# **Oil and Gas Update: Legal Developments in 2018 Affecting the Oil and Gas Exploration and Production Industry**

2019

**Reporter**

56 RMMLF Journal 23

**Length:** 24413 words

**Author:** Mark D. Christiansen, Editor  [[1]](#footnote-2)1, Edinger Leonard & Blakley PLLC, Oklahoma City, Oklahoma

**Text**

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

I. ALASKA

*A. Legislative Developments*

In June 2018, the Governor of Alaska signed into law HB 331, codified at Alaska Stat. §§ 37.18.010 et seq., which establishes the public Alaska Tax Credit Bond Corporation (ATCBC). The legislatively expressed purposes of the ATCBC are to, among other things, finance the purchase of over $ 800 Million in transferable tax credits for certain losses and expenditures and of alternative tax credits for ***oil*** and gas exploration, and pay claimed refunds for gas storage facility tax credit certificates, liquefied natural gas storage facility tax credits, and qualified in-state ***oil*** refinery infrastructure expenditures tax credits. The legislation allows the State of Alaska to issue nearly $ 1 Billion in bonds to pay off tax credits it owes to ***oil*** producers.

HB 331 has been challenged on constitutional grounds in the Superior Court for the State of Alaska. [[2]](#footnote-3)2 The lawsuit alleges that such bond sales would cause the State of Alaska to legislatively incur debt above an amount permitted by the Alaska Constitution. First oral arguments were heard October 1, 2018.

*B. Judicial Developments*

In *State of Alaska, Dep't of Natural Res. v. Alaskan Crude Corp.*,  [[3]](#footnote-4)3 an ***oil*** and gas lessee conducted drilling activity on the last day of a lease term. The subject lease provided that such activity extended its term. Nevertheless, two days later, the State of Alaska, Department of Natural Resources (DNR), notified the lessee that the lease had expired. The lessee halted drilling activity and requested reconsideration and reinstatement. Several weeks later, the DNR granted reinstatement. However, the lessee insisted that the reinstatement terms added new and unacceptable conditions, and administratively appealed to the DNR. Six months later, the DNR terminated the lease, finding that the lessee failed to diligently pursue drilling after reinstatement.

The Superior Court for the State of Alaska reversed the DNR's termination and held that it materially breached the lease by reinstating it with new conditions. However, on appeal, the Alaska Supreme Court concluded that, although the DNR breached the lease, it cured the breach through reinstatement. The court also held that the DNR's later decision to terminate due to the lessee's failure to diligently pursue drilling activities following reinstatement was supported by substantial evidence. The Alaska Supreme Court reversed the superior court's reinstatement of the lease and affirmed the DNR's termination decision.

In the consolidated Alaska Supreme Court case *All American Oilfield, LLC v. Cook Inlet Energy, LLC*,  [[4]](#footnote-5)4 several questions were certified by the U.S. District Court for the District of Alaska and the U.S. Bankruptcy Court for the District of Alaska regarding Alaska's "dump lien" statute. Alaska Stat. § 34.35.140 creates a lien in favor of one who, at the instance of another in possession of an ***oil*** or gas well, performs such tasks as sinking, drilling, drifting, stopping, mucking, etc. in or about the well, or performs any other work necessary or convenient to the development, operation, or working of a well. The resulting lien encumbers the "dump or mass," or other minerals contained in or extracted from the well. Of crucial importance, these so-called dump liens are prior and preferred over a deed, mortgage or other claim, whether given before or after the work for which the lien is claimed is started.

In early 2018, the Alaska Supreme Court accepted the certified questions from the federal courts which ask, among other things: (1) whether a dump lien can apply to natural gas stored in its natural reservoir and, if so, whether a mineral "dump" was created when All American Oilfield, LLC drilled three natural gas wells at the request of Cook Inlet Energy, LLC (CIE); (2) whether a mineral "dump" was created each time CIE released gas from the natural reservoir in which the gas was formed, and then transported that gas via pipeline to a point of sale; and (3) whether a dump lien claimant must prove, in order to have a valid lien, that the gas produced was, in whole or in part, the product of the lien claimant's labor. At the time of this writing, oral argument was scheduled for March 20, 2019.

II. ARKANSAS

*A. Judicial Developments*

In Arkansas ***Oil*** & Gas Commission v. Hurd,  [[5]](#footnote-6)5 the Arkansas Supreme Court reversed a trial court's ruling holding that an appeal from an order of the Arkansas ***Oil*** and Gas Commission was barred by the doctrine of sovereign immunity. Article 5, Section 20 of Arkansas' Constitution provides: "The State of Arkansas shall never be made defendant in any of her courts." In Board of Trustees of University of Arkansas v. Andrews,  [[6]](#footnote-7)6 the court held that, contrary to some of its previous decisions, the Arkansas Legislature was powerless to waive that sovereign immunity by statute. A section of the Arkansas Administrative Procedure Act  [[7]](#footnote-8)7 provides a procedure for an appeal from an administrative agency in the form of an action in circuit court naming the agency as defendant. Relying upon *Andrews*, the trial court in *Hurd* ruled that provision of the Act unconstitutional as a legislative waiver of sovereign immunity. The trial court then proceeded to declare most of the remainder of the Administrative Procedure Act to also be unconstitutional because it allowed administrative orders from which, applying *Andrews*, there was no remedy through appeal. The Arkansas Supreme Court reversed, holding that *Andrews* only applied to actions where the state was the real party in interest. The state agency has no stake in the outcome of an appeal from its order, regardless of the literal reading of the constitutional provision. The state was not made a defendant in an appeal under the Administrative Procedure Act.

In *JS Interests, Inc. v. Hafner*,  [[8]](#footnote-9)8 a case discussed in the 2017 Year in Review report of this Committee, the U.S. District Court for the Eastern District of Arkansas had interpreted the parties' 1982 A.A.P.L. Form 610 Operating Agreement to require a unit's operator to pay overriding royalties to parties burdening a non-operating owner who was non-consent in the wells in question, ruling that such overriding royalty interests were not *subsequently created interests* because they were created by instruments recorded prior to the execution of the Operating Agreement. As part of a settlement of the case, the court vacated that ruling.  [[9]](#footnote-10)9

In *Hicks v. Southwestern Energy Inc.*  [[10]](#footnote-11)10 the plaintiff's unleased mineral interest was subject to an Arkansas ***Oil*** and Gas Commission integration order binding him to a commission-approved form of ***oil*** and gas lease. That lease contains an "affiliate sale" provision requiring a lessee who sold to an affiliate  [[11]](#footnote-12)11 to pay proceeds royalty based upon a price no lower than that received from any other purchaser within the governmental township and range in which the lease is situated. Southwestern obtained the commission integration order and thus was the "lessee" under the integration lease. Southwestern paid royalties based upon the weighted average price of its sales (WASP) during the production month from all its Arkansas wells, which Hicks alleged was less than amount received by at least some other producers within the same township and range and thus violated the lease provision.

Hicks sought certification of a class of all unleased owners whose interests were integrated into Arkansas drilling units operated by Southwestern during the relevant time period. The district court denied class certification, noting that the integration order to which the Hicks' interest was subject listed approximately 50 separate unleased mineral owners and purported to also bind any unknown spouse, heir, devisee, personal representative, successor or assigns thereof.  [[12]](#footnote-13)12 Moreover, during the relevant time period, Southwestern had obtained nearly 700 such integration orders in Arkansas, covering approximately 47 township and range combinations, each containing 36 separate drilling units. The court concluded that the identity of class members was not readily ascertainable. It also held the plaintiff's claims did not satisfy the typicality requirement of FRCP Rule 23(a) and that the proposed class failed to satisfy the requirements of FRCP rule 23(b)(3) since individual questions, rather than common questions predominated. Those individual questions went to both liability and damages, since both determinations would require ascertaining multiple third-party producers' prices, each month, in every township-range combination and comparing each "highest" price to Southwestern's WASP. Such an exercise, even if it were feasible, would likely produce different results for multiple different groups of class members.

In *Roberts v. Unimin Corp.*,  [[13]](#footnote-14)13 the Eighth Circuit affirmed a district court ruling granting summary judgment that upheld a mining lease which provided for a term of years and then so long thereafter as siliceous materials were shipped from the lessee's mill or at least as long as mining, mining operations, or transporting siliceous materials was taking place. The lessors advanced a number of theories why that language was either ambiguous or created a prohibited perpetuity. They contended that the lease became terminable at will at the end of its primary term, citing an Alabama decision which so held.  [[14]](#footnote-15)14 The district court held otherwise.  [[15]](#footnote-16)15 That ruling was later affirmed.

III. CALIFORNIA

*A. Legislative Developments*

Continuing its efforts to limit offshore ***oil*** and gas exploration and production, the California Legislature passed two bills, Assembly Bill No. 1775  [[16]](#footnote-17)16 and Senate Bill No. 834,  [[17]](#footnote-18)17 adding Section 6245 to the Public Resources Code to prohibit the State Lands Commission or a local trustee of granted public trust lands from entering into any new lease or other conveyance authorizing new construction of ***oil*** and gas related infrastructure upon tidelands and submerged lands within state waters associated with Outer Continental Shelf leases issued after January 1, 2018. The bills also imposed public notice, comment and process requirements should the commission or a local trustee consider a lease renewal, extension, amendment or modification to authorize the new construction of ***oil*** and gas related infrastructure associated with new federal leases.

The Legislature adopted Senate Bill No. 1147  [[18]](#footnote-19)18 requiring the State ***Oil*** and Gas Supervisor, before July 1, 2020, to evaluate and estimate the costs associated with the decommissioning of offshore ***oil*** and gas wells and, if necessary, to develop a schedule to increase the bond amounts or other financial surety provided by an operator of an offshore ***oil*** or gas well to ensure sufficient funds are available to the state to decommission the well if no other entity is responsible for those decommissioning costs. The bill also amended Section 6829 of the Public Resources Code to require that, as a condition for the approval of an assignment of an ***oil*** and gas lease from the State Lands Commission, the lease be modified to include additional provisions to secure the payment of the proper amount or value of production, drainage offset requirements, operational standards, and infrastructure bonding or other financial assurance requirements.

