remediation of the property to the extent of the public's interest."<sup>94</sup>

---

91. *Id.* at 312–13.

92. 229 So. 3d 993 (La. Ct. App. 10/18/2017).

93. *Id.*

94. *Id.*

## VII. New Mexico

### A. Judicial Developments

In *T.H. McElvain Oil & Gas LP v. Benson-Montin-Greer Drilling Corp.*,<sup>95</sup> the court refused to set aside a 1948 final judgment in a quiet title case. Plaintiffs were the successors to three joint tenants who reserved all of the oil and gas underlying a 160-acre tract when conveying that tract in 1931. In 1948, the 1931 grantee's successor sought to quiet fee simple title to a larger tract which included the 160 acres. The court file from the 1948 action revealed a complaint verified by the plaintiff and an affidavit from the New Mexico county sheriff both averring that various defendants, including the three joint tenants or their unknown heirs, could not be located after a due and diligent search. There was no description of any efforts undertaken in that search. Plaintiffs proved that, in 1948, the surviving joint tenant still resided in the same California city recited in the 1931 deed, although under her married name, and could have been located with a truly diligent search. Judgment was entered by default in 1948 after notice by publication. The court found that the court file did not reveal any constitutionally defective effort at searching for parties, that the number of plaintiffs varies as to how a diligent search could have located the surviving joint tenant in 1948, many of those efforts were more appropriate to modern technology and availability of information, and that plaintiffs did not provide evidence of a "direct path" under which the 1948 plaintiff could have ascertained the "identity and whereabouts" of the surviving joint tenant to persuade the court of an obvious lack of diligence.<sup>96</sup> The court cited a policy to protect reliance interests in property transactions created by old quiet title judgments.

In *Abraham v. WPX Energy Production, LLC*,<sup>97</sup> plaintiff sought to certify a class action for royalty and overriding royalty owners related to WPX's alleged practice of WPX paying royalty and overriding royalty on a wellhead BTU value rather than paying on the value of natural gas liquids subsequently taken from the gas stream. Plaintiff proposed a class consisting of all overriding royalty and royalty owners paid by WPX from August 2006 forward with two subclasses: those covered by "proceeds" instruments and "market value" instruments.<sup>98</sup> The court ruled that the

---

95. 388 P.3d 240 (N.M. 2017), *cert. denied*, 137 S.Ct. 1584 (2017).

96. *Id.* at 252.

97. 322 F.R.D. 592, 2017 WL 4402398 (D.N.M. 2017).

98. *Id.* at \*4-6.



proposed class lacked commonality and that common issues would not predominate. Commonality was not present first because plaintiff could not demonstrate that the language in form oil and gas leases was substantively the same as the language in overriding royalty instruments which are not generally reserved on preprinted preexisting forms. Second, the court found that the duty of good faith and fair dealing and breach of implied covenant to market claims were not common because the court would be required to examine the language of individual instruments to determine whether there was a duty to pay royalties on extracted NGLs. Third, the court found that civil conspiracy claims lacked commonality because the division of all instruments into the simple categories of “proceeds” and “market value” was insufficient to describe legal relationships between the parties. Finally, the court held that, while there were some common issues, they would not predominate finding that evidence regarding lease language variation would likely consume most time at a trial.

In *XTO Energy, Inc. v. Furth*,<sup>99</sup> XTO sought restitution for overpayments it had made on a production payment reserved in 1964 covering 920-acres of land at \$1,000.00 per acre. In 1985, the production payment was bequeathed to three testamentary trusts for the benefit of the owner’s daughters. The prior operator paid approximately one-half of the production payment and that XTO paid an additional \$1.9 million dollars on the production payment before it fully realized its mistake. Defendants argued that the restitution claim was barred by XTO’s negligence. The court found that the overpayments could have been avoided by an exercise of due diligence, but that no bar existed because the voluntary payment rule required actual knowledge that the production payment had been satisfied when the payments occurred. However, the court denied plaintiff complete summary judgment as equitable considerations, namely that the beneficiary of the trusts were elderly women who rely on the trusts for financial support and medical care and that the trusts assets were less than the amount of restitution claimed, so that trial was needed on the equities as to the amount, if any, of restitution.

The bankruptcy case of *In Re Franco*<sup>100</sup> concerned a debtor and her husband who had conveyed to their son a portion of a tract of land under which they owned an undivided half interest in the minerals. The deed was not clear as to whether minerals were conveyed or reserved. The widow filed for bankruptcy protection. The son’s surviving wife sued the widow to

---

99. 2017 WL 5891740 (D.N.M. 2017).

100. 574 B.R. 730 (Bankr. D.N.M. 2017).

quiet title to the minerals and obtained a state court judgment. The bankruptcy court held that the automatic stay rendered the judgment void and declined to annul the automatic stay as it would remove a “potentially valuable asset” from the estate.

#### *B. Administrative Developments*

The New Mexico Oil Conservation Division issued a Notice<sup>101</sup> to operators May 5, 2017 specifying that oil gathering lines as subject to health and safety regulations that previously were understood to apply to gas gathering lines. The Division also eliminated New Mexico’s requirement of an individual form for reporting of the hydraulic fracturing content used in well completion. Effective September 26, 2017, New Mexico operators are required to file with the FracFocus Chemical Disclosure Registry.<sup>102</sup>

### *VIII. Ohio*

#### *A. Judicial Developments*

As in prior years, the Supreme Court of Ohio remained engaged with oil and gas issues in 2017. The case of *Bohlen v. Anadarko E&P Onshore, L.L.C.*,<sup>103</sup> involved the lessors’ claim that delayed rental payments and minimum royalty payments under their lease were functional equivalents such that the failure to pay a minimum royalty resulted in the lease’s automatic termination. Disagreeing, the court held that the clauses operated independently of one another and that a shortfall in the lessor’s minimum royalty did not cause the lease to expire.

Ohio’s appellate courts also heard a number of oil and gas related cases this year. In *Paulus v. Beck Energy Corp.*,<sup>104</sup> the court addressed, as a matter of first impression, a number of issues concerning Ohio’s standard for determining whether an oil and gas lease is producing in paying quantities. The court found, among other things, that (i) the determination of the period of time used to measure paying quantities is made by examining the totality of the circumstances and requires consideration of

---

101. Notice to Oil and Gas Operators, State of New Mexico Energy, Minerals and Natural Resources Department (May 5, 2017) <http://www.emnrd.state.nm.us/OCD/documents/201705-05NoticetoOilandGasOperatorsOilfieldGatheringLines.pdf>.

102. NMAC 19.15.16.19 (2017).

103. 80 N.E.3d 468, 469 (Ohio 2017).

104. No. 16 MO 0008, 2017 Ohio App. LEXIS 2750, at \*1 (Ohio Ct. App. June 16, 2017).

the good faith of the lessee; (ii) royalties paid to the lessor must be deducted either from the lessee's gross income or included as operating expenses when determining profitability; and (iii) that while an individual lessee's own labor is not an operating expense when the lessee made no direct expenditure from gross receipts for his labor, the same is not true for the labor of a corporate lessee's salaried employee. Such labor is a direct operating expense to be subtracted from the lessee's income.

In a decision that garnered significant attention within the industry, the court in *Dundics v. Eric Petroleum Corp.* ruled that landmen in Ohio were required to obtain real estate broker's licenses in order to be entitled to compensation for brokering deals with landowners on behalf of oil and gas companies.<sup>105</sup> There, the plaintiff landmen alleged that they were not compensated by the defendant oil and gas company for their work in assisting the company with negotiating and obtaining oil and gas leases in Ohio. The company moved to dismiss the lawsuit, asserting that the landmen were not licensed Ohio real estate brokers, and therefore, were barred from recovering under a state statute that precluded the recovery of compensation for "real estate . . . brokerage transaction[s]" unless the person brokering the transactions is a licensed real estate broker.<sup>106</sup> Agreeing with the lower court, the appellate court held that "real estate," for purposes of the statute, was broadly defined to include "leaseholds as well as any and every interest or estate in land"—which, under Ohio law, includes oil and gas rights. And so, to be entitled to compensation for brokering in oil and gas rights, the landmen needed to be licensed. The court disagreed that the statute was inapplicable because oil and gas was different from traditional real property, noting that "the fact that oil and gas rights are different does not excuse third parties who ask the courts to enforce their engagement with either owners of surface real estate or those who wish to extract subsurface oil and gas from the real estate broker's license requirement at issue here."<sup>107</sup>

A pre-civil war reservation was the subject of *Sheba v. Kautz*, which held that a deed executed in 1848 reserving "all of the minerals and coal" did not reserve oil and gas.<sup>108</sup> In reaching its decision, the court turned to ordinary principles of contract interpretation and drew upon the decision in *Detlor v.*

---

105. 79 N.E.3d 569, 571 (Ohio Ct. App. 2017), *appeal accepted*, Nov 1, 2017.

106. See OHIO REV. CODE § 4735.21.

107. *Dundics*, 79 N.E.3d at 572.

108. No. 15 BE 0008, 2017 Ohio App. LEXIS 4032, at \*36 (Ohio Ct. App. Sept. 18, 2017).

*Holland*,<sup>109</sup> to conclude that the parties to the deed did not intend to reserve oil and gas because the deed predated the development of oil and gas in Ohio. The court specifically noted that there was no indication that oil and gas were being produced in the immediate vicinity or in the general area or elsewhere when the deed was executed.

In *Barclay Petro., Inc. v. Bailey*,<sup>110</sup> the current owners of property covered by a lease originally executed in 1985 sought to terminate the lease, alleging it had expired for lack of commercial production some years earlier, before the current owners had acquired the property. During that period of non-commercial production, the lessee continued to operate and maintain the well on the property, which also provided household gas. The evidence showed that the prior owners of the property were content with the supply of household gas, that household gas was continually supplied without any pronged interruption and that the lessee properly remedied any issue with the household gas supply. The lessee contended, among other things, that the prior owners had agreed that the supply of household gas would be sufficient to hold the lease, and that the doctrines of modification, waiver and estoppel barred the current owners from claiming that the lease expired. Reversing the trial court's finding in favor of the lessee, the court of appeals determined that the lease had expired on its own terms and that no affirmative action was necessary on the part of the lessors to formally cause the lease's termination. Additionally, the court found that the lease was not modified by the parties' course of performance or by oral agreement because the change in the parties' understanding regarding the lessee's obligations was not supported by independent consideration. Finally, the court rejected the equitable defenses of estoppel and waiver, finding that the supply of household gas was a benefit under the lease, and that the prior owners' acceptance of benefits was not inconsistent with the (subsequent) owners' position that the lease had expired.

