# **Legal Developments in 2015 Affecting the Oil and Gas Exploration and Production Industry**

2016

**Reporter**

53 RMMLF Journal 123

**Length:** 11299 words

**Author:** Mark D. Christiansen, Editor [[1]](#footnote-2)1, McAfee & Taft, Oklahoma City, Oklahoma

**Text**

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

I. ALASKA

*A. Legislative Developments*

In the 2016 operating budget, Alaska Governor Bill Walker used his line-item veto power to reduce a $ 700 million appropriation for refundable exploration expenditures (tax credits) to $ 500 million. In exercising his veto power, Governor Walker emphasized that the $ 200 million he vetoed from the FY2016 operating budget does not deny but rather delays those state expenditures.

The Alaska State Legislature approved SB 3001, allowing the buyout of the pipeline company TransCanada so the state-owned Alaska Gasline Development Corp. (AGDC) can acquire a 25 percent share of the Alaska LNG project alongside BP, ConocoPhillips and ExxonMobil. SB 3001 appropriates $ 68.4 million to repay TransCanada for its expenses to date in preliminary engineering on its share of the project. The bill also authorizes AGDC to spend $ 75.6 million to pay what would have been TransCanada's share in completing preliminary engineering now underway.

*B. Judicial Developments*

In *McIntyre v. BP Expl. & Prod., Inc.*, the court granted summary judgment against an individual who sued BP Exploration and Production, Inc. for, *inter alia*, breach of contract and misappropriation of trade secrets in connection with BP's solicitation of suggestions from the public for ways to stop the uncontrolled leaking of ***oil*** from the Macondo ***Oil*** Well. Plaintiff claimed that BP used his suggested method to cap the well, and filed U.S. Patent Application for the method, without offering plaintiff any compensation, credit, or acknowledgment. The court found that plaintiff and BP never formed a contract and that plaintiff never made any efforts to maintain the secrecy of his idea. Further, the court found that plaintiff's suggested solution lacked the characteristics and specificity to be a "protected idea."

In *State, Dep't of Revenue v. BP Pipelines (Alaska) Inc.*, pipeline owners and municipalities sought review of the State Assessment Review Board's (SARB) 2007, 2008, and 2009 property tax value for the Trans-Alaska Pipeline System (TAPS) of $ 4.589 billion, $ 6.154 billion, and $ 9.046 billion, respectively. The municipalities asserted that the value of TAPS for each of the years in question should be about $ 14 billion, while the owners asserted that the value should be little more than $ 1 billion. The reason for the difference in these values was that the owners continued to argue for the income approach to valuation, which would limit TAPS's value based on its tariff income, while the municipalities advocated for a cost approach using the replacement-cost-new-less-depreciation method. On review, the superior court agreed with the municipalities' calculation methodology but arrived at a higher valuation of $ 8.941 billion in 2007, $ 9.644 billion in 2008, and $ 9.249 billion in 2009. The pipeline owners and municipalities thereafter appealed to the Alaska Supreme Court, which held that the superior court did not err in arriving at the final valuation and upheld the court's ruling in all respects.

In *State v. Jewell*, the State of Alaska brought an action seeking an order directing the Secretary of the Interior to review the State's submitted plan for the exploration of ***oil*** and gas resources within the coastal plain of the Arctic National Wildlife Refuge (ANWR). The state submitted the exploration plan pursuant to § 1002 of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. § 3142(b)(1)). The court, in granting summary judgment in favor of the Secretary, held that the Secretary's interpretation that her statutory authority and obligation to review and approve exploration plans under § 1002 of ANILCA had ceased after 1987 was based on a permissible and reasonable construction of the statute.

In *Alaska Wilderness League v. Jewell*, environmental organizations brought an action challenging an incidental take regulation (ITR) promulgated by the United States Fish and Wildlife Service (FWS). The ITR allowed the industry to apply for letters of authorization to permit the incidental take of Pacific walruses in connection with ***oil*** and gas exploration activities in the Chukchi Sea. The court, in upholding the ITR, held that FWS's negligible impact findings were not arbitrary and capricious and that it met its obligation under the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA) to describe the mitigation necessary to meet its finding of no significant impact.

In *Kunaknana v. U.S. Army Corps of Engineers*, the court denied a second challenge to the U.S. Army Corps of Engineers' (USACE) decision to issue a permit to ConocoPhillips Alaska, Inc. to fill certain wetlands in order to develop a drill site known as CD--5, which is located in the National Petroleum Reserve--Alaska (NPR--A). The court held, *inter alia*, that (a) USACE's decision not to supplement the final environmental impact statement (FEIS) in lieu of changes to the proposed project and (b) its decision not to prepare a supplemental environmental impact statement due to recent climate change information were not arbitrary and capricious.

In *Alaska Wilderness League v. Jewell*, the court upheld the Bureau of Safety and Environmental Enforcement's (BSEE) approval of Shell Gulf of Mexico Inc. and Shell Offshore Inc.'s (collectively Shell) ***oil*** spill response plans (OSRPs) for development of offshore ***oil*** and gas resources in the Beaufort and Chukchi Seas. In granting summary judgment in favor of BSEE, the court held that BSEE's interpretation of the Outer Continental Shelf Lands Act and its own regulations, that BSEE lacked discretion to deny approval once it determined that the OSRPs satisfied the statutory requirements, was not arbitrary and capricious. The court further held that Endangered Species Act consultation and National Environmental Policy Act review were not required.

In *Shell Offshore, Inc. v. Greenpeace, Inc.*, after granting a temporary restraining order against Greenpeace, Inc. for interference with Shell Gulf of Mexico Inc. and Shell Offshore Inc.'s (collectively Shell) preparation to conduct ***oil*** exploration offshore of Alaska on the Outer Continental Shelf, the court denied Greenpeace's motion to dismiss Shell's complaint for trespass to chattels, interference with navigation, private nuisance, and civil conspiracy. Shell's complaint alleges that Greenpeace has been blockading vessels in transit, blocking access to vessels attempting to dock at port, boarding vessels, placing swimmers in the water in front of vessels, hanging climbers on the sides of vessels, hanging survival pods on vessels, attempting to foul propulsion systems and chaining individuals to anchors, vessels or other facilities.

In *Alaska Eskimo Whaling Comm'n v. U.S. E.P.A*, the court remanded to the Environmental Protection Agency (EPA) to reconsider its determination that discharge of non-contact cooling water by ***oil*** and gas exploration facilities will not cause unreasonable degradation of the marine environment. Specifically, the court required the EPA to identify evidence in the record sufficient to support its decision concerning the possible effect, or non-effect, of the discharge of non-contact cooling water on the bowhead whale migration and subsistence hunting season in the Beaufort Sea.

*C. Administrative Developments*

The Alaska ***Oil*** and Gas Conservation Commission (AOGCC) approved an increased natural gas "offtake" rate of 3.6 billion cubic feet of gas per day from the Prudhoe Bay field on the North Slope to supply the planned Alaska LNG Project. The AOGCC's order amended a previous order from several years ago that allowed 2.7 billion cubic feet of gas to be produced.

The AOGCC also approved pool rules for the Point Thomson field that ExxonMobil is developing on the North Slope. The rules, which would allow the initial cycling of gas through the Point Thomson reservoir for condensate production, also allow for the eventual annual average offtake of up to 1.1 billion cubic feet per day of natural gas to supply the planned Alaska LNG project.

II. ARKANSAS

*A. Legislative Developments*

In its 2015 regular session, the Arkansas General Assembly enacted minor amendments to the statute that governs the integration procedure. The most important of those substituted the words "opportunity for hearing" for "hearing" in the statute, enabling the Commission to issue orders without an actual public hearing under some circumstances when no hearing is requested by any interested party.