Senate Bill No. 1493 [[19]](#footnote-20)19 amended Section 3206 of the Public Resources Code to extend the annual deadline for operators to submit idle well fees from January 1 to May 1 of each year.

*B. Judicial Developments*

In Center For Biological Diversity v. Department of Conservation,  [[20]](#footnote-21)20 the court of appeal affirmed a trial court's denial of a petition for a writ of mandate by an environmental group to direct the Division of ***Oil***, Gas, and Geothermal Resources (DOGGR) of the California the Department of Conservation to immediately order the shut-in of ***oil*** and gas wells which had been issued permits by DOGGR to inject fluids into nonexempt aquifers. DOGGR had discovered after issuing many permits that certain permitted wells may have been injecting into nonexempt aquifers. DOGGR and the U.S. Environmental Protection Agency (EPA) developed a corrective plan and DOGGR issued an emergency and permanent regulation  [[21]](#footnote-22)21 to address the problem over an approximately two-year period, which allowed some wells to remain in operation while the operator sought an aquifer exemption. The court rejected the petitioner's argument that DOGGR had a mandatory duty under the federal Safe Drinking Water Act (SDWA), EPA's regulations, and a memorandum of agreement between DOGGR and EPA, to immediately order the wells to stop injecting on the ground that, while the SDWA and EPA's regulations required DOGGR to protect nonexempt aquifers, they did not dictate a specific course of action to do so and DOGGR had discretion as to the manner in which it implemented the statutory mandate.

In *State of California v. BLM*, [[22]](#footnote-23)22 the court issued a preliminary injunction restraining the Bureau of Land Management (BLM) from implementing its December 8, 2017, rule (the "Suspension Rule") [[23]](#footnote-24)23 which would have suspended and delayed the requirements of the BLM's November 2016 "Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule." [[24]](#footnote-25)24 The court found that the Suspension Rule was not grounded in a reasoned analysis by BLM, and irreparable harm in the form of waste of publicly-owned natural gas, increased air pollution, exacerbated climate harms, and other environmental injury would likely occur in the absence of an injunction.

*C. Administrative Developments*

DOGGR is the California agency responsible for regulating underground gas storage projects. As previously reported, the California Legislature responded to the October 23, 2015 natural gas leak at the Aliso Canyon Natural Gas Storage Facility in Los Angeles County through Senate Bill 887  [[25]](#footnote-26)25 enacted in 2016 new requirements for underground gas storage facilities. As part of its regulatory response to this legislative mandate, DOGGR adopted new regulations, effective on October 1, 2018,  [[26]](#footnote-27)26 which include new requirements for well construction, risk management plans, testing and monitoring requirements for gas storage wells and underground gas storage facilities.

California's Public Resources Code requires DOGGR to prescribe minimum facility maintenance standards for ***oil*** and gas production facilities, including pipelines that are not under the jurisdiction of the State Fire Marshal. Larger gas pipelines in non-urban areas had not been previously covered by DOGGR's testing and inspection regulations. As required by the 2015 California Assembly Bill No. 1420,  [[27]](#footnote-28)27 DOGGR adopted new regulations, effective on October 1, 2018, imposing testing and inspection requirements for active gas gathering lines in environmentally sensitive areas and urban pipelines, regardless of diameter.  [[28]](#footnote-29)28

In July 2018, DOGGR established an Office of Enforcement as a dedicated statewide enforcement unit comprised of engineering, geologists and legal staff to identify and investigate violations and track compliance.  [[29]](#footnote-30)29

The Office of Spill Prevention and Response (OSPR) of the California Department of Fish and Wildlife re-adopted emergency regulations on July 30, 2018 regarding ***oil*** spill contingency plans for inland facilities that could impact inland waters,  [[30]](#footnote-31)30 financial responsibility requirements  [[31]](#footnote-32)31 and modifications to requirements for the ***oil*** spill response drills and exercises of inland facilities.  [[32]](#footnote-33)32 The emergency regulations will be valid for 12 months while OSPR proceeds through the rulemaking process for final regulations.

IV. COLORADO

*A. Legislative Developments*

The Colorado legislature enacted Senate Bill 18-230 modifying Colorado's forced pooling statute.  [[33]](#footnote-34)33 The bill clarifies that, commencing July 1, 2018, an order entered by the Colorado ***Oil*** and Gas Conservation Commission (COGCC) to pool ***oil*** and gas resources within a drilling unit may authorize more than one well.  [[34]](#footnote-35)34 The order must specify that a nonconsenting owner is immune from liability for costs arising from spills, releases, damage, or injury resulting from ***oil*** and gas operations on the drilling unit.  [[35]](#footnote-36)35 In the provision relating to reimbursement of consenting owners who pay for the nonconsenting owner's proportionate share of costs and risks out of the nonconsenting owner's share of production, the exclusion with respect to the owner's royalty and other non-cost-bearing interests now is limited "if and to the extent that the royalty is consistent with the lease terms prevailing in the area and is not designed to avoid the recovery of costs provided for" in the statute.  [[36]](#footnote-37)36 The provision prohibiting entry of a pooling order until the mineral rights owners have been given a reasonable offer to lease their rights was modified to specify that the offer must be given at least 60 days before the hearing on the order and must include a copy of or link to a brochure supplied by COGCC that describes the pooling procedures and the mineral owner's options.  [[37]](#footnote-38)37

While numerous bills were proposed in the 2018 legislative session that either would have restricted or eased restrictions on ***oil*** and gas operations, none of them passed. Thereafter, Proposition 112 was included on the Colorado ballot as a citizen initiated statutory amendment to mandate that any new ***oil*** and gas development in Colorado be located at least 2,500 feet from any structure intended for human occupancy and other areas designated as vulnerable (including drinking water sources, canals, reservoirs, lakes, rivers and streams and other areas designated by state or local government). Proposition 112 was defeated in the November 6, 2018, election.

*B. Judicial Developments*

In *Maralex Resources, Inc. v. COGCC*,  [[38]](#footnote-39)38 the Colorado Court of Appeals upheld the trial court's order affirming an order finding violation issued by the COGCC. Maralex (the operator) and the O'Hares (surface owners) contended that Rule 204, which permits authorized COGCC staff "the right at all reasonable times to go upon and inspect any ***oil*** or gas properties,"  [[39]](#footnote-40)39 violates the United States and Colorado Constitutions. The appellate court upheld the district court's ruling that Rule 204 is constitutional because it permits searches falling within the *Colonnade-Biswell* administrative search exception to the warrant requirement.  [[40]](#footnote-41)40 Under this exception "a warrantless inspection made pursuant to a regulatory scheme of a closely regulated industry is reasonable if three requirements are met."  [[41]](#footnote-42)41 First, the regulatory scheme "must be informed by a substantial government interest."  [[42]](#footnote-43)42 Second, warrantless searches must be necessary to further that government interest.  [[43]](#footnote-44)43 Third, the regulatory scheme must "provide a 'constitutionally adequate substitute' for a warrant in terms of certainty and regularity of the program's application."  [[44]](#footnote-45)44 Citing the authority granted COGCC to regulate ***oil*** and gas facilities by the ***Oil*** and Gas Conservation Act,  [[45]](#footnote-46)45 the court first found that the ***oil*** and gas industry is closely regulated.  [[46]](#footnote-47)46 The court then found that the three additional criteria necessary to make warrantless inspections were satisfied. In particular, it concluded that the state has a substantial interest in regulating ***oil*** and gas operations,  [[47]](#footnote-48)47 that warrantless searches are necessary to further the state's substantial interest in the safe and efficient operation of ***oil*** and gas facilities,  [[48]](#footnote-49)48 and that the occurrence of warrantless COGCC inspections was not "so random, infrequent or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials."  [[49]](#footnote-50)49 The court reached the same conclusion under the Colorado Constitution with little discussion.  [[50]](#footnote-51)50

*Spring Creek Exploration & Production Co. v. Hess Bakken Investment, II, LLC*  [[51]](#footnote-52)51 involved, among other things, interpretation of an area of mutual interest (AMI) agreement containing a Colorado choice of law provision that covered ***oil*** and gas property in North Dakota known as the Tomahawk Prospect. Due to issues that arose out of a prior agreement that Hess had with Statoil ***Oil*** & Gas, LP, Hess assigned to Statoil most of the leases in the Tomahawk Prospect that it had acquired from Spring Creek and Gold Coast Energy, LLC, and Hess did not acquire any additional new leases within the Tomahawk Prospect during the remainder of the three-year term of its AMI with Spring Creek and Gold Coast. Spring Creek and Gold Coast sued Hess, claiming that the failure to acquire any new leases was a breach of contract and breach of the implied covenant of good faith and fair dealing. The Tenth Circuit upheld the district court's dismissal of both of those claims as a matter of law. The AMI agreement contained fairly standard language specifying Hess's obligations to the other parties "[i]f, during the term of the AMI, [Hess] should acquire any ***oil*** and gas lease, leasehold interest or mineral interest."  [[52]](#footnote-53)52 The Tenth Circuit agreed with the trial court that the language of the AMI agreement was not ambiguous and plainly did not *require* Hess to acquire new leases.  [[53]](#footnote-54)53 It rejected plaintiffs' arguments that a recital and a broker provision in the AMI agreement resulted in ambiguity as to whether Hess was required to acquire new leases.  [[54]](#footnote-55)54 The court also concluded that the plaintiffs were not deprived of the benefit of their bargain under this interpretation of the AMI agreement.  [[55]](#footnote-56)55 Finally, the court concluded that since the AMI contract did not contain any requirement that Hess obtain new leases, Hess did not breach the implied covenant of good faith and fair dealing under Colorado law when it stopped trying to acquire new leases.  [[56]](#footnote-57)56