*Rudolph v. Viking Int'l Res. Co.*<sup>111</sup> involved a claim that an oil and gas lease expired under its habendum clause due to an interruption in production. One of the issues before the court was which statute of limitations applied: the 21-year statute pertaining to the recovery of real property, or the 15-year statute pertaining to actions on a written contract. The court found that it was the 21-year statute, concluding that because an oil and gas lease is regarded as a fee simple determinable interest, its

---

109. 49 N.E. 690 (Ohio 1898).

110. No. 16CA14, 2017 Ohio App. LEXIS 3878, at \*1 (Ohio Ct. App. Aug. 18, 2017).

111. 84 N.E.3d 1066, 1069 (Ohio Ct. App. 2017).

expiration does not necessarily give rise to a cause of action for a breach of the lease. Instead, the appropriate action is one for a declaratory judgment that the lease has expired, which is a claim in “the nature of an action to recover title to or possession of real property” to which Ohio’s statute of limitations for recovery of real property was applicable.<sup>112</sup> But the court determined that on the particular facts before it, the 21-year limitations period had not yet lapsed. The court also went on to repudiate its earlier statements in *Schultheiss v. Heinrich Enterprises, Inc.*,<sup>113</sup> where it suggested that no statute of limitations ever applied to a lease expiration claim.

*Blackstone v. Moore*<sup>114</sup> interpreted a statutory exception to “marketable record title” under Ohio’s Marketable Title Act (OMTA), Ohio Rev. Code § 5301.47, *et seq.* The court held that whether a reference to an interest inherent in the muniments of the chain of record title is “specific”—and thus not extinguished by the OMTA, or general, depends upon four factors: (1) does the reference state the type of mineral right created; (2) does the reference state the nature of the encumbrance (an estate, profit, lease, or easement); (3) does the reference state the original owner of the interest; and (4) does the reference identify the instrument creating the interest. In so holding, the court expressly rejected the decision of another appellate district in *Duvall v. Hibbs*,<sup>115</sup> which held that a reference to an interest inherent in the muniments of the chain of record title is specific only if it recites the volume and page number of the instrument creating the interest.

Ohio courts continued to hear cases involving Ohio’s Dormant Mineral Act (ODMA), Ohio Rev. Code § 5301.56, *et seq.* In a decision of first impression, the court in *Devitis v. Draper* held that oil and gas royalty interests may be abandoned under the ODMA.<sup>116</sup> The court looked to its prior decision in *Pollock v. Mooney*,<sup>117</sup> which found that royalty interests are subject to extinguishment under the OMTA. In *Pollock*, the court relied on broad language in the OMTA that applied the act’s provisions to all

---

112. *Id.* at 1078.

113. 57 N.E.3d 361, 367–368 (Ohio Ct. App. 2016).

114. No. 14 MO 0001, 2017 Ohio App. LEXIS 2739, at \*1 (Ohio Ct. App. June 29, 2017).

115. No. CA-709, 1983 Ohio App. LEXIS 13042, at \*4–5 (Ohio Ct. App. July 8, 1983).

116. No. 13 MO 0017, 2017 Ohio App. LEXIS 1131, at \*26 (Ohio Ct. App. Mar. 20, 2017).

117. No. 13 MO 9, 2014 Ohio App. LEXIS 4350, at \*21–22 (Ohio Ct. App. Sept. 30, 2014).

interests, claims, or charges whatsoever. While noting that the language of the ODMA is different than the OMTA, the *Draper* court found that parallels can be drawn” between the two statutes because the ODMA’s definition of “mineral interest” was also broad and included the catch-all phrase “regardless of how the interest is created and of the form of the interest.” Moreover, the court found that conceptually, a royalty interest is simply one stick within the bundle of attributes comprising the mineral estate, and that it may be separately transferred. Therefore, a royalty interest fell within the definition of a “mineral interest” under the ODMA. Ultimately, the court went on to find that the particular royalty interest at issue, while potentially subject to abandonment under the ODMA, was preserved through the timely filing of a claim of preservation.

Courts also wrestled with the issue of whether certain parties were “holders” under the ODMA, and therefore, were entitled to assert claims to a severed mineral interest. In *M&H Partnership v. Hines*,<sup>118</sup> the court interpreted the term “holder” to include the heirs and devisees of the record owner of the severed mineral interest that succeeded to the severed mineral interest by intestacy or devise. In a follow-up decision, *Warner v. Palmer*,<sup>119</sup> the same court further clarified that a “holder” includes heirs of the record holder of a severed mineral interest, even if such heirs did not acquire their interest through a chain of title of conveyances or probate estates that specifically transmitted the mineral interest.

Finally, in *Lutz v. Chesapeake Appalachia, L.L.C.*,<sup>120</sup> the court concluded, as a matter of first impression, that Ohio state courts would adopt the “at the well” rule regarding the deduction of post-production costs. In *Lutz*, the plaintiff-lessors had filed a class action complaint, alleging the lessee underpaid gas royalties under the terms of their oil and gas leases by allocating to the lessors their share of post-production costs when calculating royalties. One of the lease forms at issue contained “at the well” royalty language, which the lessee argued permitted the deduction of post-production costs from the downstream sales price of natural gas to work back to the price of the gas “at the well” when calculating royalties. The lessors, however, urged the court to adopt the “marketable product rule,” (specifically, West Virginia’s formulation of the rule) which may

---

118. No. 14 HA 0004, 2017 Ohio App. LEXIS 921, at \*37 (Ohio Ct. App. Mar. 13, 2017).

119. No. 14 BE 0038, 2017 Ohio App. LEXIS 1047, at \*25 (Ohio Ct. App. Mar. 22, 2017).

120. No. 4:09-cv-2256, 2017 U.S. Dist. LEXIS 176898, at \*20 (N.D. Ohio Oct. 25, 2017).

require that certain downstream costs, such as costs for compression, dehydration, processing, and transportation of gas, be borne solely by the lessee. In April 2015, the district court certified the question of whether Ohio follows the “at the well” rule or the marketable product rule to the Ohio Supreme Court. Although the court accepted the certified question, it ultimately declined to answer it, concluding that oil and gas leases are contracts and the “the rights and remedies of the parties are controlled by the specific language of their lease agreement[.]”<sup>121</sup>

Back at the district court, the lessee then filed a motion for partial summary judgment as to the “at the well” lease form, which the district court granted. Holding that the “at the well” language in the lease was clear and unambiguous, the district court found that it referred to the “location at which the gas is valued for purposes of calculating a lessor’s royalties”—*i.e.*, at the well.<sup>122</sup> Conversely, applying the marketable product rule, as urged by the plaintiffs, “runs the risk of giving the lessor the benefit of a bargain not made.”<sup>123</sup>

#### *B. Administrative Developments*

In the summer of 2017, the Division issued revised guidelines for statutory unitization applications.<sup>124</sup> Among other things, the guidelines now provide for a Division review of applications on a rolling basis and require that applications include pre-filed testimonies by a geologist, engineer, and landman, as well as six specific exhibits, including one that lists properties within the proposed unit subject to pending ownership litigation.

### *IX. Oklahoma*

#### *A. Judicial Developments*

In *Kamo Electric Cooperative v. Nichols*,<sup>125</sup> Kamo appealed a judgment awarding the landowners \$30,715 for an easement across 3.9 acres of rural land used primarily for cattle. The parties were in agreement that the price for the outright sale of fee simple title to similar agricultural land was

---

121. 71 N.E.3d 1010, 1011 (Ohio 2016).

122. *Lutz*, 2017 U.S. Dist. LEXIS 176898 at \*18.

123. *Id.* (citation omitted).

124. OHIO DEP’T NATURAL RES., DIVISION OF OIL AND GAS RES. MGMT., *Unitization Application Procedural Guideline* (Aug. 4, 2017), available at [http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/unitization/UnitizationApplicationGuidelines8\\_17.pdf](http://oilandgas.ohiodnr.gov/portals/oilgas/pdf/unitization/UnitizationApplicationGuidelines8_17.pdf).

125. 2017 OK CIV APP 60, 406 P.3d 36.

\$2,000 per acre. However, the expert appraiser for the landowners testified that “the 3.9 acres taken was worth approximately \$8,000 per acre based on the negotiated acquisition price of similar easements by public utilities in the area.”<sup>126</sup> The jury returned a verdict for \$30,615 (approximately \$7,800 per acre). Kamo appealed. The court of appeals concluded that a transaction involving the purchase of an easement on property that will be taken by condemnation, if negotiations are not successful, is not a transaction between a willing seller and willing buyer without compulsion and does not reflect the market value of the property taken. As a consequence, such transactions are generally inadmissible as comparable sales to show the value of similar property in a condemnation proceeding. The court reversed and remanded.

The case of *Strack v. Continental Resources, Inc.*<sup>127</sup> was filed on November 4, 2010, with the plaintiff mineral owners asking the district court to certify a class of royalty owners with respect to claims of alleged royalty underpayments, insufficient reporting and failure to receive the best price by the defendant. On January 12, 2015, Strack filed an amended motion to certify class, seeking a “hybrid, issue class action under 12 O.S. 2011 and Supp. 2013, § 2013(B)(1) and/or (B)(2) and § 2023(C)(6)(a).”<sup>128</sup> More specifically, in the words of the court, plaintiffs sought certification with respect to approximately 48 legal issues. In objecting to this approach to class certification, the defendant complained that no Oklahoma court had ever certified a hybrid or issue class, and that the plaintiffs were essentially seeking 48 advisory opinions on issues that did not resolve the underlying claims, on issues unrelated to numerous prospective class members. The district court granted Strack’s motion to certify class. The court of appeals reversed, observing at the outset of its decision that this is an issue of first impression in Oklahoma, as no Oklahoma court has granted a hybrid class action or applied Section 2023(C)(6)(a) to maintain a class action with respect to particular issues. In a lengthy opinion, the court of appeals concluded that the requirements for class certification under Section 2023 were not met and it reversed the class certification order of the district court.

The *Strack* decision is one of at least four court of appeals royalty law decisions recognizing that the Oklahoma Supreme Court has never provided a definition of the critical term “marketable product,” as used in

---

126. *Id.* at ¶ 2.

127. 2017 OK CIV APP 53, 405 P.3d 131.

128. *Id.* at ¶ 4.



its landmark 1998 *Mittelstaedt*<sup>129</sup> decision.<sup>130</sup> *Mittelstaedt* addresses circumstances in which oil and gas lessees may include in the computation of royalty payments a proportionate share of certain post-production costs. Consequently, oil and gas producers, royalty owners and the lower Oklahoma courts have no clear guidance as to what is required for gas to be considered a “marketable product” under *Mittelstaedt*.