*B. Judicial Developments*

Arkansas is a "force pooling" jurisdiction. That pooling process is called "integration" in the Arkansas statutes. The authority of the Arkansas ***Oil*** and Gas Commission to integrate the interests of non-consenting owners into Commission-formed units originated in Arkansas' 1939 ***oil*** and gas conservation act.  *Gawenis v. Arkansas* ***Oil*** *and Gas Commission*,

*Lewis v. Enerquest* ***Oil*** *and Gas, LLC*,

*Stevens v. SEECO, Inc*.

*SEECO, Inc. v. Holden*

*C. Administrative Developments*

As is its practice, the Arkansas ***Oil*** and Gas Commission made minor revisions to several of its regulations during 2015. Since these regulations are constantly in revision, the practitioner is advised to regularly check these regulations, online at http://www.aogc.state.ar.us.

III. CALIFORNIA

*A. Legislative Developments*

The Legislature continued to focus in 2015 on increasing the regulation of ***oil*** and gas exploration, production and transportation operations in California. Among the highest profile issues before the Legislature was the supervision by the Division of ***Oil***, Gas, and Geothermal Resources of the California Department of Conservation (DOGGR) of water injection and disposal wells that are essential for California production operations. Senate Bill 83

A high profile pipeline rupture which spilled heavy crude ***oil*** along the Santa Barbara County coast on May 19, 2015 was the motivating factor behind Assembly Bill No. 864,

California Government Code § 51015.1 was added by Senate Bill No. 295 to require the State Fire Marshal to annually inspect all intrastate pipelines commencing January 1, 2017 and to adopt regulations to ensure compliance with applicable laws and regulations.

Assembly Bill No. 1420

Assembly Bill No. 815 California Government Code § 8670.40 to impose an ***oil*** spill prevention and administration fee not to exceed $ 0.065 per barrel of crude ***oil***. The ***oil*** spill prevention and administration fee will be imposed upon a person owning crude ***oil*** or petroleum products at the time that the crude ***oil*** or petroleum products are received at a refinery within the state by any mode of delivery that passes over, across, under, or through waters of the State.

*B. Administrative Developments*

Reflecting the increased public and legislative interest in underground injection wells used for waste water disposal and secondary recovery purposes and the perceived potential impact on drinking water aquifers, DOGGR adopted emergency regulations and proposed permanent regulations requiring operators injecting or disposing water into identified aquifers to obtain an aquifer exemption issued by the EPA under the Safe Drinking Water Act by specified dates or to cease injection activity.

DOGGR released a "Renewal Plan" 2010 Senate Bill 855  n29 with respect to DOGGR's enforcement and permitting of underground injection control operations.  n30 The Renewal Plan includes DOGGR completing its review of aquifer exemptions and conducting a project-by-project review while ensuring that any UIC project approval letters clearly outline conditions of the permit. The plan also contemplates developing and updating DOGGR's regulations for hydraulic fracturing and underground injection control, as well as establishing standard practices for record-keeping and workforce training to ensure consistent practices locally and statewide and building a publicly accessible online database, and establishing deadlines for new regulations, public input and well evaluations.

To implement Senate Bill 4 enacted in 2013,

As part of its implementation of Senate Bill 4, the State Water Resources Control Board adopted Resolution No. 2015-0047 establishing model criteria for groundwater monitoring in areas of ***oil*** and gas well stimulation.

At the end of 2014, DOGGR entered into memoranda of agreements pursuant to Senate Bill 4 to coordinate California state agencies' regulation of well stimulation treatments and related activities with the State Water Resources Control Board and Regional Water Quality Control Boards,

***Kern*** County, California's largest ***oil*** producing county, amended its County Zoning Ordinance to set forth new development standards for all future ***oil*** and gas exploration, extraction, operations, and production activities in unincorporated areas of the County.

IV. COLORADO

*A. Legislative Developments*

While the Colorado legislature did not pass any legislation directly relating to ***oil*** and gas during the 2015 legislative session, one bill did pass that should be of interest to title examiners. Senate Bill 15-049 broadened a prior statute governing the effect of delivery a deed to a corporation before it is incorporated to include other entities. The amended statute now provides that if a grantee described in a deed as an entity has not been formed at the time of delivery of the deed, title to the real property described in the deed vests in the grantee when the entity is formed, and no other instrument of conveyance is required. An "entity" includes a domestic or foreign corporation, general partnership, cooperative, limited liability company, limited partnership, limited partnership association, nonprofit association, nonprofit corporation, or any other organization or association recognized under law as a separate legal entity (including a foreign limited liability partnership or foreign limited liability limited partnership).

*B. Judicial Developments*

As reported in the 2014 edition of this report, district court judges struck down three of the five local government bans on hydraulic fracturing that were approved by voters in 2012 and 2013 and challenged by the Colorado ***Oil*** and Gas Association, an industry group. In unpublished opinions, the court of appeals affirmed orders denying motions to intervene in the Fort Collins and City of Lafayette cases. The Colorado Supreme Court accepted certiorari in those cases on the question: "Whether home-rule cities are preempted from promulgating local land-use regulations that prohibit the use of hydraulic fracturing in ***oil*** and gas operations and the storage of such waste products within city limits when the Colorado ***Oil*** and Gas Conservation Commission regulates hydraulic fracturing within the state."

In *Kinder Morgan CO2 Co., L.P. v. Montezuma Cnty. Bd. of Commissioners*,

After multiple appeals, *Patterson v. BP Am. Prod. Co*. COLO. REV. STAT. ANN. § 5-12-102(1)(a). The Colorado Court of Appeals affirmed because the class was unable to prove BP's actual gain or benefit attributable to the money withheld from royalty payments. The Colorado Supreme Court denied the petition for certiorari, bringing the extended case to a conclusion.

In *Phelps* ***Oil*** *& Gas, LLC v. Noble Energy, Inc.*,

In 2012, the court certified a class for the purpose of addressing claims for declaratory relief which were decided this year in *A-W Land Co., LLC v. Anadarko E&P Co. LP*.

In *Antero Res. Corp. v. Strudley*,

*C. Administrative Developments*

In March 2015, the COGCC finalized safety rule changes that grew out of recommendations made by COGCC following the September 2013 flood affecting the Colorado front range. Rule 603.g requires all equipment at drilling and production sites in geological hazard areas to be anchored with anchors engineered to support the equipment and to resist flotation, collapse, lateral movement or subsidence. Rule 603.h(1) requires notification of COGCC when a new proposed location is within a defined Floodplain (i.e., an area officially declared to be in a 100-year floodplain by a Colorado municipality, county or state agency or by a Federal agency); requires new wells within a defined Floodplain to be equipped with remote shut-in capabilities prior to commencing production; and requires secondary containment areas around tanks. Rule 603.h(2) requires Operators to maintain a current inventory of all existing wells, tanks and separation equipment in a defined Floodplain as of April 1, 2016. Rule 603.h(2) also establishes the following requirements with respect to new wells and locations (effective June 1, 2015) and existing wells and locations (effective April 1, 2016, unless a variance is obtained): requires tanks and separation equipment to be anchored to the ground with anchors engineered to support the equipment and to resist flotation, collapse, lateral movement or subsidence; requires containment berms around all tanks to be constructed of steel rings or another engineered technology that provides equivalent protection from floodwaters and debris; and requires COGCC approval for production pits, special purpose pits and flowback pits containing E&P waste within a defined Floodplain.