Two cases involved suits by environmental groups under the Administrative Procedure Act (APA) challenging BLM decisions relating to exploration and development of federal ***oil*** and gas. One case related to the first stage of BLM decision making--development of a resource management plan (RMP). In *Wilderness Workshop v. BLM*,  [[57]](#footnote-58)57 the federal district court agreed with plaintiffs that the BLM failed to adequately consider greenhouse gas impacts from ***oil*** and gas consumption in its new RMP for the Colorado River Field Office (which administers more than 700,000 acres of federal minerals in western Colorado). In particular, BLM violated the National Environmental Policy Act (NEPA) "by not taking a hard look at the indirect effects resulting from the combustion of ***oil*** and gas in the planning area under the RMP."  [[58]](#footnote-59)58 Further, BLM "failed to consider reasonable alternatives to ***oil*** and gas leasing and development" when it did not closely study an alternative that closes to leasing lands with low and medium potential for ***oil*** and gas development.  [[59]](#footnote-60)59

The other case related to BLM's analysis prior to leasing--the second step in BLM decision-making. In *Wildearth Guardians v. BLM*,  [[60]](#footnote-61)60 the federal district court concluded that the plaintiff had not met its burden of proving that BLM had acted arbitrarily or capriciously in concluding that it had no duty to perform a National Ambient Air Quality Standards (NAAQS) "conformity" analysis under the Clean Air Act prior to its ***oil*** and gas lease auctions of tracts in eastern Colorado (much of which is in nonattainment status for ozone) in May and November of 2015. Relying on EPA's General Conformity Rule,  [[61]](#footnote-62)61 BLM had concluded that it had no duty to forecast whether the lease sale would prolong the ozone problems in the nonattainment area because it was not reasonably foreseeable that either sale would indirectly lead to 100 tpy in emissions of an ozone precursor.  [[62]](#footnote-63)62 However, the court signaled that it likely would have decided in favor of the plaintiffs had they framed their argument relating to reasonable foreseeability in terms of the small number of wells operating in a single year that it would take to exceed that limit.  [[63]](#footnote-64)63

Finally, 2018 presented an ***oil*** and gas tax case. In *Bill Barrett Corp. v. Lembke*, [[64]](#footnote-65)64 the Colorado Court of Appeals upheld the taxation of ***oil*** and gas produced by the lessees of severed mineral owners by a special district established to develop water infrastructure. Neither the severed mineral owners nor the lessees had consented to inclusion of the property in the special district. The court concluded that the owner of the severed mineral estate is a "fee owner" [[65]](#footnote-66)65 under Colorado's Special District Act, [[66]](#footnote-67)66 but the severed mineral interest is not "real property capable of being served with facilities of the special district" under that statute. [[67]](#footnote-68)67 Thus, the land could be included in the special district without consent of owners of the severed mineral estate. Also, while the court agreed that interests in ***oil*** and gas leases are characterized as interests in real property, it declined to treat lessees as "fee owners" under the statute. [[68]](#footnote-69)68

*C. Administrative Developments*

COGCC completed the rulemaking begun in 2017 to strengthen its flowline regulations and modify its related safety rules, effective May 1, 2018. COGCC's rules were modified to add registration requirements for off-location flowlines (i.e. those that transport fluids between different locations), including geophysical data necessary for identifying the specific location of new off-location flowlines  [[69]](#footnote-70)69 (and similar data for pre-existing off-location flowlines if the operator has it).  [[70]](#footnote-71)70 COGCC regulations now require that operators record new instruments that grant rights of access or easements for off-location flowlines, or a memorandum or notice of it, in the county records.  [[71]](#footnote-72)71 Registration requirements were added for installed domestic taps  [[72]](#footnote-73)72 and crude ***oil*** transfer lines and produced water transfer systems.  [[73]](#footnote-74)73 COGCC adopted new requirements relating to design, installation, repair and maintenance of flowlines and crude ***oil*** transfer systems, including industry standards that operators must follow when designing and installing their pipelines and repairing or replacing existing pipelines or segments of such pipelines.  [[74]](#footnote-75)74 Operators are required to become Tier One members of the Utility Notification Center of Colorado (UNCC), Colorado's "one-call" program that property owners rely on when preparing to dig, and to supply digital information about an operator's belowground operations to UNCC.  [[75]](#footnote-76)75 COGCC increased testing requirements for all flowlines and crude ***oil*** transfer lines,  [[76]](#footnote-77)76 and revised the abandonment provisions for flowlines and crude ***oil*** transfer lines.  [[77]](#footnote-78)77

V. KANSAS

*A. Legislative Developments*

Kansas amended the Gas Safety and Reliability Policy Act, codified at Kan. Stat. Ann. §§ 66-2201 to -2204, which allows natural gas pipeline utilities, with authorization from the Kansas Corporation Commission, to recover certain legally required infrastructure replacement costs through a Gas System Reliability Surcharge (GSRS). The amendment broadens the law to allow utilities to petition the Commission for a GSRS to recover capital investments for facility upgrades and cyber security systems. It also raises existing caps on GSRS-generated revenues and the maximum monthly GSRS charges to residential customers. The amendment is effective January 1, 2019.

*B. Judicial Developments*

2018's most significant judicial development is the Kansas Supreme Court's holding in LCL, LLC v. Falen  [[78]](#footnote-79)78 that negligence and breach of fiduciary duty claims against a title company for failing to except mineral interests in drafting a deed are subject to the statute of limitation's discovery rule. In 2008 the parties hired Rice County Abstract as closing agent and to prepare the deed in the purchase and sale of real property. Rice County Abstract failed to except the minerals from the deed in compliance with the parties' contract and the deed was recorded at closing. Despite the error the sellers continued to receive royalties as though they had retained the minerals. In 2014 Rice County Abstract again acted as closing agent and prepared the deed for a sale of the same property and again failed to except the minerals from the deed. The new purchaser then asserted ownership of the minerals and royalty and sued to quiet title. The original seller answered the quiet title suit and asserted third-party claims for negligence and breach of fiduciary duty against Rice County Abstract for its poor draftsmanship. The trial court ruled in favor of Rice County Abstract on its statute of limitations defense, but the court of appeals reversed finding that the claims did not accrue until the original sellers first suffered substantial injury in 2014 when they stopped receiving royalties. The Kansas Supreme Court affirmed the court of appeals but rejected its analysis. The court reasoned instead that the cloud on sellers' title to the minerals created by the erroneous 2008 deed was *substantial injury* but that under the discovery rule the claim did not accrue until the sellers could *reasonably ascertain* the fact of the injury. The court found further that the deed's recording did not make the injury reasonably ascertainable as a matter of law and remanded the case for factfinding on whether the sellers should have ascertained the injury in 2008 when signing the deed.

The Kansas Court of Appeals issued an unpublished but significant opinion in Adamson v. Drill Baby Drill, LLC  [[79]](#footnote-80)79 addressing the burden of proof in actions brought to cancel an ***oil*** and gas lease for lack of production in paying quantities during its secondary term. The plaintiffs, owners of the surface of property covered by defendant's ***oil*** and gas leases, sued to terminate the leases for failure to produce ***oil*** in paying quantities. To establish nonproduction the plaintiffs relied exclusively on publicly available production records maintained on the internet by the Kansas Geological Survey (KGS). The trial court granted defendant summary judgment and plaintiffs appealed arguing the lessee defendant should bear the initial burden of proving the existence of production to sustain the lease and the burden was not on the plaintiff to show the absence of adequate production. The court of appeals affirmed summary judgment holding that the initial burden in an action to terminate an ***oil*** and gas lease for failure to produce in paying quantities is on the plaintiff to show by competent evidence a lack of production, and, if satisfied, the burden shifts to the defendant to prove the lease did not terminate. The court further held that the online records of the KGS were insufficient evidence to satisfy the plaintiffs' burden in this case. The plaintiffs asserted the KGS records showed no production from the inception of the leases in 1918 through 1953 and showed insufficient production from 1953 through 1984. The court found the evidence lacking because the KGS does not maintain records before 1953 and does not certify the accuracy of records maintained before 1987 as lease operators were not at that time obligated to report production.

In another unpublished decision, Batman v. Deutsch, [[80]](#footnote-81)80 the court of appeals addressed a ubiquitous but not often litigated provision of ***oil*** and gas leases--the change in ownership clause, which requires the lessor to notify the lessee of any change in mineral or royalty ownership in the leasehold premises as a condition to the lessee's liability for directing lease payments to the transferee. Deutsch purchased and operated an ***oil*** and gas lease on minerals owned in severalty by the Batmans and two companies, Robro and Bitter End. Robro and Bitter End owned the minerals underlying the ten-acre tract surrounding the only existing well and therefore received all royalties payable on production from the well. Deutsch drilled a new well on a portion of the premises in which the Batmans owned the minerals but directed the first purchaser to pay all resulting royalties to Robro and Bitter End. Defending a subsequent suit for breach of contract by the Batmans, Deutsch argued the Batmans failed to comply with the lease's change in ownership provision. The trial court rejected Deutsch's defense finding that only the payor of the royalties--here, the first purchaser instead of Deutsch--is entitled to invoke the clause. The court of appeals affirmed but reasoned instead that the clause did not apply because the Batmans owned their interest in the minerals when Deutsch acquired the lease. In other words, a lessee cannot invoke the change of ownership provision when the ownership at issue was already in place when the lessee acquired its rights under the lease.

*C. Administrative Developments*

The Conservation Division of the Kansas Corporation Commission is primarily responsible for regulating the state's ***oil*** and gas industry and is funded in large part through an assessment on each barrel of crude ***oil*** and thousand cubic feet (Mcf) of natural gas sold in the state. In 2018 the Commission increased the crude ***oil*** and natural gas assessments promulgated in regulations Kan. Admin. Regs. §§ 82-3-206 and -307, respectively. The changes increased the monthly assessment on each barrel of crude ***oil*** marketed or used in the state to 144.00 mills, and on each Mcf of gas sold or marketed in the state to 20.50 mills. Under the regulations the first purchaser of production is responsible for deducting the amount of the assessment from production proceeds and remitting it to the Conservation Division.