In contrast to the outcome in *Strack*, the case of *Naylor Farms, Inc. v. Chaparral Energy, LLC*,<sup>131</sup> resulted in an order granting certification of a limited class. *Naylor Farms* brought a putative class action suit on behalf of royalty owners in certain Oklahoma wells seeking to recover for the alleged underpayment of royalties by Chaparral. The court described the lawsuit as “similar to several other lawsuits filed by royalty owners claiming that well operators (or non-operators which marketed the gas) have underpaid royalties in violation of Oklahoma law by improperly deducting certain costs incurred in making the gas marketable.”<sup>132</sup> In commenting on how courts have previously denied class certification in certain cases where a remarkable variety of royalty provisions were presented in the case, the court observed there were “several distinctions between this case and those in which classes were not certified or in which the certification orders were vacated.”<sup>133</sup> After substantial further discussion of the particular attributes perceived to be present in the *Naylor Farms* case, the court granted class certification, but excluded the fraud claims from the class and limited the certification order to a specified type of oil and gas lease. On June 7, 2017, the Tenth Circuit granted Chaparral’s petition for permission to appeal

---

129. *Mittelstaedt v. Santa Fe Minerals, Inc.*, 1998 OK 7, 954 P.2d 1203.

130. *Strack v. Continental Res., Inc.*, 2017 OK CIV APP 53, 405 P.3d 131, at ¶ 31; *Tipton Home, Trustee v. Burlington Res. Oil & Gas Company, L.P.*, (Okla. App. 2015 – No. 111,735, November 24, 2015) (Not for Publication) (“The question of where and when particular gas is marketable is not settled in Oklahoma.”). *See* page 20 of the opinion in *Tipton*; *Fitzgerald v. Chesapeake Operating, Inc.*, (Okla. App. 2014 – No. 111,566, February 14, 2014) (Not for Publication) (“The question of where and when particular gas is marketable is not settled in Oklahoma.”). *See* page 8 of the opinion in *Fitzgerald*. A like observation was made in the January 5, 2018 decision (still pending on efforts at further review at the time of the submission of this paper) in *Pummill v. Hancock Exploration, LLC*, No. 114,703, Before the Oklahoma Court of Appeals.

131. 2017 WL 187542 (W.D. Okla. 2017).

132. *Id.* at \*1.

133. *Id.* at \*4.

under Fed. R. App. P. 5 and Fed R. Civ. P. 23(f).<sup>134</sup> The case remained on appeal at the time this paper was submitted for publication.

In *Blair v. Natural Gas Anadarko Co.*,<sup>135</sup> the plaintiff mineral owners (Blair) contended that, following three specific 90-day spans of time, the well did not cumulatively produce in paying quantities. Blair argued that, during the three 90-day periods, the total lifting costs at the end of those periods exceeded the value of the oil sold, causing the cessation of production clause to terminate the lease. The court of appeals found the case of *Pack v. Santa Fe Minerals, Inc.*,<sup>136</sup> to be dispositive, and further found that the trial court erred in concluding that production had ceased during the 90-day time periods relied upon by Blair. The court found that the well' demonstrated production "capability" caused the lease to continue under the habendum clause, even though defendants did not "market" production at certain times. The court observed that the cessation of production clause did not spring into operation because the well was capable of production in commercial quantities at all times, and remanded the case with instructions to enter summary judgment in favor of the defendants.

The case of *Newkumet Exploration v. Saxet Corp.*<sup>137</sup> involved oil and gas leases of Newkumet burdened by an overriding royalty interest held by Saxet. Newkumet released the leases because of alleged issues concerning the validity of the leases and uncertainties as to ownership. Newkumet acquired new leases and took the position that Saxet's overriding royalty interest terminated by its terms when the original leases were released. Saxet asserted that there was no justification for the release and that Newkumet released the leases to extinguish Saxet's override. The trial court entered summary judgment in favor of Newkumet. Saxet appealed. The court of appeals reviewed its prior decision in *Olson v. Continental Resources, Inc.*<sup>138</sup> The court observed that, as in *Olson*, it was undisputed here that the original leases contained a specific provision allowing the lessee to surrender and release the leases *at any time*. Additionally, the assignment of overriding royalty interest in favor of Saxet did not contain a provision stating that the override applied to extensions and renewals of the original leases. The court noted that the assignment of an overriding royalty interest

---

134. Order filed June 7, 2017, Chaparral Energy LLC v. Naylor Farms Inc., No. 17-601, United States Court of Appeals for the Tenth Circuit.

135. 2017 OK CIV APP 57, 406 P.3d 580.

136. 1994 OK 23, 869 P.2d 323.

137. 87 OBJ 2673 (Okla. App. 2016 - #114,794) (Not for publication).

138. 2005 OK CIV APP 13, 109 P.3d 351, *cert. denied*.

does not, by itself, create a fiduciary relationship between assignor and assignee. However, such a relationship may arise from other factors. The court concluded that there were no facts supporting the existence of a fiduciary relationship between Saxet and Newkumet which might have prevented the termination of the override. The court affirmed the trial court's decision in favor of Newkumet.

The case of *Max Oil Company Inc. v. Range Production Company LLC*,<sup>139</sup> involved a suit by the plaintiff owners of certain producing oil and gas wells against Range. The plaintiffs alleged that Range's oil and gas hydraulic fracture operations permanently damaged their nearby producing oil and gas wells. The plaintiffs sued Range alleging negligence, trespass, nuisance and conversion. Range filed a motion to dismiss asserting, in part, that the plaintiffs' claims were time-barred under the two-year statute of limitations under OKLA. STAT. ANN. tit. 12 § 95(3) (2017). The arguments on appeal were limited to the claims of trespass and nuisance. However, after reviewing the alleged facts the plaintiffs knew and the dates on which the plaintiffs knew them, both the district court and the 10th Circuit concluded that their suit was filed beyond the two-year limitations period.

In *Stephens Production Co. v. Tripco, Inc.*,<sup>140</sup> the issue before the court was whether the statutory Pugh clause in OKLA. STAT. ANN. tit. 52 § 87.1(b) (2017) applies to a secondary recovery unit formed under the Unitization Act, OKLA. STAT. ANN. tit. 52 § 287.1, *et seq.* (2017). The answer to that question, in the context of the present case, would determine *which* oil and gas leases were in effect as to the unitized field at issue in this case. Specifically, Stephens argued that the statutory Pugh clause had operated to extinguish Tripco's lease as to right outside a specified tract. The trial court granted summary judgment in favor of Tripco. Stephens appealed. In its review of the pertinent statutes, the court of appeals emphasized the repeated references in the statutory Pugh clause to "spacing units" created under Section 87.1. The court of appeals agreed that the Pugh clause in § 87.1 does not apply to the field-wide enhanced recovery units created by the Unitization Act of 52 O.S. § 287.1, *et seq.*" The court of appeals affirmed the decision of the trial court, found that the statutory Pugh clause did not apply in this case, and that the Tripco lease was valid as a result of being held by production from the secondary recovery unit formed under OKLA. STAT. ANN. tit. 52 § 287.1, *et seq.* (2017).

---

139. 2017 WL 972083 (10th Cir. 2017) (applying Oklahoma substantive law).

140. 2016 OK CIV APP 80, 389 P.3d 365.

The court in *Bebout v. Ewell*,<sup>141</sup> was presented with an attempt to set aside a district court order entered some 32 years earlier distributing assets in the probate of an estate. Two grandsons of the decedent alleged that the final order in the estate was void on the face of the judgment roll and sought to quiet title to certain mineral interests in the grandsons. The district court found that the final order was void for lack of required notice to the grandsons. The court of appeals affirmed. The Oklahoma Supreme Court granted certiorari. The grandsons contended that, in probate proceedings, a failure to send copies of the final account to known heirs or beneficiaries, providing notice of the personal representative's adverse demands upon the estate, violated due process. However, the court found that the wording in the notice sent to the grandsons was sufficient. It informed them of the date, time, and place of the hearing, and apprised the grandsons that their grandfather's estate was to be settled at the hearing and that all persons interested had to appear to dispute the proposed distribution. Critically, the notice informed the grandsons that the final account and petition with will annexed were on file with the court and that the account would be settled and allowed, putting the Grandsons on further inquiry notice. Had they investigated the matter by either inspecting the documents in the court file or attending the hearing, they could have easily ascertained that the entire estate was to be distributed to others and that nothing was to be left to either of them. The final order was not void for lack of proper notice.

In *Vance v. Enogex Gas Gathering, L.L.C.*,<sup>142</sup> Enogex appealed the trial court's judgment on a jury verdict in favor of the plaintiff-landowners in a suit alleging oil field pipeline leakage and pollution. Enogex witnesses testified at trial that they repaired a pinhole leak in the pipeline and did not hear any complaints from the landowners until two years later when the lawsuit was filed. Enogex's expert testified that he then investigated the claim and again found no groundwater pollution and only a very small amount of soil contamination. The landowners presented certain evidence in support of their claims and requested damages in the amount of \$400,000.00 for diminution in the value of their property and punitive damages. The jury returned a verdict in favor of the landowners for \$25,000.00 in damage to the property, but awarded no damages on landowners' claims for personal inconvenience, annoyance and discomfort. The jury also found clear and convincing evidence that Enogex acted in

---

141. 2017 OK 22, 392 P.3d 699.

142. 2017 OK CIV APP 14, 393 P.3d 718.

reckless disregard of the rights of the landowners and returned a verdict for \$25,000.00 in punitive damages. Enogex appealed the judgment only as to the award of punitive damages and did not challenge the \$25,000.00 compensatory award. After reviewing the aspects of the trial court's rulings that were complained of on appeal in detail, the court affirmed the judgment below.

In *Stephens Production Co. v. Larsen*,<sup>143</sup> Stephens filed a condemnation action against the defendant landowners under Oklahoma's underground gas storage statutes that provide certain condemnation rights. Stephens sought to condemn underground gas storage easements and surface easements to complete a natural gas storage facility on and underneath some 900 acres of property. Approximately 140 defendants were originally named in Stephens' petition. Upon issuance of the report of the commissioners, all defendants except Larsen settled with Stephens. Larsen owned an 80-acre tract within the 900-acre area. The commissioners valued Larsen's property that would be taken, and the damage to the remainder of his lands, as being \$12,400.00. The case proceeded to a non-jury trial. Larsen's expert witness testified that \$419,000.00 would be just compensation to Larsen. Stephens' expert testified that \$9,000.00 would be just compensation. The trial court determined that \$9,000.00 represented just compensation. Larsen appealed. The court of appeals affirmed the trial court's decision. The Oklahoma Supreme Court granted Larsen's petition for certiorari. The court noted that Larsen's expert's valuation of \$419,000—which constituted more than eight times the fee simple value of the entire 80-acre parcel—was premised on the value of the property upon the completion and operation of an underground gas storage facility. Yet, the evidence at trial indicated that there was no active market for underground storage in the area at issue in this case. The court affirmed the district court's valuation of \$9,000.00, stating in part:

[W]ithout any evidence from Mr. Larsen regarding the reasonable probability of combination or the market demand for underground gas storage in the area, the highest and best use of the property was the use to which it was subject at the time of the taking—natural resource, agricultural, and recreational use. The record supports the trial court's valuation of just compensation at \$9,000.00.<sup>144</sup>

---

143. 2017 OK 36, 394 P.3d 1262.