V. KANSAS

*A. Legislative Developments*

In 2015 K.S.A. 55-193 was amended to extend to 2020 payments to the abandoned ***oil*** and gaswell fund, the "plugging" fund for wells drilled before July 1, 1996. The source of funding was modified to eliminate the $ 100,000 in annual funding from "the state water plan fund" by increasing the amount paid from the "conservation fee fund" from $ 100,000 to $ 200,000.

*B. Judicial Developments*

The most significant development in Kansas ***oil*** and gas jurisprudence in 2015, and during the past two decades, is the Kansas Supreme Court's decision in *Fawcett v.* ***Oil*** *Producers, Inc. of Kansas*.

In *Netahla v. Netahla*

The duration of a defeasible term mineral interest was also addressed by the Kansas Court of Appeals in *OXY USA, Inc. v. Red Wing* ***Oil****, LLC*. *Netahla* case discussed above but also addressed whether including the interest in a pooled area would satisfy the "production" requirement to perpetuate it beyond its primary term that ended in 1965. Current Kansas law would perpetuate the interest to the extent the acreage shares in pooled production, even though the well for the pooled area is not located on the defeasible interest acreage. *Classen*, overruled a prior rule, established in the *Smith v. Home Royalty Association, Inc.*, *Kneller v. Federal Land Bank of WichitaClassen*-like rule would apply during the time frame prior to the *Smith* holding in 1972, it refused to give *Classen* retroactive effect. This means the interest must satisfy the *Smith* production requirement during the June 10, 1972 through October 7, 1980 timeframe when the *Smith* rule applied. Under the facts the interest terminated on June 10, 1972 for failing to have a well physically on the defeasible interest acreage. The court also rejected estoppel, waiver, and statute of limitations arguments that sought to impose on the owner of the possibility of reverter an obligation to take action to declare a termination.

The court of appeals interpreted the Kansas plugging statute in *John M. Denman* ***Oil*** *Co. v. State Corporation Commission*,

The Kansas ***oil*** and gas lien statute, K.S.A. 55-207, was interpreted in *Klima Well Service, Inc. v. Hurley*,

The court in *Gaudreau v. United States*

*C. Administrative Developments*

The Kansas Corporation Commission, by Order dated March 19, 2015, reduced injection rates and pressures for Class II injection wells in Harper and Sumner Counties out of concern for "increasing seismic activity in Harper and Sumner Counties, correlating with increasing volumes of saltwater injected in those counties . . . ."

VI. LOUISIANA

*A. Legislative Developments*

Act No. 448 establishes provisions for alternative dispute resolution for legacy suits subject to the provisions of Act 312 (also known as La. R.S. 30:29). Most notably, the Act creates two methods to assist in narrowing the issues involved in a particular suit and/or resolve a suit. First, Subsection B provides that within sixty days after the end of a stay of litigation required by La. R.S. 30:29(B)(1), "the parties shall meet and confer in an effort to assess the dispute, narrow the issues, and reach agreements useful or convenient for the litigation of the action." Second, upon the earlier of any party's motion after discovery or five hundred fifty days after commencement of the action, "the court shall enter an order compelling the parties to enter nonbinding mediation." For any mediation ordered, the parties will have fifteen days to agree on the details of the mediation such as date, time, and identity of the mediator. If the parties cannot agree, the court will conduct a contradictory hearing to determine such issues. In addition, expenses associated with the mediation will be split according to the parties' agreement, but in the absence of an agreement, the party moving for mediation shall be responsible for payment of mediation fees and costs. Finally, Act No. 448 requires that each party in a mediation have a representative present with settlement authority or a person present with direct contact with a person having settlement authority on behalf of the client. If a party fails to meet this requirement, the court may, after a contradictory hearing, order that party to pay costs and attorney's fees associated with the mediation.

Act No. 253 of the 2015 Louisiana Regular Session modifies the definition of what constitutes a "drilling unit," which is now defined as "the maximum area which may be efficiently and economically drained by the well or wells designated to serve the drilling unit as the unit well, substitute unit well, or alternate unit well." The most notable aspect of this change is that it explicitly allows the Office of Conservation to create drilling units that are drained by multiple wells. Furthermore, it reinforces the Office of Conservation's practice of approving alternate unit wells--a practice that, while routine, has been challenged in Court. Act No. 253 also recognized the Office of Conservation's authority to approve "Cross-Unit Horizontal Wells." The Act created La. R.S. 30:9.2 and defines the term "cross-unit horizontal well" as "a well drilled horizontally and completed under multiple drilling units that is designated by the commissioner after notice and public hearing to serve as a unit well, substitute unit well, or alternate unit well for said units."

*B. Judicial Developments*

Within the past year, Louisiana appellate courts have addressed the question of whether or not the subsequent purchaser doctrine applies to claims asserted under a mineral lease in the context of legacy lawsuits. In *Wagoner v. Chevron*, the Second Circuit found that the right to damages under a mineral lease is a personal right and as such, did not pass to new owners of land in the absence of a specific conveyance of the right in the instrument. *Bundrick v. Anadarko Petroleum*, the Third Circuit reinforced its previous decision and a similar decision of the First Circuit in *Global Marketing* and concluded that "the supreme court's instruction to the trial court in *Global Marketing* is a recognition that the subsequent purchaser rule applies in matters involving mineral leases."

With regard to royalty demands under Louisiana law, at least one decision is notable. In *Samson Contour Energy E&P, L.L.C. v. Smith*, the Second Circuit arguably modified its previous holding in *Rivers v. Sun Exploration & Production Co.*, as to the standard for notice under Mineral Code article 137.  *Rivers* in its articulation of the standard, the standard in *Smith* potentially alters the requirement that a demand provide information that would "allow for an appropriate investigation" by the mineral lessee. This is especially true when one considers the factual scenario in *Smith*. While the plaintiffs engaged in extensive correspondence with their mineral lessee regarding royalty payments to a succession, it occurred in a fashion that one could characterize as requests for information regarding certain payments, as opposed to an actual demand for payment.

In *Hayes Fund v. Kerr-McGee*, a group of mineral owners contended that several mineral lessees failed to follow proper, customary, and industry-wide accepted protocol for drilling two ***oil*** and gas wells.

In *McCarthy v. Evolution Petroleum Corp.*, the court analyzed whether Louisiana mineral law imposed "a duty on a mineral lessee purchasing the lessor's mineral royalty rights to disclose to the lessor that the lessee has already negotiated the resale of the mineral rights to a third party for a significantly higher price."

One way that a non-operator can secure payment of an obligation owed by the unit operator is through the non-operator's privilege. In order to state a valid privilege, a non-operator must set forth the items listed in La. R.S. 9:4887. One of the items that must be set forth is "the amount of the obligation due as of the date of the statement." *Hilcorp Energy I, L.P. v. Merritt Operating, Inc.*, the court addressed the meaning of this phrase and what information must be included in a non-operator's statement of privilege. In this case, the non-operator filed a statement of privilege that described the amount due in terms of the percentage of production.

VII. NEW MEXICO

*A. Judicial Developments*

In *SWEPI, LP v. Mora County, New Mexico*,

After addressing standing and ripeness, the court, among other rulings, rejected the notion that local governments may supersede state and federal law, invalidating the portions of the Ordinance that purported to strip corporations of their constitutional rights based on the Supremacy Clause of the U.S. Constitution.

In *Anderson Living Trust v. WPX Energy Production, LLC*,   *Elliot Industries LP v. BP America Production Co*.

