# **Legal Developments in 2016 Affecting the Oil and Gas Exploration and Production Industry**

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**Text**

As a preliminary caveat, 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 approved H.B. 247, which, among other things, phased out and capped certain ***oil*** and gas exploration tax credits and increased the interest rates charged on delinquent or assessed production taxes for the first three years that the tax is delinquent. The majority of the phase-outs and caps took effect on January 1, 2017. Gov. Bill Walker signed the bill into law but vetoed the $ 430 million appropriation for the payment of tax credits from the FY 2017 budget.

*B. Judicial Developments*

In *Chevron U.S.A. Inc. v. Dep't of Revenue*, ***oil*** producers challenged an Alaska Department of Revenue (Revenue) decision to treat separate ***oil*** and gas fields operated by common working interest owners as a single entity when calculating the ***oil*** production tax obligations because they were "economically interdependent ***oil*** or gas production operations" under former Alaska Statute § 43.55.013. The producers asserted that, by interpreting a statutory phrase "economically interdependent" in the decision, DOR effectively promulgated a regulation without following the procedures established in the Alaska Administrative Procedure Act and, as a result, DOR's decision was invalid. In upholding the superior court, the Alaska Supreme Court held that DOR's decision was not a regulation but instead was a "common sense" interpretation of the statute, and thus, not a regulation.  [[1]](#footnote-2)2

In *Alaska* ***Oil*** *& Gas Ass'n v. Pritzker*, the United States Court of Appeals for the Ninth Circuit reversed a district court's ruling that the National Marine Fisheries Service (NMFS) use of long-term climate projections as a basis for protecting bearded seals in Alaska was arbitrary and capricious. In reinstating the NMFS decision, the Ninth Circuit held that the Endangered Species Act (ESA) does not require NMFS to base its decision on ironclad evidence when it determines that a species is likely to become endangered in the foreseeable future; it simply requires the agency to consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination. Thus, "NMFS did not act arbitrarily or capriciously in concluding that the effects of global climate change on sea ice would endanger the [bearded seal population] in the foreseeable future."  [[2]](#footnote-3)3

In *City of Kenai v. Cook Inlet Nat. Gas Storage Alaska, LLC*, Cook Inlet Natural Gas Storage Alaska, LLC (CINGSA) had leases with the holders of the mineral rights, which allowed it to use a mile-deep porous formation as a reservoir for storing injected natural gas. The City of Kenai, which owns a significant part of the surface estate above the reservoir, claimed an ownership interest in the storage rights and brought suit against CINGSA, seeking compensation. The superior court granted summary judgment in favor of CINGSA. In upholding the superior court, the Alaska Supreme Court held that under a plain reading of the state reservation statute, Alaska Statute § 38.05.125, the pore space and attendant storage rights were reserved to the State of Alaska, and therefore, the holders of the leasehold interest in the mineral estate own the storage rights.  [[3]](#footnote-4)4

In *City of Valdez v. State*, three municipalities challenged an Alaska Revenue regulation that all appeals of ***oil*** and gas property tax valuation must be heard by the State Assessment Review Board (SARB), while appeals of ***oil*** and gas property taxability must be heard by Revenue. The municipalities argued that Alaska Statutes § 43.56.120 and § 43.56.130 grant SARB exclusive jurisdiction over all appeals from Revenue's "assessments" of ***oil*** and gas property. The superior court upheld the regulation as valid. In reversing the superior court, the Alaska Supreme Court held that the regulation is inconsistent with the plain text, legislative history, and purpose of the statute, and thus, the regulation was invalid and falls outside of Revenue's statutory authority.  [[4]](#footnote-5)5

In *Alaska* ***Oil*** *& Gas Ass'n v. Nat'l Marine Fisheries Serv.*, the Alaska ***Oil*** and Gas Association (AOGA) challenged the NMFS and National Oceanic and Atmospheric Administration decision listing the Arctic subspecies of ringed seal as threatened under the ESA. AOGA argued that it was unreasonable for NMFS to list the Arctic ringed seals as a "threatened species," while the population is strong and healthy, based on projected decreases in sea ice and snow cover in the arctic 80 to 100 years in the future. In vacating the listing, the court held that the listing was arbitrary and capricious because of the lack of any articulated discernable, quantified threat of extinction within the reasonably foreseeable future and the express finding by NMFS that the listing was not necessary for the conservation of the seal at this time, and that it was unlikely that it would provide appreciable conservation benefits.  [[5]](#footnote-6)6

In *Alaska* ***Oil*** *& Gas Ass'n v. Jewell*, the Ninth Circuit reversed a district court order vacating a United States Fish & Wildlife Service (FWS) designation of critical habitat in Alaska for the endangered polar bear. In reversing the district court, the Ninth Circuit held that FWS's designation of polar bear habitat was not arbitrary, capricious or otherwise in contravention of applicable law--even in areas where polar bears were not actually present--because FWS drew rational conclusions from the best available scientific data.  [[6]](#footnote-7)7

In *Alaska Crude Corp. v. State, Dep't of Natural Resources*, [[7]](#footnote-8)8 the court decided a long and complex administrative appeal, holding that the DNR materially breached an ***oil*** and gas lease when it terminated the lease and unilaterally imposed conditions upon its extension that were not provided for in the lease and that were not possible for the lessee to comply with, because of an order prohibiting production issued by the Alaska ***Oil*** and Gas Conservation Commission. The court construed Alaska ***oil*** and gas leases as contracts to be interpreted by the courts, and not by DNR, and held that a material breach by DNR excused further performance by the lessee. The court also held that DNR's decisions were not entitled to deference, but even if they were, those actions lacked a "reasonable basis." At the time this report was submitted for publication, the parties were in the process of proceeding toward an appeal.

*C. Administrative Developments*

Citing authority under section 12(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. 1341(a) (OCSLA), President Obama issued a Presidential Memorandum withdrawing 125 million acres of the Arctic Ocean and its estimated 27 billion barrels of ***oil*** from disposition by leasing, effective for an indefinite period. The withdrawal does not affect rights under existing leases in the withdrawn area and excludes a nearshore area of the Beaufort Sea, which is adjacent to existing state ***oil*** and gas activity and infrastructure.

Also citing authority under section 12(a) of the OCSLA, President Obama signed an Executive Order creating the Northern Bering Sea Climate Resilience Area and withdrawing 112,300 square miles in Norton Sound and near St. Lawrence Island from future ***oil*** and gas leasing. The withdrawal does not affect rights under existing leases in the withdrawn area and is effective for a period without specific expiration.

II. ARKANSAS

*A. Judicial Developments*

In *Union Pacific Railroad Co. v. Tyus*,  [[8]](#footnote-9)9 the court dealt with issues of adverse possession, as well as the standard of proof required to establish a missing deed. The tract in question was originally patented to the railroad predecessor of Union Pacific. It later came into possession of the Tyus family. Tyus family members have lived there since at least 1941. However, no deed out of the original patentee could be found. Recent natural gas production triggered this dispute over the tract's mineral ownership. Union Pacific claimed mineral ownership via a reservation in a lost deed. Indeed, it produced a document purporting to be an unexecuted file copy of such a deed, containing a reservation of all minerals, but offered no proof that the original of that document was ever executed. The trial court, affirmed by the Arkansas Court of Appeals, held that the file copy, standing alone, did not satisfy Arkansas's requirement of clear satisfactory and convincing proof. Thus, the minerals beneath the tract were never effectively severed from the surface, and the Tyus family's adverse possession of the surface caused it to also become owner of the minerals.

Ark. Code Ann. § 15-72-305 requires each working interest owner who sells gas produced from a dry-gas well to remit one-eighth of the *net proceeds* thereof to the well's operator. The operator then distributes the blended one-eighth share to all unit royalty owners, proportionate to their respective net acreage within the unit. Any royalty in excess of one-eighth remains the responsibility of the working interest owner burdened by the excess royalty. In *Whisenhunt Investments, LLC v. ExxonMobil Corp.*,  [[9]](#footnote-10)10 the court, applying Arkansas Law, considered whether the plaintiff, whose lease provided for royalty based upon gross sale proceeds, was entitled to be paid the difference between net and gross proceeds by its lessee. The district court held that the statutory language displaced the plaintiff's inconsistent lease provision, since the force majeure clause of the lease expressly made it subject to state law. Therefore, its payment of one-eighth of net proceeds to the unit operator fully discharged the lessee from any further responsibility for the one-eighth portion of the royalty. This ruling is currently on appeal.

*Roberts and McShane v. Unimin Corp.* [[10]](#footnote-11)11 involved a mining lease but has implications for ***oil*** and gas law as well. The lease in question had both primary and secondary terms. The secondary term was for as long thereafter as mining and/or mining operations are prosecuted. Relying upon a single Alabama decision, [[11]](#footnote-12)12 the plaintiffs contended that this language created an indefinite term that was thus terminable at will. The United States district court determined that the issue had never been directly decided by the Arkansas Supreme Court and thus attempted to certify the question to that court. Then, the Arkansas court declined to accept the certification request. The federal court predicted that Arkansas would follow the majority rule that the words "so long thereafter" validly created a terminable fee mineral interest in the lessee.

*B. Administrative Developments*

As is its practice, the Arkansas ***Oil*** and Gas Commission made certain revisions to several of its regulations during 2016. Since these regulations are constantly in revision, those interested are advised to regularly check these regulations, online at http://www.aogc.state.ar.us.

III. CALIFORNIA

*A. Legislative Developments*

In response to high profile events, such as the October 2015 leak from a gas injection and withdrawal well in the Aliso Canyon storage facility operated by Southern California Gas Company in Los Angeles County, the California Legislature continued to focus in 2016 on expanding the State's regulation of ***oil*** and gas exploration, production, storage and transportation operations. Following the Governor's Proclamation of a State of Emergency on January 6, 2016,  [[12]](#footnote-13)13 the Legislature passed a trio of bills to address the Aliso Canyon gas leak. Senate Bill 380,  [[13]](#footnote-14)14 enacted as emergency legislation in May 2016, required the State ***Oil*** and Gas Supervisor to immediately institute a moratorium on injection of natural gas into any wells in the storage facility until specified conditions were met and a comprehensive safety review of all of the wells was completed. The bill also required the California Public Utilities Commission to open a proceeding to determine the feasibility of minimizing or eliminating use of the Aliso Canyon storage facility while still maintaining energy and electric reliability for the region.

Senate Bill 887  [[14]](#footnote-15)15 requires the Division of ***Oil***, Gas and Geothermal Resources within the California Department of Conservation (DOGGR) to inspect all storage wells serving, or located in, a natural gas storage facility commencing January 1, 2018, and annually thereafter. The bill requires DOGGR to perform unannounced random onsite inspections of some gas storage wells annually.  [[15]](#footnote-16)16 The bill extended DOGGR's emergency regulations for underground gas storage projects until January 1, 2019, and directed DOGGR to adopt final regulations establishing standards for the design, construction, and maintenance of all gas storage wells. The bill also added Public Resources Code § 3180, requiring operators of all gas storage wells to commence a mechanical integrity testing regime before January 1, 2018.  [[16]](#footnote-17)17

Senate Bill 888  [[17]](#footnote-18)18 designated the California Office of Emergency Services (Cal OES) as the lead agency for emergency response to a leak of natural gas from a natural gas storage facility and requires Cal OES to coordinate among other state and local agencies emergency response, public health and environmental assessment, monitoring, and long-term management and control of the leak.  [[18]](#footnote-19)19 The bill also created the Gas Storage Facility Leak Mitigation Account into which any penalties assessed as a result of a gas storage facility leak will be deposited. The bill requires that those funds be expended to achieve a reduction in greenhouse gases that will fully offset the impact on the climate from those gases emitted by a leak.  [[19]](#footnote-20)20

California has approximately 20,000 idle ***oil*** and gas wells that have been idle for over five years and that number continues to increase annually. Fifty percent of those wells have been idle for more than 10 years, and nearly 25% have been idle for 25 years or more.  [[20]](#footnote-21)21 To address this issue, DOGGR asked the Legislature to pass Assembly Bill 2729,  [[21]](#footnote-22)22 which increased idle ***oil*** and gas well fees and indemnity bonds to provide a disincentive for operators to maintain large numbers of idle wells. The bill increased the bond amounts for operators of idle wells. Commencing January 1, 2018, the option for an operator to provide an escrow account and indemnity bond to the Supervisor instead of paying annual fees will no longer be available. The bill changed the definition of "idle well" in Public Resources Code § 3308(d)  [[22]](#footnote-23)23 to include any well not producing ***oil*** or natural gas or being used for injection for six consecutive months. DOGGR was directed to review and update its idle well regulations pertaining to idle wells by June 1, 2018, to include idle well testing requirements.  [[23]](#footnote-24)24 One particularly significant change affecting mineral owners was the addition of Public Resources Code § 3016, which provides that an abandoned well becomes the property of the *mineral interest owner* when the operator loses the right to remove the personal property under common law or under the lease. In that case, the mineral interest owner can be held jointly liable for the well under the conditions specified in Public Resources Code § 3237. Another significant change set forth in AB 2729  [[24]](#footnote-25)25 was the amendment of statutory requirements for well abandonment in Public Resources Code § 3016 to include the decommissioning of production facilities of the well.

DOGGR sponsored Assembly Bill 2756, [[25]](#footnote-26)26 which substantially revised the civil penalty structure for violations and procedures for appeals of DOGGR orders. Public Resources Code § 3236.5 now sets forth factors to be considered in imposing a penalty, including any economic benefit to the violator, and establishes both "major" and "minor" violations. [[26]](#footnote-27)27 Since the Division had no established general formal policy for the handling of proprietary information, the bill also requires the Division to keep certain confidential material from public release.

*B. Judicial Developments*

In an unreported decision in *Los Padres ForestWatch v. United States Bureau of Land Management*, [[27]](#footnote-28)28 the district court held that the BLM failed to fully consider the potential environmental impact of hydraulic fracturing in its resource management plan for the planning area of 17 million acres of onshore federal lands in the counties of Kings, San Luis Obispo, Santa Barbara, Tulare, Ventura, Madera, eastern Fresno, and western ***Kern***.

*C. Administrative Developments*

DOGGR responded to the Aliso Canyon leak by the adoption of emergency regulations in February 2017.  [[28]](#footnote-29)29 The Governor's January 6, 2016 emergency proclamation directed DOGGR to promulgate emergency regulations imposing safety and reliability standards for all underground gas storage facilities in California. Those regulations require (i) at least a daily inspection of gas storage well heads, using gas leak detection technology such as infrared imaging; (ii) ongoing verification of the mechanical integrity of all gas storage wells; (iii) measurement of annular gas pressure or annular gas flow within wells; (iv) regular testing of all safety valves used in wells; (v) establishing a comprehensive risk management plan; and (vi) establishing minimum and maximum pressure limits for each gas storage facility in the state. DOGGR has circulated draft permanent regulations  [[29]](#footnote-30)30 that will replace the emergency regulations and is conducting public workshops on those regulations.  [[30]](#footnote-31)31

On November 15, 2016, DOGGR, in consultation with the State Water Resources Control Board, gave public notice that it intended to advise the United States Environmental Protection Agency that ten aquifers used for the injection and disposal of fluids associated with ***oil*** and gas production and historically treated as exempt did not meet the federal regulatory criteria for exemption from the federal Safe Drinking Water Act and that it intended to request an amendment to its Memoranda of Agreement with the United States Environmental Protection Agency (USEPA) for the purpose of clarifying that these aquifers are not exempt.  [[31]](#footnote-32)32

The Office of Spill Prevention and Response adopted emergency regulations for inland facilities, including ***oil*** pipelines, which were approved by the Office of Administrative Law on September 3, 2015.  [[32]](#footnote-33)33 These temporary regulations were readopted on September 1, 2016 for another 12 months.  [[33]](#footnote-34)34 OSPR intends to finalize the emergency regulations through the formal rulemaking process.

The U.S. Department of the Interior's Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE) prepared a final programmatic environmental assessment (PEA)  [[34]](#footnote-35)35 to evaluate the potential environmental impacts of the proposed approval of the use of selected well stimulation treatments on the 43 current leases and 23 platforms currently in operation on the Southern California Outer-Continental Shelf Planning Area.  [[35]](#footnote-36)36 The PEA  [[36]](#footnote-37)37 concluded that offshore hydraulic fracturing and acidizing from the California offshore ***oil*** platforms would have no environmental impact. The assessment also concluded that wastewater discharges from proposed well stimulation activities would not have a significant impact on the environment and that the possibility of accidental releases of well stimulation fluids was small. The California Attorney General, the California Coastal Commission and two environmental groups have filed suit challenging the BOEM and BSEE action.  [[37]](#footnote-38)38

IV. COLORADO

*A. Legislative Developments*

Although several pieces of legislation dealing with local control of the ***oil*** and gas industry were introduced, the Colorado legislature did not pass any legislation directly relating to the ***oil*** and gas industry during the 2016 legislative session.

*B. Judicial Developments*

As reported in the 2015 report, the Colorado Supreme Court accepted certiorari in cases stemming back to 2012 and 2013 local controls of hydraulic fracturing 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."  [[38]](#footnote-39)39 In May the Colorado Supreme Court affirmed the Court of Appeals in both cases, concluding that, because fracking is a matter of mixed state and local concern, local control is subject to preemption by state law.  [[39]](#footnote-40)40 Because the five-year moratorium in Ft. Collins and the Longmont ban of both fracking and the storage and disposal of fracking waste operationally conflict with state law, the Court affirmed the district court's order in each case and held that the local control in each case is "invalid and unenforceable."  [[40]](#footnote-41)41

In *Grant Bros. Ranch, LLC v. Antero Res. Piceance Corp.*,  [[41]](#footnote-42)42 the court affirmed dismissal of a claim for proceeds from production and sale of ***oil*** and gas for failure to exhaust administrative remedies provided under the ***Oil*** and Gas Conservation Act. Antero received approval from the Colorado ***Oil*** and Gas Conservation Commission (COGCC) to establish two drilling and spacing units to produce ***oil*** and gas in Garfield County, including the forced pooling of all nonconsenting interests in the units over the objection of plaintiffs Grant Brothers. Three years after the last pooling order was issued, and after its request to audit the books of Antero was refused, Grant Brothers sued Antero in district court, seeking an equitable accounting and alleging that the wells had reached payout so the nonconsenting owners were entitled to a share of the proceeds. The court concluded that, because Grant Brothers' interests were forcibly pooled and no dispute over interpretation of a contract was involved, the legislature intended that a proceeding before the COGCC would be the primary remedy for the claims at issue. The court explained that this allows the COGCC to exercise its expertise and would develop an administrative record in the event that judicial review is then sought.

*BP Am. Prod. Co. v. Colorado Dep't of Revenue*  [[42]](#footnote-43)43 involved deductions from revenue in valuing ***oil*** and gas resources for purposes of calculating state severance tax. Colorado's severance tax statute permits taxpayers to deduct "any transportation, manufacturing, and processing costs" from revenue C.R.S. § 39-29-102(3)(a). BP sought to deduct the amount of money it could have earned had it invested in other ventures as the cost of the capital invested to generate the revenue being taxed. The Department of Revenue did not allow the deduction because cost of capital is not an actual cost but a "benefit forgone." Reversing the Court of Appeals, the Supreme Court held that the cost of capital is a deductible cost under the broad language of the statute and remanded with instructions to return the case to the district court.

In *Lindauer v. Williams Prod. RMT Co.*,  [[43]](#footnote-44)44 the court considered whether costs incurred to transport natural gas to markets beyond the first commercial market must enhance the value of that gas and increase actual royalty revenue to be deductible from royalty payments. The court analyzed its precedent involving the implied covenant to market, and specifically what it referred to as the "enhancement test," allowing deduction of costs that enhance the value of gas that is already a marketable product. The court concluded that the enhancement test did not apply to transportation costs so that transportation costs beyond the first commercial market need not enhance the value of the gas to be deductible from royalty payments.

*Youngquist Bros.* ***Oil*** *& Gas, Inc. v. Indus. Claim Appeals Office of the State of Colorado* [[44]](#footnote-45)45 involved a company with no business operations in Colorado that hired employees from Colorado to work on ***oil*** rigs in North Dakota. A worker from Grand Junction was hired after submitting an online application and participating in a telephonic interview. Within six months of flying to North Dakota, the worker was injured, and subsequently applied for and was awarded workers' compensation benefits in Colorado. The Court of Appeals affirmed, finding that Colorado had jurisdiction because the worker was hired in Colorado. The Supreme Court granted certiorari on the reframed question: Whether the court of appeals erred in concluding that Colorado has jurisdiction to award benefits for out-of-state work-related injuries and impose a statutory penalty on the employer under the Workers' Compensation Act, section 8-41-204, C.R.S. (2015), when the employer is not a citizen of Colorado, has no offices or operations in Colorado, but hired a Colorado citizen within the state. [[45]](#footnote-46)46

*C. Administrative Developments*

Although the Colorado ***Oil*** and Gas Conservation Commission published guidance on a number of rules, including guidance on Floodplain Rule 603 reported on in last year's report, there were no significant rules adopted during 2016.

V. KANSAS

*A. Legislative Developments*

Kansas Statutes Annotated § 79-331, regarding valuation of producing ***oil*** and gas leases for *ad valorem* taxation, was amended to establish specific time frames production information can be used to value a newly completed well. [[46]](#footnote-47)47

*B. Judicial Developments*

The most significant 2016 development in Kansas ***oil*** and gas law is a limestone mining case, *Armstrong v. Bromley Quarry & Asphalt, Inc.*,  [[47]](#footnote-48)48 addressing subsurface trespass issues equally applicable to ***oil*** and gas. The Kansas Supreme Court held that Quarry failed to carry its burden of proving that its subsurface mining of limestone from under Armstrong's land was done by accident in both subjective and objective good faith. Therefore, Quarry was liable for the value of the extracted limestone without reduction for Quarry's extraction costs. This would increase Armstrong's damages ten-fold. The Court also held there was a material issue of fact when Quarry's illegal mining would have been "reasonably ascertainable" so as to trigger the discovery provisions of the Kansas statute of limitations for trespass and conversion. The Court suggested that because Quarry, from 1992 through 2010, had filed false maps with the state indicating it had not mined under Armstrong's land, the trespass did not become reasonably ascertainable until 2011 when an accurate map was filed showing the encroachment into Armstrong's land. Armstrong filed suit in 2011.