144. *Id.* ¶ 21.

The court further observed that the law does not permit the court to fix speculative, boom or fancy values on condemned property.

The case of *Sierra Club v. Chesapeake Operating, LLC*,<sup>145</sup> involved a lawsuit by the Sierra Club for declaratory and injunctive relief under the citizen suit provision of the Solid Waste Disposal Act, amended as the Resource Conservation and Recovery Act.<sup>146</sup> The plaintiff alleged in its complaint that that the deep injection of liquid waste from oil and gas extraction activities by defendants . . . has contributed, and continues to contribute, to an increase in earthquakes throughout the State of Oklahoma and in southern Kansas.”<sup>147</sup> The defendants filed multiple motions to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The defendants asserted multiple grounds for their motions including abstention and primary jurisdiction doctrines, and plaintiff’s failure to join in the suit every company disposing of liquid wastes from oil and gas extraction activities into injection wells. After a lengthy discussion of certain of the underlying facts and applicable law, the court granted the motions to dismiss under the *Burford* abstention doctrine and the primary jurisdiction doctrine. The substantial work of the Oklahoma Corporation Commission in addressing the earthquake-related issues asserted in the complaint was described in detail in the court’s ruling.

### *B. Administrative Developments*

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission’s (Commission’s) website at [www.occeweb.com](http://www.occeweb.com).

Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission’s *Oil & Gas Conservation Rules*, were addressed in Cause RM No. 201600019. Following is a brief summary of certain of the amendments which became effective on September 11, 2017:

OAC 165:10-1-4 was amended to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 to update the list of Oil and Gas Conservation Division prescribed forms and to add new forms; OAC 165:10-3-10 regarding the use of diesel fuel as the base fluid for hydraulic fracturing operations and reporting of impacts of hydraulic fracturing operations on other wells; OAC 165:10-3-25 concerning Completion

---

145. 2017 WL 1287546 (W.D. Okla. 2017).

146. 42 U.S.C. § 6901, *et seq.*, specifically, 42 U.S.C. § 6972(a)(1)(B).

147. *Id.* at \*1.

Reports and amended Completion Reports; OAC 165:10-5-5 with respect to applications for approval of enhanced recovery injection and disposal operations; OAC 165:10-5-6 regarding testing and monitoring requirements for enhanced recovery injection wells and disposal wells; OAC 165:10-5-7 concerning monitoring and reporting requirements for enhanced recovery injection wells, disposal wells and storage wells, and to include a reference to OKLA. STAT. ANN. tit. 17 § 52 and provisions appearing therein; OAC 165:10-5-10 with respect to transfer of authority to inject concerning underground injection wells; OAC 165:10-5-15 regarding reporting requirements for simultaneous injection wells, and OAC 165:10-7-19 was amended concerning land application of water-based fluids from earthen pits, tanks and pipeline construction.

OAC 165:10-7-26 was amended with respect to land application of contaminated soils and petroleum hydrocarbon-based drill cuttings; OAC 165:10-9-1 concerning use of commercial pits; OAC 165:10-9-3 regarding commercial disposal well surface facilities; OAC 165:10-11-3 with respect to plugging of wells; OAC 165:10-11-6 regarding plugging and plugging back procedures for wells.

An emergency rulemaking was filed in Cause RM No. 201700009 regarding OAC 165:10-3-28. Amendments to the rule were needed on an emergency basis so that the Commission's Oil and Gas Conservation rules set forth in the Oklahoma Administrative Code (OAC) 165:10 would conform to provisions in Senate Bill No. 867-the Oklahoma Energy Jobs Act of 2017-which became effective August 25, 2017. The proposed changes to OAC 165:10 were to address changes to OKLA. STAT. ANN. tit.52 § 87.1 and OKLA. STAT. ANN. tit.52 §§ 87.1 and 87.6 through 87.9. The changes include the addition of definitions for new terms, deletion of definitions for other terms, and adding references to 1,280-acre horizontal well units.

Amendments to Title 165, Chapter 5 of the Oklahoma Administrative Code, which comprises the Commission's *Rules of Practice*, were addressed in Cause RM No. 201700001. Following is a brief summary of certain of the amendments which became effective on September 11, 2017:

OAC 165:5-1-3 was amended concerning definitions; OAC 165:5-1-4 with respect to filings with the Court Clerk; OAC 165:5-1-5 regarding filing of documents; OAC 165:5-1-9 concerning telephonic and videoconferencing testimony; OAC 165:5-1-26 concerning receipt of pollution complaints; OAC 165:5-1-27 with respect to review of pollution complaints; OAC 165:5-1-28 regarding closure of pollution complaints;

OAC 165:5-1-29 concerning pollution complaint resolution; OAC 165:5-1-30 with respect to reporting of pollution complaints.

OAC 165:5-5-1 was amended regarding docketing; OAC 165:5-7-1 with respect to application and notice requirements; OAC 165:5-7-15 is revoked regarding tertiary crude oil recovery project certification; OAC 165:5-7-30 was amended with respect to amendment of existing orders or permits authorizing injection for enhanced recovery, saltwater disposal or LPG storage wells; OAC 165:5-7-60 concerning reciprocity of final orders between states with respect to electric companies; OAC 165:5-21-3.1 is a new rule regarding applications to permanently close underground storage tanks in place; Appendix J concerning a witness identification form was revoked and a new Appendix J promulgated with respect to a witness identification form for presentation of testimony by telephone or videoconferencing connection.

An emergency rulemaking was filed in Cause RM No. 201700008 regarding OAC 165:5-7-6, OAC 165:5-7-6.1, OAC 165:5-7-6.2 and OAC 165:5-7-7. Amendments to the rules were needed on an emergency basis so that the Commission's Rules of Practice set forth in the Oklahoma Administrative Code (OAC) 165:5 would conform to provisions in Senate Bill No. 867-the Oklahoma Energy Jobs Act of 2017-which became effective August 25, 2017. The proposed changes to OAC 165:5 were to address changes to OKLA. STAT. ANN. tit.52 § 87.1 and OKLA. STAT. ANN. tit.52 §§ 87.1 and 87.6 through 87.9. The changes include modification of terms regarding applications requesting the issuance of orders concerning horizontal well unitizations and multiunit horizontal wells in targeted reservoirs, addressing authorizations for expenditure regarding applications for pooling orders, as well as requirements for horizontal spacing units.

## *X. Pennsylvania*

### *A. Legislative Developments*

The House of Representatives passed House Bill 674,<sup>148</sup> the fiscal code bill for 2017, on October 24, 2017. The bill was presented to Governor Wolf on October 25, 2017 and approved by the Governor on October 30, 2017. Section 1610-E of the bill, entitled "Temporary Cessation of Oil and Gas Wells," establishes that a lessor shall be deemed to acknowledge that a period of nonproduction under an oil and gas lease is a temporary cessation insufficient to terminate the lease, and the lessor may not allege that the

---

148. <https://legiscan.com/PA/bill/HB674/2017>.



lease is terminated if either of the following occur: (1) before the lessor claims that the lease has expired, the lessee restarts production from the lease and the lessor accepts a royalty payment; or (2) the lessee drills a new well on the lease after giving the lessor 90 days to object.

On March 21, 2017, Governor Wolf announced that the Department of Environmental Protection launched an e-submissions public review tool to allow the public to more quickly and easily view documents submitted by unconventional oil and gas operators.<sup>149</sup> The public review tool enables citizens to search for documents by various parameters, including well site and operator, and houses documents including well development impound registrations, well completion reports, and post-drilling site restoration reports.

### *B. Judicial Developments*

On October 8, 2016, the Environmental Quality Board passed final rulemaking on regulations related to surface activities associated with the development of unconventional oil and gas wells, which amended Chapter 78 (relating to oil and gas wells) and added Chapter 78a (relating to unconventional wells).<sup>150</sup> Prior to this final rulemaking, the surface activity requirements in Chapter 78 had not been updated since 2001.

The rules set performance standards governing surface activities associated with the development of unconventional well sites. For example, Section 78a.68a requires pipeline operators conducting horizontal directional drilling beneath a body of water or a watercourse to notify the DEP at least 24 hours before beginning said drilling. The rules also implement more stringent requirements for the storing of wastewater at impoundments, and in large part prohibit any disposal of drill cuttings at well sites. Section 78a.56 prohibits the use of pits for temporary storage on unconventional well sites, and Section 78a.59a establishes requirements for impoundment embankments. Section 78a.59b sets requirements for registration of new and existing well development impoundments, including standards for the location and construction of well development impoundments.

The court enjoined certain provisions of the Chapter 78a regulations on November 8, 2016.<sup>151</sup> First, the court enjoined portions of certain provisions

---

149. <https://www.governor.pa.gov/governor-wolf-announces-launch-of-oil-and-gas-electronic-submissions-review-for-accelerated-public-access/>.

150. 25 PA. CODE Chs. 78,78a; *see also* 46 PA. BULL. 6431 (Oct. 8, 2016).

151. *See* Marcellus Shale Coal. v. Dept. of Env'tl. Prot., No. 573 MD 2016, 2016 Pa. Commw. (Unpublished), LEXIS 830, (Pa. Commw. Ct. Nov. 8, 2016).

that mandated that unconventional operators must provide certain information to listed public resource agencies within a specified distance of a proposed well, including a plat and proposed measures to mitigate potential damage to public resources. The court also enjoined Chapter 78a provisions that required unconventional operators to identify and monitor and possibly remediate active, inactive, orphan, abandoned, or plugged wells under certain conditions. The court held that these requirements were problematic because a well operator could be required to monitor and even plug wells that may be inaccessible to the operator or off-lease. The court also enjoined the imposition of new construction standards for existing impoundments that were built pursuant to permits and the DEP's view of the law at the time, finding that if these provisions were not enjoined, the Marcellus Shale Coalition would be unable to recover hundreds of thousands to millions of dollars to retrofit existing impoundments.