In *Diné Citizens Against Ruining Our Environment v. Jewell*,

In *Smith v. Hess Corp.*,

actually value enhancing was not the focus; "rather, the focus is to reconstruct a wellhead value by deducting costs that were included in determining the downstream price."

In *King v. Estate of Gilbreath*,

In *Woody Investment, LLC v. Sovereign Eagle, LLC*,

*B. Administrative Developments*

On March 31, 2015, the New Mexico ***Oil*** Conservation Commission (OCC) repealed and replaced Rule 34, which regulates the disposition of produced water, to encourage the reuse and recycling of produced water.

VIII. NORTH DAKOTA

*A. Judicial Developments*

In *EOG Resources, Inc. v. Soo Line Railroad Co.*,

To reach its conclusion, the court rejected EOG's argument that the outcome of the case was dictated by the court's 1960 decision in *Lalim v. Williams County*. *Lalim*, the court held that a warranty deed from a landowner to Williams County for a strip of land used to construct a highway conveyed only an easement. *Lalim* court held that even though the deed appeared on its face to grant fee simple title, it was ambiguous because counties usually acquire only easements for highways, the county could have acquired no more than an easement through eminent domain, and the grant reserved the grantor's interest in an existing easement adjacent to the property being conveyed. *Lalim*, usually acquired easements and could only have acquired an easement via eminent domain, the court distinguished the deeds at issue by noting that the railroad was not a public entity and there was no reservation in the granting clause.

Turning to the language of the deeds at issue, the court held that most of them unambiguously conveyed fee simple title to the land, including the minerals.  *Lalim*, included a reservation that expressly excepted from the grant an existing railroad easement.

In *Fleck v. Missouri River Royalty Corp.*,

In 2015 the court added additional clarity to the so-called Dormant Minerals Act,   *Yesel v. Brandon*,

In *Northern* ***Oil*** *and Gas, Inc. v. Moen*,

In *Mosser v. Denbury Resources, Inc.*,

In *Johnson v. Shield*, the court reaffirmed that an exception to a grant included in a deed need not be located in the granting clause to be effective. *Johnson* granted the plaintiffs' predecessors in interest fee simple title to certain property, and contained no reservation in the granting clause.

IX. OHIO

*A. Legislative Developments*

House Bill 64--Ohio's biennial budget bill--went into effect on September 29, 2015. The Bill includes changes to Ohio's ***oil*** and gas regulatory program found in Chapter 1509 of the Revised Code. Originally, the Bill included a severance tax and provided fixed rates for ***oil*** and natural gas at 6.5% at the wellhead, and a lower rate of 4.5% for natural gas and natural gas liquids sold downstream. Small natural gas producers would not have been required to pay a severance tax. House Bill 64 was ultimately signed into law without the proposed fixed rates but it did create a tax policy study commission tasked to reform Ohio's severance tax in a way that maximizes competitiveness and enhances the general welfare of the state with recommendations due by October 1, 2015.

Other relevant portions of House Bill 64 require the Division of ***Oil*** and Gas Resources Management (Division) to create a program for the electronic submission of Emergency Planning and Right-to-Know Act (EPCRA) reports and authorizes the Division to include land owned by the Ohio Department of Transportation in units created by order of the chief under R.C. § 1509.28.

Substitute House Bill 9, which became effective March 23, 2015, clarifies the issue of whether an ***oil*** and gas lease creates an interest in real estate under Ohio law. While the ***oil*** and gas industry has long regarded an ***oil*** and gas lease as creating a real estate interest, several decisions called this view into question. The Bill helps resolve the confusion by amending Ohio's ***oil*** and gas lease recording statute--R.C. § 5301.09--to state that all ***oil*** and gas leases and licenses "create an interest in real estate."

*B. Judicial Developments*

The year began with a significant victory for the ***oil*** and gas industry when the Supreme Court of Ohio affirmed that the Division of ***Oil*** and Gas Resources Management (the Division) had sole and exclusive authority to regulate ***oil*** and gas operations in the state. In *State ex rel. Morrison v. Beck Energy Corp.*,

The court concluded that R.C. § 1509.02

Second, the court found that the ordinances conflicted with R.C. § 1509.02 because the statute goes beyond simply conferring the Division with "sole and exclusive authority" over the regulation of ***oil*** and gas operations in Ohio. Rather, the statute "reserves for the state, to the exclusion of local governments, the right to regulate 'all aspects' of the location, drilling, and operation of ***oil*** and gas wells, including 'permitting relating to those activities.'"

The opinion emphasized that the court's decision was limited to those ordinances at issue in the case. The decision left open the possibility that other types of local ordinances could coexist with the state's regulatory scheme.

Over the past year, Ohio appellate courts continued to issue many important rulings on the interpretation of ***oil*** and gas lease terms. In *Kenney v. Chesapeake Appalachia, L.L.C.*,

In *Reuschiling v. Cart*,

In *Feisley Farms Family, L.P. v. Hess Ohio Resources LLC*,

Ohio's Seventh District Court of Appeals reaffirmed its 2014 decision in *Hupp v. Beck Energy Corp.Belmont Hills Country Club v. Beck Energy Corp.Bentley v. Beck Energy Corp.*

The lessors claimed that the leases were void as against public policy because the habendum clause language created "no-term" or "perpetual" leases that could go on indefinitely at the option of the lessee. The lessors also argued that the leases allowed the lessee to hold the property indefinitely and without production through the payment of minimal delay rentals or by the lessee's mere assertion that the land was capable of producing ***oil*** and gas.

In each case, the court found that the form of lease in question was not perpetual. The delay rental clause only allowed the lessee to delay drilling a well during the primary term and could not be used to extend the lease into the secondary term. Language providing for the perpetuation of the lease into its secondary term so long as ***oil*** and gas were being produced or were capable of being produced *in the judgment of the lessee* did not vest the lessee with unlimited discretion in determining the duration of the lease, as the lessee was required to use good faith in determining whether drilling was economically feasible. Because the lease was not perpetual, it was not void for public policy, and therefore was not void ab initio. Additionally, the court determined that the lease form waived any implied covenants.

The court strictly interpreted a voluntary pooling provision in *Filicky v. American Energy-Utica, LLC.*

The terms of the underlying lease provided that "[e]ach unit or reformation thereof may be created . . . by Lessee recording in the county recorder's office a Declaration containing a description of the pooled acreage."

The interpretation of an express forfeiture clause was the key issue in *Sims v. Anderson*.

By contrast, in *Armstrong v. Chesapeake Exploration, L.L.C.*,

In *Hoop v. Kimble*

In *Love v. Beck Energy Corp.*, *any* reason, including their desire to receive monetary compensation for giving consent.

Ohio courts have also addressed the lessee's duty to fully develop the leasehold, including undeveloped formations where the deep rights of the lease are held by a different lessee than the shallow rights due to a partial lease assignment. The plaintiffs in *Marshall v. Beekay Co.*, *Popa v. CNX Gas Co, LLC*

*K&D Farms, Ltd. v. EnerVest Operating, LLC*,

Statutoryunitization was the focus of the court's decision in ***Kerns*** *v. Chesapeake Exploration, LLC.*

The Ohio Dormant Mineral Act ("DMA"), R.C. § 5301.56, *Dodd v. Croskey*. *or* timely filing a claim to preserve within the 60 days immediately following the notice of abandonment.

The court addressed ***oil*** and gas leases under the DMA in *Chesapeake Exploration, L.L.C. v. Buell*. *Buell*, the court held that a recorded ***oil*** and gas lease is a "title transaction" and, therefore, a "savings event" that prevents minerals from being abandoned to a surface owner. Further, the court held that the unrecorded expiration of an ***oil*** and gas lease is *not* a savings event.