The importance of language in a divorce decree regarding title is highlighted by the Kansas Supreme Court's holding in *Einsel v. Einsel*.  [[48]](#footnote-49)49 In a 1993 journal entry of divorce the husband was given the option to pay a specified sum to the wife to exclude her from any rights in a remainder interest the husband had obtained during the marriage. If he failed to exercise the option, then the wife was given 40% "of the remainder interest of the inheritance received by [husband] during the marriage . . . ."  [[49]](#footnote-50)50 The husband did not exercise the option and the remainder interest was ignored until 2008 when the life tenant died and the owners of the remainder interest obtained their fee possessory interests. ***Oil*** and gas development in the area had increased land values. In a 2010 partition action by the wife the district court ordered the husband to make a cash payment to the wife reflecting the husband's 40% interest. The Supreme Court reversed the district court holding the journal entry clearly established the wife's entitlement to 40% of the husband's remainder interest.

In *Nickelson v. Bell*,  [[50]](#footnote-51)51 the Court of Appeals held a person can file a statement of claim to preserve an unused mineral interest even though his or her ownership claim arises from the alleged but unestablished status as an heir. The Court concluded that to be an "owner" under the Kansas Mineral Lapse Act the interest need not be shown of record in the owner's name. "[A]n owner of an unused mineral interest, as the term is used in K.S.A. 55-1604, is simply one who has acquired the right to possess, use, and control the subject mineral interests."  [[51]](#footnote-52)52

A significant but unreported case is the Court of Appeals opinion in *Jenkins v. Chicago Pacific Corporation*. [[52]](#footnote-53)53 The Court does an expert job of sorting through the Kansas cases that limit railroad ownership of strips of land acquired for right-of-way purposes to easements as opposed to fee interests. The court properly applies the Kansas Supreme Court's analysis in *Abercrombie v. Simmons*. [[53]](#footnote-54)54 This is important because the Federal Circuit Court of Appeals, in *Biery v. United States*, [[54]](#footnote-55)55 failed to apply the teaching of *Abercrombie* and in the process took, without compensation, the fee ownership in lands owned by Kansas farmers.

*C. Administrative Developments*

Kansas has experienced a significant increase in seismic activity that has been associated with the disposal of produced saltwater in conjunction with ***oil*** and gas development. Rex Buchanan, interim director of the Kansas Geological Survey, in his January 20, 2016 testimony before the Kansas House Standing Committee on Energy and Environment, addressed the potential source of increased earthquake activity in Kansas stating: "[T]he issue appears to be one of disposal of large volumes of saltwater that has activated critically stressed faults in the deep subsurface." The Kansas Corporation Commission responded to the situation by issuing a series of orders reducing injection rates for saltwater disposal wells in the areas where increased seismic activity has been recorded.  [[55]](#footnote-56)56

The Kansas Corporation Commission, responding to complaints by landowners raised during a proceeding to interpret Commission spacing rules as to a particular operator, created a new 165-foot surface-use setback limitation from "any currently-existing residence or building" that applied to "any well or installing any associated facilities (including but not limited to lease roads, tank batteries, or lead lines) . . . ."  [[56]](#footnote-57)57 The practical effect of these limitations was to, in some cases, prevent further development of the leased lands. The operator sought judicial review and the Commission's order was reversed and remanded because there was no evidence in the administrative record to support the order.  [[57]](#footnote-58)58

On November 30, 2016 the Kansas Corporation Commission convened a proceeding to discuss draft regulations being considered by Commission staff interpreting K.S.A. § 55-179 governing liability for unplugged abandoned wells.  [[58]](#footnote-59)59 It has been disputed for over 20 years whether the Commission has the authority to hold anyone who takes a new lease on lands liable for unplugged abandoned wells that may be found on the leased lands. The perennial issue has been whether the Commission must establish some level of culpability before holding a lessee, having no association with the well, or those who drilled or abandoned the well, liable for its plugging.

VI. LOUISIANA

*A. Legislative Developments*

Louisiana's risk-fee statute governs the relationship between a compulsory unit operator and various types of owners within the geographical boundaries of that unit. [[59]](#footnote-60)60 Among other things, this statute allows an operator to notify, and under certain circumstances, impose a risk fee on unit owners. Effective June 13, 2016, the Louisiana Risk-Fee Statute was amended by Act No. 524 to address a number of previously undefined issues. [[60]](#footnote-61)61 The amendment removed language that required an operator of the unit well to send the risk-fee notice to all unit owners "prior to the actual spudding" of the well. [[61]](#footnote-62)62 Correspondingly, with the removal of this language, La. R.S. 30:10 now provides that payment of the authorization for expenditure sent with the risk-fee notice is timely if received by the operator within sixty (60) days of the actual spudding of the well or receipt by the notified owner of the notice, whichever is later. [[62]](#footnote-63)63 Likewise, the amendment has eliminated the sixty (60) day temporal limitation when sending risk-fee notices after a unit is created around a well drilled or drilling or when a unit order is revised. [[63]](#footnote-64)64 Finally, the amendment to La. R.S. 30:10 expressly addresses the consequences of failing to send a riskfee notice to all owners in a unit. Under prior law, there was uncertainty on what impact that failure may have on other units who were properly notified. This amendment clarifies that the failure to notify all owners in a unit will not affect those notices that were sent in accordance with the statute. [[64]](#footnote-65)65 While obviously there remain additional undefined issues, this amendment gives precision as to certain issues that were unresolved under prior law.

*B. Judicial Developments*

Louisiana is one of a number of states that has dealt with local government's resistance to ***oil*** and gas operations in the community. In *St. Tammany Parish Gov't v. Welsh*, the court was faced with a local zoning ordinance enacted by St. Tammany Parish Government. That local ordinance conflicted with the State's issuance of a permit to drill a unit well in a drilling and production unit via its primary administrative head, the Commissioner of Conservation.  [[65]](#footnote-66)66 In analyzing this conflict, the court looked to the express language of La. R.S. 30:28(F), which is the statute in which the legislature bestowed the power to issue drilling permits upon the Commissioner of Conservation. In so doing, the court found that the local ordinance was expressly preempted to the extent it affected the State's regulation of ***oil*** and gas operations.  [[66]](#footnote-67)67 Furthermore, the court opined that the local ordinance was impliedly preempted due to (1) the pervasiveness of the state's statutory scheme affecting ***oil*** and gas operations, (2) the need for uniformity throughout the state on matters of such nature, and (3) the danger of conflict between local laws and the administration of the state's program.  [[67]](#footnote-68)68

Pursuant to Louisiana Civil Code article 2679, the term of a lease may not exceed ninety-nine years. In *Regions Bank v. Questar Exploration & Production Corp.*, the court examined whether this rule of Louisiana lease law applied to mineral leases that were maintained by production in paying quantities beyond a period of ninety-nine years.  [[68]](#footnote-69)69 As an initial matter, the court noted that Mineral Code article 2 provides that when a conflict exists between other laws and the Mineral Code, the specific provisions of the Mineral Code will prevail.  [[69]](#footnote-70)70 The court then looked to the Mineral Code's provision that controls the duration of a mineral lease.  [[70]](#footnote-71)71 Mineral Code article 115(A) states that a lease cannot be maintained for a period in excess of ten years in the absence of drilling or mining operations or production.  [[71]](#footnote-72)72 After juxtaposing the Mineral Code and Louisiana Civil Code articles, the court found a conflict did, in fact, exist between the articles. Accordingly, the ninety-nine year limitation on leases in the Louisiana Civil Code did not apply to a mineral lease that complied with Mineral Code article 115(A).  [[72]](#footnote-73)73

In *Guy v. Empress, L.L.C.*, the court was faced with the issue of whether a lease was divided as a result of an assignment of a geologic cross section of the lease.  [[73]](#footnote-74)74 The lease at issue provided that

[i]f Lessor or assignee of part or parts hereof shall fail to comply with any other provisions of the lease, such default shall not affect this lease insofar as it covers a part of said lands upon which Lessee or any assignee shall comply with the provisions of the lease.  [[74]](#footnote-75)75

The original lessee in *Guy* executed an assignment that conveyed "all right title and interest" in the lease, excepting a shallow geologic formation underlying the lease surface acreage.  [[75]](#footnote-76)76 Reaffirming its prior stance on this issue, the court cited *Hoover Tree Farm L.L.C. v. Goodrich Petroleum Co.*,  [[76]](#footnote-77)77 where the transaction was classified as an "assignment of an undivided interest in an incorporeal immovable," and found that the instant assignment of deep rights did not divide the lease.  [[77]](#footnote-78)78

In *TDX Energy, LLC v. Chesapeake Operating, Inc.*, a number of disputes arose between an operator and a non-operating working-interest owner included in a drilling and production unit established by the Commissioner of Conservation.  [[78]](#footnote-79)79 On one hand, the non-operating working-interest owner claimed that the operator was required to send reports to the non-operating working-interest owner pursuant to La. R.S. 103.1.  [[79]](#footnote-80)80 On the other hand, the operator claimed that pursuant to La. R.S. 30:10, it had a right to recover a risk fee out of the non-operating working-interest owner's share of production from the unit well even though the risk-fee notice was sent after the unit well was completed.  [[80]](#footnote-81)81 The court resolved both disputes in an exercise of statutory interpretation. As to the nonoperating working-interest owner's claim, the court looked at the language of La. R.S. 103.2, which provides a remedy to those "owners of unleased ***oil*** and gas interests."  [[81]](#footnote-82)82 On its face, the statute was deemed to clearly and unambiguously refer only to those mineral interests that were unleased, not mineral interests that were unleased *by the operator*.  [[82]](#footnote-83)83 Had the legislature intended the phrase to encompass such a broad meaning, it could have stated as much in the statute.  [[83]](#footnote-84)84

Next, the court in *TDX Energy* rendered an opinion on the operator's claim that it was entitled to recover a risk fee out of the non-operating working-interest owner's share of production when the risk-fee notice was sent after completion of the unit well.  [[84]](#footnote-85)85 Importantly, the unit well was completed prior to the recordation of the non-operating working-interest owner's leases.  [[85]](#footnote-86)86 The operator claimed that it was entitled to recover the risk fee because it sent a risk-fee notice within thirty days of being notified that the non-operating working-interest owner held a lease in the unit.  [[86]](#footnote-87)87 Conversely, the non-operating working-interest owner argued that La. R.S. 30:10 mandates that the notice must be sent prior to completion of the well.  [[87]](#footnote-88)88 The court agreed with the non-operating working-interest owner, finding that the plain language of the statute only contemplated transmission of the risk-fee notice prior to the completion of the unit well.  [[88]](#footnote-89)89 Incidentally, as discussed above, this issue has now been reversed by the 2016 amendment to Louisiana's risk-fee statute.

Following *TDX Energy*, the issue of whether a non-operating working-interest owner had a claim against an operator for failure to comply with La. R.S. 30:103.1 *et seq.* came before the Third Circuit. In *XXI* ***Oil*** *& Gas, LLC v. Hilcorp Energy Co.*, the court reaffirmed its position on a prior exception of no cause of action that La. R.S. 30:103.1 *et seq.* apply in the context of a non-operating working-interest owner and an operator.  [[89]](#footnote-90)90 In addition, the Third Circuit was confronted with the scope of costs included within the forfeiture penalty outlined in La. R.S. 30:103.2.  [[90]](#footnote-91)91 The court looked to the language of the statute that delineates the penalty as a forfeiture of "the costs of the drilling operations of the well."  [[91]](#footnote-92)92 After a comparison to the historical language used in La. R.S. 30:103.1, the current language was deemed to include both drilling and operational costs.  [[92]](#footnote-93)93 Under any other interpretation, the court contended, an operator would have no incentive to provide quarterly reports under the statute.  [[93]](#footnote-94)94 Writs are currently pending before the Louisiana Supreme Court in this matter.

In *AIX Energy, Inc. v. Bennett Properties, LP*, an issue arose as to whether a servitude encompassed within a voluntary drilling and production unit had extinguished.  [[94]](#footnote-95)95 While there was no production from wells within the servitude boundary, there was production from a well included within a nearby voluntary drilling and production unit.  [[95]](#footnote-96)96 However, the owner of the servitude never signed the unit agreement that was filed in the public records.  [[96]](#footnote-97)97 Despite not signing the unit order, the servitude owner executed division orders, received production attributable to the voluntary unit, and signed a tax-related document certifying that he retained an economic interest in the conventional drilling and production unit.  [[97]](#footnote-98)98 The issue presented was whether these acts of subsequent ratification were binding upon third parties when the unit order filed in the public records was not signed by the servitude owner.  [[98]](#footnote-99)99 Relying upon Louisiana Civil Code article 3339, which states that "a tacit acceptance . . . is effective as to a third person although not evidenced in the record," the court found that the unrecorded acts of ratification were binding on the third parties.  [[99]](#footnote-100)100 In addition, the court declared that because the voluntary unit agreement expressly provided for subsequent ratification by owners, a reasonable person or title examiner would be alerted to the possibility that the agreement was effective even in the absence of a recorded signature.  [[100]](#footnote-101)101

In *The Parish of Jefferson v. Atlantic Richfield Co.*,  [[101]](#footnote-102)102 one of many pending coastal zone lawsuits filed in Louisiana, the plaintiffs allege that the historical ***oil*** and gas operations along the Louisiana coast violated the State and Local Coastal Resources Management Act of 1978 (the "SLCRMA"), along with its associated regulations, rules, ordinances and orders. The decision rendered in the Twenty-Fourth Judicial District Court for Jefferson Parish found that the statutory regime contemplated surveillance by the permitting authority and suspension of the permit if a violation occurred. After giving the permittee an opportunity to respond to the findings of the permitting authority, the permitting authority could reinstate, modify, or revoke the permit. Accordingly, judicial relief was only appropriate after a permittee's noncompliance under the aforementioned enforcement regime. In *Atlantic Richfield Co.*, the plaintiffs made no attempt to follow the existing administrative enforcement regime prior to filing suit, and thus, the suit was dismissed on the basis that the plaintiffs failed to exhaust the administrative remedies. In view of an affidavit from the Department of Natural Resources, however, the trial court reversed that decision on a motion for new trial finding it would be too difficult to prosecute the violations administratively. The defendants have a pending writ application.

In *Middleton v. EP Energy E & P Co., L.P.*, a lessee brought suit for cancellation of leases on the basis that a unit well failed to produce in paying quantities for a forty-one month period that pre-dated the suit by approximately twenty years.  [[102]](#footnote-103)103 At the trial court, the plaintiffs succeeded on a motion for summary judgment that the lease terminated at the end of the forty-one month period.  [[103]](#footnote-104)104 On appeal, the defendants claimed that (1) consideration of a time period that was almost twenty years before filing of suit was improper, (2) the time period between the forty-one month period and the filing of suit should be considered, and (3) the evidence reflected that a reasonably prudent operator would have continued production.  [[104]](#footnote-105)105 The first two claims were rejected by the Second Circuit.  [[105]](#footnote-106)106 However, after excising extraordinary, non-recurring expenses from the paying quantities calculation, the court found that the unit well yielded a slight profit over the forty-one month period.  [[106]](#footnote-107)107 Further, the court stated that the determination of whether a reasonably prudent operator would have continued production is inherently a fact-intensive inquiry.  [[107]](#footnote-108)108 Accordingly, an issue of material fact existed and the order granting summary judgment was reversed.  [[108]](#footnote-109)109

*Moore v. Denbury Onshore, LLC*, was an oilfield legacy suit where the plaintiffs claimed ***oil*** and gas operations contaminated their property.  [[109]](#footnote-110)110 Pursuant to Act 312, defendant admitted liability and the matter was referred to the Louisiana Department for Natural Resources, Office of Conservation to determine the most feasible plan to remediate to statutorily-delineated standards.  [[110]](#footnote-111)111 Following the Office of Conservation's adoption of the defendant's most feasible plan, the defendant filed a motion for summary judgment on the grounds that, based upon Act 312 as amended in 2014, its only obligation was to fund the most feasible remediation plan.  [[111]](#footnote-112)112 Plaintiffs opposed, claiming that defendant operated unreasonably and excessively on plaintiffs' property, and even in the absence of an express contractual provision, they were entitled to directly recover remediation damages in addition to the amounts used to fund the most feasible plan.  [[112]](#footnote-113)113 In making an *Erie* guess, the court reviewed the legislative and judicial history of Act 312 and found that the plaintiffs could not directly recover additional damages in the absence of an express contractual provision.  [[113]](#footnote-114)114 However, the court did not go so far as to find that additional damages for unreasonable and excessive operations could not ever be recovered under the amended version of Act 312. Rather, the court found that the statute now required payment of the additional damages into the registry of the court.  [[114]](#footnote-115)115

VII. NEW MEXICO

*A. Judicial Developments*

In *T.H. McElvain* ***Oil*** *& Gas Limited Partnership v. Group I: Benson-Montin-Greer Drilling Corp.*,  [[115]](#footnote-116)116 the successors to the grantors of a warranty deed collaterally challenged a 1948 quiet title action that negated grantors' ***oil*** and gas reservation, which was held in a joint tenancy. After the district court ruled for the successors to the grantees, the Court of Appeals reversed. To the consternation of title lawyers, the court held that the successor to the grantee that brought the 1948 quiet title action failed to exercise diligence and good faith to notify the surviving joint tenant, Mabel Wilson, violating her due process rights by depriving her of her property.  [[116]](#footnote-117)117 The New Mexico Supreme Court disagreed and reversed the Court of Appeals. As indicated on the face of the 1948 district court quiet title decision, that court had a verified complaint and sheriff's return indicated that plaintiffs' predecessors could not be located. Ms. Wilson's address was not in any of the original deeds, she had changed her name and moved to San Diego, and she had not exercised any rights to ownership. Publication in a Farmington, New Mexico newspaper was therefore sufficient. The court stated, "[w]ithout evidence on the face of the quiet title judgment that the district court lacked jurisdiction, that judgment must be accorded finality in accordance with the reliance interests created as a consequence of the quieting of the title in its owner."  [[117]](#footnote-118)118

In *Conception and Rosario Acosta v. Shell Western Exploration and Production, Inc.*,  [[118]](#footnote-119)119 the plaintiff residents brought a toxic tort action against ***oil*** and gas companies alleging that toxic chemicals from crude ***oil*** that was released from an unlined pit caused autoimmune disorders. The trial court and the New Mexico Court of Appeals excluded the plaintiff's expert's causation testimony based on *General Electric Co. v Joiner*,  [[119]](#footnote-120)120 which refines *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,  [[120]](#footnote-121)121 and allows exclusion of expert testimony where there is a large analytical gap between the data and the opinion proffered. The New Mexico Supreme Court reversed, stating that New Mexico has never adopted *Joiner* and places great value on allowing the jury to hear the evidence.  [[121]](#footnote-122)122 Because summary judgment was granted to Shell as a result of the exclusion of evidence, the court remanded for further proceedings.

In 2008, the New Mexico ***Oil*** Conservation Commission adopted a stringent new rule to regulate pits used in ***oil*** and gas production activities (the Pit Rule). Industry appealed the rule and the Court of Appeals stayed the proceedings. While the appeals were stayed, and after a change of administrations, the 2013 Commission adopted a revised version of the Pit Rule acting on a petition from industry associations that relaxed, simplified, and clarified certain requirements. The revised rule was appealed by environmental organizations by writ of certiorari because the ***Oil*** and Gas Act does not provide a statutory right to appeal rulemakings.  [[122]](#footnote-123)123 On appeal in *Earthworks'* ***Oil*** *& Gas Accountability Project v. New Mexico* ***Oil*** *Conservation Commission*,  [[123]](#footnote-124)124 the court held that the pending appeals regarding the 2008 Pit Rule did not prevent the Commission from adopting a new version of the rule. Although an appeal might divest a tribunal of jurisdiction where it is acting in an adjudicatory capacity, the 2013 Pit Rule was the result of a rulemaking, not adjudication. The doctrine of separation of powers prevents the judicial branch from acting to stop a rulemaking before the rule is final, notwithstanding that a prior version of the rule has been appealed. To the extent of any difference between the 2008 Pit Rule and the 2013 Pit Rule, the former rule has been repealed by implication.  [[124]](#footnote-125)125 The court also refused to take judicial notice of the record in the 2008 rulemaking proceeding because administrative appeals are limited to the record before the agency.  [[125]](#footnote-126)126 The fact that the 2013 Pit Rule is different from the 2008 rule does not automatically render the new rule arbitrary and capricious. The Commission had provided adequate reasoning to support the new rule and did not impermissibly apply economic considerations. The ***Oil*** and Gas Act allows the Commission to include economic considerations, and there was no indication that the economic considerations were the primary consideration for the new rule.  [[126]](#footnote-127)127

In *Enduro Operating LLC v. Echo Production, Inc.*,  [[127]](#footnote-128)128 the court refined the test for what it means to "commence operations" under New Mexico law. The court had previously stated in *Johnson v. Yates Petroleum Corp.*  [[128]](#footnote-129)129 that "it appears that any activities in preparation for, or incidental to, drilling a well are sufficient."  [[129]](#footnote-130)130 In *Johnson*, the lessee had staked and surveyed the location, applied for and received a drilling permit, and conducted preliminary site work, including clearing brush and leveling the site. In *Enduro*, the operator had staked and surveyed the site, designed a closed loop system, contracted to build a drill pad, and entered into a drilling contract, but unlike in *Johnson*, had not actually obtained a drilling permit or conducted activity on the site other than staking and surveying. The *Enduro* court adopted the Texas rule that at least some meaningful onsite activity is required,  [[130]](#footnote-131)131 but also muddled the clear test from *Johnson*. After *Enduro*, onsite activities ancillary to actual drilling "can, under some circumstances, amount to commencement, but each case requires an individual analysis of the actions taken by the proposed driller."  [[131]](#footnote-132)132

In *Diné Citizens Against Ruining Our Environment v. Jewell*,  [[132]](#footnote-133)133 the Tenth Circuit Court of Appeals affirmed the denial by the district court of a preliminary injunction sought by the plaintiffs to prevent the drilling of ***oil*** and gas wells in the Mancos Shale formation of the San Juan Basin in New Mexico based on violations of the National Environmental Policy Act. In so doing, the court agreed with the district court that the Supreme Court in *Winter v. Natural Resources Defense Council*  [[133]](#footnote-134)134 impliedly overruled the use of a "sliding scale" test for a preliminary injunction. Under this alternative test, the plaintiff would not be required to show "substantial likelihood" of success on the merits (the normal standard) if the plaintiff could instead show that "questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."  [[134]](#footnote-135)135 In concurrence, Judge Lucero disagreed that *Winter* had overruled the use of the sliding scale test, but the panel unanimously agreed that under any test the plaintiffs had failed to satisfy their burden that the District Court abused its discretion in denying the injunction.