Finally, the court enjoined the provisions of Chapter 78a regarding well site restoration standards and found that there was a legal question as to whether the new well site restoration standards impose requirements in excess of what is required by the Clean Stream Laws. Currently, Act 13 provides that erosion and sediment control regulations must comply with the Clean Streams Law, and the court was persuaded that there was a substantial legal question as to whether Section 78a.65(d) abrogates any requirements or exemptions in the Clean Streams Law. The DEP has appealed the court's injunction to the Pennsylvania Supreme Court.<sup>152</sup>

The Commonwealth Court issued a published opinion interpreting the impact fee provision in Act 13.<sup>153</sup> In *Snyder Bros. v. Pa. Public Utility Commission*, the issue on appeal was the statutory interpretation of the definition of "stripper well" in Act 13, which is not required to pay impact fees. The court was tasked with determining whether the General Assembly intended the word "any" to mean "one" or "every." The court held that the phrase "any" meant "any" or "one" and not "all" or "every" based on the plain language of Act 13, thus a stripper well is not required to pay an impact fee if it is a well that produces less than 90,000 cubic feet of gas in at least one month. On October 18, 2017, the Pennsylvania Supreme Court granted the Pennsylvania Public Utility Commission's petition for allowance of appeal.<sup>154</sup>

---

152. See *Marcellus Shale Coal. v. Dept. of Env'tl. Prot.*, No. 115 MAP 2016.

153. *Snyder Bros. v. Pa. Pub. Util. Comm'n*, 157 A.3d 1018 (Pa. Commw. Ct. 2017).

154. *Snyder Bros. v. Pa. Pub. Util. Comm'n*, No. 166, WAL 2017, 2017 WL 4680121 (Oct. 18, 2017).

Federal courts in Pennsylvania have been wrestling with the question of arbitrability in royalty class action disputes involving oil and gas leases with arbitration provisions. In *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*,<sup>155</sup> the court held that courts, and not arbitrators, decide questions of class arbitrability absent clear and unmistakable evidence otherwise.<sup>156</sup> Following the decision by the Third Circuit in *Scout I*, the trial court judge was tasked with resolving the second issue raised in the complaint, which involved whether the contracts permitted class arbitration, or whether only individual or bilateral arbitration was permitted.<sup>157</sup> The court noted that in *Chesapeake Appalachia, L.L.C. v. Ostroski*,<sup>158</sup> the court had held that class arbitration was not permitted in a similar lease provision, which provided that, in the event of a disagreement between lessor and lessee concerning the lease, the resolution of all such disputes would be determined in accordance with the rules of the American Arbitration Association. The district court judge adopted the reasoning in *Ostroski* and held that the leases only permitted individual or bilateral arbitration rather than class arbitration. Scout Petroleum filed an appeal to the Third Circuit on May 9, 2017.<sup>159</sup>

In *Valley Rod & Gun Club v. Chesapeake Appalachia, L.L.C.*, Chesapeake constructed a natural gas well pursuant to an oil and gas lease which granted Chesapeake “such exclusive rights as may be necessary or convenient for Lessee, at its election, to explore for, develop, produce, measure and market production from the premises...”<sup>160</sup> The oil and gas was severed from the surface of the property, and the surface owners filed suit alleging misappropriation and conversion of the rock, fill, mulch, and other surface material that Chesapeake used to build a well pad on its property. The district court granted summary judgment to Chesapeake,

---

155. *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*, 809 F.3d 746 (3d Cir. 2016) (“*Scout I*”).

156. *See also* *Chesapeake Appalachia, L.L.C. v. Brown*, 2016 WL 815571 (M.D. Pa. Mar. 2, 2016); *Chesapeake Appalachia, L.L.C. v. Ostroski*, 199 F. Supp. 3d 912 (M.D. Pa. 2016) (granting a motion for summary judgment filed by Chesapeake Appalachia, L.L.C. declaring that the lease at issue did not permit class arbitration, agreeing with Chesapeake that because the lease was silent on the issue of class arbitration, it was not permissible).

157. *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*, 2017 WL 1541659, \*1 (M.D. Pa. Apr. 28, 2017).

158. *Chesapeake Appalachia, L.L.C. v. Ostroski*, 2016 WL 4179583 (M.D. Pa. Aug. 8, 2016).

159. *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*, No. 17-2037 (3d Cir.).

160. *Valley Rod & Gun Club v. Chesapeake Appalachia, L.L.C.*, 2017 WL 1173930 (M.D. Pa. March 29, 2017).

finding that both the lease and Pennsylvania law allow for a lessee to use as much of the surface property as is “reasonably necessary” to extract the oil and gas. Because Chesapeake is the exclusive owner of the oil and gas underlying the property, Chesapeake has the right to use as much of the surface as is reasonably necessary to develop and produce the gas underlying the surface tract. Valley Rod filed an appeal to the Third Circuit on May 1, 2017.<sup>161</sup> The appeal was dismissed on September 8, 2017.<sup>162</sup>

In *Cardinale v. R.E. Gas Development, LLC*, plaintiffs brought a breach of contract class action alleging that the defendants failed to pay pre-paid rental or bonus payments under leases purportedly executed with the plaintiffs.<sup>163</sup> The leases were substantially identical in all material respects except for the name of the lessor, the description of the leased area, and the amount of payment because the amount depended on the acreage covered by the lease. The leases provided that payment was supposed to occur within 60 days of the receipt of the executed lease and order for payment. The defendants’ obligation to pay the bonus payments was subject only to its inspection, approval of the surface, geology and title of the leased premises. The court found that class certification was proper because there common questions predominated over individual questions, including: (1) whether the defendants entered into a contract with each class member; (2) at what point the contract was executed; (3) when the defendants were obligated to pay the bonus payments to class members; (4) whether defendants’ obligation to pay the bonus payments was contingent only upon the three reasons stated in the contract; (5) whether the bonus payments absolute at the expiration of the 60 days; and (6) whether the 60 days ran by calendar days or banking days.

In *EQT Production Company v. Borough of Jefferson Hills*, the Borough of Jefferson Hills appealed a trial court decision reversing the Borough Council’s denial of a conditional use application by EQT Production Company (EQT) to construct and operate a natural gas production facility. The Council denied the application on the basis that EQT had failed to satisfy a zoning ordinance which provided that the use shall not endanger the public health, safety or welfare nor deteriorate the environment, as a result of being located on the property where it is proposed. The trial court reversed the Council’s decision, and the Council appealed. The

---

161. *Valley Rod & Gun Club v. Chesapeake Appalachia, L.L.C.*, No. 17-1951 (3d Cir.).

162. *Valley Rod & Gun Club v. Chesapeake Appalachia, L.L.C.*, 2017 WL 5256217 (3d Cir. Sept. 8, 2017).

163. *Cardinale v. R.E. Gas Dev., LLC*, 154 A.3d 1275 (Pa. Super. Ct. 2017).

Commonwealth Court held EQT had successfully established compliance with specific requirements of the ordinance, and that the burden shifted to the Borough to prove that there was a high degree of probability that the conditional use will constitute a detriment to the public health, safety, and welfare exceeding that ordinarily to be expected from the proposed use. The court concluded that the Borough did not meet its burden because the evidence provided by the Borough was speculative, and the lay and expert testimony was not specific to the site proposal at issue. The court concluded that “given the fact that there has been a legislative decision that the particular use is presumptively consistent with the health, safety, and welfare of the community”, the Borough’s testimony was insufficient to satisfy its burden.<sup>164</sup>

The Pennsylvania Supreme Court issued a landmark decision<sup>165</sup> addressing the issue of whether certain statutory enactments related to funds generated from the leasing of forest and park lands owned by the Commonwealth for oil and gas exploration and extraction were constitutional under Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment.<sup>166</sup> The Pennsylvania Environmental Defense Foundation (PEDF) filed a declaratory judgment action against the Commonwealth challenging budget-related decisions from 2009 to 2015 related to leasing lands owned by the Commonwealth for oil and gas development and the use of the monies in the Oil and Gas Lease Fund, and whether these actions violated the Amendment.<sup>167</sup> On appeal, the court held that the proper standard of review was described in the text of the Amendment as based on the underlying principles of Pennsylvania trust law in effect at the time of its enactment. The court noted that the Amendment granted two rights to the people of the Commonwealth: 1) the right to clean air, water, and the preservation of natural values of the environment, and 2) a public trust pursuant to which natural resources are the corpus of the trust, the Commonwealth the trustee, and the people the named beneficiaries. The court concluded that because the Amendment creates a trust, the proceeds that the Commonwealth generates by selling its oil and gas reserves remain in the corpus of the trust. Second, the court determined that the assets of the trust should be used for conversation and maintenance purposes because the Amendment

---

164. *EQT Prod. Co. v. Borough of Jefferson Hills*, 162 A.3d 554 (Pa. Commw. Ct. 2017).

165. *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017).

166. PA. CONST., art. I, § 27.

167. *Pa. Env'tl. Def. Found. v. Commonwealth*, 108 A.3d 140 (Pa. Commw. Ct. 2015).

provided that the trust should be used for the benefit of all of the people. Thus, the court held that the statutes at issue that diverted oil and gas sale proceeds to programs other than those for conserving and maintaining public natural resources were unconstitutional.

## XI. Texas

### A. Judicial Developments

In *Wenske v. Ealy*,<sup>168</sup> a divided 5-4 decision, the Texas Supreme Court analyzed the difference between the language “a reservation from” and an “exception to” in a conveyance of minerals. The Wenskes bought a 55 acre mineral estate. The two grantors each reserved a 1/8<sup>th</sup> NPRI for a period of 25 years, resulting in a combined one-fourth NPRI over all the oil, gas and other minerals produced from the property. Subsequently, the Wenskes sold the property to the Ealys by Warranty Deed. After reviewing lengthy provisions in the deed providing for new reservations to the Wenskes and referring to the prior reservations, the trial court granted summary judgment that the Ealys and Wenskes must share the NPRI’s burden in proportion to their interests. Noting that neither party argued that the deed was ambiguous, the Texas Supreme Court agreed and proceeded to review the intent expressed in the wording of the deed. The court held that there was not a clear expression of intent that the Ealys interest should be the sole interest subject to the NPRI, and that the parties should share the NPRI burden in proportion to each of their interests. The practical result of this holding is to avoid an unintended result where the buyer exclusively bears the NPRI. The Court further noted that it did not hold that all conveyances of a fractional mineral interest subject to an NPRI will result automatically in the various fractional interest owners being responsible for paying an NPRI.

In *Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*,<sup>169</sup> a farmout agreement provided that the rights granted to a party may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of the granting party. The court held that the contract allowed the granting party to withhold consent and that it had no obligation to act reasonably. In making its determination, the court found persuasive evidence showing that in the course of negotiations of the contract,

---

168. 521 S.W. 3d 791 (Tex. 2017).