The court also heard oral arguments in three other cases involving the DMA. *Corban v. ChesapeakeWalker v. Shondrick-NauCorban* also involves the question of whether the payment of a delay rental during the primary term of a lease is a "title transaction," and therefore a "savings event," under the DMA.

The third DMA case heard by the court in 2015, *Eisenbarth v. Reusser*, *Eisenbarth* appellants also contend that an ***oil*** and gas lease executed by the owner of the surface and the executive rights to the severed mineral interest is not a "title transaction" for the purposes of the DMA.

*C. Administrative Developments*

Effective July 16, 2015, the Division implemented new rules regulating the construction of horizontal well sites.

The Division also continues to work on several rule packages to address various issues that have arisen as a result of the growth in Ohio's ***oil*** and gas industry. Specifically, the Division is in the process of revising its rules on the spacing of wells and adopting rules regarding the permitting of waste management facilities. Additionally, rules for the classification of waste, incident notification, EPCRA reporting, simultaneous operations, and procedures in the event of seismicity near a well are in the drafting process. Several of these rules should be finalized and implemented in 2016.

2015 also saw the first appeal of a unit order issued by the Division in the case of *Gary L. Teeter Revocable Trust v. Division of* ***Oil*** *and Gas Resources Management*,

X. OKLAHOMA

*A. Judicial Developments*

The Oklahoma Supreme Court in *Ladra v. New Dominion, LLC*

The case of *Stinson Farm and Ranch, L.L.C. v. Overflow Energy, L.L.C.*,

In *D. Kirk, LLC v. Cimarex Energy Co.*,

In *Chaparral Energy, L.L.C. v. Samson Resources Company*,  *all* of the 320 mineral acres owned by the grantor at the time of that deed. Circle F Ranch, in contrast, contended that the deed conveyed only one-half of the mineral interests (i.e., 160 mineral acres). The trial court entered summary judgment in favor of Circle F Ranch. Helm appealed. After reviewing the comments in certain treatises and prior case law,

The case of *Buckles v. Triad Energy, Inc.*,

In late 2015, the court issued what should be the final ruling in the long-pending litigation in *Krug v. Helmerich & Payne, Inc.*,

In *Calyx Energy, LLC v. Hall*,  *Calyx Energy, LLC v. Hall*.

The court in *Xanadu Exploration Co. v. Welchentire* tract owned by the landowners resulting from the drilling operations, as opposed to only the lands actually used and occupied, (2) agreed with the Operator that the appraisers' report was flawed in that it did not describe the quantity, boundaries and value of the property entered on or to be utilized in the drilling operations, as required by 52 O.S. § 318.5(C), and (3) ruled that the appraisers had "no authority to direct mitigation, but may award the cost to restore land to its former condition, with compensation for loss of use of it, only if this cost is less than the diminution in fair market value of the land."

The case of *Veteran Exploration & Production, LLC v. McCraw*

The court of appeals reached mixed outcomes on the many issues presented on appeal in *Chesapeake Operating, Inc. v. Kast Trust Farms*.

First, the court agreed and found that the factors to be considered under the prior decision in *Davis* ***Oil*** *Co. v. Cloudwas* stigma associated with the well on the landowner's property, thereby removing any discretion from the jury. Second, as a matter of trial procedure, Chesapeake, citing 12 O.S. § 577 (2011), asserted that the trial court erred by requiring Chesapeake to present its case first, as the plaintiff, even though the burden of proof was on the landowner. . Third, the court rejected the landowner's assertion on appeal that the trial court erred in denying the landowner's claim for treble damages, which was based upon an alleged failure by Chesapeake to comply with the notice requirements under the Act.

The court of appeals in *Carnahan v. Chesapeake Operating, Inc.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra*, and *Kumho Tire Co., Ltd. v. Carmichael*, *Christian v. Gray*. *Worsham v. Nix*.

The case of *B&W Operating, L.L.C. v. Corporation Commission*,

The court in *Eagle Energy Production, L.L.C. v. Corporation Commissionafter* the hearing before the Oklahoma Corporation Commission ALJ on a force-pooling application, but *before* the issuance of the force-pooling order, the lessor-mineral owner who was not named in the pooling (due to the existence of the lease at the time of the hearing) will not be subject to the compulsory pooling order.

In *A.B. Still Wel-Service, Inc. v. Antinum Midcon I, LLC*,

The plaintiff in *Hoffman v. Jones, as Co-Trustee of the Clyde Hansen Testamentary Trust*,

On appeal, the Trust asserted that the lease agreement only entitled Hoffman to receive 25% of any "damages" caused as the result of ***oil*** and gas exploration on the lease, and that the $ 7,522.00 was paid for the "right to conduct" seismic activities and not for any damages caused. However, the court of appeals noted that Hoffman testified at trial regarding the damages caused by the seismic operations, including the disturbance to his quiet enjoyment of the leasehold. That testimony was found to be competent evidence to support the trial court's ruling on this claim, and the ruling was affirmed.

In *Natural Gas Anadarko Company v. Venable*,

"2. Lessee agrees to release any portion of the leased premises not included in a producing unit or is not currently being drilled on a unit as designated by the Corporation Commission upon the expiration of the primary term of this lease. . . ."

NGAC asserted that it continued to hold all the common sources of supply at all depths within its leases by production from those two wells and two formations. However, lessors maintained that the leases expired at the end of their primary term as to all common sources of supply that were not producing on that date. In substance, NGAC alleged that the clause was a "vertical" Pugh clause that kept the leases in effect as to *all zones or formations* within the 640-acre geographic area where the two wells were producing from two common sources of supply or formations. In contrast, the lessors asserted that it was a "horizontal" Pugh clause that caused the leases to terminate as to all formations that were not within the Oklahoma Corporation Commission-established common source(s) of supply producing at the end of the primary term.

Both the trial court and court of appeals ruled in favor of the lessors. The appellate court distinguished the prior decision in *Rist v. Westhoma* ***Oil*** *Co*. *Rist*. The court found that the clause here "clearly expresses the intent of the parties to prohibit lease continuation as to unproductive units."

The case of *AEP Oklahoma Transmission Company, Inc. v. Wootenpublic purpose* under Oklahoma law. In particular, the landowner argued that prior case law

In the long-pending litigation in the class action royalty lawsuit of *Bank of America, N.A. v. El Paso Natural Gas Company*,

In *Tipton Home, Trustees v. Burlington Resources* ***Oil*** *& Gas Company, L.P.*,

*B. Administrative Developments*

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission's website at www.occeweb.com. Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission's***Oil*** *and Gas Conservation Rules*, were addressed in Cause RM No. 201500001. Following is a brief listing of certain of the amendments that became effective on August 27, 2015:

OAC 165:10-1-2 was amended to modify the definition of commercial disposal well and to add definitions of business day, public water supply well(s) or public water well(s), reclaimed water and regular mail; OAC 165:10-1-4 to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 to update the list of ***Oil*** and Gas Conservation Division prescribed forms; OAC 165:10-1-24 regarding applications for emergency orders pertaining to well location exceptions; OAC 165:10-3-1 concerning temporary authorization to commence activities without an approved permit to drill; OAC 165:10-3-4 to delete provisions regarding notice of hydraulic fracturing operations and to revise rule subsections accordingly; OAC 165:10-3-10 to add provisions concerning notice of hydraulic fracturing operations and to change a reference from municipal water supplies to public water supplies, and OAC 165:10-3-28 was amended regarding horizontal drilling in accordance with 52 O.S. § 87.6 et seq. and amendments thereto in Enrolled Senate Bill No. 78 (2014). OAC 165:10-3-28 was also amended concerning the minimum distance of the perforated interval of an ***oil*** or gas non-horizontal well from the completion interval of any ***oil*** or gas horizontal well completed in the same common source of supply.