In *Anderson Living Trust v. WPX Energy Production, LLC*,  [[135]](#footnote-136)136 the court denied the plaintiffs' motion to reconsider class certification. Plaintiffs had previously alleged underpayment of royalties based on improper deductions of costs, and class certification had been denied for failure to satisfy the commonality and predominance elements because the court would have been required to examine too many different forms of leases to determine whether the cost deductions were appropriate.  [[136]](#footnote-137)137 In this case, the plaintiffs sought to re-characterize the common question as the failure of the lessee to obtain the highest obtainable price in violation of the implied duty to market, rather than a breach of the marketable condition rule. The court concluded that New Mexico would recognize a claim based on the failure to obtain the highest obtainable price, but that plaintiffs had not properly pled the duty to market claim, and changing its prior denial of class certification would be unfair to the defendants.  [[137]](#footnote-138)138 Note, however, that the court would allow the plaintiffs to file a new motion to consider class certification based on this new claim.  [[138]](#footnote-139)139 In the virtually identical case of *Anderson Living Trust v. ConocoPhillips Co., LLC*,  [[139]](#footnote-140)140 the court allowed the plaintiffs to amend their complaint to add a cause of action under the implied duty to market for failure to secure the best price reasonably available applying the reasonably prudent operator standard. The court was careful, however, to disallow any new claims for violation of the duty to market based on cost deductions.  [[140]](#footnote-141)141

In *Abraham v. WPX Production, LLC*,  [[141]](#footnote-142)142 the plaintiffs in a class action lawsuit alleged that the defendants underpaid royalties by substituting residue gas for more valuable natural gas liquids (NGLs) in calculating royalty payments, and by breaching their contractual royalty obligations, the covenant of good faith and fair dealing, and their implied duty to market. The defendants argued that as overriding royalty owners (as opposed to lessors under an ***oil*** and gas lease), the named plaintiffs did not have standing to sue for breach of the implied covenant to market. The district court disagreed. Although the Supreme Court of New Mexico has not directly addressed standing of overriding royalty owners in implied covenant cases, and in an earlier case implied that implied covenants apply only in the lessor-lessee relationship,  [[142]](#footnote-143)143 in a more recent case, the court allowed named class action lessor royalty owners to represent both royalty owners and overriding royalty owners,  [[143]](#footnote-144)144 implicitly determining that overriding royalty owners may sue for breach of the implied covenant to market.  [[144]](#footnote-145)145

In a separate memorandum opinion and order issued later in the year in the same case, however, the court denied class certification to the plaintiffs.  [[145]](#footnote-146)146 To be certified under Rule 23(b)(3) of the Federal Rules of Civil Procedure, a class must meet all four of Rule 23(a)'s requirements--numerosity, commonality, typicality, and adequacy--and both of rule 23(b)(3)'s requirements--predominance and superiority; and the class must be identifiable. The court concluded that the class was not ascertainable because the plaintiffs defined the class to include only leases that produce gas that has been delivered to certain named processing plants for extraction and marketing of NGLs, but plaintiffs conceded that gas from some of the leases did not flow to those plants or was bypassed around the processing unit.  [[146]](#footnote-147)147 The plaintiffs also failed to satisfy the commonality and predominance requirements. The answer to the common question central to the case, the underpayment of royalties, depended not just on the actual payment practices, which were common, but also on the lessors' entitlement to payment--which varied based on the various different royalty language used in the leases.  [[147]](#footnote-148)148 Further, because the court would spend more time adjudicating individual issues, such as the lessors' entitlement to payment and which wells' gas has been delivered for processing of NGLs, individual issues were found to predominate over common issues.  [[148]](#footnote-149)149

In *Anderson Living Trust v. Energen Resources Corp.*,  [[149]](#footnote-150)150 the court granted summary judgment to the defendant on all claims asserted by the plaintiff royalty owners under New Mexico law. Specifically, this court, which had previously ruled that New Mexico does not recognize the marketable condition rule and refused to certify the question to the New Mexico Supreme Court, held that the defendant could deduct the New Mexico natural gas processors tax that was paid by the lessee as compensation to the gas processor and that the defendant owed no royalty on drip condensate retained by the processors as in-kind compensation or on gas used off the lease for post-production processing.  [[150]](#footnote-151)151 Even though the free use clause only allowed the use of gas by the lessee "on said land for its operations thereon,"  [[151]](#footnote-152)152 the court adopted the reasoning of the North Dakota Supreme Court in *Bice v. Petro-Hunt, L.L.C.*  [[152]](#footnote-153)153 that such a clause allows the free use of gas in furtherance of lease operations either on or off the lease.

For the third time and by a third U.S. District Court judge,  [[153]](#footnote-154)154 a motion to certify the question to the New Mexico Supreme Court as to whether the marketable condition rule is implied in an ***oil*** and gas lease under New Mexico law was denied in *Ulibarri v. Southland Royalty Co., LLC.*  [[154]](#footnote-155)155 Because the Tenth Circuit in *Elliot Industries Ltd. Partnership v. BP America Production Co.*  [[155]](#footnote-156)156 had already determined that the marketable condition rule is not supported by New Mexico law, the court held that the Tenth Circuit, and not the district court, is the proper judicial level to certify the question.  [[156]](#footnote-157)157

In *XTO Energy, Inc. v. ATD, LLC*,  [[157]](#footnote-158)158 XTO Energy, as operator, contracted with Air Tech to provide well services. After two employees of Air Tech  [[158]](#footnote-159)159 were harmed in a fire at the well site, the employees and their families sued XTO Energy in state court claiming that XTO Energy supervised the work. Notably, the employees did not sue their employer, Air Tech, because of the sole workers' compensation remedy. XTO Energy thereafter sued Air Tech in federal court for breach of Air Tech's indemnification and defense obligations under its Master Service Contract, and sued Zurich Insurance, the insurer of Air Tech, for breach of its obligations to XTO Energy as an additional insured. The court denied Zurich's and Air Tech's motion for summary judgment, finding that the savings clause that followed the indemnification provision, which provided that "the provisions therein shall be read not to include indemnification for one's own negligence," saved the indemnity from the New Mexico Oilfield Anti-Indemnity Statute.  [[159]](#footnote-160)160 Without the savings clause, the broad indemnification of XTO Energy in the contract for any losses arising out of or connected to the work would have been void. The court later clarified in a separate opinion that the statute did not void the indemnity only to the extent it required indemnification for the vicarious liability of XTO Energy arising out of the negligence of Air Tech.  [[160]](#footnote-161)161

In *King v. Estate of Gilbreath*,  [[161]](#footnote-162)162 the court issued a series of unpublished summary judgment memorandum opinions that expounded on New Mexico law. First, a cessation of production clause did not save the lease even though the defendant argued that he commenced "drilling or reworking operations" on the well because the clause at issue required "operations for drilling a well" and only "if production results therefrom."  [[162]](#footnote-163)163 The court held that the judicial ascertainment clause in the lease, which prohibited cancellation for failure to perform "implied covenants, conditions, or stipulations," did not require a lawsuit before terminating the lease because the habendum clause is a special limitation on the grant and a judicial ascertainment clause generally does not prevent automatic termination.  [[163]](#footnote-164)164

In a separate order, the court ruled that a broadly worded New Mexico "catchall" four year limitations statute applied to both claims for underpayment and claims for violation of the pooling statute, and that for limitations purposes, each revenue underpayment gave rise to a separate claim such that all claims for underpayments more than four years before the filing of the suit (i.e., before 2009) were time barred.  [[164]](#footnote-165)165 The discovery rule could not save the plaintiffs' claims because correspondence and certain other proceedings put the plaintiffs on inquiry notice that something was amiss. Curiously, the court also time barred a claim for violation of the New Mexico Lease Release Act, which requires a lessee to release a lease of record within 30 days of the forfeiture of the lease,  [[165]](#footnote-166)166 and allows a lessor to sue for such a release.  [[166]](#footnote-167)167

The court also held that the New Mexico ***Oil*** and Gas Proceeds Payment Act (OGPPA), which requires the payment of 18% interest in addition to court costs and attorney fees for nonpayment or underpayment of "***oil*** and gas proceeds," did not apply to an alleged trespasser because the term "payor" applies only to the first purchaser of production, or one who is lawfully the operator or a lessee.  [[167]](#footnote-168)168 The court also held that the OGPPA does not apply retrospectively to a lease and assignment executed before the effective date of the OGPPA.  [[168]](#footnote-169)169 As for a claim that the operator violated the pooling statute, the court first ruled that the New Mexico ***Oil*** and Gas Act allows for a private right of action for damages for violation of its provisions,  [[169]](#footnote-170)170 but then granted summary judgment to the operator on this claim because it had obtained a pooling order; ***Oil*** Conservation Division regulations only require notice to mineral owners of record or known to the applicant at the time of filing; and substantial compliance with the notice provision is sufficient.  [[170]](#footnote-171)171

The operator then requested a declaratory judgment that only the lessee could be held liable for underpayment, which the court denied based on the joint operating agreement (JOA), a modified A.A.P.L. Form 610 - 1982. Although Article IV.B. of the model JOA imposes liability for loss of title on the party that contributed the lost acreage to the JOA, the parties to the JOA had deleted the individual loss provisions, leaving only paragraph 3, which provided all losses shall be joint losses and borne by all parties. [[171]](#footnote-172)172 Finally, the court ruled that despite the apparent liability of the non-operating working interest owners under the JOA, two owners that were assigned their working interests could not be held liable for damages before the date of their assignment because these assignees never assumed related liabilities arising before the date of the assignment and the general rule in New Mexico is that a successor corporation does not automatically acquire the liabilities or obligations of the transferor corporation. [[172]](#footnote-173)173

*B. Administrative Developments*

The New Mexico ***Oil*** Conversation Commission amended rules 19.15.2, 19.15.35, and 19.15.36 of the New Mexico Administrative Code to revise the definition of "***oil*** field waste"; to clarify that its waste disposal rules apply to ***oil*** and gas storage, transportation, treatment, refining, and ***oil*** field services (in addition to ***oil*** and gas development and production); and to significantly amend the permitting and financial assurance requirements applicable to surface waste management facilities. Notably, the Commission removed a $ 250,000 cap on financial assurance for commercial facilities permitted before the effective date of Rule 19.15.36, subject to a transition provision to allow such commercial facilities to participate in the development of closure and post closure cost estimates.  [[173]](#footnote-174)174

VIII. NORTH DAKOTA

*A. Judicial Development*

In *Horob v. Zavanna, LLC*,  [[174]](#footnote-175)175 the court considered whether a lease terminated following a temporary cessation of production. Under the lease's cessation of production clause, the lease was to terminate following a cessation of production unless the lessee began drilling or reworking operations within sixty days of the cessation. The district court concluded that under the common law, the lessee had a *reasonable* time to conduct, maintain, and restore production after each lapse in production. The Supreme Court of North Dakota disagreed and held that when parties agree on a specific period for a temporary cessation of ***oil*** or gas production, that clause controls over the common law doctrine of temporary cessation allowing a reasonable time for resumption of production. Although the lease would have terminated pursuant to its cessation of production clause because the lessee failed to begin drilling or reworking operations within sixty days of the cessation, it remained in effect under the communitization agreement with the United States. The agreement stated that it would remain in force for two years and for so long as ***oil*** and gas are, or can be, produced from the communitized area. It further stated that production anywhere on the communitized area is considered production on all leases that may be wholly or partly in the communitized area. Finally, because there was "production," as defined in the communitization agreement from the communitized area, the entire lease remained in effect.

In *Vogel v. Marathon* ***Oil*** *Corp.*,  [[175]](#footnote-176)176 the court held that a royalty owner does not have a private right of action for damages for violations of the statute limiting the flaring of gas from an ***oil*** well. Although N.D.C.C. § 38-08-06.4 provides that a producer shall pay royalties to royalty owners upon the value of the gas flared in violation of the statute, it neither expressly nor implicitly provides a private right of action for damages. Rather, the statute contains a comprehensive regulatory scheme providing an administrative remedy for royalty owners to obtain payment for alleged violations of the statute.  [[176]](#footnote-177)177 The court also held that the royalty owner did not have a private right of action under the common-law doctrines of waste and conversion. The court held that there is no common law in any case in which the law is declared by statute. The Environmental Law Enforcement Act (ELEA) also failed to provide the royalty owner a private right of action. Although the ELEA provides a private right of action for the violation of any environmental statute, the ELEA's remedies are cumulative and do not replace statutory or common law remedies. A royalty owner seeking the payment of royalties for gas flaring violations must exhaust administrative remedies before pursuing a claim in court.

In *Valentina Williston, LLC v. Gadeco, LLC*,  [[177]](#footnote-178)178 the court held that when an ***oil*** and gas lease does not provide how the parties may modify its terms, the parties may alter the lease by a contract in writing, or by an executed oral agreement, and not otherwise. The lease in question contained a "continuing operations clause," which enabled Gadeco, an ***oil*** and gas company, to extend the primary term of the lease if not more than ninety days elapsed between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well. In addition to the lease with Gadeco, the landowners also entered into a top lease with Valentia Williston, which would become effective if and when the existing lease with Gadeco expired or was terminated. A few months before the end of the Gadeco lease's primary effective term, Gadeco mailed the landowners a letter stating that the company would extend the primary term of certain sections of the land and would terminate others if no wells were spud by a certain date. Valentia brought suit arguing that Gadeco's lease had terminated as a matter of law due to Gadeco's letter. The court disagreed with Valentia and held that the letter did not indicate a surrender of the primary lease. The letter as written was not a written contract that modified the lease because it did not contain an offer and lacked consideration. The doctrine of promissory estoppel was also inapplicable because there was no promise or agreement between the parties.

In *Kittleson v. Grynberg Petroleum Co.*,  [[178]](#footnote-179)179 the lessor of ***oil*** and gas interests brought an action against successors to the lessee, alleging the wrongful deduction of certain costs from gas royalties. The royalty clause at issue prohibited the lessee from deducting from the value of any gas sold from the lease costs processing, dehydration, compression, transportation, or other post-production costs required to make the gas marketable. The clause also required lessor's royalty to be calculated on the basis of the gas's market value at the well. Under the "at the well" rule, calculating market value using the "work-back method" would allow the lessee to deduct post-production costs from the royalty. However, the court held that the lessee was not allowed to deduct those costs from the lessor's royalty. When a specific provision and a general provision in a contract conflict, the specific provision ordinarily prevails over the general provision. The "no deductions" language in the royalty clause specifically prohibited deductions of post-production costs from the royalty. Therefore, the court found that the more specific "no deductions" language qualified and prevailed over the "market value at the well" language, and the lessee was prohibited from deducting post-production costs from the lessor's royalty.

In *Desert Partners IV, L.P. v. Benson*,  [[179]](#footnote-180)180 a purported purchaser of mineral interests brought an action against the purported owners to quiet title. A mineral interest owner deeded his interests to his five grandchildren. Two of the grandchildren conveyed their interest in 160 acres to an individual by quit claim deed; however, they failed to immediately record the deed. Twenty-two years later, the parties recorded the deed and a statement of claim. Following the recording, one of the grandchildren conveyed her interest in 1,720 acres, including the aforementioned 160 acres, to a corporation. The deed was recorded and the corporation thereafter conveyed 24 of the 160 acres to a third party. The third party and the corporation brought suit to quiet title. The court reaffirmed the principle that an unrecorded instrument is valid between the parties to the instrument and those with notice. An unrecorded conveyance of land is void against any subsequent purchaser in good faith and for valuable consideration. However, the recording of any instrument affecting title to real property serves as constructive notice to all subsequent purchasers or encumbrancers of the real property. Because the parties recorded the deed and statement of claim, albeit twenty-two years later, the third party was deemed to have constructive notice.

In *Fredericks v. Fredericks*,  [[180]](#footnote-181)181 the plaintiff brought an action against his brother, and purchasers of mineral interests, seeking to reform a mineral deed and to quiet title to the mineral interests. The purchasers cross-claimed against the brother, arguing the brother breached the warranty of title. The court held that a party seeking reformation of a written instrument must establish by clear and convincing evidence that the document does not state the parties' intended agreement. The court found that clear and convincing evidence existed to support a finding that a mutual mistake was made sufficient to reform quit claim mineral deed, and to provide claimant with ownership of disputed mineral interests.

The purchasers could not claim good-faith purchaser status, as required to preclude reformation of the deed, because they failed to make inquiry. A purchaser who has notice of circumstances sufficient to put a prudent person upon inquiry and fails to do so cannot claim good-faith purchaser status and will be charged with constructive notice of all facts that the inquiry would have revealed. The purchasers also could not claim reasonable reliance on a landman's title examination in order to secure good-faith purchaser status.

In *EEE Minerals, LLC v. State of North Dakota*,  [[181]](#footnote-182)182 the court dismissed a putative class action based on the plaintiffs' failure to join the United States as a necessary party. The plaintiffs sought to quiet title on behalf of a class of mineral owners to the minerals under and adjacent to the Missouri River in twenty-seven townships in North Dakota. The parties agreed that the State owns the minerals in and under the bed of the Missouri River under the equal footing doctrine, but they disagreed about where the high water mark--the dividing line between the riverbed and riparian lands--was located. The plaintiffs claimed the State improperly delineated the river's ordinary high water mark and failed to take into account rising waters caused by the construction of the Garrison Dam and impoundment of the 300,000-acre Lake Sakakawea, thereby claiming minerals that rightfully belonged to the plaintiffs and the putative class. Before considering the merits of the underlying dispute or whether it could proceed as a class, Continental Resources, Inc. and other defendants moved to dismiss, arguing the plaintiffs failed to join the United States as a necessary party under Rule 19 of the Federal Rules of Civil Procedure. The court agreed and dismissed the complaint without prejudice. The underlying issues raised in the case--the location of the high water mark and the legal consequences of the construction of the Garrison Dam and Lake Sakakawea--have been raised in several other cases pending in North Dakota state courts, but remain largely unresolved.

In two separate cases, the scope of the lessee's implied right to make use of the surface of an ***oil*** and gas lease to explore for, produce, and market ***oil*** and gas was clarified. In *Continental Resources, Inc. v. Langved*,  [[182]](#footnote-183)183 the court confirmed that the lessee could use the surface of land covered by the lease at issue to drill several ***oil*** wells that produced from a force-pooled spacing unit even though that spacing unit contained only a small portion of the acreage covered by the lease. In *Continental Resources, Inc. v. Reems*,  [[183]](#footnote-184)184 the court confirmed the lessee's implied right to use the surface to provide power to its well site even though the minerals had been severed from the surface, and the surface owners had not executed the applicable lease or any other document granting surface rights.

IX. OHIO

*A. Legislative Developments*

On June 28, 2016, House Bill 390 was signed into law. [[184]](#footnote-185)185 Among other matters, the bill clarified the status of pending applications for unit operations concerning mineral rights owned by the Ohio Department of Transportation. In particular, it required the chief of the Ohio Department of Natural Resources, Division of ***Oil*** and Gas Resources Management to issue unit orders with respect to such applications within forty-five days of the law's effective date (where some applications had been pending for nearly two years). It also provided that if such an order were approved, the applicant was not required to commence unit operations for a period of two years from the order's effective date.

*B. Judicial Developments*

In *State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals*,  [[185]](#footnote-186)186 the court addressed the construction of a certain form of ***oil*** and gas lease that is prevalent across much of Ohio's Utica shale play. Each lease contained a habendum clause stating that it will continue for a primary term of a set number of years and so much longer thereafter as ***oil*** and gas or their constituents are produced or are capable of being produced in paying quantities, in the judgment of the lessee, or as the premises shall be operated by the lessee in the search for ***oil*** or gas. The leases also contained a delay rental clause providing for lease termination unless the lessee paid a specified delay rental. The delay rental clause did not, however, expressly state that it applied only during the lease's primary term. The landowners filed suit to terminate the leases, arguing that they were void as against public policy as "no-term" or "perpetual" leases because the combination of habendum clause and delay rental language allowed the producer to hold the leases indefinitely without production. The court rejected the landowners' interpretation of the lease. Delay rentals--the court found--could only be paid during the leases' primary term and not beyond. The court further found that the habendum clause in the leases was a two-tiered clause with a definite primary term and an indefinite secondary term that continued as long as certain conditions set forth in the leases were met (i.e., production in paying quantities). It was not therefore the open-ended or perpetual grant claimed by the landowners.

The court also issued a long-awaited series of rulings interpreting the 1989 version of the Ohio Dormant Mineral Act (DMA). In the lead case, *Corban v. Chesapeake Exploration, L.L.C.*,  [[186]](#footnote-187)187 the court held that the 1989 version of the DMA was not self-executing (i.e., did not automatically transfer ownership of dormant mineral rights to the surface owner of the property by operation of law). Rather, the surface owner must have filed a quiet title action seeking a decree that the dormant mineral interest had been abandoned in order to merge the interests. The court further held that the 2006 version of the DMA applies to claims to abandon dormant mineral interests asserted after the act's effective date on June 30, 2006.

Lastly, the court turned its attention to post-production costs. In *Lutz v. Chesapeake Appalachia, L.L.C.*,  [[187]](#footnote-188)188 the court declined to answer a certified question from a federal court regarding whether Ohio follows the "at the well" rule or the "marketable product" theory with respect to post-production costs, leaving it up to the federal court to interpret the parties' contracts under traditional canons of contract construction.