169. 516 S.W.3d 89, *pet. filed*, (Tex. App.—Tyler 2017).

qualifying language providing that consent could not be unreasonably withheld was deleted from the contract.

The court in *Greer v. Shook*<sup>170</sup> construed a 1927 deed that basically conveyed an undivided one-sixteenth interest in and to all oil, gas, and other minerals that may be produced, but then added that the grantee was purchasing one-half of the royalty, one-half of the minerals produced. The deed also provided that the sale covered and included one-half of all the oil and gas royalty due and to be paid under a then-existing lease. The issue on appeal was whether this language conveyed a floating one-half royalty interest or a fixed one-sixteenth royalty. The court applied the estate misconception doctrine to harmonize the conveyance's inconsistent fractions, finding that the grantor used "1/16" as a shorthand for one-half of what he believed to be his remaining one-eighth mineral interest. The court therefore held that the deed unambiguously conveyed a floating one-half royalty, noting that there was nothing in the deed to indicate that grantor intended to convey a one-half royalty under the existing lease which would result in a substantially reduced one-sixteenth royalty under all future leases.

*Reed v. Maltzberger/Storey Ranch, LLC*<sup>171</sup> resolved contradictory language in a deed. A 1942 deed said it conveyed an undivided one-fourth interest in and to all of the oil, gas and other minerals in and under and that may be produced from certain lands. The deed stated that the described lands were subject to an existing oil and gas lease. The deed limited certain rights normally given to mineral-interest owners. Although certain wording in the deed suggested the conveyance of a royalty interest, the court only looked at what was stated in the wording of the deed and did not otherwise consider the grantor's intentions. Further, the court did not give controlling weight to the fact that the document was titled "Royalty Deed". The court explained that the deed conveyed a mineral interest since it stated that it conveyed an interest in and to all of the oil, gas and other minerals in and under the described lands.

In *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*,<sup>172</sup> the court considered whether a deed that contained ambiguous language granted only an easement or a fee simple interest in the land. The granting clause of the deed purported to grant an easement by granting a right of way in a certain strip of land, while the habendum clause contemplated granting an interest

---

170. 503 S.W.3d 571, *pet. filed*, (Tex. App.—El Paso 2016).

171. 04-16-00231-CV, 2017 WL 1683717, *pet. filed*, (Tex. App.—San Antonio May 3, 2017).

172. 528 S.W.3d 124, *no pet.*, (Tex. App.—El Paso 2017).

in fee simple. The court held that the overall intent of a grantor must be gleaned from within the four corners of the deed. Following the principle in *Texas Electric Railway*,<sup>173</sup> the court held that the language in the granting clause controls. Because the overall language in the deed evidenced an intent to grant only an easement and the granting clause contemplated a right of way, while the habendum clause purported to grant a fee simple, the court upheld the decision that the deed granted to BNSF only an easement. Thus, BNSF had no rights to the mineral estate. The court did not reconcile the two grants by holding that there was a grant of an easement in perpetuity.

In *Samson Exploration, LLC v. T.S. Reed Props., Inc.*,<sup>174</sup> the court refused to reform the agreement based upon an assertion that the lessee mistakenly agreed to pay royalties twice by virtue of overlapping pooled units. A lessee of three wells maintained two pooled units. The second unit was maintained by the second and third wells. The lessee later amended the second unit to include only the second well and created a third unit to encompass the third well. During this process, however, the lessee mistakenly created the second and third units in a manner that caused the underlying rights to overlap and subjected the lessee to the duty to pay royalties on the wells twice—once to those in the second unit and once to those in the third unit. When the lessee failed to pay the appropriate amount of royalties, the royalty owners in the units brought suit to recover the unpaid royalties. Arguing defense of impossibility, the lessee asserted that it was impossible to cross-convey the same pooled lands, substances and depths twice at the same time. Rejecting this argument, the court noted that there was no impediment from enforcement of the royalty obligations against the lessee, even if there was no effective conveyance of title. The lessee additionally sought reimbursement from the second unit for any royalty obligation paid to it that was actually owed to those in the third unit. Rejecting this request, the court stated that the lessee must bear its contractual obligation to pay royalties out of its working interest rather than seeking reimbursement from owners of the second unit as the lessee's economic consequences of its actions were of its own making.

In *Norhill Energy LLC v. McDaniel*,<sup>175</sup> an oil and gas lessee brought suit against its lessor alleging breach of contract and the equitable claim of money “had and received.” These actions arose out of lessor's failure to

---

173. *Tex. Elec. Ry. Co. v. Texas*, 252 S.W.2d 451 (Tex. 1952).

174. 521 S.W.3d 766 (Tex. 2017).

175. 517 S.W.3d 910, *pet. denied*, (Tex. App.—Fort Worth 2017).



provide \$50,000 to lessee under the lease contract which stipulated that the subject lease would be assigned back to the lessor at which time the lessor would pay lessee \$50,000. The trial court rendered judgment in favor of lessor, lessee appealed and the court of appeals reversed and rendered. The appeals court overruled lessee's breach of contract claim because, although lessee established the element of breach at trial, it did not demonstrate how it was entitled to \$50,000 in damages for the breach. However, the court did uphold lessee's claim for money had and received. Lessor argued that the claim for money had and received was barred because the express contract between the parties precluded the claim and the lessee had an adequate remedy at law. However, the court noted that the Texas Supreme Court has not ruled on whether an action for money had and received is barred when the money in dispute is part of a valid contract that would otherwise provide an adequate remedy at law. Although the court went on to note that equitable claims are generally barred when there is an express contract covering the issue, it also noted that the general rule is not absolute. The court concluded that the facts in this case did not preclude lessee's claim for money had and received because it was not inconsistent with the express agreement.

In *Crystal River Oil & Gas, LLC v. Patton*,<sup>176</sup> the court determined whether the trial court erred when it limited "reworking operations," under an oil and gas lease, to activities on "producing wells." Crystal River owned and operated wells on the oil and gas lease in question. The oil wells produced about twenty barrels of salt water for each barrel of oil they produced, so Crystal River operated a disposal well on the lease to manage the salt water production. The disposal well broke down, and while Crystal River was repairing the well it shut in its oil wells for more than sixty days. Believing that the lapse in production terminated the lease, Patton obtained an oil and gas lease covering the same lands. Thereafter, Patton sued Crystal River to establish his title. Crystal River's lease provided that, if production should cease after the primary term, the lease would not terminate if the lessee commenced additional drilling or reworking operations within sixty days thereafter. The case was submitted to the jury, and the jury was given the following questions: Did the Defendants fail to commence drilling or reworking activities on the producing wells in question within 60 days after the wells ceased to produce oil and gas? The jury answered yes, and Crystal River appealed. The court of appeals reversed and remanded, holding that the trial court erred in restricting

---

176. 510 S.W.3d 226, *no pet.*, (Tex. App.—Eastland 2016).

“reworking operations” to activities “on the producing wells”, as such restriction was not expressly so stated in the Crystal River lease.

In *BP America Production Co. v. Laddex, Ltd.*,<sup>177</sup> top lessee Laddex brought suit against BP arguing BP’s bottom lease had terminated for failure to produce in paying quantities. In turn, BP argued that Laddex’s top lease was void as it violated the Rule Against Perpetuities. Laddex’s top lease specified that it would commence on (1) the date when written releases of BP’s bottom lease were filed or (2) the date a judgment terminating BP’s lease became final and non-appealable. The trial court determined that the Rule did not void Laddex’s lease, and the jury found that BP’s lease terminated for failure to produce in paying quantities over a reasonable time period. The court of appeals affirmed that the Rule did not invalidate Laddex’s lease, but determined that the jury was improperly instructed on the production in paying quantities analysis. The Supreme Court affirmed. In so doing, the court determined that Laddex’s lease conveyed to it a partial alienation of the lessors’ possibility of reverter under BP’s bottom lease—an interest that had already vested. Turning to the jury instruction issue, the court determined that the instruction asking whether the well at issue produced in paying quantities during a specific 15-month time period was error. The court noted that narrowing the question on paying production to any particular time period was arbitrary. Thus, although the parties were free to argue their views regarding what would be a reasonable time period, the charge to the jury may not instruct the jury as to the time period to consider. The Texas Supreme Court affirmed the intermediate appellate court and remanded the matter for a new trial.

In *Hardin Simmons University v. Hunt Cimaron LP*,<sup>178</sup> the lessor sued the lessee, claiming the lease terminated at the conclusion of the primary term because the lessee failed to develop any new wells or convert any existing wells to producing wells during that term. Evidence showed that the lessee began reworking operations on ten existing wells prior to the end of the primary term. The trial court entered a take nothing judgment against the lessor. On appeal, the appellate court reviewed the lease contract, specifically the Pugh, retained acreage, reworking, and continuous development clauses. The court interpreted the reworking clause to mean the lease only continued with respect to the ten existing wells being reworked and the retained acreage associated with those wells. The court’s decision turned on the difference in language between the continuous

---

177. 513 S.W.3d 476 (Tex. 2017).

178. 07-15-00303-CV, 2017 WL 3197920, *no pet.*, (Tex. App.—Amarillo July 25, 2017).

development and reworking provisions. The continuous development clause kept the lease in effect regarding *all lands and all depths* whereas the reworking clause only continued the lease *in accordance to its terms*. The court ruled that because of the language referring to the terms of the lease, the reworking clause incorporated the Pugh and retained acreage clauses. The result was the termination of the lease with respect to the land not producing or being reworked. However, the lease remained in effect as to the ten wells being reworked and 40 acres around each of those wells.

In *Westlake Ethylene Pipeline Corp. v. Railroad Commission of Texas*,<sup>179</sup> the court ruled on the enforceability of the tariff of Westlake Ethylene Pipeline Corporation, a common carrier and the owner and operator of a pipeline that solely transports liquified ethylene and runs between Mont Belvieu and Longview, Texas. In 2013, Eastman Chemical Company filed a complaint with the Railroad Commission, asserting that Westlake's tariff was discriminatory, and therefore unenforceable. The tariff canceled two services that were previously offered by Westlake—backhaul services and exchange services. To backhaul is to cause the flow of product in the opposite direction from the usual direction of flow. Exchange services refer to the transfer of custody of a specific quantity or volume of a fungible product (such as ethylene) from one location to another so that no physical movement of the product is necessary. Eastman claimed that these cancellations provided an unreasonable preference to Westlake Longview Corp., an affiliate of Westlake, because elimination of the backhaul and exchange services cut off access to the Mont Belvieu market and unduly required other shippers to conduct business with Westlake Longview Corp. The issue was initially brought before the Railroad Commission, which found that the tariff was unenforceable. Westlake challenged that ruling, and the district court ruled in favor of Eastman. The court of appeals affirmed the Railroad Commission's decision, holding that discrimination includes not only disparate treatment of similarly situated shippers but also the granting of an undue or unreasonable preference or advantage to a particular shipper. Here, there was a reasonable basis for the Commission's finding that the tariff was discriminatory.