VI. LOUISIANA

*A. Legislative Developments*

As a result of cases like *J&L Family, L.L.C. v. BHP Billiton Petroleum Properties (N.A.), L.P.*, [[81]](#footnote-82)81 the legislature has proposed an edit to La. R.S. 31:212.21 in manner that would embrace the finding in *Adams v. Chesapeake Operating Co.* [[82]](#footnote-83)82 Louisiana House Bill No. 444 of the 2018 Regular Session proposes an addition of the following language to La. R.S. § 31:212.21: "A mineral production payment is an obligation owed to the purchaser to make a payment from the proceeds of production and does not mean, include, or encompass the payments owed on production to an unleased mineral owner." The proposal was under consideration at the time of the submission of this paper.

*B. Judicial Developments*

For the past 15 years, environmental legacy litigation has been one of the most active areas of ***oil*** and gas law in Louisiana. While legacy suits are primarily aimed at addressing environmental damage to property, many of the threshold issues involve significant intricacies of ***oil*** and gas law. This year was no different. Three significant ***oil*** and gas decisions were handed down in the context of legacy suits. Each will be addressed in turn.

In *Global Marketing Solutions, LLC v. Blue Mill Farms, Inc.*,  [[83]](#footnote-84)83 the First Circuit Court of Appeal considered whether a landowner was legally entitled to seek injunctive relief in the place of the Commissioner of Conservation who was notified of alleged regulatory violations. This issue arose as a result of the landowner's pivot to salvage some claim against the ***oil*** company defendants in light of the dismissal of their tort and contract claims under the subsequent purchaser doctrine, as upheld previously by the Louisiana Supreme Court in *Global Marketing Solutions, LLC v. Blue Mill Farms, Inc.*  [[84]](#footnote-85)84 Prior to amending their petition to add claims for injunctive relief under La. R.S. 30:14 and 30:16, plaintiff sent two letters to the Commissioner of Conservation complaining about alleged regulatory violations which contaminated the property. Plaintiff requested that the Commissioner file suit or else plaintiff would do so under La. R.S. § 30:16. In response to plaintiff's letters, the Commissioner issued a compliance order seeking a work plan for assessing the soil and groundwater conditions at the site. When plaintiff amended its petition, it claimed the Commissioner failed to act, thus affording plaintiff the right to seek relief through a citizen suit under La. R.S. 30:14 and 30:16. The appellate court reversed the trial court's decision and held that the statutory requirements were fulfilled to allow plaintiff to assert a cause of action. One judge dissented because he interpreted the complaint as a whole to be alleging wholly past violations rather than present or ongoing violations. A concurring judge indicated other procedural actions may be available to address the potential inconsistency of whether La. R.S. §§ 30:14 and 30:16 are intended to apply to past or present violations. The case was remanded for further proceedings.

In *Grace Ranch, LLC v. BP America Production Co.*,  [[85]](#footnote-86)85 the plaintiff, an LLC, purchased property that it alleged was contaminated by operations conducted pursuant to an expired mineral lease that was originally granted in 1944. The Third Circuit Court of Appeal upheld the application of the subsequent purchaser rule to both this claim and to mineral leases in general. The subsequent purchaser rule recognizes the personal nature of a claim for damages in tort or contract. Without an express assignment, that claim remains with the owner at the time the damage occurred. In reaching this decision, the court also expressly considered the extent to which a mineral lease is considered to be a real right under Louisiana law. The court found that Louisiana statutory law holds that a mineral lease creates a real right in favor of the mineral lessee rather than the lessor. This is an explicit rejection of the often-made argument that claims related to a mineral lease run with the land in favor of the lessor or landowner. The court clarified that the real right associated with a mineral lease is held by the mineral lessee who has the right to enter the premises to explore for and produce minerals. Similarly, the corresponding real obligation is imposed on the mineral lessor or surface owner to allow that to occur. The court further rejected the argument that plaintiff had a real right of action based on La. R.S. § 31:11 or La. Civ. Code art. 667. The court found both of those statutes require contemporaneous occupation of the property, which did not exist in this case because the mineral lease expired prior to plaintiff's acquisition of the property. Finally, the court also rejected plaintiff's attempt to obtain assignments of the right of action to avoid application of the subsequent purchaser doctrine. One of the plaintiff's predecessors in title was an entity that dissolved by affidavit under La. R.S. §§ 12:142.1 and 12:250.1. Finding no provision allowing survival of the dissolved corporation's inchoate claims, the court concluded the dissolved predecessor corporation was incapable of assigning claims to plaintiff.

*Britt v. Riceland Petroleum Co.*,  [[86]](#footnote-87)86 confirmed what had been the practice for many years in relation to the settlement of claims for environmental damage under Act 312, La. R.S. § 30:29. This case involved a settlement between the plaintiff-landowners and two defendants, who agreed to remediate the property to state regulatory standards. Notice and an opportunity to comment on the proposed settlement was given to the Office of Conservation of the Louisiana Department of Natural Resources (LDNR) and to the Attorney General's office. LDNR is the agency charged with overseeing any environmental remediation. After reviewing the proposed settlement, LDNR issued a letter of no objection to the settlement. Plaintiff-landowners then moved for court approval of the settlement, which was granted by the Court. Certain insurers objected after the settlement was approved. They claimed that La. R.S. § 30:29(J) required the trial court to hold a contradictory hearing, determine if remediation is required, and order that the funds be deposited into the court registry. The court read the statute to require a contradictory hearing only if there is an objection. Here, there were no objections or opposition to the settlement. Thus, the court held that all mandatory requirements for approval were satisfied, and the trial court acted well within its authority to approve the settlement at the time.

In addition to the developments in legacy litigation, there were a number of noteworthy decisions in other areas of ***oil*** and gas law this past year. In *J. Fleet* ***Oil*** *& Gas Corp. v. Chesapeake Louisiana, L.P.*,  [[87]](#footnote-88)87 a dispute arose between the parties to the language of a Participation Agreement that established an Area of Mutual Interest. Plaintiffs contended, among other allegations, that the interest assigned by defendant under the Participation Agreement was a cost-free net revenue interest (NRI) while defendant argued the interest was an overriding royalty interest (ORRI). Plaintiffs also alleged that defendant improperly deducted post-production costs from payments made to plaintiffs. These issues were taken up by the Western District on a motion for summary judgment filed by the defendants. First, the court recognized that the term *overriding royalty* was a technical term of art in the ***oil*** and gas industry. The characterization of the interest as such in the Participation Agreement and the definition of the term unequivocally evidenced the parties' intent to create an ORRI. Second, the court determined that the Participation Agreement provided defendants with the right to deduct post-production expenses. At the outset, the court noted that Louisiana law allows the deduction of post-production expenses from lease-royalty payments unless the language of the lease provides otherwise. Looking to the language of the Participation Agreement, the court concluded that the provision stating that the ORRI shall be free of all development, production, and operating expenses made no mention of post-production costs. Thus, in accordance with Louisiana's general rule, the Participation Agreement evidenced an unambiguous intent to share in post-production costs on a pro rata basis.

The Western District also opined on the sufficiency of detail contained in reports provided by an operator to an unleased owner pursuant to La. R.S. §§ 30:103.1 et seq. In *M&N Resources Management, LLC v. Exco Operating Co.*,  [[88]](#footnote-89)88 the court applied the analytical framework set forth by the United States Fifth Circuit in *Brannon Properties, LLC v. Chesapeake Operating, Inc.*,  [[89]](#footnote-90)89 and determined that certain reports sent initially by defendant failed to comply with La. R.S. § 30:103.1 while other later-sent reports were sufficiently detailed under the statute. The early reports sent by defendants only contained six categories of expenses: Leasehold Producing; Intangible Drilling Costs; Lease Operating Expense; Intangible Completion Cost; Lease & Well Equipment; and Lease & Well Surface Equipment. Because these reports contained only a few limited, broad categories of expenses, the court concluded that the reports were similar to the reports deemed insufficient in *Brannon* insofar as they did not provide any detail from which an owner could assess what it was getting for its money. Pursuant to La. R.S. § 30:103.2, the defendant forfeited the right to demand contribution from the unleased owner for the costs of the drilling operations of the well. Noting that the Louisiana Supreme Court had not addressed the scope of the penalty provision, the Western District relied upon the only state appellate court decision, *XXI* ***Oil*** *& Gas, LLC v. Hilcorp Energy Co.*,  [[90]](#footnote-91)90 and concluded that the penalty included the cost of drilling, completing, and equipping the well. However, consistent with *Brannon*, the court concluded that the later-sent reports containing the requisite level of detail cured defendant's failure to comply with the statute. These later-sent reports, the court reasoned, were sufficiently detailed because the expenses were listed by date, contained references to invoice numbers, were set forth in more specific categories of cost, and vendor names were provided for most of the expenses. Thus, the court concluded these later-sent reports complied with La. R.S. § 30:103.1.

In *Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc.*,  [[91]](#footnote-92)91 the Supreme Court of Louisiana considered whether a mortgagee with credit rights to an ***oil*** and gas leasehold interest, along with the ***oil*** and gas producing assets, was liable for the failure to furnish an act evidencing the expiration of the lease and the failure to pay royalties. In addition, the court considered whether Mineral Code article 140 provides a lessor with the right to potentially recover unpaid royalties and an additional damage amount of double the unpaid royalties. The Supreme Court of Louisiana agreed with the appellate court that the mortgagee was not an *owner* of the lease under Mineral Code articles 206 and 207 by virtue of assignment. However, the court reversed the holding that the mortgagee was an *owner* of the lease because it controlled the bundle of rights that make up ownership. Looking to the Mineral Code articles relating to granting and transferring mineral leases, the court noted the absence of articles sanctioning ownership under the *control of rights* theory adopted by the appellate court. Moreover, the court recognized that the Mineral Code clearly distinguished between rights of ownership and security rights. Accordingly, the Supreme Court concluded the appellate court erred in finding that a mortgage and a credit agreement effectuated a conveyance of the mineral lease. And as a result, the mortgagee could not be liable for breach of the lease. As to the penalty for unpaid royalties, the court engaged in an exercise of statutory interpretation with the language of Mineral Code article 140 that authorizes a court to award as damages double the amount of royalties due. Based on the foregoing language, the court determined that the legislature intended to allow courts to award up two times the amount of unpaid royalties, not three times the amount.