OAC 165:10-5-2 was amended to change a reference from municipal water supply wells to public water supply wells with respect to approval of enhanced recovery injection wells or disposal wells; OAC 165:10-5-7 to add a provision regarding notice of initial commencement of operations for wells permitted as disposal wells in the Arbuckle formation and to revise rule subsections accordingly; OAC 165:10-7-5 regarding reporting of discharges of deleterious substances; OAC 165:10-7-6 to change a reference from protection of municipal water supplies to protection of public water supplies; OAC 165:10-7-16 to change references from municipal water wells to public water wells and from working days to business days with respect to noncommercial pits; OAC 165:10-7-17 to change references from municipal water wells to public water wells and from working days to business days regarding surface discharge of fluids; and OAC 165:10-7-19 was amended to change references from municipal water wells to public water wells and from working days to business days concerning land application of water-based fluids from earthen pits, tanks and pipeline construction.

In addition, OAC 165:10-7-20 was amended to change references from working days to business days with respect to noncommercial disposal or enhanced recovery well pits used for temporary storage of saltwater; OAC 165:10-7-22 to change references from working days to business days regarding permits for county commissioners to apply waste ***oil***, waste ***oil*** residue, or crude contaminated soil to roads; and OAC 165:10-7-34 is a new rule concerning use of reclaimed water in ***oil*** and gas operations. OAC 165:10-9-1 was amended to change references from municipal water wells to public water wells with respect to commercial pits; and OAC 165:10-9-2 to change references from municipal water wells to public water wells and from working days to business days concerning commercial soil farming.

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. 201500002. Following is a brief listing of certain of the amendments that became effective on August 27, 2015:

OAC 165:5-1-3 was amended regarding definitions; OAC 165:5-1-5 concerning filing of documents; OAC 165:5-1-11, OAC 165:5-1-12, OAC 165:5-1-12.1, OAC 165:5-1-13, OAC 165:5-1-13.1, OAC 165:5-1-14, OAC 165:5-1-14.1 and OAC 165:5-1-14.2 are new rules pertaining to electronic filing of documents; OAC 165:5-3-1 with respect to filing of documents in paper form with the court clerk's office and payments regarding electronic funds transfer; OAC 165:5-3-2 concerning payments by electronic funds transfer and to strike language specifying that a facility that has both petroleum and hazardous substances will be considered as one facility.

OAC 165:5-7-6 was amended concerning drilling and spacing unit establishment or modification; OAC 165:5-7-6.2 with respect to multiunit horizontal wells was amended in accordance with 52 O.S. § 87.6 et seq. and amendments thereto in Enrolled Senate Bill No. 78 (2014), and to provide that certain map(s) be attached to orders approving applications for multiunit horizontal wells in targeted reservoirs; and OAC 165:5-27-1, OAC 165:5-27-2, OAC 165:5-27-3, OAC 165:5-27-4, OAC 165:5-27-10, OAC 165:5-27-11, OAC 165:5-27-12, OAC 165:5-27-13 and OAC 165:5-27-14 are new rules pertaining to procedures for Pipeline Safety Department enforcement actions pursuant to 63 O.S. § 142.1 et seq. and amendments thereto in Enrolled House Bill No. 2533 (2014).

XI. PENNSYLVANIA

*A. Legislative Developments*

A new act that will encourage the use of treated mine water in natural gas drilling operations.

On January 29, 2015, Governor Wolf signed Executive Order 2015-03. The Order prevents the leasing of State Park and State Forest lands owned or managed by the Pennsylvania Department of Conservation and Natural Resources (DCNR) for ***oil*** and gas development. The Order stated that the leasing of State lands for ***oil*** and gas development was contrary to DCNR's duty to conserve and maintain State lands in the public trust for the use and benefit of all citizens as required under Article 1, Section 27 of the Pennsylvania Constitution, also known as the Environmental Rights Amendment.

On May 27, 2015, Governor Wolf announced the formation of a Pipeline Infrastructure Task Force (PITF), which will assist the Commonwealth in developing best practices for the continued expansion of Pennsylvania's pipeline infrastructure. The first draft of the PITF report was released in November 2015. It features strategies aimed at limiting the environmental impact of new projects. A total of 184 recommendations were included in the report. Some recommendations from the draft report include requiring full-time inspectors on site for new projects and five years of post-construction monitoring after a site is completed. The report also recommended that no pipelines be placed parallel to streams or within their 100-year floodway.

*B. Judicial Developments*

In *Harrison v. Cabot* ***Oil*** *& Gas Corp.*,

In *Warren v. Equitable Gas Co.*, Pomposini v. T.W. Phillips Gas & ***Oil*** Co., 580 A.2d 776 (Pa. Super. Ct. 1990), where the court held that storage on a property was impermissible because an ***oil*** and gas lease did not expressly allow for storage. The Superior Court held that, unlike in *Pomposini*, the lease at issue did allow for the storage of gas, and thus it was permissible for storage to extend the lease even in the absence of production. Relying on the Pennsylvania Supreme Court's decision in Jacobs v. CNG Transmission Corp., 772 A.2d 445 (Pa. 2001), the Superior Court refused to find that the lessee had breached any implied covenant to produce, noting that *Jacobs* implied such a covenant where the only compensation to the landowner contemplated in the lease is royalty payments resulting from the extraction of that underground resource. Here, the lease's explicit requirement of storage payments meant there was compensation other than that tied to production and thus no implied covenant applied.

In *Mason v. Range Resources-Appalachia L.L.C.*,

In *Seneca Resources Corp. v. S&T Bank*, Jacobs v. CNG Transmission Corp., 772 A.2d 445 (Pa. 2001), considered the lease's language, the character of the consideration, the circumstances surrounding the lease's execution, conduct of the parties, and any other discernible intent that can be derived from the lease. The court found that the lease language allowing the unoperated acreage to be converted to operated acreage at any time reflected an intent of the parties to achieve the fullest development of the lease premises. Thus, the court concluded that the lease was entire. The court also rejected the landowner's second argument that Seneca violated the implied covenant to develop because it had not acted with reasonable diligence in developing the land. The court looked to the language of the lease that provided that the primary term would be extended if ***oil*** or gas or either of them is stored in, produced, or withdrawn from all or *any portion of said premises*. Because Seneca was drilling on a portion of the leased premises, the court found that the lease foreclosed a finding of a breach of the implied covenant to develop and produce gas on unoperated acreage.

In *In re Mustafa Tayfur*, *Nolt v. T.S. Calkins & Associates*, *Nolt* rejected a similar contention, holding that an application of the Landlord Tenant Act to an ***oil*** and gas lease would ignore case law rejecting the notion that ***oil*** and gas leases are governed by landlord/tenant legal principles. The Third Circuit noted that while the provision "initially appears to apply to the lease at issue," an ***oil*** and gas lessee is more in the position of a purchaser of real property than a mere occupant of the property. The court then applied *Nolt* to hold that the Landlord and Tenant Act statute of frauds was inapplicable and that Tayfur's signature alone was sufficient to satisfy Pennsylvania's general statute of frauds.

The Supreme Court of Pennsylvania announced in November 2015 that it will again hear oral arguments on Act 13. The Public Utility Commission is challenging the Pennsylvania Commonwealth Court's ruling on remand in *Robinson Township v. Commonwealth* that a regulator cannot review local drilling ordinances.