In *Alford v. Collins-McGregor Operating Co.*,  [[188]](#footnote-189)189 the court found that the non-development of horizons below the "Gordon Sand" formation did not result in a forfeiture of those zones. The lessor claimed that the lessee had breached its implied covenants with respect to the horizons below the Gordon Sand because there had been no development of those deeper depths during the lifetime of the lease. While agreeing that production from a well may not necessarily hold all acres of a lease, and that forfeiture may be an appropriate remedy for a breach of an implied covenant, the court refused to find that "a partial forfeiture [was available] as a remedy for horizontal, as opposed to vertical property."  [[189]](#footnote-190)190 "In the absence of persuasive authority to the contrary and because current precedent does not recognize the availability of partial horizontal forfeiture of ***oil*** and gas rights in Ohio, we agree with the trial court that it appeared beyond doubt that the landowners could provide no set of facts entitling them to their requested relief."  [[190]](#footnote-191)191

In *Pottmeyer v. East Ohio Gas Co.*,  [[191]](#footnote-192)192 lessors under two ***oil*** and gas leases purchased the wells drilled under those leases to provide them with gas for household and personal use. Several decades later, the lessors sued to have the leases declared forfeited for failing to produce in paying quantities. The court agreed, finding that the lessors' use of gas for domestic purposes does not factor into the paying quantities calculation. The court also rejected the operator's argument that the lessors' operations on the property maintained the lease. Looking to the express language of the lease, the court observed that "[i]n cases similar to the case at hand - i.e., where the lessee ***oil*** and gas company have [sic] retained only the deep rights and the landowner/shallow rights lessee have [sic] been assigned the only producing well and chose to take the well out of production and use it for domestic gas purposes only - courts have held that operations mean those conducted by the ***oil*** and gas company, not the landowner, even though the landowner had been assigned the rights to the well."  [[192]](#footnote-193)193

In *RHDK* ***Oil*** *& Gas LLC v. Dye*,  [[193]](#footnote-194)194 lessors claimed that three separate periods of non-production for no more than six months each caused their lease to terminate despite otherwise continuous production for three decades. Alternatively, the lessors argued that the lease terminated for failing to produce in paying quantities. The lessee responded by noting that the cessation of production was only temporary, and that the evidence provided below shows that the lease was producing in paying quantities. The court agreed with the lessee, finding that "absent a finding of unreasonableness, a six-month cessation period is temporary and does not terminate a lease."  [[194]](#footnote-195)195 After considering possible weather causes and well maintenance records, the court found that the lessee's actions to resume production following the gaps in non-production were reasonable. The court further found that there was production in paying quantities, relying on affidavits provided by the lessee stating its belief that the wells remained profitable, evidence of royalty payments, and statements by the lessors that they had received royalty payments since acquiring the property.

Addressing the question of who bears the burden of proof in a lease expiration claim, the court in *Burkhart Family Trust v. Antero Resources Corp.*  [[195]](#footnote-196)196 placed the burden on the lessor, holding that the trial court had improperly shifted the burden to the lessees to establish production in paying quantities. "For instance, the trial court found that [the shallow lessee] had presented 'no credible evidence to support his blanket assertion' that the well remain profitable."  [[196]](#footnote-197)197 This, according to the court, was one of many instances showing that the trial court believed that the lessees bore the burden of proof. However, "the burden of proof question is not controlled by substantive ***oil*** and gas law, but rather procedure. … The party who asserts a claim carries the burden of proof."  [[197]](#footnote-198)198

Ohio courts also wrestled with the sufficiency of the evidence in a lease expiration suit. In *Mobberly v. Wade*,  [[198]](#footnote-199)199 the court held that the lessee's failure to file production reports was not evidence of a lack of production resulting in the underlying lease's termination: "Whether or not Appellee sent ODNR production reports is not a relevant issue in this matter. To prevail, Appellee need only produce evidence that ***oil*** was produced, not that he filed the requisite production records to ODNR."  [[199]](#footnote-200)200 Adopting *Mobberly*, the *Burkhart Family Trust*  [[200]](#footnote-201)201 court also rejected the lessor's attempt to rely on a lessee's failure to report production to ODNR or the county auditor, and its showing of a loss generally on its tax returns, as evidence of a lack of production in paying quantities regarding the lease at issue.

But in *Holland v. Gas Enters. Co.*,  [[201]](#footnote-202)202 the court reached a contrary result. There, the lessors claimed that the underlying lease expired of its own accord following several periods of non-production (i.e., during 2006 08 and 2012-13). The court agreed, noting first that "[an] ***oil*** and gas lease containing a habendum clause that states the lease shall remain in effect as long as ***oil*** or gas is produced in paying quantities automatically expires when no ***oil*** or gas is produced for two years or more" (while recognizing that Ohio follows the temporary cessation of production doctrine). Moreover, the court found that the fact that the forms the lessee issued to ODNR and the county auditor affirmatively reported no production for those periods distinguished this case from *Mobberly* above. "Gas Enterprises did not merely fail to send production reports to ODNR; instead, Gas Enterprises *affirmatively reported* to both ODNR and the county auditor that the wells on the pertinent property did not produce any ***oil*** or gas in 2006-2008 and 2012-2013."  [[202]](#footnote-203)203

In *Schultheiss v. Heinrich Enters., Inc.*,  [[203]](#footnote-204)204 the lessor sought to cancel a 1950 lease, in part, for lack of production alleged to have occurred over three decades earlier (from 1977 to 1981). The lessee argued that the lessor's claim was barred by the relevant statute of limitations and equitable doctrines such as laches. In rejecting that argument, the court first noted that under Ohio law, when the primary term of a lease expires, if the conditions of the secondary term are not met, the lease automatically expires. "In such a case, no affirmative action on the part of a lessor is required to formally terminate the lease; it expires on its own terms."  [[204]](#footnote-205)205 The court also cited to *Williams & Meyers* for the proposition that "when the lease has terminated by operation of law, any delay by the lessor in asserting termination of the lease cannot give life to the affirmative defenses of laches or the statute of limitations."  [[205]](#footnote-206)206

In *Holland v. Gas Enters. Co.*,  [[206]](#footnote-207)207 also discussed above, the lessee argued that the lessors' claim that the underlying lease expired for non-production was barred by a four-year statute of limitations. The court rejected that position, first because the four-year period applied to royalty claims and not lease expiration claims, and second because the last period of non-production ended in 2013, well within the applicable eight-year limitations period. Moreover, it found the argument generally inapplicable, following its previous decision in *Schultheiss*. But in *Ricketts v. Everflow Eastern, Inc.*,  [[207]](#footnote-208)208 another court of appeals, considering a claim that an ***oil*** and gas lease expired because of an improper pooling more than twenty years earlier, found that the action sounded in breach of contract and held that the related eight-year statute of limitations barred the plaintiffs' claims.

The disgorgement of a lease bonus was the subject of *Miller v. Cloud*.  [[208]](#footnote-209)209 There, the buyer of property established that it was entitled to a deed reformation indicating that it owned the underlying minerals (as opposed to the seller). As a consequence, in part, it asked the court to require the seller to disgorge the lease bonus that the seller had been paid by an ***oil*** and gas producer for entering into a lease of the minerals. Disgorgement, according to the court, is "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion" and is available when there is wrongdoing.  [[209]](#footnote-210)210 In the case before it, the court determined that the seller was not a wrongdoer under disgorgement law because a person could have reasonably inferred from the underlying documents that the seller owned the minerals at the time she entered into the lease. Furthermore, the court determined that the seller would be prejudiced in the event she was required to disgorge the lease bonus because most of it had already been spent. The court therefore denied the buyer's request.

In *Summitcrest, Inc. v. Eric Petroleum Corp.*,  [[210]](#footnote-211)211 a lessee obtained a lease of over 2,700 acres out of which a 40-acre unit had been formed and on which a well had been drilled and completed. After the lessee subsequently increased the size of the unit to 640 acres, the lessor filed suit alleging, in part, that the new unit was invalid because the lease did not permit the re-pooling and it violated the lessee's duty of good faith and fair dealing. The court rejected both arguments, finding that the terms of the pooling clause authorized the operator to increase the size of its unit, and that such an increase, being contemplated by the parties' agreement, did not breach the lessee's duty of good faith and fair dealing. But in *Filicky v. Am Energy -- Utica, LLC*,  [[211]](#footnote-212)212 the court found the lessee's pooled unit unauthorized when the lessee reconfigured the size of its unit but failed to record a declaration of pooling as required by the terms of its lease. Finally, in *Eclipse Res.-Ohio v. Madzia*  [[212]](#footnote-213)213 the court rejected the lessor's claim that the lessee had breached its covenant of good faith and fair dealing by including only a small portion of the leased premises into a unit. The court found that this allegation failed to state a claim for relief because Ohio does not recognize a standalone claim for a breach of this implied covenant absent a valid breach of contract claim. Moreover, the court found that this covenant cannot be breached by acting as allowed under a specific term of a contract.

Owning to the increase in wet gas production in the Utica shale and elsewhere in the Appalachian Basin, this year the state's courts heard several cases concerning the use of the state's appropriations laws for the construction of natural gas liquids pipelines. In *Kinder Morgan Cochin LLC v. Simonson*,  [[213]](#footnote-214)214 a pipeline operator sued for access to conduct surveys, inspections, and examinations allowed under state law pertaining, in part, to a company organized in part for the purpose of transporting petroleum. The landowner argued that the statutory term "petroleum" in R.C. 1723.01--which permits common carriers to appropriate land--did not include natural gas liquids such as ethane and propane, and thus the pipeline operator was not entitled to access his property. The court disagreed, based on prior case law and related statutory definitions. It also concluded that the pipeline operator qualified as a common carrier under Ohio law with respect to the pipeline operations at issue.

Another appellate court reached the same conclusion in *Sunoco Pipeline L.P. v. Teter*. [[214]](#footnote-215)215 There, the landowner contested the pipeline exercise of eminent domain on the basis that pure propane and pure butane (i.e., the liquids to be transported by the pipeline) were not "petroleum" for purposes of R.C. 1723.01. The court found that while R.C. 1723.01 did not define "petroleum," other Ohio statutes and administrative code provisions indicated that pure propane and butane were considered petroleum, and that such a construction was supported by considering the technical or industry definition of "petroleum" as well as its historical meaning. Further, the court rejected the landowner's claim that the appropriation was not "necessary" or for a "public use."

*C. Administrative Developments*

On December 8, 2016, ODNR's Division of ***Oil*** and Gas Resources Management formally enacted new rules creating an emergency notification process for ***oil*** and gas related emergencies, such as an uncontrolled fire or the release of natural gas, ***oil***, brine, hazardous substances and other wastes at a production or processing facility.  [[215]](#footnote-216)216 Under the rules, such emergencies are to be reported to the Division, which will then coordinate statewide notification and responses. The rules had already been instituted on an interim basis after Ohio Governor Kasich's signed Executive Order 2016-04K on August 9, 2016.

X. OKLAHOMA

*A. Judicial Developments*

The decision in *U.S. Energy Development Corp. v. Stephens Energy Group, LLC*,  [[216]](#footnote-217)217 involved the interpretation of a Participation Agreement (PA) between Slawson, USEDC and Osage covering a field of ***oil*** and gas leases and wells. A number of third party working interest owners held interests of varying sizes in those wells, but those other owners did not sign, and were not subject to, the PA. As between the three parties to the PA, the contract provided that Slawson would be the operator of all wells. Attached as an exhibit to the PA was an unsigned AAPL Model Form 610 - 1989 Operating Agreement. The PA provided that "[w]here there is a conflict between the Operating Agreement and [the PA, the PA] will control."  [[217]](#footnote-218)218 The PA also recognized the right of each of the parties to assign their rights, duties and obligations under the PSA. Slawson later sold and assigned most of its rights, titles and interests in the project area to Stephens. Relying on the provisions of the Operating Agreement exhibit to the PA, rather than the above-referenced assignability clause of the PA, Osage asserted that Slawson had resigned as operator under the PA and had also ceased to be operator under the PA by virtue of assigning all of its working interest rights in the lands covered by the PA to Stephens. Stephens asserted that the express wording in the PA allowed Slawson to assign its contractual right to be operator under the PA to Stephens, and controlled over the conflicting provisions of the Operating Agreement exhibit cited by Osage. The district court found that the operator election and succession provisions of the attached Operating Agreement controlled and that Osage was the valid successor operator under the PA. On appeal, the Tenth Circuit reversed and held that Slawson had the right to assign its contractual right to be operator under the PA.

In *A.B. Still Wel-Service, Inc. v. Antinum Midcon I, LLC*,  [[218]](#footnote-219)219 the operator of a vertical well sued the operator and non-operators of the nearby Eggers horizontal well alleging that the frac job conducted on the Eggers well caused damage to its vertical well. The plaintiff asserted claims for alleged negligence, trespass, nuisance, conversion of hydrocarbons and unjust enrichment. The lawsuit was filed in the county where the plaintiff corporation was located. The trial granted the defendants' motion to dismiss due to improper venue, finding that this suit was an action for "damages to land, crops or improvements thereon" within the meaning of 12 O.S. § 131(2), and that the lawsuit must instead be filed in the county where the plaintiff's land and well were located. On appeal, that decision was affirmed by the Oklahoma Court of Appeals.

The first appeal in *Pummill v. Hancock Exploration LLC*  [[219]](#footnote-220)220 sought reversal of the district court's entry of some 40 pages of orders granting summary judgment in favor of the plaintiff royalty owners on certain issues associated with the allegations of improper deductions and royalty underpayments. The Oklahoma Supreme Court reversed the trial court's rulings in favor of the royalty owners on the above issues on the grounds that disputed material facts made it improper to decide the case through a summary judgment. The case was remanded to the district court. A three-day bench trial was subsequently conducted in October 2015. In January 2016, the district court issued a 74-page decision that again ruled in favor of the royalty owners. An appeal was filed by the defendants in February 2016. Multiple amicus curiae participants were allowed to submit briefs. The briefing of the issues on appeal was completed in August 2016, and the parties and the industry are awaiting a decision from the Oklahoma Court of Appeals.

In the early years following BP-Amoco's success in defeating class certification in the case of *Watts v. Amoco Production Company*,  [[220]](#footnote-221)221 different plaintiff counsel, representing a different plaintiff, sought certification of a royalty owner class against BP in a different Oklahoma county district court in spite of the earlier court's denial of class certification in *Watts*. In *Rees v. BP America Production Co.*,  [[221]](#footnote-222)222 the court held that the new attempt in *Rees* to obtain class certification (i.e., a second bite at the apple) was precluded by the denial of class certification in the earlier *Watts* case. Unit Petroleum encountered a like scenario after defeating class certification in the earlier case of *Panola Independent School District No. 4 v. Unit Petroleum Co.*  [[222]](#footnote-223)223 A different plaintiff lawyer, representing a different plaintiff, sought certification of a royalty owner class against Unit Petroleum in a different court in *Consul Properties, LLC v. Unit Petroleum Co.*  [[223]](#footnote-224)224 However, the court in *Consul*, citing and discussing the above-referenced *Rees* decision from 2008, dismissed the portion of the *Consul* case that requested class certification (leaving the case pending only as to the individual claims of the named plaintiffs). "Oklahoma as a matter of state law has clearly recognized [*e.g., Rees v. BP America Production Co.*] non-mutual defensive collateral estoppel or issue preclusion to apply in the circumstances of this case."  [[224]](#footnote-225)225

The case of *Concorde Resources Corp. v. Williams Production Mid-Continent Co.*,  [[225]](#footnote-226)226 involved an ***oil*** and gas lease termination lawsuit. No production was marketed from the well for over 17 years because there was no pipeline in the vicinity of the well. Under Oklahoma law, the question in the case was whether the well *had the ability* to produce in paying quantities when the impediment (no pipeline) to marketing was removed.  [[226]](#footnote-227)227 The plaintiff contended that the well required repair and additional equipment before it could be turned on and begin flowing gas. The court found that the determination of whether a well is *capable* of producing in paying quantities involves equitable considerations reviewed on a case-by-case basis. Looking at the status of a well at a precise moment in time might overlook rational explanations of whether a well is, or is not, capable of producing in paying quantities. Here, it was clear to the appellate court that the trial court expressly or implicitly examined the facts pertinent to the well and concluded that it was capable of producing in paying quantities, and that its conclusion was not against the clear weight of the evidence or contrary to law.

The landowner plaintiffs in *Lee v. ConocoPhillips Co.*  [[227]](#footnote-228)228 sued ConocoPhillips (Conoco) to enforce their interpretation of the free gas clauses contained in the underlying ***oil*** and gas leases. During the period leading up to the filing of the landowners' lawsuit, Conoco had expressed growing concerns about the risks associated with the landowners' taking and use of untreated, unodorized gas, and whether the landowners were complying with federal and state rules and regulations that applied to the facilities they constructed to transport the free gas to their property. **[ADD WORDS]** Conoco urged the landowners to find alternate sources for natural gas, and offered a financial payout. When those communications failed to lead the landowners to end their use of the free gas option, Conoco notified certain of the plaintiff landowners that it was going to disconnect their farm taps by a specified date due to the volatile mixture of untreated elements in the gas, and it provided a list of alternate providers of gas. Other landowners were advised that their taps would be disconnected unless they provided proof that they were in compliance with specified regulations of the U.S. Department of Transportation that are administered by the Oklahoma Corporation Commission. The landowners filed suit in the state district court of Texas County, Oklahoma and sought injunctive relief with respect to seeking a declaratory judgment that Conoco was required to comply with its contractual obligation to make natural gas available to landowners. Conoco sought declaratory relief that, *inter alia*, it was not obligated to continue providing natural gas under the leases, due to stated concerns, and that it could turn off, disconnect and disable the farm taps. The landowners moved for a preliminary injunction prohibiting Conoco from terminating the supply of natural gas via the farm taps during the pendency of the lawsuit. The court analyzed the pertinent factors required in order for a preliminary injunction to be granted, concluded that the landowners failed to make an adequate showing of irreparable harm and denied the plaintiffs' request. The court did, however, direct Conoco to reasonably assist the landowners in locating and connecting an alternative source of energy, and to temporarily refrain from shutting off the farm taps for a reasonable time in order to allow such alternative sources to be put in place.

In *Calvert v. Swinford*,  [[228]](#footnote-229)229 the first of three decisions issued by the Oklahoma Supreme Court in October 2016 involving the same set of facts and under the same case name,  [[229]](#footnote-230)230 the plaintiffs alleged that two deeds they signed as grantors in July 2002, which were recorded that same month, were intended to reserve term mineral interests. In November 2014, the plaintiffs sued the grantees, the abstract company and their former attorney in the transaction in an effort to recover the mineral interests they thought they had reserved. The trial court entered summary judgment in favor the defendant abstract company on the grounds that the plaintiffs' claims were time-barred under the applicable statutes of limitation. The plaintiffs appealed. The plaintiffs argued that their action was timely because, while their lawsuit was filed over twelve years after the deeds were recorded in the real estate records, the plaintiffs did not discover the deficiency in their deeds until 2013, within two years of filing their lawsuit. The plaintiffs alleged that they did not previously review the final deed that they had signed. In rejecting the plaintiffs' arguments, the Oklahoma Supreme Court found that a recorded deed serves as constructive notice of its contents as to subsequent purchasers, mortgagees, encumbrancers or creditors. The deed clearly did not reserve any mineral interests whatsoever. The court found that a reasonable person would have read the deed before signing it, or at the very least, asked for a copy of it after it is signed and filed and then read it. A copy of the filed deed could now be secured anytime by anyone. The court concluded that, in the present action for negligence regarding mistaken deeds, the statute of limitations accrued when the deed was filed, and that the discovery rule was inapplicable to this cause.

In the second *Calvert v. Swinford*  [[230]](#footnote-231)231 decision issued one week later, the court affirmed the trial court's grant of summary judgment in favor of the attorney and law firm, who had been sued as co-defendants. The court adopted the same reasoning described in its affirmation of summary judgment in favor of the abstract company.

Finally, in the third *Calvert v. Swinford*  [[231]](#footnote-232)232 decision, issued on the same date as the second decision, the court affirmed the trial court's grant of summary judgment in favor of the grantee-landowners under the deed which plaintiffs alleged was intended to include a reservation of certain mineral rights. Again, the court adopted the same reasoning described in lengthier prior decision affirming the summary judgment ruling in favor of the abstract company.

In a fourth, albeit unrelated, appeal decided by the Oklahoma Supreme Court later the same month, the court was again faced with the issue of whether the notice that had been imparted to the grantor of a deed by recording it with the county clerk in the real estate records precluded the grantor's claims for reformation as being time-barred. In *Scott v. Peters*,  [[232]](#footnote-233)233 Scott had executed a warranty deed in 1997 in favor of the grantees covering 120 acres. Scott asserted that the deed was intended to convey only his surface rights and no minerals; however, the deed did not contain words that were legally sufficient to reserve the minerals (although the opinion suggests that an ineffective attempt to reserve the minerals was apparent on the face of the deed).  [[233]](#footnote-234)234 Scott argued that the five year limitation period on reformation of the 1997 deed did not begin to run when the deed was recorded because the deed "did contain a mineral reservation, but the reservation is alleged to have been insufficient . . . and a layman, such as himself, should not be held to know the legal effect of such an insufficiency until the legal effect is questioned or disputed."  [[234]](#footnote-235)235 He contended that he did not learn of the mistake regarding his efforts to reserve the mineral interests until February 2014.  [[235]](#footnote-236)236 In rejecting Scott's claims, the court cited and adopted the reasoning announced in the earlier *Calvert* decisions and affirmed the trial court's entry of judgment in favor of the defendants and against Scott.