In *J&L Family, L.L.C. v. BHP Billiton Petroleum Properties (N.A.), L.P.*,  [[92]](#footnote-93)92 the Western District considered whether an unleased mineral owner could recover attorney's fees under La. R.S. §§ 31:212.21 et seq. or La. C.C. art. 1958 for fraud. Both issues were reviewed by the court on defendants' motion for summary judgment. The court reaffirmed *Adams v. Chesapeake Operating Co.*,  [[93]](#footnote-94)93 and concluded that the statute did not apply to unleased mineral owners because such owners were not the purchasers of mineral production payments. Accordingly, plaintiff was barred from recovering attorney's fees under La. R.S. §§ 31:212.21 et seq. The court also rejected plaintiff's argument that La. C.C. art. 1958 provided unleased mineral owners with a right to recover attorney's fees. The court noted that Article 1958 provides for attorney's fees in conjunction with a claim of contract fraud. The court was unwilling to extend the remedies set forth in Article 1958 to the quasi-contractual relationship between an unleased mineral owner and the operator of a well drilled pursuant to a drilling and production unit created by the Commissioner of Conservation.

VII. NEW MEXICO

A. *Judicial Developments*

What constitutes commencement of operations under an AAPL form operating agreement was the issue addressed by the New Mexico Supreme Court in *Enduro Operating LLC v. Echo Production, Inc.*  [[94]](#footnote-95)94 The court ruled that, absent language to the contrary in the operating agreement, the following rules apply to proving whether an operator timely commenced drilling operations: (1) actual drilling is conclusively commencement but is not required; (2) obtaining a drilling permit is not mandatory; (3) activities such as leveling the well location, digging a slush pit, or other good-faith commitment of resources at the drilling site will suffice as evidence of the parties' present intent to diligently drill, and (4) "the off-site commitment of resources, such as entering into an enforceable drilling contract requiring the diligent completion of the well, will also suffice as evidence that the operator actually commenced drilling operations."  [[95]](#footnote-96)95 The operator in that case had not conducted any of the on-site activities described by the court or obtained a drilling permit by the time the contractual commencement deadline expired. However, the case was remanded as there was a material fact in dispute as to whether the operator had signed a drilling contract with a cancellation penalty prior to expiration of the commencement deadline.  [[96]](#footnote-97)96

In *Anderson Living Trust v. Energen Resources Corp.*,  [[97]](#footnote-98)97 the Tenth Circuit faced class claims for royalty underpayment for some New Mexico and Colorado ***oil*** and gas leases in the San Juan Basin. It rejected various theories of royalty underpayment under New Mexico law while agreeing with some of those claims applying Colorado law. Energen paid natural gas royalties to the plaintiff on a netback basis in which it deducted various third-party, post-production costs from its downstream sales price to calculate royalty.  [[98]](#footnote-99)98 First, consistent with prior Circuit authority, the court ruled that New Mexico has not adopted a marketable condition rule.  [[99]](#footnote-100)99 Second, the court ruled that Energen was entitled to deduct from royalty payments the natural gas processors tax that the processor passed through to Energen since the act authorizing the tax did not prohibit pass through to royalty owners.  [[100]](#footnote-101)100 Third, the court addressed Energen's deduction of off-lease fuel consumed by third party service providers when calculating royalty. It reached different results applying the law of New Mexico and Colorado. As to the New Mexico leases, the court ruled that the deduction of fuel consumed off-lease was appropriate as New Mexico courts had taken a broad view of free use provisions.  [[101]](#footnote-102)101 As to the Colorado properties, the court found that the leases did not expressly provide for the deduction of off-lease fuel to render the gas marketable.  [[102]](#footnote-103)102

In a separate case, involving the same plaintiff, the Tenth Circuit also addressed the appealability of a denial of class certification in a royalty underpayment case.  [[103]](#footnote-104)103 The court held a denial of class certification was not a final appealable order under the circumstances of this case.

A federal district judge addressed an ***oil*** and gas company's rights to recover time-barred claims using equitable recoupment in *SDF, L.L.C. v. ConocoPhillips Co.*  [[104]](#footnote-105)104 The case involved an overriding royalty interest which, by its terms, was not payable if the subject wells did not produce, on average, more than 500 Mcf per day. The operator stopped paying the overriding royalty in 2016 and began recouping for overpayments dating back to 1990.  [[105]](#footnote-106)105 The operator sought to dismiss a claim that the self-help nature of the recoupment was an attempt to illegally evade the statute of limitations.  [[106]](#footnote-107)106 The district court found that there was no indication that New Mexico courts would overrule case law that permitted offensive use of recoupment.  [[107]](#footnote-108)107

The BLM's authority to order another casing integrity test (CIT) for a well that had been temporarily abandoned for over 25 years was the subject of *Cibola Energy Corp. v. U.S. Dep't of the Interior*. [[108]](#footnote-109)108 Though the actual facts are more convoluted, basically Cibola operated a marginal well located more than 10 miles from the nearest pipeline that had been granted temporarily abandoned (TA) status by the BLM. In 2002, 12 years after the well was completed, Cibola performed a successful CIT witnessed by a BLM representative. In 2011, upon another request by Cibola for TA status, the local BLM office ordered a new CIT test. Cibola objected on the grounds that the well had been continually shut in so that there was no rational basis to order a new CIT test. The local BLM ordered a new test and Cibola appealed and lost at both the State Director and Interior Board of Land Appeals levels. [[109]](#footnote-110)109 Noting the heavy burden of proving the agency determination to be arbitrary and capricious, the district court sustained the agency decision as it was clear that the agency had considered Cibola's arguments that it was impossible that the conditions of the casing had not changed and "Cibola does not point to evidence in the record that changes in the [w]ell in twenty years are impossible." [[110]](#footnote-111)110

*B. Administrative Developments*

The New Mexico ***Oil*** Conservation Commission adopted an extensive overhaul to the rules related to horizontal wells in an Order dated May 22, 2018.  [[111]](#footnote-112)111 The changes to the rules are substantial. One principal change is to reduce the setback requirements. For initial and last take points, the distance to the outer boundary of the spacing unit is reduced to 100 feet in horizontal ***oil*** wells and 330 feet in horizontal gas wells.  [[112]](#footnote-113)112 The perpendicular setback from the outer boundary of the spacing unit is now 330 feet for horizontal ***oil*** wells and 660 feet for horizontal gas wells.  [[113]](#footnote-114)113 The new rules also have the effect of allowing the creation of horizontal spacing units that are not traditional "stand-up" or "lay-down" in shape.  [[114]](#footnote-115)114 The new rules also provide for a stream-lined procedure for pooling interests for "infill horizontal wells."  [[115]](#footnote-116)115

In a July 24, 2018 Order,  [[116]](#footnote-117)116 the Commission repealed the former rules regarding spill and release and adopted new rules on those topics effective August 14, 2018.  [[117]](#footnote-118)117 The new spill rules created specific criteria for an operator's initial response to a spill; imposed requirements for site assessment, characterization and delineation of the spill; imposed requirements for a remediation plan; imposed obligations for restoration, reclamation and re-vegetation; made provisions for applications for variances from the rule; and imposed new enforcement standards.  [[118]](#footnote-119)118

VIII. OHIO

*A. Judicial Developments*

Despite a lull in drilling activity, the Supreme Court of Ohio remained engaged with ***oil*** and gas issues in 2018. Several of the court's decisions involved potential threats to the sole and exclusive nature of the Division of ***Oil*** and Gas Resources Management's authority over ***oil*** and gas operations in Ohio. As background, environmental activist groups (some from out-of-state) repeatedly sought to put to the general vote, local governmental charter amendments that would severely hamper--and at times eliminate outright--***oil*** and gas development in the area. In each of these cases--*State ex rel. Khumprakob v. Mahoning County Board of Elections*,  [[119]](#footnote-120)119 *State ex rel. Bolzenius v. Preisse*,  [[120]](#footnote-121)120 and *State ex rel. Twitchell v. Saferin*  [[121]](#footnote-122)121--appellants asked the court to determine whether a county board of election properly excluded a community *bill of rights* from the ballot. While in both *Bolzenius* and *Twitchell*, the court found that the board had properly excluded the charter amendments, in *Khumprakob*, the court granted the writ directing the board to place the amendments on the ballot. These efforts are likely to continue to be an issue in Ohio.

In *Alford v. Collins-McGregor Operating Co.*,  [[122]](#footnote-123)122 the Supreme Court held that Ohio does not recognize an implied covenant of further exploration apart from the implied covenant of reasonable development. In reaching its decision, the court often quoted with approval the Oklahoma Supreme Court, noting the importance of the profit motive for all parties: "[T]he issue is whether a prudent operator would further develop the land 'having due consideration for the interest of both the lessee and lessor, considering all factors, including what is known about the market, the geology and adjoining activity.'"  [[123]](#footnote-124)123 This decision establishes that compliance with an implied development covenant in Ohio depends, at least in part, on the anticipated economics of that development.