In *Pennsylvania Environmental Defense Foundation v. Commonwealth*,

In *Gorsline v. Board of Supervisors of Fairfield Township v. Inflection Energy, L.L.C.*,

In *Pennsylvania General Energy Co. v. Grant Township*,

On March 5, 2015, a jury found in favor of a class of plaintiff-lessors against defendant Energy Corporation of America (ECA), on claims that ECA had improperly deducted from royalties interstate pipeline costs and marketing expenses incurred after title passed to ECA's buyer.

In *Wright v. Misty Mountain Farm L.L.C.*,

In *Bachmann v. EQT Production Co.*,

In *Dewing v. Abarta* ***Oil*** *& Gas Co.*,

XII. TEXAS

As in years past, Texas courts issued a number of decisions in 2015 addressing disputes related to the interpretation of ***oil*** and gas lease terms. In its highly publicized opinion in *Chesapeake Exploration, L.L.C. v. Hyder*, *Hyder* was whether the applicable lease expressed an intent that the overriding royalty was to be free of post-production costs. The court held that the royalty provision, which provided for a perpetual cost-free (except only its portion of production taxes) overriding royalty of five percent (5%) of gross production obtained from certain wells, did not permit the lessee to deduct post-production costs from the overriding royalty. In reaching its decision, the court concluded that the term "cost-free" applied to both production and post-production costs.

The El Paso Court of Appeals reached a different conclusion regarding the deductibility of post-production costs in *Commissioner of the General Land Office of the State of Texas v. SandRidge Energy, Inc*. *SandRidge* was the construction of a lease royalty clause contained in the Texas General Land Office (GLO) lease form covering royalties on non-processed gas. The dispute arose when SandRidge, the lessee under several leases, stopped paying royalties to the GLO for carbon dioxide. For a period of time, SandRidge sold carbon dioxide produced from the lease to a third party and paid royalties to the GLO based on such sales. However, SandRidge entered into an agreement with the owner of a gas plant whereby SandRidge gave the carbon dioxide to the plant owner free of charge in exchange for the plant owner not charging SandRidge for the costs of extracting the carbon dioxide from its produced natural gas. The GLO argued that it was entitled to royalties on carbon dioxide based on the unprocessed gas royalty clause in the GLO lease form and the prohibition on post-production deductions contained in a separate clause. SandRidge argued that the non-processed gas royalty clause, when read in the context of the entire lease form, functions as a "market value at the well" clause. The court agreed with SandRidge holding that the non-processed gas royalty clause was the "functional equivalent" of a *market value at the well* clause because its terms make it clear that the royalty is payable only on a single substance: raw gas, as it comes out of the ground from the well, together with carbon dioxide and all of the other various components. Further, the court held that the no deduction language in the lease did not apply because the non-processed gas royalty clause constituted a *market value at the well* clause that renders the no deduction language surplusage as a matter of law.

Texas courts addressed the construction of "retained acreage" clauses in multiple cases this year. For example, in *ConocoPhillips Company v. Vaquillas Unproven Minerals, Ltd.*,

*Chesapeake Exploration L.L.C. v. Energen Resources Corp*.

Another case interpreting a retained acreage clause, *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*, *assigned* to a well if a proration plat is filed with the Railroad Commission. As such, the plain language of the lease provided that it would terminate as to all acreage not included in a governmental proration unit assigned to a well in a certified proration plat filed with the Railroad Commission.

In *XOG Operating, LLC v. Chesapeake Exploration Limited Partnership*,

*Albert v. Dunlap Exploration, Inc*.

In *BP America Prod. Co. v. Laddex, Ltd.*,

In *KCM Financial LLC v. Bradshaw*, *Bradshaw*, the non-executive claimed that the executive breached its duty by negotiating a lease that provided for a below-market royalty in exchange for an above-market bonus. Citing a long line of Texas cases addressing the duty owed by the executive to the non-executive, the court acknowledged that the contours of the duty remain somewhat indistinct. Nonetheless, the court concluded that the controlling inquiry is whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest. With respect to the non-executive's claim, the court held that the negotiation of a below market royalty does not conclusively establish a breach of duty, nor is it irrelevant. A determination of whether the duty was breached depends on an analysis of the lease and the circumstances of its execution as a whole, so the claim was remanded to the trial court for further proceedings. On an ancillary issue, the court held that the non-executive's derivative-liability claim lacked merit because the lessee does not owe a fiduciary duty to the non-executive and the lessee in this case merely entered into an arms-length transaction with the executive.

*Lightning* ***Oil*** *Co. v. Anadarko E&P Onshore, LLC*

*Griswold v. EOG Resources, Inc*.

*Medina Interests, Ltd. v. TrialBulter v. HortonLeal v. Cuanto Antes Mejor LLC*.

*Orca Assets, G.P., LLC v. Burlington Resources* ***Oil*** *and Gas Company, L.P.*,

*Roland* ***Oil*** *Co. v. Railroad Commission of Texas*

The court in *Anderson Energy Corp. v. Dominion Oklahoma Texas Exploration & Prod.*, *Inc*. *and* Leases" showed that the parties intended that the Contract Area include unleased land, as well as existing wells and leases. Harmonizing all of the JOA's language, the court concluded, as to this first issue, that the parties intended that interests acquired in the future by them and their successors within the Contract Area be subject to the JOA. As to the second issue, the court implied that the JOA was to go on for a reasonable term in order to effectuate the AMI provision and Preferential Right of Purchase provision. Additionally, the court stated that in situations like this, where a contract contemplates substantial expenditures and investments in accordance with performance, courts have frequently implied a reasonable term where the contract does not have an express duration.

In *Hooks v. Samson Lone Star*,

XIII. WEST VIRGINIA

*A. Legislative Developments*

The West Virginia Legislature passed H.B. 2001, repealing the state's Alternative and Renewable Energy Portfolio Standard (AREPS). West Virginia Code §§ 24-2F-1 through 7 and 24-2F-9 through 12. The sole remaining provision of the AREPS pertains to net metering.

S.B. 423 revised the recently passed (2014) aboveground storage tank regulations (2015 Act).

The three categories of tanks, each with different requirements, are defined as: 1) "Aboveground storage tanks" (ASTs); 2) Regulated level 1 ASTs; and 3) Regulated level 2 ASTs.    West Virginia Code § 22-30-3(A)-(L).

A Regulated level 1 AST includes all of the following ASTs: (a) ASTs located within a "zone of critical concern" *surface* water supply or a public surface water-influenced groundwater supply source; (b) ASTs that contain "Hazardous substances" as defined in CERCLA at 42 U.S.C. § 9601(14), or Substances included on EPA's List set out in 40 C.F.R. §§ 355, 372, 302 & 68 in a concentration of 1 percent or greater--regardless of location (meaning these ASTs do not need to be a ZCC); or (c) ASTs with a capacity of 50,000 gallons or more--*regardless* of *location* (meaning these ASTs do not need to be in a ZCC) or substance. A Regulated level 2 AST is defined as: an AST that is located within a "zone of peripheral concern"

The fourth category requires the Bureau of Public Health (BPH) to inventory all "potential sources of significant contamination" contained within a public water system's "zone of critical concern" and to identify those not already regulated by WVDEP. This requirement is not limited to "tanks," but includes a facility or activity that "stores, uses or produces substances … with potential for significant contaminating impact if released into the source water of a public water supply."