In *American Natural Resources, LLC v. Eagle Rock Energy Partners, L.P.*,  [[236]](#footnote-237)237 the two primary questions before the Court were (1) whether a clause in an agreement giving American Natural (ANR) the right to participate in all future wells on unleased property violates Article II, Section 32 of the Oklahoma Constitution prohibiting perpetuities, and (2) whether a limited liability company is a "life in being" for purposes of that provision of the Oklahoma Constitution. In affirming the district court's dismissal of the case based upon the rule against perpetuities, the Oklahoma Supreme Court found that the option at issue in this case did not expire when an existing lease expired, but instead continued when new leases are executed with new wells to be drilled on those leases. The AMI agreement in this case was found to be a stand-alone document that provided by its terms that ANR could participate in wells *ad infinitum*. Additionally, the court found that ANR, as a limited liability company, could not be a life in being under the Rule. It further stated that, when there is no measureable life in being (such as in the instance of a corporation or an LLC), "the only definite period permitted by the rule against perpetuities is a term not exceeding 21 years."  [[237]](#footnote-238)238 The option provision violated the rule against perpetuities.

The decision in *Natural Gas Anadarko Company v. Venable*  [[238]](#footnote-239)239 involved the appeal of the district court's judgment awarding costs and attorney fees to the Venable defendants after they prevailed on the merits in the quiet title action described in the preceding case summary of this paper. Anadarko's appeal challenged the Venable defendants' statutory entitlement to costs and attorney fees under the Nonjudicial Marketable Title Procedures Act (NMTPA).  [[239]](#footnote-240)240 Anadarko contended that the attorney fee portion of the Act did not apply. Anadarko argued that attorney fees are authorized only if a party prevails on its entire claim. Anadarko noted that although it did not obtain the relief it sought, it did obtain some relief, i.e., the validity of its leases as to the two producing formations was confirmed. In affirming the district court's award of attorney fees and costs to the Venable defendants under the NMTPA, the court found that what Anadarko sought before the trial court was clear and uncontested title to the nonproducing formation. On that issue, the Venable defendants prevailed. The NMTPA authorizes recovery of attorney fees by a quiet title defendant who correctly "failed or refused" to take the corrective action demanded by the plaintiff in its pre-lawsuit request.  [[240]](#footnote-241)241 The district court's award of attorney fees, costs and expenses to the Venable defendants was affirmed.

The case of *Stinson Farm and Ranch, L.L.C. v. Overflow Energy, L.L.C.*,  [[241]](#footnote-242)242 involved a suit by the plaintiff-seller of land to obtain rescission of the sale and transfer documents based on the defendant-buyer's alleged misrepresentation that it was buying the property for use as an equipment yard. Less than a year after the sale, the seller learned that the defendant had applied for a commercial disposal well permit several weeks after the closing of the sale. In rejecting the request for rescission based upon alleged fraud, the court ruled that the seller could not simply inquire in discussions with the buyer about the intended usage, even on more than one occasion, and then seek to rely on the buyer's response without seeking to protect the seller by affirmatively stating in the sale documents that the property would not be used for certain specified offensive purposes. The court further noted that there was no evidence that the buyer did not actually intend at the time of the earlier discussions to build an equipment yard on the property other than the fact that the buyer did not do so.

In *Buckles v. Triad Energy, Inc.*,  [[242]](#footnote-243)243 involving the construction by OG&E (an electric utility) of an electrical highline to supply electricity to a well operated by Triad, the plaintiff landowners objected to the fact that the electrical supply line ran across public right-of-way including their lands in Section 28 in order to supply electricity to a well in Section 22. The landowners did not sue the utility, OG&E. Instead, they sued the operator Triad as an alleged aider and abetter of trespass in the construction of the line. Triad responded that it did not own, operate or maintain the supply line and did not construct it. Rather, Triad was merely a customer of OG&E--a utility that had the right to use the right-of-way. The court found that the legal authority relied upon by the landowner "provides no support for the proposition a customer of a public utility is liable as an aider and abettor simply by requesting the provision of electrical service by a public utility."  [[243]](#footnote-244)244 The court further rejected the landowner's assertion that this case involved a "private use" for a single ***oil*** and gas well of a public right-of-way.

*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.

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. 201600001. Following is a brief summary of certain of the amendments that became effective on August 25, 2016: 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 eliminate requirements for the submission of multiple copies of forms to the Commission; OAC 165:10-1-15 regarding transfer of operatorship of ***oil*** and gas wells; OAC 165:10-3-1 concerning permits to drill for horizontal wells; OAC 165:10-3-15 regarding the venting and flaring of gas from wells; OAC 165:10-3-16 with respect to operations in hydrogen sulfide areas; OAC 165:10-5-7 to add a provision concerning requested monitoring and reporting within areas of interest regarding seismicity and to address administrative shutdown of underground injection wells; OAC 165:10-5-9 with respect to duration of underground injection well orders or permits, and OAC 165:10-5-10 was amended regarding transfer of authority to inject concerning underground injection wells.

OAC 165:10-5-13 was amended to eliminate surface casing injection of reserve pit fluids; OAC 165:10-7-16 regarding liner requirements for flow back water pits in hydrologically sensitive areas, sampling of monitor wells and leachate collection systems, and the use of flow back water pits by other operators; OAC 165:10-7-20 to eliminate a requirement that applications to permit noncommercial disposal or enhanced recovery well pits used for temporary storage of saltwater be submitted in duplicate to the Commission and regarding sampling of monitor wells and leachate collection systems pertaining to such pits; OAC 165:10-7-33 regarding sampling of monitor wells and leachate collection systems with respect to truck wash pits; OAC 165:10-9-1 regarding monitoring by engineers during construction of commercial pits, geomembrane liners installed in such pits and sampling of monitor wells pertaining to such pits; OAC 165:10-9-2 with respect to sampling of monitor wells concerning commercial soil farming; OAC 165:10-9-3 to eliminate a requirement that applications to permit commercial disposal well pits be submitted in duplicate to the Commission, amend requirements regarding geomembrane liners installed in such pits, and approval and sampling of monitor wells and leachate collection systems regarding such pits; and OAC 165:10-9-4 concerning monitoring by engineers during construction of commercial recycling facilities, geomembrane liners installed in pits pertaining to such facilities, and sampling of monitor wells and leachate collection systems regarding such facilities.

In addition, OAC 165:10-10-1 was amended concerning the purpose, authority and applicability of the Brownfield program; OAC 165:10-10-2 regarding Brownfield sites; OAC 165:10-10-3 concerning administration and enforcement of rules pertaining to Brownfield sites; OAC 165:10-10-4 with respect to determination of eligibility for the Brownfield program; OAC 165:10-10-5 regarding the Brownfield program application process; OAC 165:10-10-6 concerning Brownfield site eligibility (revoked); OAC 165:10-10-7 with respect to the Commission's maintenance of a list of Brownfield sites; OAC 165:10-10-8 regarding processing of Brownfield applications (revoked); OAC 165:10-10-9 concerning assessment and remediation of Brownfield sites; OAC 165:10-10-10 with respect to public notice requirements pertaining to Brownfield sites; OAC 165:10-10-11 regarding public meetings and public comments concerning Brownfield sites; OAC 165:10-10-12 with respect to closure of Brownfield sites; OAC 165:10-10-13 regarding issuance of Brownfield certificates by the Commission; and OAC 165:10-10-14 concerning closures of sites by responsible parties.

Further, OAC 165:10-11-4 was amended to eliminate a requirement that notification of intention to plug forms be submitted in duplicate to the Commission; OAC 165:10-11-7 to eliminate a requirement that plugging record forms be submitted in duplicate to the Commission; OAC 165:10-12-3 to change the reference to the statute authorizing the Commission to promulgate and enforce rules and issue and enforce orders relating to seeping natural gas; OAC 165:10-12-6 regarding notice requirements for seeping natural gas occurrences; OAC 165:10-12-8 concerning procedures for the Rapid Action Assessment Team pertaining to gas surface seeps; OAC 165:10-12-9 regarding assistance to an owner of property that has a seeping natural gas occurrence and in accordance with 17 O.S. § 180.10 and amendments thereto in Enrolled House Bill No. 2234 (2015); and OAC 165:10-15-17 to eliminate a requirement that initial production test forms regarding excessive water exempt ***oil*** projects be submitted in duplicate to the Commission.

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. 201600002. Following is a brief summary of certain of the amendments that became effective on August 25, 2016:

OAC 165:5-1-6 was amended regarding computation of time periods; OAC 165:5-1-25 to strike the phrase "hazardous substance" with respect to storage tanks from the definition of "site specific" concerning responses to citizen environmental complaints; OAC 165:5-3-1 to add filing fees for certain ***Oil*** and Gas Conservation Division forms and to add a Transportation Network Company annual permit fee pursuant to 47 O.S. § 1013; OAC 165:5-7-61 regarding procedures for rate change causes filed on the Public Utility Docket pursuant to OAC 165:70, Minimum Standard Filing Requirements in Support of a Request by a Public Utility Doing Business in Oklahoma for a Proposed General Rate Change; and OAC 165:5-17-1 regarding motions filed after an order of the Commission is entered.

XI. PENNSYLVANIA

*A. Legislative 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).  [[244]](#footnote-245)245 The rules add additional controls to the surface activities associated with the development of unconventional well sites. Section 78a.15(f) and (g) establish pre-application requirements for a well permit for drilling operations close to forests, parks, schools and other public resources, including notifying the public resource agency if an operator intends to drill a well within eight specified areas, including "a location that will impact other critical communities." Section 78a.68a requires pipeline operators conducting horizontal directional drilling beneath a body of water or a watercourse to notify the Department of Environmental Protection (DEP) at least 24 hours before beginning said drilling. The rules also implement more stringent requirements for the storing of fracking 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.

Senate Bill 1145 was referred to the Senate Environmental Resources and Energy Committee on March 4, 2016. Senate Bill 1145 would amend the ***Oil*** and Gas Conservation Law. Currently, the ***Oil*** and Gas Conservation Law requires ***oil*** and gas operators that penetrate the Onondaga formation, either on purpose or by accident, to meet additional permitting requirements and pay a $ 5,000 fee. Under the proposed legislation, an operator who inadvertently penetrates but does not intend to develop the Onondaga formation or a shale formation below the Onondaga formation would be exempt from the additional requirements and fees.

Proposed House Bill 2319 would amend the ***Oil*** and Gas Lease Act to clearly define the terms "royalty" and "wellhead." The proposed legislation would define "royalty" as "a lessor's ownership interest in the ***oil***, natural gas or gas of any other designation produced from below a specific tract of real property, valued at the wellhead free of expenses of production." The proposed legislation would define "wellhead" as "the point at which ***oil***, natural gas or gas of any other designation reaches the ground surface or departs from the subject real property for which a lease or other such agreement conveys the right to remove or recover ***oil***, natural gas or gas of any other designation from the lessor to the lessee." The bill was referred to the House Environmental Resources and Energy Committee on September 9, 2016.

House Bill 2366 would amend Title 58 (***Oil*** and Gas) of the Pennsylvania Consolidated Statutes to provide for additional unconventional gas well location restrictions. Specifically, the proposed legislation would amend Section 3215 of Title 58 to prohibit the drilling of unconventional gas wells within 4,000 feet of any existing dam or reservoir. It would further limit the drilling of unconventional gas wells within 2,000 feet (measured horizontally) of any existing water well, surface water intake, or water supply extraction point used by a water purveyor without the written consent of the water purveyor. The bill was referred to the House Environmental Resources and Energy Committee on September 23, 2016.

*Executive Action:* On January 19, 2016, Governor Tom Wolf announced the creation of a multi-pronged plan to target and reduce methane emissions from unconventional natural gas wells, pipelines, and other sources in the Pennsylvania ***oil*** and gas sector. The rules comprise four parts that the DEP will create and implement over the next year. First, the DEP aims to replace the August 2013 Category No. 38 conditional permit exemption (Exemption 38) with an Air Quality General Permit requirement for ***oil*** and gas exploration, development, and production facilities, including well pads. Second, the DEP will revise its current general permit, updating best-available technology requirements and applying more stringent leak detection and repair (LDAR) measures, as well as other requirements to minimize leaks. Third, the DEP will develop a regulation for consideration by the Environmental Quality Board that establishes stringent requirements for existing sources in the ***oil*** and gas industry. Finally, in conjunction with the Pipeline Infrastructure Task Force, the DEP will establish Best Management Practices, including LDAR programs, to reduce fugitive methane emissions from production, gathering, processing, and transmission facilities.

On December 8, 2016, the DEP unveiled plans for new general permit requirements for Marcellus Shale well pads. The new general permits will incorporate current federal standards for reducing ***oil*** and gas well site emissions, and build on the federal standards in some areas. For example, the new permits will require LDAR surveys to be performed quarterly instead of semi-annually, as required under the federal standard, until an operator can show that 2% or less of its well site components are leaking. The new permits also will apply to remote pipeline cleaning operations, which are not currently covered by the federal requirements. The DEP also plans to unveil a broader regulatory package in early 2017.

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 PITF released its final report of recommendations on February 18, 2016. Some recommendations from the final report include expanding Pennsylvania's One Call Program requirements for all classes of pipelines, and ensuring adequate agency staffing for reviewing pipeline infrastructure projects.

*B. Judicial Developments*

In *Loughman v. Equitable Gas Co.*, the court held that a lease granted the lessees the right to produce gas or store gas, and that the lease was not severable.  [[245]](#footnote-246)246 The relevant lease language provided, in part, that it remained in effect as long as the property was operated for the exploration or production of gas or ***oil***, or as gas or ***oil*** is found in paying quantities thereon, or stored thereunder or as long as said land is used for the storage of gas or the protection of gas storage on lands in the general vicinity of said land, and that the lease was properly held by storage alone. Here, the lease was held by storage alone. The plaintiffs argued that a sublease of the production rights by the lessee proved that the lease was severable into separate leases for the production and storage and argued that the production rights had terminated. The court held that the durational provisions of the lease were unambiguously written in the disjunctive, providing that the lease would continue during either production *or* storage. The court disagreed with the plaintiffs' interpretation of the effect of the sublease of production rights, noting that the language of the sublease explicitly stated the parties did not intend to sever the lease. The court held that the language of the lease, and in particular, the use of the disjunctive "or," indicated that the production and storage rights were not severable, and the lease was held by the use of the property for the storage of gas. This case follows a recent string of decisions in Pennsylvania courts interpreting leases based on the plain language of ***oil*** and gas leases and holding that the use of the disjunctive "or" in habendum clauses means that lessees may hold a lease by engaging in any of the enumerated activities listed in the habendum clause.  [[246]](#footnote-247)247

In response to the Public Utility Commission's (PUC's) appeal of the Pennsylvania Commonwealth Court's ruling on remand in *Robinson Township v. Commonwealth*,  [[247]](#footnote-248)248 the Pennsylvania Supreme Court issued an opinion striking down various provisions of Act 13.  [[248]](#footnote-249)249 The court held that the PUC is no longer authorized to review local ordinances to ensure compliance with Act 13. The court also struck down the restrictions and obligations placed on doctors related to confidentiality of fracturing fluid trade secrets, and concluded that the ***oil*** and gas industry was receiving "special treatment not afforded to any other class of industry" and that there was no justifiable reason to provide the special treatment. The court struck down Section 3218.1 of the Act, which required the DEP to notify only public drinking water facilities that could be affected by a spill, and not private drinking water facilities. The court held that this provision was a *special law* because Act 13 was enacted to secure the health, safety, and property rights for all Pennsylvania residents during the ***oil*** and gas extraction process, without exception. As to this part of its holding, the court issued a stay of its decision for 180 days to allow the legislature an opportunity to reach a solution; otherwise, the entire provision will be stricken. Finally, the court struck down the provision of the Act that granted private companies the power of eminent domain for gas storage, finding that it violated the United States and Pennsylvania Constitutions because the power was not limited to public utilities.

In *Pennsylvania Environmental Defense Foundation v*.

*Commonwealth*,  [[249]](#footnote-250)250 the Pennsylvania Environmental Defense Foundation (PEDF) sought declaratory relief against the Commonwealth challenging budget-related decisions from 2009 to 2015 related to leasing State lands for ***oil*** and gas development and the use of the monies in the ***Oil*** and Gas Lease Fund (Lease Fund). PEDF argued that the actions by the Commonwealth violated the Environmental Rights Amendment of the Pennsylvania Constitution. The court held that the General Assembly could vest in itself the power to appropriate certain monies in the Lease Fund, and the decision to do so did not reflect a failure by the General Assembly to uphold its trustee obligations under the Environmental Rights Amendment. Second, the court held that the legislature did not violate the Environmental Rights Amendment by passing legislation, including Act 13, which appropriates monies from the Lease Fund. The court noted that the Environmental Rights Amendment merely required that monies be used for the benefit of all the people, and the General Assembly appropriated the Lease Fund monies for the benefit of all people of the Commonwealth. The Commonwealth Court ruled that the Environmental Rights Amendment did not require revenue from ***oil*** and gas drilling to go towards environmental goals. Finally, it held that the Pennsylvania Department of Conservation and Natural Resources was best positioned to act consistent with its constitutional duties related to further leasing of state lands for ***oil*** and gas development. The PEDF appealed the Commonwealth Court's decision, and the Pennsylvania Supreme Court heard oral argument on March 9, 2016. The issues on appeal include the proper standards for judicial review of government regulations and legislation challenged under the Environmental Rights Amendment and the constitutionality of the challenged provisions in the Fiscal Code. The Pennsylvania Supreme Court has not yet rendered its decision.

In *Pennsylvania General Energy Co. v. Grant Township*,  [[250]](#footnote-251)251 the court, in an unpublished opinion, held that several provisions of an ordinance enacted by Grant Township establishing a "Community Bill of Rights" were invalid or preempted by state law. Pennsylvania General Energy Company (PGE) filed suit against Grant Township after Grant Township enacted an ordinance banning the depositing of waste from hydraulic fracturing and invalidating any permit issued by a government agency, whether state or federal, in violation of the ordinance. The court held that Grant Township exceeded its legislative authority under the Second Class Township Code. Further, the court found that the challenged provisions were exclusionary in violation of Pennsylvania law that requires a municipality to authorize all legitimate uses somewhere within its borders. The Third Circuit affirmed the district court's decision in an unpublished decision.  [[251]](#footnote-252)252

In *In Re: Condemnation of Temporary Construction Easement Across Lands of Curtis R. Lauchle and Terri L. Lauchle*,  [[252]](#footnote-253)253 the court, in an unpublished decision, held that a natural gas public utility could use its eminent domain power to condemn an easement for the construction and maintenance of a pipeline supplying gas to a private power plant. The court found that the scope of the easement was not greater than necessary to acquire property rights in connection with the pipeline easement. The court also concluded that the scope of the taking was not greater than necessary to acquire necessary property rights.

The Pennsylvania Commonwealth Court upheld a condemnation by a pipeline company to construct a pipeline to deliver natural gas from Pennsylvania, West Virginia, and Ohio to a refinery in eastern Pennsylvania.  [[253]](#footnote-254)254 The landowners had argued in the lower court that the pipeline company lacked the power to condemn property because (a) it is not a public utility regulated by the Pennsylvania PUC, and (b) the pipeline is not an intrastate pipeline subject to regulation by the PUC. The Commonwealth Court held that the pipeline had been reconfigured as both an interstate pipeline and an intrastate pipeline subject to PUC regulation. Accordingly, the pipeline company had the power to condemn property in the Commonwealth.

In March 2016, a federal jury awarded $ 4.24 million to two landowners alleging that Cabot ***Oil*** & Gas Corporation's drilling operations were contaminating the plaintiffs' well water.  [[254]](#footnote-255)255 The claims tried against Cabot were for negligence and private nuisance. Cabot subsequently filed a motion for judgment as a matter of law, arguing that the evidence at trial was insufficient to establish that Cabot was negligent in drilling the wells at issue or that Cabot caused injury to the plaintiffs' water supply. Cabot argued that the plaintiffs failed to demonstrate a causal link between Cabot's drilling activity and the methane in their water supply. Cabot's motion for judgment as a matter of law or for a new trial was pending at the time of this submission.

In another case, a district court granted Cabot's motion for summary judgment in a memorandum, finding that Cabot had not breached its duty to warn or remedy dangers on the site where a drilling operator was injured by a dust cloud.  [[255]](#footnote-256)256 In its motion for summary judgment, Cabot argued that 1) it owed no duty to the plaintiff; 2) even if it did owe a duty to the plaintiff, it did not breach that duty; and 3) the plaintiff failed to establish causation. The district court agreed with Cabot and granted its motion for summary judgment. Of particular relevance to ***oil*** and gas drilling companies, the district court held that the dumping of large quantities of cement to solidify drill cuttings is a usual and ordinary risk associated with pit abatement, and the "peculiar risk" exception did not apply. This exception provides that persons owe a duty where 1) the risk is foreseeable to the owner at the time the contract is executed; and 2) the risk is different from the usual and ordinary risk associated with the type or work done.

A court recently denied a lessee's motion for summary judgment on private nuisance and negligence claims in a memorandum opinion.  [[256]](#footnote-257)257 In this case, the lessor entered into an ***oil*** and gas lease with the lessee that conveyed the right to the lessee to explore, develop, produce, and market ***oil*** and gas from the unit of which her property was a part. There is no language in the lease regarding the location of drilling activity, but the lessor alleges that she was assured that no drilling would occur within miles of her property because of a nearby water source. The lessee engaged in drilling activities less than a quarter of a mile from the lessor's home. The lessor filed suit, alleging that the lessee is liable for private nuisance and negligence, but the lessor subsequently abandoned her negligence claim, leaving only a claim for private nuisance. The lessee filed a motion for summary judgment based on three grounds: 1) county noise and light ordinances establish the proper standards under which the lessee's alleged nuisance causing activities should be evaluated, and the lessor failed to measure the noise or light output levels quantitatively, thus she cannot prove any violation of the ordinances; 2) the record fails to establish that the lessee's employees and equipment caused the complained-of noise, light, and vibrational harms; and 3) there is no record evidence that the lessee acted intentionally, a required element for succeeding in a private nuisance claim. The court held that the county ordinances were not a proper standard because conduct could comply with county ordinances and still be found to constitute a private nuisance under the community standard that is applied for private nuisances. Second, the court found that the plaintiff's deposition testimony established sufficient evidence from which a reasonable juror could deduce that the lessee's conduct was the legal cause of the alleged invasion. Finally, the court concluded that the lessor had produced sufficient evidence for a reasonable juror to conclude that the defendant acted intentionally.