The supreme court addressed whether independent landmen must obtain Ohio real estate licenses to negotiate ***oil*** and gas leases in *Dundics v. Eric Petroleum Corp.*  [[124]](#footnote-125)124 Noting first that Ohio law prohibited anyone from acting as a real-estate broker without a license, the court observed that activities requiring a license included "negotiating the lease of real estate, holding one's self out as engaged in the business of leasing real estate, and 'the procuring of prospects or the negotiation of any transaction . . . which does or is calculated to result in' the lease of real estate."  [[125]](#footnote-126)125 After reaffirming that ***oil*** and gas leases create an interest in real estate, the court found "[t]here is simply no exception in the statutes governing real-estate-broker licenses for ***oil***-and-gas leases or ***oil***-and-gas land professionals."  [[126]](#footnote-127)126

Brought as a mandamus action, the complaint in *State ex rel.* ***Kerns*** *v. Simmers*  [[127]](#footnote-128)127 asked the court to find that a unit order issued under Ohio Rev. Code § 1509.28 required compliance with Ohio appropriations law as a taking under Ohio's Constitution. Without addressing the takings issue, the court dismissed the petition for the writ due to the appellate proceedings available to plaintiffs. "A finding that Ohio Rev. Code § 1509.28 was unconstitutional [on appeal] would have invalidated the chief's order. No taking would have occurred, so there would have been no need for a writ compelling appropriation proceedings."  [[128]](#footnote-129)128

Ohio's appellate courts also heard a number of ***oil*** and gas related cases this year. One of the primary topics was production in paying quantities. The Fifth Appellate District addressed the type of evidence that a lessee could use to support a paying quantities claim in *Browne v. Artex* ***Oil*** *Co.*  [[129]](#footnote-130)129 The lessors argued that the use of production records and affidavit testimony on summary judgment was insufficient, and that only "run tickets" and "legal tender of ***oil***" were permissible.  [[130]](#footnote-131)130 The appellate court disagreed, noting, "[e]xamples of proof of production include royalty payments to lessor, lessee's accountant's charts, and affidavits."  [[131]](#footnote-132)131

The Seventh Appellate District also addressed the types of payments to be included as operating costs in a paying quantities analysis in *Neuhart v. Transatlantic Energy Corp.*  [[132]](#footnote-133)132 The issue, according to the court, is whether the payments are "directly related to the production of ***oil*** and gas."  [[133]](#footnote-134)133 The court found that an administrative fee related to overhead costs, as well as gathering and compression costs, were not directly related to the production of ***oil*** and gas and therefore should not be included in the analysis.  [[134]](#footnote-135)134 Nor should the costs related to a pump replacement be included.  [[135]](#footnote-136)135 The court did include income and property taxes, pumping costs, royalties, and chart integration fees. In all, the court concluded that the wells were producing in paying quantities.  [[136]](#footnote-137)136

Ohio courts also continued to hear cases involving pooling and unitization issues. In *American Energy-Utica, LLC v. Fuller*,  [[137]](#footnote-138)137 the Fifth Appellate District held that the lessee's application for a unit order under Ohio's compulsory unitization law, R.C. 1509.28, violated the Retroactivity Clause of the Ohio Constitution. The court held so in the context of a handwritten lease provision stating "unitization by written agreement only!" in a lease that post-dated the unitization statute's effective date. The lessee has asked the supreme court to review the appellate court's decision. As of this writing, the court has not ruled on the lessee's request.

In ***Kerns*** *v. Chesapeake Exploration, L.L.C.*, the Northern District of Ohio addressed whether the State of Ohio's issuance of a unit order under Ohio Rev. Code § 1509.28 was a taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983.  [[138]](#footnote-139)138 The district court held that it was not, finding (i) that the producer was not a state actor for purposes of constitutional responsibility (reasoning that filing an application for a unit order, and drilling and producing a well, "do not demonstrate a 'sufficiently close nexus' between [the producer] and the state such that [the producer's] conduct could be fairly attributed to the state."); and (ii) that, contrary to plaintiffs' claims, "the statutory unitization procedure set forth in R.C. § 1509.28 operates to protect the correlative rights of landowners, including plaintiffs, and it was passed as a valid exercise of Ohio's police power."  [[139]](#footnote-140)139 In reaching its conclusion, the court affirmed long-standing precedent that unitization and pooling statutes are valid, constitutional exercises of the state's police power for the protection of correlative rights, and found that this precedent applies to horizontal development. The court also rejected the plaintiffs' argument that a *per se* taking had occurred because the lessee's operations injected water, sand, and chemicals into the plaintiffs' property (finding that a landowner's property rights in the subsurface are limited and not absolute).  [[140]](#footnote-141)140

Several courts also addressed Ohio's Dormant Mineral Act (DMA).  [[141]](#footnote-142)141 In *Shilts v. Beardmore*,  [[142]](#footnote-143)142 the Seventh Appellate District analyzed whether a surface owner complied with the notice requirement of the 2006 version of the DMA. One of the central issues on appeal was whether the statute required the surface owner to try serving his notice of abandonment by certified mail *prior* to serving his notice of abandonment by publication. The court held that service by publication was sufficient because the surface owner established that he had exercised reasonable efforts to locate the unknown heirs of the record owners of the dormant mineral interest.  [[143]](#footnote-144)143 The surface owner searched the records of the county recorder's office and probate court where the subject land is located. He also searched the records of the Ohio Department of Natural Resources, Division of ***Oil*** and Gas Resources Management and conducted an online search. None of these sources revealed the names and addresses of the unknown heirs. Because "it became clear that service [of the notice of abandonment] could not be completed by certified mail," service by publication was sufficient. As the court found, "[i]t would be absurd to absolutely require an attempt at notice by certified mail when a reasonable search fails to reveal addresses or even the names of potential heirs who must be served."  [[144]](#footnote-145)144

In *Jefferis Real Estate* ***Oil*** *& Gas Holdings, LLC v. Schaffner Law Offices, L.P.A.*,  [[145]](#footnote-146)145 defendants appealed the trial court's decision finding the plaintiffs successfully abandoned certain severed mineral rights under the 2006 version of the DMA. The defendants disputed the abandonment, pointing to the preservation notice they filed within 60 days after plaintiffs filed their notice of abandonment. Plaintiffs claimed that the preservation notice was invalid because defendants, who were heirs of the record mineral holder, were not "on record" heirs. The court looked to the express language of the DMA and found that it defines "record holder" as "any person who derives the person's rights from, or has a common source with, the record holder . . . ."  [[146]](#footnote-147)146 Because defendants derived their rights from the "record holder," the court found that defendants' preservation notice was valid and reversed the trial court's abandonment of the minerals.  [[147]](#footnote-148)147

Deed interpretation was the central issue in *Mid-Ohio Coal Co. v. Brown*.  [[148]](#footnote-149)148 The Fifth Appellate District found that the grantees received ***oil*** and gas rights in an 1882 deed conveying all right, title, and interest in the property, "but reserving to said grantors their heirs and assigns all the surface of said land including stone and water privileges on or under the same excepting stone coal."  [[149]](#footnote-150)149 The court reasoned that "[a] grant without qualifying or limiting words of the minerals underlying certain reason estate will include ***oil*** and gas. The . . . deed contains no such qualifying language, so we must construe the deed to include ***oil*** and gas."  [[150]](#footnote-151)150

Ohio's federal courts addressed several times class certification issues in the context of royalty disputes. Of particular note, in *Lutz v. Chesapeake Appalachia, L.L.C.*,  [[151]](#footnote-152)151 the Northern District of Ohio denied class certification in a matter involving claims that the producer had paid royalties on an incorrect unit price and made impermissible deductions from royalty payments where the leases did not contain "at the well" language. The court found that the plaintiffs had failed to establish the commonality, typicality, and predominance needed for class certification. Among other reasons, the plaintiffs failed "to account for the notable variations in the language of the leases, [and failed] to refute defendant's interrogatory answers regarding the variation in the method of calculating royalties."  [[152]](#footnote-153)152

Lastly, the Northern District of Ohio, in *Baatz v. Columbia Gas Transmission, LLC*,  [[153]](#footnote-154)153 dismissed plaintiffs' claims that Columbia Gas's use of an underground storage field constituted a trespass. Columbia Gas used a gas storage field in Medina County under a certificate from the Federal Power Commission but did not seek gas storage easements from the plaintiffs-landowners until 2014. In dismissing plaintiffs' claims, the court held that plaintiffs failed to prove actual damage because they never used the formation where Columbia stored its gas, nor did plaintiffs plan to use this property.  [[154]](#footnote-155)154

IX. OKLAHOMA

*A. Judicial Developments*

The final appellate decision in the long-pending litigation in *Pummill v. Hancock Exploration LLC*  [[155]](#footnote-156)155 (*Pummill II*) involved an appeal of the district court's declaratory judgment on the merits, following a bench trial, rejecting the ***oil*** and gas-lessee defendants' contention that they were allowed to proportionately charge certain expenses against the plaintiffs' royalty interest payments. The court of appeals observed that "[t]he question of consequence on appeal involves defendants' challenge to the trial court's determination of when the natural gas at issue here became a 'marketable product.'"  [[156]](#footnote-157)156 In affirming the district court's judgment at the conclusion of the trial in favor of Pummill, the court held in part as follows: The court initially observed that "[t]he issue of when natural gas first becomes 'marketable' has been the source of much contention and consternation in both legal and ***oil*** and gas circles for several years."  [[157]](#footnote-158)157

In summarizing certain legal principles, the court noted that a lessee has an implied duty to obtain a *marketable product*, including the cost of preparing the gas for market and getting the gas to the place of sale in marketable form. As a general rule, the lessee may not deduct from royalty payments the costs of gathering, transportation, compression, dehydration, or blending if those costs are required to create a marketable product, unless the lease provides otherwise. The lessee's obligation is not unlimited. In *Mittelstaedt*, where the court considered a *gross proceeds* lease, the court recognized that, although expenses to obtain a marketable product are not chargeable against royalty, reasonable post-production expenses might be applied if the expenses involve enhancing the value of an already marketable product, and the lessee shows that the expenditures resulted in a proportionate increase in royalty revenue. Unfortunately, the court in *Mittelstaedt* did not define the meaning of *marketable product*, nor has it done so since.  [[158]](#footnote-159)158 The court of appeals agreed with the trial court that the defendants failed to sustain their burden of proving that they were entitled to deduct the costs at issue, and affirmed the district court's ruling in favor of the *Pummill* plaintiffs.

In *Whisenant v. Strat Land Exploration Co.*,  [[159]](#footnote-160)159 the plaintiff Whisenant asserted that Strat Land failed to pay the royalty amounts that were due on its production, both as operator and non-operator, from Oklahoma wells. The state district court granted Whisenant's motion and certified a royalty owner class under 12 Okla. Stat. § 2023(B)(3).  [[160]](#footnote-161)160 Strat Land appealed. The Oklahoma Court of Appeals found that class certification was not appropriate in this case "because a 'highly individualized' review of the facts pertaining to each of the numerous wells is necessary."  [[161]](#footnote-162)161 The court held that the issue of liability and "the appropriate damages (if any) to be awarded, to each of the royalty owners in the proposed class is not susceptible to class-wide resolution 'in one stroke.'"  [[162]](#footnote-163)162 Common questions of law or fact did not predominate in this case.