In *ExxonMobil v. Lazy R Ranch*,<sup>180</sup> a landowner sought damages and injunctive relief to remedy a continuing nuisance caused by soil and groundwater contamination from an oil and gas lease. The Texas Supreme Court agreed with the trial court that claims concerning two of the four

---

179. 506 S.W.3d 676, *pet. filed*, (Tex. App.—Austin 2016).

180. 511 S.W.3d 538 (Tex. 2017).

contaminated sites were barred by the statute of limitations. As to the other two sites, active operations were still being conducted when suit was filed. Consequently, the court found the evidence conflicting as to when the contamination had occurred and reversed the trial court's summary judgment ruling as to those two sites. The court reiterated that the "discovery rule" does not apply to delay the commencement of the limitations period when conditions on the ground are objectively verifiable. Additionally, the court affirmed Texas' economic feasibility exception to the measure of damages for contamination of land. However, even though the court cited with approval prior cases holding that limitations is not a defense to abate a continuing nuisance, the court declined to address the plaintiffs' claims for injunctive relief. The court found that Exxon Mobil failed to address the injunctive claims in its original summary judgment motion, and the plaintiffs' claims for injunctive relief evolved over the course of the case and muddled the issue further.

*Lightning Oil Company v. Andarko E&P Onshore, LLC*<sup>181</sup> involved a claim against one mineral lessee by an adjoining mineral lessee for tortious interference with contract and trespass. Lightning sought an injunction and restraining order to prevent Anadarko from siting a well on the surface of Lightning's lease and drilling through that tract to produce a well bottomed on the adjacent lease. The court held that the drilling from the adjacent lease could be enjoined or prevented by the lessee of the drill site tract. Such drilling would not constitute tortious interference with the contractual rights of the Plaintiff lessee. The court noted that that drilling of wells from one lease to an adjacent lease is surface use for accommodation doctrine purposes. The court further found that when land is leased for oil and gas purposes, the surface owner owns and controls the earth underground his surface and the mineral owner has the exclusive right to possess, use and appropriate oil and gas. The mineral estate is the "dominant estate" in that the lessee has the right to use the surface as is reasonably necessary to remove and produce the leased mineral. A trespass includes the unauthorized interference with the rights of the property holder as well as unauthorized interference with the physical property. However, the court noted that the right to drill, explore and produce the mineral does not include the right to possess the specific space where the minerals are located. A trespass as to minerals only occurs if there is an interference with the ability of the lessee to exercise its right. The loss of minerals by such drilling activity would be small and is outweighed by interests of the

---

181. 520 S.W.3d 39 (Tex. 2017).

industry and society to maximize oil and gas recovery. The court found that the surface owner's action in allowing Anadarko to drill from the adjacent tract did not constitute a tortious interference.

In *Noble Energy, Inc. v. ConocoPhillips Co.*,<sup>182</sup> the court held that Noble assumed certain liability, when its predecessor purchased a lease from Alma Energy Corp., a debtor in bankruptcy. ConocoPhillips had assigned Alma Energy a lease (the Lease), which assignment was governed by an exchange agreement. Under the exchange agreement Alma Energy agreed to indemnify ConocoPhillips for all claims arising out of waste materials or hazardous substances arising under the Lease, among other properties. A few years later, Alma Energy declared bankruptcy. Noble's predecessor in title acquired the Lease, which Alma Energy did not specifically reject during the bankruptcy proceedings. Thereafter, ConocoPhillips settled a \$63 million claim related to the Lease. ConocoPhillips sought indemnity from Noble pursuant to the exchange agreement, which it claimed Noble had assumed. Noble contended that it never specifically assumed the exchange agreement. Noble also argued that the boilerplate language in the bankruptcy plan, which provided that "any Executory Contract or lease not referenced above shall be assumed and assigned," did not reflect Noble's intent to assume the exchange agreement. Nonetheless, the court found in favor of ConocoPhillips, stating that the language in the plan was sufficient to provide Noble's predecessor with notice that the exchange contract was assumed.

*Crawford v. XTO Energy, Inc.*<sup>183</sup> centered on whether Texas Rule of Civil Procedure 39 required joinder of the lessor's neighboring landowners as parties to the suit. The plaintiff-lessor claimed an interest in a narrow strip of land based on a 1964 mineral reservation. But XTO, the lessee's successor, apportioned all royalties on the strip to other adjacent landowners under the common law strip-and-gore doctrine. The lessor sued XTO for royalties without joining the abutting landowners. The trial court dismissed the case because of the absence of the adjacent owners, reasoning that they were necessary parties under Rule 39. The court held this was an abuse of discretion. Rule 39 requires joinder of a party who *claims* an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. While XTO claimed these surrounding landowners had such an interest under the common law strip-

---

182. 15-0502, 2017 WL 2719329 (Tex. June 23, 2017).

183. 509 S.W.3d 906 (Tex. 2017).

and-gore doctrine, the surrounding landowners themselves made no such claim. The court explained that Rule 39 does not require joinder of persons who potentially could claim an interest in the subject of the action; it only requires joinder of persons who actually claim such an interest. Accordingly, the surrounding landowners were not necessary parties under Rule 39.

In *Jarzombek v. Ramsey*,<sup>184</sup> the court determined that the “discovery rule” is not applicable in cases in which the terms of the deed differ from the terms in the associated real estate contract. The Jarzombeks owned the surface estate to two tracts of land. They owned 100% of the mineral interest to one tract and a one-sixteenth royalty interest to the second tract. In the real estate contract, Ramsey purchased the surface estate and one-half of the mineral and royalty interest then owned by the Jarzombeks for both tracts. The warranty deed conveyed both tracts to Ramsey, reserving an undivided one-thirty-second royalty interest to the two tracts for twenty years. Almost seven years later, the Jarzombeks sued for deed reformation, alleging the suit was timely because the discovery rule tolled the statute of limitations. The appellate court affirmed the trial court's order of summary judgment on this issue, holding that the deed unambiguously reserved only a one-thirtysecond interest in both tracts. Because this fact was evident on the face of the deed, the Jarzombeks had actual knowledge of what the deed included as of the date the deed was signed. Therefore, the statute of limitations began to run upon execution of the deed and the discovery rule did not apply.

In *FLST, Ltd. v. Explorer Pipeline Co.*,<sup>185</sup> the court declined to determine for purposes of the “discovery rule” whether plaintiffs were reasonably diligent in their investigation of certain property that they had purchased. Plaintiffs filed suit against defendant for damages resulting from a reduction in the subsequent sale price of plaintiffs’ property that was due to defendant’s pipeline that ran underneath plaintiffs’ property. Defendant argued that plaintiffs were on constructive notice of the pipeline before purchasing the property and thus should not be afforded the benefit of the discovery rule because, among other pieces of evidence, gas pipeline markers were present and visible on the property when plaintiffs purchased it. Although plaintiffs were aware of the gas pipeline markers, they provided at least some evidence that contradicted the fact that a pipeline ran

---

184. 04-16-00571-CV, 2017 WL 2561556, *pet. denied*, (Tex. App.—San Antonio June 14, 2017).

185. No. 4:16-CV-00017-KPJ, 2017 WL 1956796 (E.D. Tex. 2017).

beneath plaintiffs' property. That is, the easement allowing the pipeline to run beneath the property had been amended by a prior owner to purportedly relocate the easement off the property. In fact, the pipeline was never actually relocated. The court held that it could not, as a matter of law, decide whether plaintiffs were reasonably diligent for purposes of the discovery rule because defendant did not establish that plaintiffs' could not rely on the contradicting evidence.

In *Cabot Oil & Gas Corporation v. Newfield Exploration Mid-Continent Inc.*,<sup>186</sup> the court highlighted the potential pitfall of a vaguely worded reservation. Cabot purported to reserve an interest in a mineral lease in an assignment executed by Cabot. Newfield was the operator of the lease and argued that the Texas statute of frauds voided the portion of the reservation pertaining to "the 160 acre proration unit surrounding said well" due to an inability to accurately identify the acreage. The court agreed and held that such a description is insufficient because such language does not identify with reasonable certainty the acres that are to be included in the reservation. The court emphasized that a proration unit relating to the well had yet to be designated, and no particular geographic proration unit was named in the assignment or identified in any writing to which the assignment alluded. The court went on to explain that merely identifying the property as some specific quantum of acreage surrounding a well does not meet the demands of the statute of frauds and thus held the reservation void. Cabot also raised judicial and quasi estoppel arguments. In rejecting those arguments, the court explained that no contractual right existed for Cabot to enforce by barring Newfield from questioning its existence through estoppel. The court reiterated the rule that estoppel cannot be used to create a contract or supply essential terms of a contract.

In *Texas Outfitters Ltd., LLC v. Nicholson*,<sup>187</sup> the court reaffirmed the rule that an executive owner can breach its duty of good faith and fair dealing by refusing to lease either arbitrarily or when "motivated by self interest to the non-executive's detriment."<sup>188</sup> After purchasing both surface rights and executive mineral rights from the Carter family, Texas Outfitters received two lease offers for the mineral rights. It declined both offers, reasoning that it wanted to protect its surface level hunting business. The

---

186. 07-16-00125-CV, 2017 WL 2622773, *no pet.*, (Tex. App.—Amarillo June 13, 2017).

187. 04-16-00392-CV, 2017 WL 2124494, *pet. filed*, (Tex. App.—San Antonio May 17, 2017).

188. *Id.* (quoting *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 491 (Tex. 2011)).

court determined that the record contained sufficient evidence to establish a breach. First, the owner of Texas Outfitters stated that there would be no lease despite purchasing the Carters' executive rights with the purpose of further developing the mineral estate. Second, Texas Outfitters proposed to resell the surface and mineral rights to the Carters at an unfavorable price. Third, Texas Outfitters proposed restrictive covenants that would effectively preclude a mineral lease. Finally, the court rejected Texas Outfitters' contention that it was holding out for a better offer because none of the surrounding landowners had received an offer better than that made to Texas Outfitters.