The Pennsylvania Superior Court affirmed a trial court's summary judgment ruling that an ***oil*** and gas lessee that hired a third party-company to drill a gas well on the leased premises was a statutory employer under Section 302(a) of the Workers' Compensation Act.  [[257]](#footnote-258)258 Here, an employee of a subcontractor was killed while working on a well under a drilling contract between Atlas Resources, LLC (Atlas) and the subcontractor. The estate of the subcontractor's employee filed suit alleging various negligence theories. Atlas alleged it was immune from any tort liability as a statutory employer under Section 302(a) of the Workers' Compensation Act, 77 P.S. § 461 (the "Act"). The court agreed with Atlas that, based on the plain language of the Act and Pennsylvania precedent, Atlas, as the primary contractor, was the statutory employer of the employee and was entitled to tort immunity under the Act. The court's decision was based on the plain language of the Act, which does not expressly or impliedly condition the payment of workers' compensation benefits as a prerequisite for immunity. Instead, the fact that the contractor is secondarily liable to provide workers' compensation benefits to injured employees of subcontractors, in the event of insolvency or some other failure to provide compensation, is sufficient to trigger immunity.

In *Hall v. CNX Gas Company, LLC*, the plaintiffs contended that CNX Gas Company, LLC (CNX) improperly allocated volumes of gas to multiple wells behind a single sales meter, thus depriving plaintiffs of royalties on gas lost or used between the wells and the point of sale. The trial court granted summary judgment to CNX on the allocation issue, holding that because the leases were silent as to how to allocate volumes, the court should supply the missing term so as to meet "community standards of fairness and policy."  [[258]](#footnote-259)259 The trial court found that CNX Gas's practice of allocating volumes pro rata met that standard. The plaintiffs appealed, arguing that the Pennsylvania Supreme Court's decision in Pomposini v. T.W. Phillips Gas & ***Oil*** Co., 580 A.2d 776 (Pa. Super. 1990), meant that if allocation of volumes was not addressed in the lease, the lessee could not allocate and was required to pay on volumes measured at each well. The Pennsylvania Superior Court affirmed, agreeing with CNX that there was no allocation of lost and used gas because such volumes are simply not part of the royalty calculation: "[g]as lost or used on the way to the point of sale is simply not part of the royalty computation. It necessarily follows that lost and used gas is not allocated when the royalty is allocated among the various lessors."  [[259]](#footnote-260)260 The Court noted that CNX bears seven-eighths of any lost revenue attributable to lost and used gas; the lessors bear one-eighth of the lost revenue. That allocation is dictated by the provision in the lease that the one-eighth royalty is based on the net amount realized at the point of sale. Plaintiffs requested review by the Pennsylvania Supreme Court, which the Pennsylvania Supreme Court denied on November 2, 2016.  [[260]](#footnote-261)261

The Third Circuit refused to overturn a jury award 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, its affiliate marketing company.  [[261]](#footnote-262)262 Prior to the jury award in March 2015, the district court had granted summary judgment in favor of ECA on the rest of plaintiffs' claims, holding that plaintiffs were not entitled to royalties on gas that was lost before the point of sale, that ECA was entitled to deduct post-production costs for transportation, processing and marketing, that ECA's method of allocating these costs among multiple wells behind the sales meters was proper, and that plaintiffs were not entitled to royalties on ECA's hedging of gas. On appeal, in a non-precedential opinion, the Third Circuit denied ECA's motion for judgment as a matter of law, or, alternatively, for a new trial, finding that a jury could reasonably conclude that transportation costs had been improperly deducted and that there was sufficient evidence to support the jury's conclusion that marketing costs were improperly deducted from the royalties.

In *Shedden v. Anadarko E. & P. Co.*, the court affirmed a decision holding that estoppel by deed applies to ***oil*** and gas leases.  [[262]](#footnote-263)263 Here, the landowners alleged that at the time they purchased 62 acres, they were unaware that their predecessors in interest had reserved a one-half interest of the ***oil*** and gas rights in a recorded deed in 1894. The landowners leased their ***oil*** and gas rights to Anadarko in May 2006. However, prior to making payment, Anadarko discovered the prior reservation and revised the order of payment so that it was only paying for half of the acreage leased, or 31 acres, which the landowners accepted. The landowners subsequently quieted title on the reserved one-half interest. In 2011, Anadarko invoked an extension clause in the lease by sending the landowners an extension payment of $ 70 per acre for 62 acres. The landowners filed a lawsuit seeking a declaration that the lease with Anadarko was only for a one-half interest. The Superior Court held that estoppel by deed barred the landowners from arguing that the lease only covered a one-half interest. The Supreme Court agreed, and held that the lease was not modified by the initial payment for one-half of the acreage because the express language in the lease provided that the landowners were only entitled to payment for the ***oil*** and gas rights they actually owned. Further, the Court rejected the landowners' argument that estoppel by deed required a showing of equitable reliance, finding that the landowners were attempting to conflate two separate concepts: equitable estoppel and estoppel by deed.

The Third Circuit, in a non-precedential decision, decided a Pennsylvania ***oil*** and gas lease dispute on appeal from the Western District of Pennsylvania that concerned the interpretation of an ***oil*** and gas lease.  [[263]](#footnote-264)264 In *McWreath v. Range Resources-Appalachia, LLC*, the lessors, who only owned partial mineral rights in the property, argued the ***oil*** and gas lease they entered into with the lessee did not apply to ***oil*** and gas produced from two wells drilled by the lessee, and claimed that they were cotenants in the ***oil*** and gas estate entitled to an accounting of the ***oil*** and gas produced from these wells. In support, the lessors argued that the lease only contemplated drilling operations on the surface of property adjacent to the lessors' mineral interests, and not on property directly above the ***oil*** and gas interests. The lessee had entered into agreements with the surface owner to conduct drilling operations on the surface, and also had leases with the other partial mineral owners in the property.

The Third Circuit rejected the lessors' interpretation of the ***oil*** and gas lease and agreed with the district court that the granting clause in the ***oil*** and gas lease gave the lessee the exclusive ability to explore for and produce ***oil*** and gas, and authorized the lessee to use any methods or techniques required to do so. The Third Circuit also rejected the lessors' reliance on a provision in the lease that provided that the lessee could not drill a well on the surface of the property. The Third Circuit noted that under Pennsylvania law, the subsurface owner has an implied right to access and use the surface estate, and here, the lessors had conveyed all rights in the subsurface to the lessee. Because the lessors did not own the surface estate and lessee had acquired the right to drill from the surface owner, the lessors could not rely on the lease's restriction of drilling on the surface.

A district court granted a lessee's motion for summary judgment, finding that the lessee did not breach a right-of-way agreement by using a pipeline to transport gas from other properties.  [[264]](#footnote-265)265 Here, the parties entered into a right-of-way agreement in 2010 that said nothing about the source of the gas to be transported (the 2010 Agreement). The district court held that the 2008 ***oil*** and gas lease was a separate agreement, and that the provision in the parties' 2008 lease barring gas from other properties was not incorporated into the 2010 Agreement. The district court noted that a provision in the 2010 Agreement stated that the 2008 lease was only incorporated where the provisions conflicted with or were inconsistent with the 2010 Agreement; here, the 2010 Agreement contained no provision addressing the source of the gas, thus the lessee did not breach the 2008 lease by transporting gas from other properties.

Another court issued a memorandum opinion granting Chesapeake Appalachia, L.L.C.'s motion for summary judgment that the court, and not an arbitrator, must decide whether class action arbitration is available based on the language of the leases at issue.  [[265]](#footnote-266)266 The district court relied upon another case involving Chesapeake and concerning arbitrability issues, *Chesapeake Appalachia, L.L.C. v. Scout Petroleum LLC*,  [[266]](#footnote-267)267 where the Third Circuit held that courts, and not arbitrators, decide questions of class arbitrability absent clear and unmistakable evidence otherwise. Most recently, a district court granted a motion for summary judgment filed by Chesapeake Appalachia 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.  [[267]](#footnote-268)268

XII. TEXAS

As usual, Texas courts dealt with a variety of energy related cases in 2016. The large volume addressed numerous areas of interest to an energy practitioner ranging from basic deed construction to ongoing liability after the sale of ***oil*** and gas properties. The following cases provide a highlight of recent decisions we found worthy of note.

The certainty of sweep language was called to issue in *Mueller v. Davis*,  [[268]](#footnote-269)269 where mineral and royalty deeds did not contain a metes and bounds description, but rather each stated that the grantor conveyed "[a]ll of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as follows," and went on to list certain parcels of land containing ***oil*** and gas production units. The deeds also contained language purporting to convey all of the mineral, royalty, and overriding royalty interest owned by the grantors in Harrison County "whether or not the same is herein above correctly described." The court held that the property descriptions in the deed were insufficient to identify the property conveyed and that the deeds were ambiguous, but noted that "a deed should not be declared void for uncertainty if it is possible...to ascertain from the description, aided by extrinsic evidence, what property the parties intended to convey." Accordingly, the court remanded the dispute for trial to determine what interests, if any, were conveyed by the deeds.

Highlighting the importance of attention to details on deed construction, in *Combest v. Mustang Minerals, LLC*  [[269]](#footnote-270)270 the court ruled that a deed's reservation clause reserved 1/2 of the minerals (being all of the grantor's interest), not 1/2 of grantor's mineral interest. The court concluded that a deed making a reservation of minerals "from the land described" reserves minerals under the entire tract. In other words, because the reservation "excepts from *this conveyance*" (i.e., the "land described") and not from the land "conveyed," the reservation is made with respect to the entire physical tract.

*Aery v. Hoskins, Inc.*,  [[270]](#footnote-271)271 involved an agreement entered into by three siblings to pool the royalty interests in their respective individually-owned tracts, and gave each sibling a right to a share of the royalties from the tracts owned by the other two siblings. A third party acquired one sibling's tract by a general warranty deed that conveyed all of such sibling's interest and all "appurtenant" interest therein. The issue before the court was whether the conveying sibling's share of the royalty interests from the other two siblings' tracts was also conveyed via the general warranty. The court held that the conveying sibling did not convey his share of royalties from his siblings' tracts, because the shares in question were literally not "appurtenant" to his tract and his interest in his siblings' royalties was not necessary for the enjoyment of his tract. Further, the court stated that the general warranty deed did not specifically convey the conveying sibling's share of royalties from his siblings' tracts.

In *Dragon v. Harrell*,  [[271]](#footnote-272)272 the court analyzed the language of a conveyance. The grantors owned 15/16 of the minerals subject to a life estate in 1/4 of the royalty, and the reversionary interest in the life estate. They conveyed all of their interest to grantee, while reserving "a free nonparticipating interest in and to the royalty on ***oil***, gas and other mineral in and under the hereinabove described property consisting of ONE-HALF (1/2) of the interest now owned by Grantors together with ONE-HALF (1/2) of the reversionary rights in and to the presently outstanding royalty in on and under said property." The issue for the court to decide was whether the reserved interest was a 1/2 royalty or 1/2 of royalty. The court held that the phrase "the interest now owned by Grantors" referred to the royalty interest owned by the grantors at the time the deed was executed. The court reasoned that the use of the phrase indicated that the grantors recognized that the royalty interest being reserved was reduced by the prior reservations.

In *Alford v. McKeithen*,  [[272]](#footnote-273)273 the court highlighted the pitfalls created when a deed incorporates documents by reference. The deed in question conveyed to the Alfords three tracts of land, citing the "metes and bounds" description provided in an attached exhibit, which such metes and bounds description also contained a reservation of 1/2 of the mineral rights. Accordingly, the court found the deed ambiguous and affirmed the trial court's decision to submit the issue to the jury.

In *Hysaw v. Dawkins*,  [[273]](#footnote-274)274 the court emphasized that, in the context of contract and deed interpretation the intent of the parties is to be determined through a "careful and detailed examination of document in its entirety rather than by application of mechanical rules of construction that offer certainty at the expense of effectuating intent." In *Hysaw*, a will provided that fee title to certain tracts would be conveyed to each of three children, but with respect to the minerals beneath all such tracts, "each of [the testatrix's] children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all ***oil***, gas, or other minerals in or under or that may be produced from any of said lands." When a lease covering the lands was executed that provided for a one-fifth royalty, a dispute arose as to whether each of the children should be entitled to (i) a "floating" one-third of one-fifth of the royalties due under the lease, or (ii) a fixed one-third of one-eighth royalty, with the owner of the surface agreement being entitled to the benefit of any royalty in the lease in excess of one eighth. After noting the "dilemma" posed by double-fraction conveyances and the shift away from the "near ubiquit[y]" of the 1/8 royalty, the court held that "all the other language in the document must be considered to deduce intent" before any particular meaning can be ascribed to double-fraction language. In doing so, the court held that the will intended to devise a floating one third royalty that would result in each of the three children equally sharing future royalties across all three tracts of land and were entitled to a one-third (1/3) or one-fifth (1/5) royalty.

In *Prochaska v. Barnes*,  [[274]](#footnote-275)275 the court recognized that defendants, managers of drilling partnerships with ***oil*** and gas wells and leases in Texas, were not subject to personal jurisdiction in Texas because the management took place outside Texas and the leases managed were property of the drilling partnerships, and not the individual partners who were defendants. Accordingly, the court held that the defendants did not directly receive revenue from Texas wells as it first flowed through the partnerships.

The court re-affirmed in *Goss v. Addax Minerals Fund, LP*  [[275]](#footnote-276)276 the limited role of the "discovery rule" in cases where a deed contains obvious errors or omissions. Goss aligned as the successor-in-interest to the grantee of a 1994 deed. The relevant sales contract from 1994 stated that Goss would receive all of the minerals. However, the 1994 deed left title to the minerals in the Grantor. In 2005, Goss secured and recorded an affidavit from the title company that prepared the 1994 deed. The affidavit described the mistake as a scrivener's error. Goss waited until 2013 (one year after the successor-in-interest to the original grantor leased the minerals to Addax) to file suit to quiet title to the mineral estate. The court rejected Goss's attempt to reform the 1994 deed, noting that the document unambiguously reserved the mineral estate to the original Grantor. Because the 1994 deed plainly left title to the minerals in the original Grantor, the discovery rule was inapplicable.

The central holding in *Garcia v. Genesis Crude* ***Oil****, L.P.*  [[276]](#footnote-277)277 was that payment of suspended royalties plus interest before judgment will defeat a claim for attorney's fees and statutory minimum damages. In *Garcia*, a lessee paid a lessor all unpaid royalties and statutory interest allegedly owed to lessor. As such, the lessee was granted a take nothing judgment on lessee's motion for summary judgment. The court held that for a plaintiff to seek attorney's fees or minimum damages under Section 91.406 of the Texas Natural Resources Code, it must first prevail on a cause of action brought under Chapter 91. Because the lessee tendered full payment of proceeds and interest to the lessor, the lessor's cause of action against lessee failed as a matter of law.

In *Fort Apache Energy, Inc. v. Resaca Resources, LLC*,  [[277]](#footnote-278)278 the court held that an unrecorded power of attorney is not synonymous with an unrecorded instrument that could bind a subsequent purchaser. The court reasoned that section 13.001(b) of the Property Code, which binds a subsequent purchaser who has knowledge of an unrecorded instrument, only contemplates an unrecorded conveyance or interest in property, not an unrecorded power of attorney, which is governed by section 489 of the Texas Probate Code. Therefore, although Fort Apache had knowledge of the unrecorded power of attorney when it entered into the lease at issue, Fort Apache was not bound by knowledge of the unrecorded power of attorney held by Resaca's predecessor's lessor, who did not own or control the minerals and thus had no authority to enter into the lease at the time of the lease, because the unrecorded power of attorney did not describe or purport to convey any interest in real property.

In *Chesapeake Exploration L.L.C. v. Hyder*,  [[278]](#footnote-279)279 the Supreme Court of Texas held that parties to an ***oil*** and gas lease may modify the general rule that an overriding royalty interest is free from costs of production but not post-production expenses. Specifically, the court held that using the term "cost-free" to describe an overriding royalty that could either be paid in cash or in-kind, at the royalty owner's choice, created a royalty that was free from post-production costs.

*Apache Deepwater, LLC v. McDaniel Partners, Ltd.*  [[279]](#footnote-280)280 confirms that production payments exist only as long as the burdened lease exists. The production payment interest in this case was created by the assignment of multiple leases, described as a fraction of total production from two surveys covered by the leases, until a dollar cap was reached. After some of these leases expired, Apache proportionately reduced payment, but the court of appeals held that Apache could not adjust the production payment equation downward, because the assignment contained no express language allowing for such a reduction. The Texas Supreme Court reversed, reasoning that the calculation behind the fraction of production payment was tied to production from each respective lease, as opposed to production from the covered lands, and ruled that Apache owed no duty to make production payments to McDaniel on expired leases.

The determination of drainage under off-set lease provisions was the issue in *Adams v. Murphy Exploration & Production Co.*  [[280]](#footnote-281)281 The court was asked to consider a summary judgment based on the meaning of "off-set well" as used in an ***oil*** and gas lease. Although the lessee timely drilled a horizontal well parallel to and approximately 2,100 feet from the draining well through the same producing, the lessors claimed this well was not an offset well under the lease and sued the lessee for unpaid in-lieu royalties. The lessee argued at trial that the conventional understanding of drainage is inapplicable to geological structures in the Eagle Ford and any well drilled in the same formation on the drained property, regardless of location, is an "offset well." The appeals panel reversed summary judgment in favor of lessee, finding that the lessee's evidence lacked the specificity necessary to prove as a matter of law that its well met the lease definition of "off-set well" (*i.e.*, that it protects the leased premises from the draining well).

In *TEPCO, L.L.C. v. Reef Exploration, L.P.*,  [[281]](#footnote-282)282 the court held that the wellbore charges for reworking a well for completion in a more shallow area were subject to a recoupment calculation for non-participating parties. The joint operating agreement (JOA) in question concerned the drilling operation under the deeper zones of a tract that already had a JOA with respect to shallower zones. The JOA for the deeper zones had a Subsequent Operations clause that provided for reimbursement of drilling costs by the participants in the shallow completion if the wellbore was taken over to be used in the shallow completion. The attempted deep well resulted in a dry hole, but it was used to complete a successful shallow well. The issue was whether the wellbore charge was a drilling cost under the terms of the agreement. The contract defined a "Subsequent Operation" as either (1) the drilling of a well on the contract area other than the well provided for in the agreement, or (2) the reworking, deepening, or plugging back a dry hole drilled at the joint expense of all parties and not then producing or capable of producing in paying quantities. The court construed Subsequent Operation to include reworking a well for completion in a more shallow zone. Because the parties agreed that the operation was not the "drilling" of a well, the court reasoned that if doing something to an existing wellbore was not "drilling" it must then be characterized as "reworking" the well.

The risk of ongoing liability after a sale was heightened in 2016. In the *ATP* ***Oil*** *& Gas Corporation*  [[282]](#footnote-283)283 bankruptcy case, the impact of the costs of plugging and abandoning (P&A) wells resulted in a $ 100 million liability for the predecessor-in-title from a decade prior, Anadarko, because the debtor could not pay the $ 100 million P&A liability.  [[283]](#footnote-284)284 The court determined that Anadarko's co-lessee P&A obligation arose pre-petition and treated it as an unsecured administrative expense claim.

In *Crosstex North Texas Pipeline, L.P. v. Gardiner*,  [[284]](#footnote-285)285 the court clarified the law regarding the legal doctrine of "nuisance." The court held "the term 'nuisance' refers not to a defendant's conduct or to legal claim or cause of action but to a type of legal injury involving interference with the use and enjoyment of real property." The court noted that a nuisance action required a "substantial" interference and "unreasonable" discomfort, and the plaintiff must prove an unreasonable effect, not unreasonable conduct by the defendant. Further, the court held that defendants can be liable for nuisance if their conduct is intentional, negligent, or by engaging in dangerous or ultra-hazardous activities.

*Phillips v. Carlton Energy Group, LLC*,  [[285]](#footnote-286)286 clarified the calculation of lost profits. The court held that when market value of a prospect is measured by lost profits, lost profits must be proved with reasonable certainty in order to prevent recovery based on speculation. Applying this rule to the case, the court found that prices fixed by investors can contain evidence to support the verdict. The court found support for the damage model in defendant's agreement to pay plaintiff an amount in exchange for an interest in the project.

The primary issue in the case of *Westlake Ethylene Pipeline Corp. v. Railroad Commission of Texas*  [[286]](#footnote-287)287 was whether a tariff issued by a pipeline was discriminatory. In *Westlake*, a pipeline issued a tariff that terminated two pre-existing services: "backhaul" and "exchange." The court of appeals affirmed the district court's judgment affirming the Texas Railroad Commission order that the tariff was discriminatory. In doing so, the court relied primarily on the fact that, by eliminating existing services, the tariff gave an affiliate of the pipeline an unreasonable preference or advantage over other similarly situated shippers due to unique circumstances in the regional ethylene market.

*Railroad Commission of Texas v. Gulf Energy Exploration*  [[287]](#footnote-288)288 involved a well that was mistakenly plugged by the Railroad Commission after an agreement was reached with the lessee to postpone the plugging. The lessee obtained legislative consent to sue the Commission and obtained a favorable verdict on negligence and breach of contract claims, which verdict was affirmed by the court of appeals. The Texas Supreme Court held that (i) the legislative consent obtained by the lessee did not preclude the Commission from invoking the protections afforded by Section 89.045 of the Texas Natural Resources Code, which provides for an exculpation from liability for the Commission related to acts done in good faith, and (ii) the good faith defense applied to claims related to the Commission's mistaken plugging of the well in question. However, the court cited a series of "red flags" in the conduct of the Commission that meant that based on the facts it could not say "as a matter of law that the Commission acted in good faith." Accordingly the court reversed the judgment of the court of appeals and remanded the matter for a new trial.