In reaching those conclusions, the court discussed in detail the impact that the landmark decision in *Mittelstaedt v. Santa Fe Minerals, Inc.*  [[163]](#footnote-164)163 and the "marketable product" standard recognized in that decision, would have on the determination of the class claims. The court noted that "highly individualized and fact-intensive review of each Class Members' claim would be necessary to determine if [the defendant] underpaid ***oil*** or gas royalties."  [[164]](#footnote-165)164 Additional considerations supporting the reversal of class certification are described by the court in the lengthy opinion. In a special concurring opinion, added by Judge Rapp to the majority opinion of Presiding Judge Barnes, the Judge discussed the way in which the determination of the amount of payment due each royalty owner, and when the payment is due, "affects the ability to sustain class actions based on numerous individual wells spaced over a large geographic area."  [[165]](#footnote-166)165

The case of *Hall v. Galmor*,  [[166]](#footnote-167)166 presented the appeal of the trial court's judgment, after a bench trial, denying the appellants' petition to cancel ***oil*** and gas leases of the appellee. The opinion in this case is 36 pages in length, so only certain of the underlying facts and rulings of the court are described in this short summery. Here, Hall appealed the adverse judgment of the trial court to the Oklahoma Supreme Court, which retained the appeal. Hall argued on appeal that, in order for a well to be "capable" of producing in paying quantities, "the well must be maintained in turn-key condition such that it will produce in paying quantities immediately upon being turned 'on.'"  [[167]](#footnote-168)167 The court found that this proposed definition was first announced by the Texas Court of Appeals in a 1993 decision.  [[168]](#footnote-169)168 The court affirmed the trial court's rejection of Hall's proposal that Oklahoma courts adopt the Texas rule and require operators to continually maintain their shut-in wells in turn-key condition.

Hall further contended that the *cessation of production clauses* of the ***oil*** and gas leases resulted in the termination of the leases. However, citing *Pack v. Santa Fe Minerals, Inc.*,  [[169]](#footnote-170)169 the court found that a well's capability to produce in paying quantities will satisfy both the habendum clause and the cessation of production clause of the lease, and the cessation of production clause is only triggered where a well has become *incapable* of commercial production.  [[170]](#footnote-171)170 Hall further argued that the above outcomes would allow a lessee to "sit" on a well capable of production in paying quantities, without any actual production, for an indefinite time period, thereby rendering the cessation of production time limits of no effect. The court observed that the lessor could make a written demand for compliance with the implied covenant to market, which would force the lessee to commence actual production of the gas out of the ground and market the production or else face the possibility of a lease cancellation.  [[171]](#footnote-172)171

The court found that the trial court addressed Hall's claims for breach of the express lease terms by finding that the wells were capable of commercial production, and then proceeded to assess whether the leases could be cancelled for breach of any other express or implied provisions or covenants. The trial court correctly found that the leases could not be canceled due to the failure to satisfy the prerequisite for a prior *demand to market* made by the lessors.  [[172]](#footnote-173)172 The court remanded the case, based on the above rulings and others, with instructions to conduct further proceedings in a manner consistent with the court's opinion.

In *American Star Energy & Minerals Corp. v. Armor Petroleum, Inc.*,  [[173]](#footnote-174)173 Armor appealed from the trial court's judgment in favor of the plaintiff, American Star, in this breach of contract action. The key controversy in this case was whether the defendant-lessees were obligated, under a provision of an assignment, to notify American Star of the proposal and plan to plug the subject well, and to also offer American Star the opportunity to purchase defendants' interests in lieu of plugging the well. The well at issue was located within the Rice Morrow Sand Formation unitized field established under 52 Okla. Stat. §§ 287.1 et seq. The Plan of Unitization became effective December 1, 1994. At some point years later, the decision was made to plug the well. The Unit sent notice of such intent to all lessees of the Rice Morrow formation. The well was plugged and abandoned on December 3, 2009. The defendants, who were lessees of the Unit and successors to the obligations under the assignment, did not notify American Star of the impending plugging of the well or afford American Star the opportunity to exercise its purchase option prior to the closure of the well.

American Star filed this suit seeking damages for the cost of drilling a new well for purposes of drilling into a new formation. Following a bench trial, the trial court held for American Star, finding the contractual obligations contained in the assignment were continuing, assumed by the defendants, and did not conflict with the unitization plan or statutes. American Star was awarded $ 200,000 in damages plus statutory interest. The defendants appealed, and the court of appeals stated in part as follows: The appellate court agreed that the Unit had no obligation to notify American Star of its intent to plug the well. The Unit operator was only required to provide notice to *lessees* of the subject tract, and American Star was not a lessee. However, the defendants were obligated to provide notice to American Star pursuant to the terms of their assignment. Contrary to their assertion, this contractual requirement remained enforceable and, in no manner, conflicted with the notice requirements of the plan of unitization, or of the unitization statutes in general.

The unpublished decision of the Oklahoma Court of Appeals in *Hobson v. Cimarex Energy Co.*,  [[174]](#footnote-175)174 presented the issue of whether the Oklahoma Surface Damages Act  [[175]](#footnote-176)175 applied to the vested remainder interest owned by Hobson in the surface of the subject property. Cimarex had reached a surface damages settlement with the life tenant. But when Hobson sued Cimarex claiming compensation under the Act based on his remainder interest, Cimarex argued that the owner of a future interest did not qualify as a *surface owner* under the Act. Cimarex also asserted that Hobson's remedy, if any, was against the life tenant. The trial court ruled in favor of Cimarex, agreeing with its first contention above. Hobson appealed.

The court of appeal observed that the Act lacks clarity and specificity regarding what constitutes a *surface owner* and an *owner* for purposes of awarding compensation. Rejecting Cimarex's argument that Hobson was not entitled to compensation under the Act, the court stated that, as a vested remainderman, Hobson had a marketable interest in the property that could be adversely affected by the drilling operation, and that he was also entitled to have the property restored. The issue in the case was not *rents and profits* but, instead, damages measured by the loss of market value or the cost of restoration. The court found that Hobson was an *owner* under the Act. Accordingly, the trial court's judgment was reversed and the cause remanded for further proceedings.

In *Oklahoma* ***Oil*** *& Gas Ass'n v. Kingfisher County Commissioners*,  [[176]](#footnote-177)176 the Oklahoma Supreme Court issued its order on rehearing  [[177]](#footnote-178)177 and found Resolution No. 23, issued by the respondent commissioners, was beyond their authority and was void. Resolution No. 23, issued on April 9, 2018, advised that the commissioners banned the use of produced water (*e.g.*, salt water, ***oil*** field brine, waste ***oil***, basic sediment, mud) in temporary lines. The commissioners further adopted pipeline crossing permit documents that again indicated that the county did not permit the use of produced water in temporary lines. The court held that 52 Okla. Stat. § 137.1 did not authorize the county to enact Resolution No. 23. Among other reasons for that finding, the court observed that the resolution was "void as being inconsistent with 52 O.S. Supp.2017 § 139(A), (B)(1)(i) and with the Corporation Commission's regulation found in section 165:10-7-24 of the Oklahoma Administrative Code."  [[178]](#footnote-179)178 The court concluded that the Corporation Commission is the governmental body that has exclusive jurisdiction to enact such a regulation.

In very brief form, the decision of the Tenth Circuit Court of Appeals in *Chieftain Royalty Co. v. SM Energy Co.*  [[179]](#footnote-180)179 discussed the controlling legal principles to be applied in reviewing the attorney's fees and incentive awards approved by the district court in connection with the approval of a class action settlement. The ruling of the district court on the attorney's fees and incentive award was reversed and the case was remanded for further proceedings adhering to the guidance provided by the appellate court.

*Hall v. Conoco, Inc.*  [[180]](#footnote-181)180 involved a lawsuit against the operator of a refinery located near the plaintiff's childhood home. The Tenth Circuit affirmed the district court's exclusion of testimony from two of the plaintiff's experts and its grant of summary judgment to the Conoco defendants based upon the resulting lack of the expert testimony needed to sustain the plaintiff's evidentiary burden.

In *Charles B. and Kathleen J. Wheeler Trust v. Slawson Exploration, Inc.*,  [[181]](#footnote-182)181 the defendants appealed the trial court's award of attorney's fees and costs to the plaintiff in an action for breach of contract. The contract involved was an ***oil*** and gas lease. The court reviewed and rejected the theories for recovery of fees and costs urged by the plaintiff. As to plaintiff's arguments under the Production Revenue Standards Act,  [[182]](#footnote-183)182 the court found that the plaintiffs' petition did not assert a claim under the PRSA. The court reversed the trial court and denied the request for fees and costs.

For a lawsuit addressing a *series* of complex disputes arising from informal ***oil*** and gas dealings and related tort claims among ***oil*** and gas entities and individuals, see *Online* ***Oil****, Inc. v. CO&G Production Group, LLC*. [[183]](#footnote-184)183

*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*** & Gas Conservation Rules, were addressed in Cause RM No. 201800002. Following is a brief summary of certain of the amendments which became effective on September 14, 2018:

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, to delete form(s) and to add new form(s); OAC 165:10-3-1 regarding permits to drill wells; OAC 165:10-3-10 concerning hydraulic fracturing operations; OAC 165:10-3-17 with respect to well site and surface facilities; OAC 165:10-3-26 regarding well logs; OAC 165:10-3-28 concerning horizontal drilling in accordance with 52 O.S. § 87.1 *et seq.* and amendments thereto in Enrolled Senate Bill No. 867 (2017); OAC 165:10-3-39 with respect to commingling of production; OAC 165:10-5-6 regarding testing and monitoring requirements for enhanced recovery injection wells and disposal wells; OAC 165:10-5-7 concerning monitoring and reporting requirements for enhanced recovery injection wells, disposal wells and storage wells; OAC 165:10-5-15 with respect to reporting requirements for simultaneous injection wells; OAC 165:10-7- 2 regarding administration and enforcement of rules; OAC 165:10-7-7 concerning informal complaints pertaining to alleged violations of Commission orders or OAC 165:10, and OAC 165:10-7-16 with respect to use of noncommercial pits.