The West Virginia legislature addressed the Clean Air Act's Section 111(d), regulating carbon dioxide emission from existing fossil fuel-fired electric generating units. H.B. 2004 amends West Virginia Code § 22-5-20 to require the WVDEP to submit a report, within 180 days after the EPA finalizes its rule, regarding the feasibility of the state's compliance with the Section 111(d) rule. If the WVDEP determines that submission of a state plan is feasible, then the WVDEP will propose a state plan and submit it to the legislature for consideration. The plan must propose separate standards of performance for carbon dioxide emissions from existing coalfired units and from existing natural-gas fired units. Under the new law, the legislature must approve any state plan before it is submitted to the EPA.

Horizontal well work permits may now be transferred in West Virginia, with prior written consent of the Secretary of the WVDEP after the passage of S.B. 280. The bill modified West Virginia Code § 22-6A-7. Previously, these permits were nontransferable and this change will make both the acquisition and transfer of existing wells easier.

*B. Judicial Developments*

In *W. Va. Dep't of Transp., Div. of Highways v. W. Pocahontas Properties, L.P.*,     *itself* generates income--such as . . . the extraction of crops, timber, or minerals--that income may be considered in a condemnation action."

Income from a business on the land is connected to the business; if the business moves, the income moves. Income from the real estate itself derives from qualities inherent only to that tract of real estate, whether from the quality of crops grown there, the rents from buildings, or the minerals that can be extracted from beneath the land.

The court found that the principal distinction between future earning power and future profits is "income as a *criterion* of value" as opposed to "income as *evidence* of value."

In *Geological Assessment & Leasing v. O'Hara*,

In *SWN Prod. Co., LLC v. Edge*,    West Virginia Code § 22-6A-2(a)(8), which "favors the responsible development of the state's natural gas resources." West Virginia Code § 22-6A-2(a)(8), above, and West Virginia Code § 22-7-1, providing the "exploration for and development of ***oil*** and gas reserves in this state must coexist with the use, agricultural or otherwise, of the surface of certain land and that each constitutes a right equal to the other," as the basis of this conclusion.

In *Leggett v. EQT Prod. Co.*,

*Braden v. Chesapeake Appalachia*, L.L.C.,

The district court, affirmed by the Fourth Circuit, found the plain meaning of the pooling provision allowed the lessee to pool the lease and that operations anywhere in the unit were deemed to be operations on plaintiff's property. Braden reaffirms the Fleming

C. *Administrative Developments*

The WVDEP issued General Permit G70-B on November 2, 2015, in an effort to prevent and control regulated air pollutants from eligible natural gas facilities located at well sites. The terms of General Permit G70-B are applicable to all facilities engaged in natural gas production activities.

Pursuant to the Aboveground Storage Tank Act, as amended in 2015, the WVDEP is required to promulgate rules and regulations governing aboveground storage tanks.

XIV. WYOMING

A. *Legislative Developments*

During its 2015 General Session, the Wyoming legislature passed a bill indemnifying surface landowners from lawsuits arising from ***oil*** and gas pipeline spills and contamination.

The legislature also addressed enhanced ***oil*** recovery (EOR) and the geologic sequestration of carbon dioxide (CO<2>). Under the new law, an EOR operator may apply to the Wyoming ***Oil*** and Gas Conservation Commission (WOGCC) for an order recognizing and certifying that the operator's EOR activities result in sequestration of CO<2>.

Two state tax measures important to the ***oil*** and gas industry also passed the legislature in 2015. First, the legislature expanded and clarified the definition of "well site" for sales tax purposes. Under existing Wyoming law, equipment used within a well site is exempt from sales tax. Effective July 1, 2015, the legislature changed the definition of well site from the area within 250 feet of the wellbore, to a detailed definition based on specific production equipment, including wellheads, valves, dehydrators and flares.

Second, the legislature created a task force charged with studying and recommending improvements to Wyoming's mineral tax system. The task force is made up of four legislative members and six members appointed by Wyoming's governor. The task force's work may result in future severance and ad valorem/gross products tax legislation.

B. *Judicial Developments*

*Pennaco Energy, Inc. v. KD Company LLC* addressed assignments of surface use agreements (SUAs).

The district court granted summary judgment to the landowners. The district court determined Pennaco remained liable under the SUAs under Wyoming contract law, even after the assignments.

The Wyoming Supreme Court affirmed. It determined the SUAs created a contractual relationship between Pennaco and the landowners, not a relationship based on privity of estate.

*Ultra Resources, Inc. v. Hartman* was the Wyoming Supreme Court's second opinion in a complicated dispute between these owners.

Shortly after the payment, the plaintiffs claimed the defendants failed to provide a proper accounting under the net profits contract. The plaintiffs filed a motion to enforce judgment with the district court. The defendants claimed the plaintiffs' claim should have been a new action, as opposed to a motion to enforce the prior order, but the district court determined it had jurisdiction over the matter, agreed with the plaintiffs' accounting claims, and required defendants to pay plaintiffs' attorney fees.

The defendants appealed. The court determined the district court had jurisdiction over the matter through the plaintiffs' motion to enforce the earlier judgment.

In *Basic Energy Services, L.P. v. Petroleum Resource Management Corp.*,

C. *Administrative Developments*

On April 14, 2015, the WOGCC commenced a formal rulemaking case to revise its ***oil*** and gas well setback requirements. The new rules require that wells and production facilities must be located no closer than five hundred feet from an existing occupied structure. The rules also require operators to give notice to owners of occupied structures for any wells or production facilities to be located within one thousand feet. The WOGCC's chief administrator may approve variances or exceptions from the new requirements. The rules define an "occupied structure" as "a building that was specifically constructed and approved for human occupancy such as a residence, school, office, or other place of work, or hospital." Excluded from the definition are "outbuildings such as, but not limited to sheds, barns or garages." The 500-foot setback requirement is measured from the center of the wellhead, the nearest edge, corner or perimeter of the production facility, and the closest exterior wall of the occupied structure.

The WOGCC started two new rulemaking cases in 2015. On September 24, 2015, the Commission proposed revisions to its bonding and fee requirements associated with applications for permits to drill (APDs). The proposed revisions streamline the current bonding and fee rules, and set a minimum blanket bond of between $ 75,000 to $ 150,000. Along with various other requirements, the new rules would define those "idle wells" that require bonding, increase the time required to give notice to the WOGCC of well transfers between companies, and clarify the bond forfeiture process.

Rocky Mountain Mineral Law Foundation Journal

Copyright © 2024 Rocky Mountain Mineral Law Foundation.

All Rights Reserved.

**End of Document**

1. 1The 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 Nicholas Ostrovsky of Guess & Rudd P.C., Anchorage & Fairbanks, 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 and Barry C. Bartel of Holland & Hart LLP, Denver, CO; David E. Pierce, Professor, Washburn Univ. School of Law, Topeka, KS; April L. Rolen-Ogden and Brittan J. Bush of Liskow & Lewis, Lafayette, LA; Alex Ritchie, Professor, Univ. of New Mexico School of Law, Albuquerque, NM; Michael Schoepf of Fredrikson & Byron, P.A., Bismarck, ND; Gregory D. Russell, Ilya Batikov and Timothy J. Cole 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); Kevin C. Abbott, Nicolle R. Snyder Bagnell, Thomas J. Galligan and Jennifer M. Cully of Reed Smith LLP, Pittsburgh, PA; Jolisa Dobbs, Gaye White and Arthur Wright of Thompson & Knight LLP, Dallas and Austin, TX; Rodney W. Stieger, Kelley M. Goes and Dale H. Harrison of Jackson Kelly PLLC, Charleston, WV; and Walter F. Eggers, III and Sami Falzone of Holland & Hart LLP, Cheyenne, WY. [↑](#footnote-ref-2)