The court held in *Southwest Royalties, Inc. v. Hegar*  [[288]](#footnote-289)289 that downhole equipment such as casing and tubing was not exempt from state sales taxes. In *Hegar*, a driller sought a refund for sales taxes paid on the casing, tubing, and pumps used by its ***oil*** and gas exploration division citing Section 151.318 of the Texas Tax Code. The section provides a tax exemption for equipment "used or consumed" in "the actual manufacturing, processing, or fabrication of tangible personal property for ultimate sale."  [[289]](#footnote-290)290 The court concluded that "processing" included any equipment used to "modify or change the characteristics of tangible personal property," including hydrocarbons.  [[290]](#footnote-291)291 The key question was whether the casing, tubing, and pumps used by the driller caused any physical or chemical change to minerals after they were extracted. While minerals undergo various phase changes during extraction, the court concluded that these phase changes were the result of natural shifts in pressure and temperature that occurred during the extraction process. Although equipment plays a vital role in transporting hydrocarbons to the surface, it is only a "conduit" by which the minerals are moved from the reservoir and therefore does not qualify as processing under the exemption.  [[291]](#footnote-292)292 This case is important because if the court determined the meaning of "processing" differently, Texas would have had to refund taxpayers a lot of money. However, the court left the door open for future tax disputes involving more advanced extraction equipment that may offer opportunities for exploration, production, and processing companies seeking tax benefits under Texas law.

XIII. WEST VIRGINIA

*A. Legislative Developments*

The West Virginia Legislature passed H.B. 4323 establishing a 15-minute accident reporting requirement for accidents with serious injuries or explosions.  [[292]](#footnote-293)293 The reports must be made to Homeland Security. The bill applies to both well operators and pipelines. The bill added new West Virginia Code §§ 15-5C-1 through 2.

H.B. 4218 expands the definition of "underground facility" in the One-Call System Act to include underground pipelines for gas, ***oil***, or any hazardous substances that are within a normal inside diameter in excess of four inches and that are not otherwise subject to one-call reporting requirements under federal and state law.  [[293]](#footnote-294)294 The bill amended and reenacted West Virginia Code § 24C-1-2.

S.B. 419 removed the "excess" severance tax of 4.7 cents per thousand cubic feet of natural gas that companies have paid since 2005 and that was first implemented to pay off the state's old workers' compensation debts. [[294]](#footnote-295)295 The bill amended and reenacted West Virginia Code § 11-13V-4.

*B. Judicial Developments*

*Mountain Valley Pipeline, LLC v. McCurdy*  [[295]](#footnote-296)296 involved the application of West Virginia's eminent domain statute. MVP was a pipeline company in the process of seeking a certificate of public convenience and necessity from FERC. The landowners sought and obtained an order from the circuit court granting preliminary and permanent injunction against MVP, precluding it from conducting surveys as part of the FERC application process. The circuit court found that MVP was not authorized under the eminent domain statute to enter the property because the pipeline at issue was not for "public use." The Supreme Court of Appeals of West Virginia affirmed. First, the court agreed that under the eminent domain statute, MVP only had the right to enter the property if it could demonstrate the pipeline was for a "public use." Second, the court found that the subject pipeline did not equate to a public use based upon the following facts: (1) the defendant is not regulated as a utility by any West Virginia agency; (2) the primary purpose of the pipeline was to deliver gas to a distributor located in Virginia; (3) up to 95% of the gas shipped through the pipeline will be owned and produced by the defendant's affiliated companies, none of which are West Virginia companies; and (4) there is only a "possibility" or "potential" that some of the gas would reach West Virginia consumers.

*Leggett v. EQT Production Company*  [[296]](#footnote-297)297 involved a dispute over the deduction of post-production costs from royalty payments issued to successor-in-interest lessors of a 1906 flat-rate royalty lease. In 1982, West Virginia enacted a statute, West Virginia Code § 22-6-8, that found flatrate royalty leases violated public policy  [[297]](#footnote-298)298 and precluded the issuance of a permit for any new drilling or reworking of existing wells under such leases, unless the operator provides an affidavit certifying that it would pay a royalty of "*not less than one eighth of the total amount paid to orreceived by or allowed to the owner of the working interest at the wellhead* . . . ."  [[298]](#footnote-299)299

There were nine wells drilled on the subject property, some which predated the statute, but the majority of wells were drilled after the statute went into effect. The case was removed to the Northern District of West Virginia, which entered judgment against the lessors on all but the breach of contract claim and then certified two questions to the Supreme Court of Appeals of West Virginia--the first of which related to whether the *Tawney*  [[299]](#footnote-300)300 decision has "any effect upon … whether a lessee of a flat-rate lease, converted [under the statute], may deduct post-production expenses from his lessor's royalty, particularly with respect to the language of '1/8 at the wellhead' found in West Virginia Code § 22-6-8(e)." Noting its ambiguity finding in *Tawney* as to the "at the wellhead" language and the fact that the statute was enacted to "right past wrongs" inflicted upon lessors, the court reformulated the question as follows:

Whenever the lessee-owner of a working interest in an ***oil*** or gas well must comply with West Virginia Code § 22-6-8(e) by tendering to the lessor-owner of the ***oil*** or gas in place a royalty not less than one-eighth of the total amount paid to or received by or allowed to the lessee, *does the statute require in addition that the lessee not deduct from that amount any expenses that have been incurred in gathering, transporting, or treating the* ***oil*** *or gas after it has been initially extracted, any sums attributable to a loss or beneficial use of volume beyond that initially measured, or any other costs that may be characterized as post-production*?  [[300]](#footnote-301)301

The court ultimately answered the reformulated question in the affirmative and declined to address the second certified question.

In *Poulos v. LBR Holdings, LLC*,  [[301]](#footnote-302)302 the court determined whether a reservation of "an undivided one-half interest in the ***oil*** and gas under said property" in a 1938 deed also reserved the coalbed methane. The defendants sought a bright-line rule that interpreted any reservation of gas to include coalbed methane. The court refused to establish such a bright-line rule, but instead reiterated its position that in the absence of specific language to the contrary or other indicia of the parties' intent, an ***oil*** and gas lease does not give the ***oil*** and gas lessee the right to drill into the lessor's coal seams to produce coalbed methane gas. The court further stated that this case-by-case rule requiring a clear intent to treat coalbed methane the same as "gas" is supported by the historical fact that coalbed methane was not a valuable resource, and was in fact considered a dangerous nuisance until the 1990s, as this created a disincentive to expressly reserve it and thus presumably parties did not intend to do so. Furthermore, the court also relied on West Virginia's Coalbed Methane and Units statute in refusing to establish a bright-line rule regarding coalbed methane ownership, finding it "'worthy of note'" that this comprehensive statute "completely avoids and eschews any attempt at deciding ownership of coalbed methane."

In *American Energy - Marcellus, LLC v. Poling*,  [[302]](#footnote-303)303 the defendant ***oil*** and gas operators moved for summary judgment on a declaratory judgment claim that they had an implied right to pool leases to form a drilling unit, when there were numerous unknown and missing heirs and a few current mineral owners who refused to sign pooling amendments to preexisting leases. The court granted the defendants' motion for summary judgment on declaratory judgment finding that there is an implied right to pool ***oil*** and gas leases. The court found that, while the leases were silent as to pooling, the purpose of the ***oil*** and gas lease is the production of ***oil*** and gas and the payment of royalties, and the ability to pool was necessary to economically develop the shale formations. Therefore, the court found that an implied right to pool existed as it was both reasonably necessary for the extraction of the minerals and it could be exercised without any substantial burden to the surface owner.

In *Dytko v. Chesapeake Appalachia, L.L.C.*,  [[303]](#footnote-304)304 a lessor/surface owner, his wife, and two minor children filed suit claiming damages for fraudulent inducement, breach of contract, negligence/intentional tort, and private nuisance in relation to the drilling of multiple wells from the subject property. The defendant successfully compelled the lessor/surface owner's claims to arbitration, with the remaining plaintiffs' claims stayed pending the outcome of the arbitration. The arbitration was completed and all of the lessor/surface owner's claims were denied. The stay of the remaining plaintiffs' claims was then lifted and the district court dismissed all of their claims with the exception of the private nuisance claim.  [[304]](#footnote-305)305 Defendant sought summary judgment, arguing *res judicata* should prevent the remaining plaintiffs from relitigating that the operations contractually agreed to by the lessor/surface owner were a private nuisance. Noting privity is typically required to impose *res judicata* on a non-party, the court found that it may still be imposed where the non-parties' interests were adequately represented by another vested with the authority of representation. Ultimately, the court granted summary judgment, finding *res judicata* applied:

First, the ruling by the arbitrator is a prior final judgment on the merits regarding this claim. Second, the claims determined in the prior arbitration and the claims under the Remaining Plaintiffs' complaint are substantially similar in identity. Finally, there is an identity of the parties as privies in this case. Regardless of the familial relationship between [lessor/surface owner] and the Remaining Plaintiffs, privity exists as a result of substantially similar claims stemming from the same lease. Those claims concern individual persons all deriving interests from one particular property interest under a common lease agreement. Despite not being parties to the arbitration, the judgment affects the Remaining Plaintiffs' interests involved in the action as if they were parties.  [[305]](#footnote-306)306

*C. Administrative Developments*

The WVDEP issued General Permit G35-C in an effort to prevent and control regulated air pollutants from eligible natural gas compressor and/or dehydration facilities. Natural gas compressor station activities involve reciprocating internal combustion engine driven compressor(s) or a combination of equipment that supplies energy to move natural gas at increased pressure from gathering systems, in transmission pipelines or into storage. The terms of General Permit G35-C are applicable to all natural gas compressor and/or dehydration facilities designed and operated for the purpose of gathering, transmitting, or compressing natural gas, with a limited number of exceptions.  [[306]](#footnote-307)307 The General Permit G35-C allows registrants to install and operate specified equipment, air pollution control devices and/or emissions reduction devices to control emissions of regulated pollutants into the air. Each registration will list all emissions units, air pollution control devices and/or emission reduction devices and will specify which sections of the general permit are applicable to the particular facility. It will also include the emission limits and throughputs for the emission units. The West Virginia ***Oil*** & Natural Gas Association appealed General Permit G35-C to the West Virginia Air Quality Board.  [[307]](#footnote-308)308 Among other objections, the appeal asserts that the general permit inappropriately prohibits unreasonable noise and light; develops an LDAR program without establishing parameters of such a program through rulemaking; and will contain sections conflicting with EPA's proposed adoption of 40 CFR 60 Subpart OOOOa. The appeal is ongoing.

The WVDEP issued General Permit G70-D in an effort to prevent and control regulated air pollutants from eligible natural gas production facilities located at well sites. The terms of General Permit G70-D are applicable to all facilities engaged in natural gas production activities.  [[308]](#footnote-309)309 General Permits G70-A, G70-B, and G70-C will continue to exist; however, there will be no future registrations, modifications, or administrative updates allowed to registrations issued under those permits. If a registrant wishes to modify an existing registration under one of these general permits, it must be done under General Permit G70-D. General Permit G70-D allows registrants "to install and operate specified equipment, air pollution control devices and emission reduction devices to control emissions of regulated pollutants into the air."  [[309]](#footnote-310)310 The General Permit G70-D establishes an emission cap on regulated and hazardous pollutants. The "fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source" for the purposes of acquiring operating permits pursuant to West Virginia Code Regulation 45-30-2 or for eligibility for the General Permit G70-D.

XIV. WYOMING

*A. Legislative Developments*

The Wyoming Legislature convened its twenty-day Budget Session on February 8, 2016. During the session, the Legislature addressed two important ***oil*** and gas issues, one related to carbon sequestration and the other addressing taxation.

The Legislature amended Wyoming's carbon sequestration statute to allow the State ***Oil*** and Gas Supervisor to convert a carbon dioxide (CO[2] ) injection permit for enhanced ***oil*** and gas purposes to a geological sequestration permit.  [[310]](#footnote-311)311 Before conversion, the new statute requires the Supervisor to determine that the permit is being used to inject CO[2] for the primary purpose of long-term storage and the Supervisor must determine the permit does not create a risk of interference with underground sources of drinking water. After conversion to a geological sequestration permit, jurisdiction over the permit transfers from the Wyoming ***Oil*** and Gas Conservation Commission (WOGCC) to the Wyoming Department of Environmental Quality.  [[311]](#footnote-312)312

The 2016 Legislature enacted legislation to remove archaic and obsolete provisions from Wyoming's mineral taxation statutes. [[312]](#footnote-313)313 These amendments made no substantive changes to the tax statutes. The Legislature also passed a bill allowing taxpayers or taxing entities to request electronic transmission of certain mineral tax assessment information. [[313]](#footnote-314)314

*B. Judicial Developments*

The federal district court issued an Order on Petitions for Review of Final Agency Action, striking down the Bureau of Land Management's (BLM's) hydraulic fracturing rule.  [[314]](#footnote-315)315

After years of work, the BLM issued its "fracking rule" applicable to ***oil*** and gas activities on federal and Indian lands.  [[315]](#footnote-316)316 The fracking rule was scheduled to become effective on June 24, 2015, but the federal court issued a preliminary injunction preventing the BLM from implementing the rule. Ultimately, the court overturned the rule on the grounds that BLM has no jurisdiction over fracking. The court determined that Congress never delegated authority to the Department of the Interior and BLM to regulate fracking.

BLM argued it had authority to regulate fracking under the Mineral Leasing Act of 1920 (MLA) and the Federal Land Policy and Management Act of 1976 (FLPMA), and several other federal leasing statutes, which grant BLM authority to regulate ***oil*** and gas leasing and development activities on federal lands.  [[316]](#footnote-317)317

For decades after enactment of the Safe Drinking Water Act (SDWA) in 1974, the Environmental Protection Agency (EPA) asserted that it had jurisdiction over fracking activities. Because of EPA's exercise of jurisdiction, BLM did not attempt to regulate fracking. However, when Congress enacted the Energy Policy Act of 2005 (EP Act), it "expedite[d] ***oil*** and gas development within the United States" and specifically removed hydraulic fracturing operations from the EPA's jurisdiction under the SDWA. Through its 2016 Fracking Rule, BLM attempted to assert jurisdiction over fracking.  [[317]](#footnote-318)318

In its 2016 order, the federal court found that the EP Act's removal of EPA's jurisdiction over fracking did not vest BLM with jurisdiction over fracking. The court held: "Given Congress' enactment of the EP Act of 2005, to nonetheless conclude that Congress implicitly delegated BLM authority to regulate hydraulic fracturing lacks common sense." The court therefore held that the fracking rule was unlawful.  [[318]](#footnote-319)319 The district court's opinion has been appealed.

In *Pennaco Energy, Inc. v. Sorenson*, the Wyoming Supreme Court issued an opinion reaffirming its prior decision that a producer remains liable for duties to a landowner under a Surface Use Agreement (SUA) after assignment of the SUA to a third party.  [[319]](#footnote-320)320 In the 1990s, the producer/operator acquired lease interests and entered into an SUA with a landowner covering coalbed methane drilling and production operations. Under the SUA, the operator was required to pay the landowner an annual fee and to ensure lands subject to development would be reclaimed once mineral production ended. In July 2010, the operator sold its lease interests and SUA interests to a third party, which then assigned all of the interests to a fourth party. Following the assignment, the operator made no further annual payments and did not reclaim any of the lands. The landowner sued the operator, as well as the subsequent interest owners, to collect unpaid annual fees and to enforce the SUA's reclamation requirements. The subsequent interest owners never responded to the lawsuit and the trial court entered default judgments in favor of the landowner against those parties.

The operator responded to the landowner's complaint and contended that, following the assignment, it was no longer required to perform any obligations under the SUA. The operator argued that an exculpatory clause included in the mineral leases was incorporated by reference into the SUA and, as a result, relieved the operator of liability. In the alternative, the operator argued its obligations under the SUA constituted covenants running with the ownership of the mineral estate and, as a consequence, the transfer and assignment to the third party released the operator from liability under the SUA.

The trial court ruled for the landowner and the operator appealed. The Wyoming Supreme Court affirmed the trial court's ruling. In its opinion, the court held that because the SUA did not contain language specifically releasing the operator from its obligations following assignment, the operator remained liable for payments and reclamation.  [[320]](#footnote-321)321

In *Merit Energy Co. v. Horr*, the court addressed an ***oil*** and gas operator's liability for injuries sustained by an independent contractor's employee. [[321]](#footnote-322)322 The operator in the case employed an operations manager and field foremen who managed operations conducted by an independent contractor. The contractor conducted various operations in the field, including the clearing of clogged high pressure wells. One of the contractor's employees was injured during the work. The employee filed suit against the operator and a jury eventually found the operator 45% at fault for the employee's injuries. The Supreme Court affirmed. It held there was sufficient evidence to support a finding that the operator, through its foremen, retained control over a portion of the independent contractor's work. The court relied upon evidence that the foremen approved equipment used by the independent contractor and the foremen did not inspect the well pressure during the work.

*C. Administrative Developments*

Effective April 1, 2016, the WOGCC amended its rules governing the flaring and venting of natural gas.  [[322]](#footnote-323)323 The new rule reduced the maximum venting of natural gas from 60 thousand cubic feet per day (MCF/D) to 20 MCF/D, unless the WOGCC issues a special order for increased venting. Following the rule change, operators must report the following to the WOGCC on a monthly basis: flaring volumes, venting volumes, the number of days flaring and/or venting has occurred, the measurement method used to determine the flared or vented volumes; and all circumstances that involved flaring or venting.

If the operator uses a gas-***oil*** ratio to determine volumes, the operator must submit a crude analysis within six months of the commencement of flaring or venting and must submit updated crude analyses every five years. Operators are required to also submit gas analysis results to the WOGCC for any natural gas that is flared or vented. This gas analysis must be submitted on the same schedule as the crude analysis reporting (six months, then every five years), but if flaring of natural gas exceeds 60 MCF/D, the operator must submit gas analysis results every three months.  [[323]](#footnote-324)324

The WOGCC also amended its well bonding and permitting rules. Effective February 1, 2016, the WOGCC increased its blanket bond requirement to $ 100,000, and set individual well bonds at $ 10 per foot per well. The WOGCC also set its split estate bonding rate at $ 10,000 per well site. The new fee for an Application for a Permit to Drill a well (APD) is $ 500, and those APDs remain valid for two years.  [[324]](#footnote-325)325