In *Mzyk v. Murphy Exploration & Prod. Co.—USA*,<sup>189</sup> the court explained the limits of the “reasonably prudent operator” standard with respect to offset well obligations. Under the lease, if a neighboring operator drilled a well within 467 feet of the lease line, the lessee agreed to drill such offset well or wells on the lease as a reasonably prudent operator would drill under the same or similar circumstances. A number of wells were drilled adjacent to the lessor's property within 467 feet. The lessee decided that drilling on the lease would not be profitable and that a reasonably prudent operator would not have drilled the lease. The lessor sued for breach of the offset-well provision, arguing the provision established *how* the lessee was to drill an offset well, not whether to drill at all. Affirming summary judgment for the lessee, the court explained that the lease provision expressly adopted the “reasonably prudent operator” standard, which generally applies to the lessee's determination of whether to drill an offset well at all, not just to how the lessee would drill an offset well, as the lessor argued. Because the lessor offered no evidence that a reasonably prudent operator would have drilled an offset well, the court affirmed summary judgment for the lessee.

## *XII. West Virginia*

### *A. Legislative Developments*

The West Virginia Legislature passed the West Virginia Safer Workplaces Act, H.B. 2857,<sup>190</sup> which expands the circumstances under which employers may conduct drug and alcohol testing. Previously, employees could be tested under two circumstances: (1) if a reasonable

---

189. No. 04-15-00677-CV, 2017 WL 2797479, *no pet.*, (Tex. App.—San Antonio June 28, 2017).

190. 2017 W.V. HB 2875.



suspicion existed to justify the test; or (2) if the employee held a safety sensitive position. Now, drug and/or alcohol testing may be performed for a variety of reasons (e.g., deterrence of illicit drug use, investigating accidents in the workplace or possible individual employee impairment). Under the new law, testing may even occur where there are no indications of individual, job-related impairment. Thus, the new law greatly expands an employer's ability to test employees.

The West Virginia Legislature passed H.B. 2811,<sup>191</sup> which amends the Aboveground Storage Tank Act (ASTA) by exempting tanks used to store brine and other gas industry waste liquids. The bill exempts an estimated 2,300 tanks. The exemption only applies to tanks located inside the "zone of peripheral concern," which is an area between 5 and 10 hours upstream of a drinking water intake. Tanks are exempted that have a capacity of 210 barrels, which is 8,850 gallons, and contain brine water or other fluids produced in connection with hydrocarbon production activities. These tanks will have to register with the West Virginia Department of Environmental Protection but are not covered under other parts of the ASTA.

The West Virginia Legislature passed S.B. 505,<sup>192</sup> which provides a five-year reclamation period following completion of well pads for horizontal wells.

#### *B. Judicial Developments*

In *Leggett v EQT Production Company*<sup>193</sup>, the court found that the use of the language "at the wellhead" in West Virginia's Flat Rate Royalty Statute allows the use of the "net back" method to calculate royalties. In doing so, the court found that the *Estate of Tawney v. Columbia Natural Resources, L.L.C.* case did not apply or control. The court was tasked with determining whether the holding in *Tawney*, which did not allow post-production expense deductions when calculating royalty, applied when royalties are paid on old, flat rate leases converted to a one-eighth royalty by application of Flat Rate Royalty Statute. The statute provides that royalties are to be paid "at the wellhead." *Tawney* held that "at the wellhead" language in a lease was ambiguous, and deductions could not be taken unless expressly authorized in the lease in detail as to the type and method of calculation. In *Leggett*, the court held that the rules of contract construction used to decide *Tawney* did not apply when interpreting a statute. The ruling in this case

---

191. 2017 W.V. HB 2811.

192. 2017 W.V. SB 505.

193. 800 S.E.2d 850 (W. Va. 2017).

indicated the court's potential willingness to reconsider *Tawney*, which would impact royalty calculations for West Virginia production.

In *Bowyer v. Wyckoff*,<sup>194</sup> the court held that a party seeking a partition of property by allotment or by sale under W. Va. Code § 37-4-3 must strictly follow the prerequisites in the statute. In *Bowyer*, a party was seeking to partition the surface of property in kind or by sale. A counterclaim was brought, however, seeking to partition both the surface and the mineral interests either though by allotment or by sale, allegedly because the party wanted to develop the shallow natural gas under the property. The court rejected partition by sale of the surface and mineral interests because the challenging party had not otherwise proven entitlement to partition by sale under §37-4-3. The Court maintained the following rationale for rejecting sale by partition:

The forced sale of oil and gas minerals precludes the owner of the benefit of lease consideration and the prospect of production proceeds, which represent the primary and perhaps the exclusive value which such ownership vests. Therefore, the public interest will not be promoted by sale.

Under this rationale, any partition for sale or by allotment under §37-4-3 can be forestalled by a single interest holder who does not wish to sell his or her interest—which undercuts the entire purpose of the partition statute and results in a “forced” sale of a person’s property interest, whether the partition be by sale or by allotment. The Court’s implicit acceptance of the notion that any “forced sale of oil and gas interests” precludes partition is likely to hamper efforts of oil and natural gas producers to use the partition statute to develop minerals.

### *C. Administrative Developments*

The WVDEP issued a Final Interpretive Rule, 33 CSR 1A, "Disposal of Completion or Production Waste." One amendment involved modifying the proposed term "Completion Waste" to instead be termed as "Completion and Production Waste." The change of the term to include the words "Production Waste" supports landfills in accepting production waste streams in addition to the completion waste streams. Further, Section 3.1 was amended to clarify that the permittee should obtain a minor permit modification prior to accepting or disposing of completion waste in the landfill. WDVDP has changed the language in subsection 3.3 to clarify the

---

194. 796 S.E.2d 233 (W. Va. 2017).

radiation monitoring requirements that apply are from subsection 3.5 of the proposed rule. Subdivisions 3.4.a and 3.4.b were combined to clarify the waste profiling requirements needed to obtain a minor permit modification. Subdivision 3.4.c was amended to ensure that if the combined concentration in the waste was equal to fifty picocuries per gram (50pCi/gr.), the facility could also accept the waste for disposal.

### *XIII. Wyoming*

#### *A. Legislative Developments*

The legislature addressed two issues related to Wyoming's *ad valorem*/gross products tax on oil and gas and other mineral production. First, the legislature required the Wyoming Department of Revenue to conduct a study on a potential discounted cash flow valuation method for *ad valorem* production taxes.<sup>195</sup> Second, the legislature clarified that when a producer properly withholds royalties to pay taxes, fees, or penalties on behalf of a royalty or overriding royalty owner, *ad valorem* tax liens will not attach to the property of the royalty or overriding royalty owner.<sup>196</sup>

The legislature authorized the Governor to use Wyoming's Federal Natural Resource Policy Account to facilitate mineral development permitting and to address related issues.<sup>197</sup>

Finally, the legislature extended the sunset or expiration date of Wyoming's sales and use tax exemption on sales or leases of machinery used in the state for manufacturing (including certain oil refining operations) from December 31, 2017 to December 31, 2027.<sup>198</sup>

#### *B. Judicial Developments*

In *Questar Exploration & Production v. Rocky Mountain Resources*,<sup>199</sup> the Wyoming Supreme Court distinguished an earlier opinion, *Ultra Resources v. Hartman*,<sup>200</sup> and determined an oil and gas lease did not constitute a renewal, substitute, or new lease, when compared to earlier

---

195. H. Enrolled Act 85, ch. 143 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

196. WYO. STAT. ANN. §§ 39-13-108(d)(vi)(B) and (O); H. Enrolled Act 74, 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

197. WYO. STAT. ANN. § 9-4-218(c); S. Enrolled Act 53, 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

198. WYO. STAT. ANN. §§ 39-15-105(a)(viii)(O); 39-16-105(a)(viii)(D); S. Enrolled Act 80, 2017 Leg., 64th Gen. Sess. (Wyo. 2017).

199. 388 P.3d 523 (Wyo. 2017).

200. 226 P.3d 889 (Wyo. 2010).

leases for similar areas. As such, royalty interests established in the older leases did not transfer to the newer lease.<sup>201</sup>

*Anadarko Land Corp. v. Family Tree Corp.*<sup>202</sup> involved complicated and competing chains of title to oil and gas interests. One chain of title originated from disputed production taxes assessed by a Wyoming county in 1911. While the court determined the production taxes were improperly assessed, it concluded the county's action was not a clear jurisdictional error. The resulting tax sale and deed were merely voidable and because the assessments were not challenged within the statutory limitations period, the court concluded deeds based on the assessment and tax sale were valid.

In *Wyoming v. Zinke*,<sup>203</sup> the court set aside the Bureau of Land Management's (BLM) March 2015 hydraulic fracturing regulation.<sup>204</sup> Supporters of the regulation appealed the court's decision to the Tenth Circuit. However, before the appeal was decided, the BLM asked the Tenth Circuit to hold the case in abeyance based on Executive Orders issued by the President.<sup>205</sup> On September 21, 2017, the Tenth Circuit dismissed the appeals as prudentially unripe.<sup>206</sup>

*Bear Peak Resources, LLC v. Peak Powder River Resources, LLC*,<sup>207</sup> concerned a mineral acquisition and development agreement between two parties. The agreement applied to a specific Area of Mutual Interest (AMI). When one of the parties acquired mineral interests without compensating the other party, that second party sued for breach of contract, breach of implied covenant of good faith and fair dealing, accounting, breach of fiduciary duty, negligent misrepresentation and unjust enrichment. A state district court entered summary judgment in favor of the defendant and dismissed the lawsuit. On appeal, the court affirmed the summary judgment order on the breach of implied covenant, accounting and breach of fiduciary duty claims. However, the court reversed the district court's decision on the interpretation and status of the AMI agreement, and remanded to the district court with instructions to reconsider those issues.

---

201. *Questar Expl. & Prod.*, 388 P.3d at 532.

202. 389 P.3d 1218 (Wyo. 2017).

203. 871 F.3d 1133 (10th Cir. 2017).

204. *Id.* at 1139 (citing *Wyoming v. United States*, Nos. 2:15-CV-041-SWS, 2:15-CV-043-SWS, 2016 U.S. Dist. LEXIS 82132, 2016 WL 3509415, at \*3-\*10 (D. Wyo. June 21, 2016)).

205. 871 F.3d at 1140.

206. *Id.* at 1146.

207. 403 P.3d 1033 (Wyo. 2017).

*C. Administrative Developments*

In early 2017, the Wyoming Oil and Gas Conservation Commission revised its rules to set specific limits for natural gas flaring and venting.<sup>208</sup> The new rules allow emergency flaring and venting, and recognize flaring and venting may occur during well purging, evaluation, or production tests.<sup>209</sup>

---

208. 055-0001-3 WYO. CODE R. § 39(b)(iv) (LexisNexis 2017).

209. *Id.* at § 39(b)(i)-(iii).