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154. 155 2016 WL 3946800 (D.N.M. July 20, 2016). [↑](#footnote-ref-155)
155. 156 407 F.3d 1091 (10th Cir. 2005). [↑](#footnote-ref-156)
156. 157 2016 WL 3946800 at \*5. [↑](#footnote-ref-157)
157. 158 No. CIV 14-1021 JB/SCY, 2016 WL 1158073 (D.N.M. Mar. 11, 2016). [↑](#footnote-ref-158)
158. 159 Technically, the employees were employed by ATD, LLC, an entity affiliated with Air Tech, and the parties disputed whether Air Tech and ATD, LLC were essentially the same company, a dispute that was not resolved. [↑](#footnote-ref-159)
159. 160 N.M. Stat. Ann. § 56-7-2(A). [↑](#footnote-ref-160)
160. 161 No. CIV 14-1021 JB/SCY, 2016 WL 4009825 (D.N.M. May 31, 2016). [↑](#footnote-ref-161)
161. 162 Slip Op. No.1:13-cv-00862-JCH-LAM (Mar. 30, 2016) (Document 314) (unpublished opinion), *available at* https://www.gpo.gov/fdsys/granule/USCOURTS-nmd-1\_13-cv-00862/USCOURTS-nmd-1\_13-cv-00862-12/content-detail.html. [↑](#footnote-ref-162)
162. 163 *Id.* at 36-37 (emphasis in original). [↑](#footnote-ref-163)
163. 164 *Id.* at 40-42. [↑](#footnote-ref-164)
164. 165 Slip Op. No. 1:13-cv-00862-JCH-LAM, 17-18 (Mar. 30, 2016) (Document 315) (unpublished opinion), *available at* https://www.gpo.gov/fdsys/granule/USCOURTS-nmd-1\_13-cv-00862/USCOURTS-nmd-1\_13-cv-00862-12/content-detail.html. [↑](#footnote-ref-165)
165. 166 N.M. Stat. Ann. § 70-1-3. [↑](#footnote-ref-166)
166. 167 N.M. Stat. Ann. § 70-1-4. [↑](#footnote-ref-167)
167. 168 Slip Op. No. 1:13-cv-00862-JCH-LAM, 7 (Mar. 30, 2016) (Document 316) (unpublished opinion), *available at* https://www.gpo.gov/fdsys/granule/USCOURTS-nmd-1\_13-cv-00862/USCOURTS-nmd-1\_13-cv-00862-12/content-detail.html. [↑](#footnote-ref-168)
168. 169 *Id.* at 10. [↑](#footnote-ref-169)
169. 170 Slip Op. No. 1:13-cv-00862-JCH-LAM, 9 (Mar. 30, 2016) (Document 317) (hereinafter Order 317) (unpublished opinion), *available at* https://www.gpo.gov/fdsys/granule/USCOURTS-nmd-1\_13-cv-00862/USCOURTS-nmd-1\_13-cv-00862-12/content-detail.html. *See* N.M. Stat. Ann. § 70-2-29 ("Any person so damaged by the violation may sue for and recover such damages as he may be entitled to receive."). [↑](#footnote-ref-170)
170. 171 *Id.* at 11-13 (citing ***Oil*** Conservation Division Rule 1207.A.(1)(a)). [↑](#footnote-ref-171)
171. 172 Slip Op. No. 1:13-cv-00862-JCH-LAM, 16 (Mar. 30, 2016) (Document 318) (unpublished opinion), *available at* https://www.gpo.gov/fdsys/granule/USCOURTS-nmd-1\_13-cv-00862/USCOURTS-nmd-1\_13-cv-00862-12/content-detail.html. [↑](#footnote-ref-172)
172. 173 Slip Op. No. 1:13-cv-00862-JCH-LAM, 15 (Mar. 30, 2016) (Document 319) (unpublished opinion), *available at* https://www.gpo.gov/fdsys/granule/USCOURTS-nmd-1\_13-cv-00862/USCOURTS-nmd-1\_13-cv-00862-12/content-detail.html. [↑](#footnote-ref-173)
173. 174 N.M. ***Oil*** Conserv. Comm'n, Order No. R-14170 (May 19, 2016) (amending N.M. Admin. Code §§ 19.15.2, 19.15.35, 19.15.36). [↑](#footnote-ref-174)
174. 175 883 N.W.2d 855 (N.D. 2016). [↑](#footnote-ref-175)
175. 176 879 N.W.2d 397 (N.D. 2016). [↑](#footnote-ref-176)
176. 177 *See* N.D.C.C. § 38-08-06.4(5) ("The industrial commission may enforce this section and, for each well operator found to be in violation of this statute, may determine the value of flared gas for purposes of payment of royalties . . . ."); *see also* N.D.C.C. § 38-08-11(4) (authorizing an interested person to petition the North Dakota Industrial Commission for a determination of royalties on gas flared in violation of the statute). [↑](#footnote-ref-177)
177. 178 878 N.W.2d 397. [↑](#footnote-ref-178)
178. 179 876 N.W.2d 443. [↑](#footnote-ref-179)
179. 180 875 N.W.2d 510. [↑](#footnote-ref-180)
180. 181 2016 ND 234, 888 N.W.2d 177. [↑](#footnote-ref-181)
181. 182 No. 1:16-CV-115, 2016 WL 7209805, at \*1 (D.N.D. Oct. 3, 2016). [↑](#footnote-ref-182)
182. 183 No. 4:15-CV-19, 2016 WL 3950744, at \*1 (D.N.D. Apr. 12, 2016). [↑](#footnote-ref-183)
183. 184 No. 1-15-CV-76, 2016 WL 5376179, at \*6 (D.N.D. Sept. 26, 2016) [↑](#footnote-ref-184)
184. 185 Ohio H.B. 390 § 715.10. [↑](#footnote-ref-185)
185. 186 47 N.E.3d 836 (Ohio 2016). [↑](#footnote-ref-186)
186. 187 12 N.E.3d 1228 (Ohio 2016). [↑](#footnote-ref-187)
187. 188 No. 2015-0545, 2016 Ohio LEXIS 2700 (Ohio 2016). [↑](#footnote-ref-188)
188. 189 2016 Ohio App. LEXIS 28876 (Ohio Ct. App. 2016). [↑](#footnote-ref-189)
189. 190 *Id.* at P 18. [↑](#footnote-ref-190)
190. 191 *Id.* at P 22. [↑](#footnote-ref-191)
191. 192 2016 Ohio App. LEXIS 1194 (Ohio Ct. App. 2016). [↑](#footnote-ref-192)
192. 193 *Id.* at P 43. [↑](#footnote-ref-193)
193. 194 2016 Ohio App. LEXIS 2486 (Ohio Ct. App. 2016). [↑](#footnote-ref-194)
194. 195 *Id.* at P 24. [↑](#footnote-ref-195)
195. 196 2016 Ohio App. LEXIS 3149 (Ohio Ct. App. 2016). [↑](#footnote-ref-196)
196. 197 *Id.* at P 12. [↑](#footnote-ref-197)
197. 198 *Id. at P* 13. [↑](#footnote-ref-198)
198. 199 2015 Ohio App. LEXIS 5098 (Ohio Ct. App. 2015). [↑](#footnote-ref-199)
199. 200 *Id.* at P 16. [↑](#footnote-ref-200)
200. 201 2016 Ohio App. LEXIS 3149 (Ohio Ct. App. 2016). [↑](#footnote-ref-201)
201. 202 2016 Ohio App. LEXIS 2593 (Ohio Ct. App. 2016). [↑](#footnote-ref-202)
202. 203 *Id.* at P 28. [↑](#footnote-ref-203)
203. 204 2016 Ohio App. LEXIS 92 (Ohio Ct. App. 2016), *application for reconsideration granted and denied in part*, Mar. 11, 2016, *appeal accepted* Aug. 31, 2016. [↑](#footnote-ref-204)
204. 205 2016 Ohio App. LEXIS 92 at P 23. [↑](#footnote-ref-205)
205. 206 *Id.* at P 24. [↑](#footnote-ref-206)
206. 207 2016 Ohio App. LEXIS 2593 (Ohio Ct. App. 2016). [↑](#footnote-ref-207)
207. 208 2016 Ohio App. LEXIS 3150 (Ohio Ct. App. 2016). [↑](#footnote-ref-208)
208. 209 2016 Ohio App. LEXIS 2852 (Ohio Ct. App. 2016). [↑](#footnote-ref-209)
209. 210 *Id.* at 92. [↑](#footnote-ref-210)
210. 211 2016 Ohio App. LEXIS 792 (Ohio Ct. App. 2016). [↑](#footnote-ref-211)
211. 212 2016 U.S. App. LEXIS 6844 (6th Cir. 2016). [↑](#footnote-ref-212)
212. 213 2016 U.S. Dist. LEXIS 25993 (S.D. Ohio Mar. 2, 2016), *vacated in part on other grounds*, 2016 U.S. Dist. LEXIS 86762 (Jul. 5, 2016). [↑](#footnote-ref-213)
213. 214 2016 Ohio App. LEXIS 2487 (Ohio Ct. App. 2016). [↑](#footnote-ref-214)
214. 215 2016 Ohio App. LEXIS 3929 (Ohio Ct. App. 2016). [↑](#footnote-ref-215)
215. 216 The rules are codified in Ohio Admin. Code §§ 1509:9-8-01 and 1509:9-8-02. [↑](#footnote-ref-216)
216. 217 2016 WL 5210888 (10th Cir. 2016) (Unpublished) (Petition for Rehearing denied). [↑](#footnote-ref-217)
217. 218 2016 WL 5210888 at \*1. [↑](#footnote-ref-218)
218. 219 \_\_\_ P.3d \_\_\_ (Okla. App. 2015 - #113755) (For Publication) (Petition for Certiorari pending at the time of the submission of this paper). [↑](#footnote-ref-219)
219. 220 2014 OK 97, 341 P.3d 69. [↑](#footnote-ref-220)
220. 221 Watts v. Amoco Production Co., 75 O.B.J. 2459 (Okla. App. 2004 - #98,782). [↑](#footnote-ref-221)
221. 222 2009 OK CIV APP 37, 211 P.3d 910 (Okla. App. 2008). [↑](#footnote-ref-222)
222. 223 2012 OK CIV APP 94, 287 P.3d 1033 (Okla. App. 2012). [↑](#footnote-ref-223)
223. 224 Order dated February 2, 2016, in Case No. CIV-15-840-R, United States District Court for the Western District of Oklahoma. [↑](#footnote-ref-224)
224. 225 *Id.* [↑](#footnote-ref-225)
225. 226 2016 OK CIV APP 37, 379 P.3d 1157. [↑](#footnote-ref-226)
226. 227 *Id.* at P 37. [↑](#footnote-ref-227)
227. 228 2016 WL 67803 (W.D. Okla. 2016). [↑](#footnote-ref-228)
228. 229 2016 OK 100, 382 P.3d 1028. [↑](#footnote-ref-229)
229. 230 *See* Calvert v. Swinford, 2016 OK 104, 382 P.3d 1039 and Calvert v. Swinford, 2016 OK 105, 382 P.3d 1037. [↑](#footnote-ref-230)
230. 231 2016 OK 104, 382 P.3d 1039. [↑](#footnote-ref-231)
231. 232 2016 OK 105, 382 P.3d 1037. [↑](#footnote-ref-232)
232. 233 2016 OK 108, 388 P.3d 699. [↑](#footnote-ref-233)
233. 234 *Id.* at P 17. [↑](#footnote-ref-234)
234. 235 *Id.* at P9. The grantor, Scott, cited in his support the case of Nelson v. Daugherty, 1960 OK 205, 357 P.2d 425. [↑](#footnote-ref-235)
235. 236 2016 OK 108, 388 P.3d 699, at P12. [↑](#footnote-ref-236)
236. 237 2016 OK 6, 374 P.3d 766. [↑](#footnote-ref-237)
237. 238 *Id.* at P 17. [↑](#footnote-ref-238)
238. 239 2016 OK CIV APP 15, 368 P.3d 3. [↑](#footnote-ref-239)
239. 240 12 O.S. §§ 1141.1 through 1141.5. [↑](#footnote-ref-240)
240. 241 *Id.* citing 12 O.S. § 1141.5(B). [↑](#footnote-ref-241)
241. 242 2015 WL 4925921 (W.D. Okla. 2015). [↑](#footnote-ref-242)
242. 243 2015 OK CIV APP 101, 364 P.3d 665. [↑](#footnote-ref-243)
243. 244 *Id.* at P 28. [↑](#footnote-ref-244)
244. 245 25 PA. CODE Chs. 78 and 78a; *see also* 46 Pa. Bull. 6431 (Oct. 8, 2016). [↑](#footnote-ref-245)
245. 246 Loughman v. Equitable Gas Co., 134 A.3d 470 (Pa. Super. Ct. 2016). [↑](#footnote-ref-246)
246. 247 *See, e.g.*, Warren v. Equitable Gas Co., 2015 Pa. Super. Unpub. LEXIS 3691 (Feb. 4, 2015) (holding that a lessee may hold both production and storage rights where the leased property has been used only for storage under a dual-purpose lease, which provides that the lease remains in effect so long as natural gas is produced or stored); Mason v. Range Resources-Appalachia L.L.C., 2015 WL 4531299 (W.D. Pa. July 27, 2015) (holding that the use of the disjunctive conjunction "or" indicated that the lease extended into the secondary term when the lessee operated the property for any of the four listed purposes in the habendum clause); Seneca Resources v. S&T Bank, 122 A.3d 374 (Pa. Super. Ct. 2015) (holding that a dual-purpose lease was not severable). [↑](#footnote-ref-247)
247. 248 Robinson Twp. v. Commonwealth, 96 A.3d 1104 (Pa. Commw. Ct. 2014). [↑](#footnote-ref-248)
248. 249 Robinson Twp. v. Commonwealth, 147 A.3d 536 (Pa. 2016). [↑](#footnote-ref-249)
249. 250 Pa. Envtl. Def. Found. v. Commonwealth, 108 A.3d 140 (Pa. Commw. Ct. 2015). [↑](#footnote-ref-250)
250. 251 Pa. Gen. Energy Co. v. Grant Twp., 2015 WL 6002163 (W.D. Pa. Oct. 14, 2015). [↑](#footnote-ref-251)
251. 252 Pa. Gen. Energy Co. v. Grant Twp. East Run Hellbenders Society Inc., 658 Fed. Appx. 37 (3d Cir. July 27, 2016). [↑](#footnote-ref-252)
252. 253 In Re: Condemnation of Temporary Construction Easement Across Lands of Curtis R. Lauchle and Terri L. Lauchle, 2016 Pa. Commw. Unpub. LEXIS 7 (Jan. 5, 2016). [↑](#footnote-ref-253)
253. 254 In Re: Condemnation by Sunoco Pipeline, L.P. of Permanent and Temporary Right of Way, 143 A.3d 1000 (Pa. Commw. Ct. July 14, 2016). [↑](#footnote-ref-254)
254. 255 Ely et al. v. Cabot ***Oil*** & Gas Corp., No. 09-cv-02284 (M.D. Pa.). [↑](#footnote-ref-255)
255. 256 Maghakian v. Cabot ***Oil*** & Gas Corp., 171 F. Supp. 3d 353 (M.D. Pa. Mar. 18, 2016). [↑](#footnote-ref-256)
256. 257 Tiongco v. Southwestern Energy Prod. Co., 214 F. Supp. 3d 279 (M.D. Pa. Oct. 14, 2016). [↑](#footnote-ref-257)
257. 258 Doman v. Atlas Am., Inc., 150 A.3d 103 (Pa. Super. Ct. 2016). [↑](#footnote-ref-258)
258. 259 Hall v. CNX Gas Co., No. GD 10-21633, 2014 WL 11430738 (Pa. C.C.P. Oct. 7, 2014). [↑](#footnote-ref-259)
259. 260 Hall v. CNX Gas Co., 137 A.3d 597 (Pa. Super. Ct. 2016). [↑](#footnote-ref-260)
260. 261 Hall v. CNX Gas Co., No. 188 WAL 2016, 2016 WL 6508939 (Pa. Nov. 2. 2016). [↑](#footnote-ref-261)
261. 262 Pollock v. Energy Corp. of Am., 665 Fed. Appx. 212 (3d Cir. Oct. 24, 2016). [↑](#footnote-ref-262)
262. 263 Shedden v. Anadarko E. & P. Co., 136 A.3d 485 (Pa. 2016). [↑](#footnote-ref-263)
263. 264 McWreath v. Range Resources-Appalachia, LLC, 645 Fed. Appx. 190 (3d Cir. Mar. 29, 2016). [↑](#footnote-ref-264)
264. 265 Camp Ne'er Too Late, LP v. SWEPI, LP, 185 F. Supp. 3d 517 (M.D. Pa. May 5, 2016). [↑](#footnote-ref-265)
265. 266 Chesapeake Appalachia, L.L.C. v. Brown, No. 3:14-0833, 2016 WL 815571 (M.D. Pa. Mar. 2, 2016). [↑](#footnote-ref-266)
266. 267 809 F.3d 746 (3d Cir. 2016). [↑](#footnote-ref-267)
267. 268 Chesapeake Appalachia, L.L.C. v. Ostroski, No. 4:16-cv-50, 2016 WL 4179583 (M.D. Pa. Aug. 8, 2016). [↑](#footnote-ref-268)
268. 269 485 S.W.3d 622 (Tex. App.--Texarkana 2016, pet. filed). [↑](#footnote-ref-269)
269. 270 No. 04-15-00617-CV, 2016 WL 4124066 (Tex. App.--San Antonio Aug. 3, 2016, pet. filed). [↑](#footnote-ref-270)
270. 271 493 S.W.3d 684 (Tex. App.--San Antonio 2016, pet. filed). [↑](#footnote-ref-271)
271. 272 No. 04-14-00711-CV, 2016 WL 1238165 (Tex. App.--San Antonio Mar. 30, 2016, pet. denied) (mem. op.) [↑](#footnote-ref-272)
272. 273 No. 12-14-00262-CV, 2016 WL 1253902 (Tex. App.--Tyler Mar. 31, 2016, no pet.) (mem. op.). [↑](#footnote-ref-273)
273. 274 483 S.W.3d 1 (Tex. 2016). [↑](#footnote-ref-274)
274. 275 No. 01-15-01044-CV, 2016 WL 4055642 (Tex. App.--Houston [1st Dist.] July 28, 2016, no pet.) (mem. op.). [↑](#footnote-ref-275)
275. 276 No. 07-14-00167-CV, 2016 WL 1612918 (Tex. App.--Amarillo Apr. 21, 2016, pet. denied) (mem. op.). [↑](#footnote-ref-276)
276. 277 No. 13-14-00727-CV, 2016 WL 1732436 (Tex. App.--Corpus Christi Apr. 28, 2016, no pet.) (mem. op.) (payment satisfies Division Order Statute). [↑](#footnote-ref-277)
277. 278 No. 09-14-00325-CV, 2016 WL 637985 (Tex. App.--Beaumont Feb. 18, 2016, no pet.) (mem. op.). [↑](#footnote-ref-278)
278. 279 483 S.W.3d 870 (Tex. 2016). [↑](#footnote-ref-279)
279. 280 485 S.W.3d 900 (Tex. 2016). [↑](#footnote-ref-280)
280. 281 497 S.W.3d 510 (Tex. App.--San Antonio 2016, pet. filed). [↑](#footnote-ref-281)
281. 282 485 S.W.3d 557 (Tex. App.--Houston [14th Dist.] 2016, no pet.). [↑](#footnote-ref-282)
282. 283 540 B.R. 294 (Bankr. S.D. Tex. 2015). [↑](#footnote-ref-283)
283. 284 In re ATP ***Oil*** & Gas Corp., No. 12-36187, 2013 WL 3157567 (Bankr. S.D. Tex. June 19, 2013). [↑](#footnote-ref-284)
284. 285 No. 15-0049, 2016 WL 3483165 (Tex. June 24, 2016). [↑](#footnote-ref-285)
285. 286 475 S.W.3d 265 (Tex. 2015). [↑](#footnote-ref-286)
286. 287 No. 03-15-00728-CV, 2016 WL 7187479 (Tex. App.--Austin Dec. 7, 2016, no. pet. h.). [↑](#footnote-ref-287)
287. 288 482 S.W.3d 559 (Tex. 2016). [↑](#footnote-ref-288)
288. 289 500 S.W.3d 400 (Tex. 2016). The Texas Supreme Court issued a revised opinion on October 21, 2016, clarifying that in most cases "artificial means" are needed to move ***oil*** & gas from its reservoir into the wellbore. [↑](#footnote-ref-289)
289. 290 Tex. Tax Code § 151.318(a)(2), (5), (10). [↑](#footnote-ref-290)
290. 291 Southwest Royalties, 500 S.W.3d at 406-09. [↑](#footnote-ref-291)
291. 292 *Id.* at 407-08 ("There is no evidence that the equipment was applied to cause changes in their characteristics as the hydrocarbons moved from the reservoir to the surface."). [↑](#footnote-ref-292)
292. 293 H.B. 4323, 2016 Leg., 83d Sess. (W. Va. 2016). [↑](#footnote-ref-293)
293. 294 H.B. 4218, 2016 Leg., 83d Sess. (W. Va. 2016). [↑](#footnote-ref-294)
294. 295 S.B. 419, 2016 Leg., 83d Sess. (W. Va. 2016). [↑](#footnote-ref-295)
295. 296 793 S.E.2d 850 (W. Va. Nov. 15, 2016). [↑](#footnote-ref-296)
296. 297 No. 16-0136, --- S.E.2d ---, 2016 WL 6835732, at \*1 (W. Va. Nov. 17, 2016). [↑](#footnote-ref-297)
297. 298 W. Va. Code § 22-6-8(b). [↑](#footnote-ref-298)
298. 299 W. Va. Code § 22-6-8(e). [↑](#footnote-ref-299)
299. 300 Tawney v. Columbia Natural Resources, L.L.C., 219 W.Va. 266, 633 S.E.2d 22 (2006). [↑](#footnote-ref-300)
300. 301 *Leggett*, No. 16-0136, --- S.E.2d ---, 2016 WL 6835732, at \*8 (W. Va. Nov. 17, 2016). [↑](#footnote-ref-301)
301. 302 No. 15-0907, 2016 WL 6407490, at \*2 (W. Va. Oct. 26, 2016). [↑](#footnote-ref-302)
302. 303 Civil Action No. 15-C-34, \*2-3 (Tyler Co. Cir. Court, W. Va., April 15, 2016) accessible at: http://oilandgas.jacksonkelly.com/2016/04/there-is-an-implied-right-to-poolan-***oil***-and-gas-lease.html. [↑](#footnote-ref-303)
303. 304 No. 5:13CV150, 2016 WL 3983657 (N.D.W. Va. July 25, 2016). [↑](#footnote-ref-304)
304. 305 The fraudulent inducement and breach of contract claims were dismissed because none of the remaining plaintiffs were signatories to the lease or other contracts at issue. Similarly, the court dismissed the negligence/intentional tort claims finding no allegations of injuries were made by the remaining plaintiffs. [↑](#footnote-ref-305)
305. 306 No. 5:13CV150, 2016 WL 3983657, \*6 (N.D.W. Va. July 25, 2016). [↑](#footnote-ref-306)
306. 307 http://www.dep.wv.gov/daq/permitting/Pages/airgeneralpermit.aspx. [↑](#footnote-ref-307)
307. 308 *WVONGA v. WVDEP*, Appeal No. 16-02-AQG (Jan. 15, 2016). [↑](#footnote-ref-308)
308. 309 http://www.dep.wv.gov/daq/permitting/Pages/airgeneralpermit.aspx. [↑](#footnote-ref-309)
309. 310 *Id.* [↑](#footnote-ref-310)
310. 311 WYO. STAT. ANN. § 35-11-313(c) (2016); S.F. 0028, 63d Leg., 2016 Budget Sess. (Wyo. 2016). [↑](#footnote-ref-311)
311. 312 *Id.* [↑](#footnote-ref-312)
312. 313 WYO. STAT. ANN. §§ 39-14-204(a)(iii) & (iv), 39-14-208(b)(iii); S.F. 0021, 63d Leg., 2016 Budget Sess. (Wyo. 2016). [↑](#footnote-ref-313)
313. 314 WYO. STAT. ANN. §§ 39-13-102(n), 39-13-103(b); H.B. 0077, 63d Leg., 2016 Budget Sess. (Wyo. 2016). [↑](#footnote-ref-314)
314. 315 Wyoming v. U.S. Dept. of Interior, 2016 WL 3509415 (D. Wyo. 2016). [↑](#footnote-ref-315)
315. 316 *Id.* at \*1 (citing 80 Fed. Reg. 16,128-16,222 (Mar. 26, 2015) (subsequently codified at 43 C.F.R. § 3160)). [↑](#footnote-ref-316)
316. 317 *Id.* at \*4-5, \*7-8, \*10. [↑](#footnote-ref-317)
317. 318 *Id.* at \*9-10. [↑](#footnote-ref-318)
318. 319 *Id.* at \*12. [↑](#footnote-ref-319)
319. 320 371 P.3d 120 (Wyo. 2016) (citing Pennaco Energy, Inc. v. KD Co. LLC, 363 P.3d 18 (Wyo. 2015). [↑](#footnote-ref-320)
320. 321 *Id.* at 130-31. [↑](#footnote-ref-321)
321. 322 366 P.3d 489 (Wyo. 2016). [↑](#footnote-ref-322)
322. 323 WYO. ***OIL*** & GAS CONSERVATION COMM'N RULES, Ch. 3 § 39. The State ***Oil*** and Gas Supervisor issued a memorandum on April 25, 2016, stating that in order to give operators time to adjust to the new requirements, the WOGCC would implement the rule for June 2016 production (reported by July 31, 2016). [↑](#footnote-ref-323)
323. 324 *Id.* [↑](#footnote-ref-324)
324. 325 WYO. ***OIL*** & GAS CONSERVATION COMM'N RULES, Ch. 3 §§ 4, 8. [↑](#footnote-ref-325)