In addition, OAC 165:10-7-17 was amended regarding surface discharge of fluids; OAC 165:10-7-19 concerning land application of water-based fluids from earthen pits, tanks and pipeline construction; OAC 165:10-7-22 with respect to permits for County Commissioners to apply waste ***oil***, waste ***oil*** residue or crude ***oil*** contaminated soil to streets and roads; OAC 165:10-7-26 regarding land application of contaminated soils and petroleum hydrocarbon based drill cuttings; OAC 165:10-7-27 concerning application of waste ***oil***, waste ***oil*** residue or crude ***oil*** contaminated soil by ***oil*** and gas operators and pipeline companies to lease roads, pipeline service and tank farm roads, well locations and production sites; OAC 165:10-7-28 with respect to application of freshwater drill cuttings by County Commissioners to streets and roads; OAC 165:10-7-29 regarding application of freshwater drill cuttings by ***oil*** and gas operators to private access areas, well locations and production sites; OAC 165:10-7-31 concerning stratigraphic operations; OAC 165:10-7-33 with respect to truck wash pits; OAC 165:10-9-1 regarding operation of commercial pits; OAC 165:10-9-2 concerning commercial soil farming; OAC 165:10-9-3 with respect to commercial disposal well surface facilities; OAC 165:10-9-4 regarding operation of commercial recycling facilities, and OAC 165:10-11-6 concerning plugging and plugging back procedures for wells.

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. 201800001. Following is a brief summary of certain of the amendments which became effective on October 1, 2018:

OAC 165:5-1-3 was amended regarding definitions; OAC 165:5-1-4 concerning telephonic communication service and filings with the Court Clerk; OAC 165:5-1-5 with respect to filing of documents; OAC 165:5-1-9 regarding telephonic and videoconferencing testimony; OAC 165:5-3-1 concerning fees, including, but not limited to, addition of provisions regarding returned payments and changes to ***Oil*** and Gas Conservation Division and Transportation Division fees; OAC 165:5-3-2 with respect to Petroleum Storage Tank Division (PSTD) fees; OAC 165:5-5-1 regarding dockets; OAC 165:5-7-6 concerning establishment of drilling and spacing units in accordance with 52 Okla. Stat. §§ 87.1 et seq. and amendments thereto in Enrolled Senate Bill No. 867 (2017), and to provide that API numbers for well(s) be included in applications and orders; OAC 165:5-7-6.1 in accordance with 52 Okla. Stat. §§ 87.1 et seq. and amendments thereto in Enrolled Senate Bill No. 867 (2017) with respect to horizontal well unitization for targeted reservoirs; OAC 165:5-7-6.2 in accordance with 52 Okla. Stat. §§ 87.1 et seq. and amendments thereto in Enrolled Senate Bill No. 867 (2017) regarding multiunit horizontal wells in targeted reservoirs; OAC 165:5-7-7 concerning pooling, and OAC 165:5-7-11 with respect to change of operator under forced pooling, location exception and increased density orders.

In addition, OAC 165:5-7-12 was amended regarding determination of well allowables; OAC 165:5-7-33 concerning extension of time for closure of noncommercial pits; OAC 165:5-7-34 with respect to waiver of noncommercial pit closure requirements; OAC 165:5-7-35 regarding applications for operation of commercial pits, commercial soil farming sites and commercial recycling facilities; OAC 165:5-9-2 concerning subsequent pleadings; OAC 165:5-9-6 with respect to continuances; OAC 165:5-13-2 regarding setting of causes; OAC 165:5-13-5 concerning exceptions to reports of Administrative Law Judges; OAC 165:5-17-5 with respect to appeals; OAC 165:5-19-1 regarding contempt procedures; OAC 165:5-21-3 concerning application and notice requirements for PSTD cases; OAC 165:5-21-3.1 with respect to applications for variances to PSTD rules; OAC 165:5-23-3 regarding informal resolution of natural gas gathering disputes; and Appendix D concerning a form for notice of application for waiver of pit closure was revoked and a new Appendix D enacted to change the form for notice of application for waiver of pit closure.

X. PENNSYLVANIA

*A. Legislative Developments*

The Pennsylvania House of Representatives passed House Bill 2154, which establishes the Conventional ***Oil*** and Gas Wells Act to restore regulatory provisions of the ***Oil*** and Gas Act of 1984 and provide a framework specific to conventional wells and well sites. The reason for House Bill 2154 is that both conventional and unconventional wells are currently permitted with the same regulatory requirements under Act 13 of 2012. House Bill 2154 establishes several new chapters to address conventional well drilling activities and related issues, such as permitting and siting requirements, protection of groundwater and water sources, well plugging requirements, and enforcement and funding provisions. It would also require the Department of Environmental Protection (DEP) to adopt regulations to establish the various requirements and protections related to conventional gas drilling activities. House Bill 2154 states that the provisions of Title 58, relating to ***oil*** and gas, are replaced insofar as they relate to conventional wells. The companion bill in the Pennsylvania Senate, Senate Bill 1088, was referred to the Environmental Resources and Energy Committee on March 19, 2018.

*B. Judicial Developments*

In *Lasher v. Statoil USA Onshore Properties Inc.*,  [[184]](#footnote-185)184 the plaintiff alleged that Statoil miscalculated royalties owed from the sale of gas underlying the plaintiff's property. Specifically, the plaintiff argued that by transferring gas from the property to an affiliate company, Statoil established a scheme whereby it was able to pay reduced royalty payments to landowners like the plaintiff while significantly marking up the extracted gas to end users, thereby breaching the lease terms.  [[185]](#footnote-186)185 The case was remanded to state court because Statoil failed to meet its burden that it had met the amount in controversy necessary for removal.  [[186]](#footnote-187)186 It is worth noting that in *Canfield v. Statoil USA Onshore Properties, Inc.*,  [[187]](#footnote-188)187 the court held that Statoil's sale to an affiliate did not constitute an express breach where no provision in the lease required Statoil to make royalty payments based on an arm's-length sale or sale to a non-affiliate.

In *Jesmar Energy, Inc. v. Range Resources Appalachia, LLC*,  [[188]](#footnote-189)188 Jesmar assigned Rice Drilling an ***oil*** and gas lease in exchange for an overriding royalty interest.  [[189]](#footnote-190)189 The lease contained an arbitration provision and the assignment contained language holding successors to the "terms, covenants, and conditions" of the original lease.  [[190]](#footnote-191)190 Rice Energy subsequently conveyed the assignment to Range Resources.  [[191]](#footnote-192)191 Jesmar, the original lessor, filed suit arguing that Range Resources had breached the assignment clause by paying only part of the overriding royalty and improperly deducting processing costs.  [[192]](#footnote-193)192 Range Resources filed a motion to dismiss or stay pending arbitration since the lease contained an arbitration clause.  [[193]](#footnote-194)193 Jesmar countered that there was no intent by Rice Drilling and Range Resources to incorporate the terms of the original lease, including the arbitration clause, in the assignment.  [[194]](#footnote-195)194 The court agreed, relying on Third Circuit precedent in *Century Indemnity Co. v. Certain Underwriters at Lloyd's*  [[195]](#footnote-196)195 which held that arbitrability depends on the circumstances of each individual case, including the type of agreement at issue, the purpose of the agreement, the language employed, and the intent of the parties. In *Jesmar*, the court held that types of agreements at issue did not resemble the contracts for reinsurance of reinsurance that compelled arbitration in *Century Indemnity*.  [[196]](#footnote-197)196

In *H2O Resources, LLC v. Oilfield Tracking Services*,  [[197]](#footnote-198)197 a district court discussed the threshold for establishing or overcoming arbitrability.  [[198]](#footnote-199)198 H2O is a company that provides services to remove water produced during drilling. Carrizo purchased H2O's services and codified the terms in a Master Service Agreement that had an arbitration clause.  [[199]](#footnote-200)199 H2O began to suspect that Carrizo was siphoning proprietary information in order to create an in-house alternative to H2O's services. H2O sued, alleging that Carrizo violated the RICO Act, among other claims, while Carrizo countered with a motion to dismiss to compel Arbitration pursuant to the agreement.  [[200]](#footnote-201)200 The court granted Carrizo's motion to dismiss and compel arbitration. The court noted that H2O had not overcome the presumption of arbitrability merely by pointing to an express provision in the agreement that suggested otherwise.

In *Chesapeake Appalachia L.L.C. v. Scout Petroleum, LLC*,  [[201]](#footnote-202)201 Scout Petroleum purchased ***oil*** and gas leases from individuals who had previously entered the leases with Chesapeake Appalachia LLC.  [[202]](#footnote-203)202 The leases had a class arbitration provision, under which Scout filed an arbitration demand on behalf of itself and similarly situated lessors alleging insufficient royalty payments by Chesapeake.  [[203]](#footnote-204)203 The U.S. District Court for the Eastern District of Pennsylvania ruled against Scout, holding that parties may not be compelled to submit to class arbitration without a contractual basis.  [[204]](#footnote-205)204 Scout appealed, and the Third Circuit affirmed. Citing to Supreme Court precedent in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, the Third Circuit held that Scout could not compel Chesapeake to submit to class arbitration regarding the royalty dispute because the leases neither explicitly nor implicitly authorized class arbitration.  [[205]](#footnote-206)205

In *Mark West Liberty Midstream & Resources, LLC v. Cecil Township Zoning Hearing Board*,  [[206]](#footnote-207)206 the Cecil Township Zoning Hearing Board granted Mark West's application for a special exception to construct a natural gas compressor station--subject to conditions that it be of the same general character as other uses permitted in the surrounding "Light Industrial District."  [[207]](#footnote-208)207 Mark West argued that the conditions imposed exceeded the zoning board's authority under the township's Unified Development Ordinance.  [[208]](#footnote-209)208 Under the ordinance, the board is permitted to place "reasonable" conditions on permits; however, those conditions may be deemed unreasonable if the board's decision lacks substantial evidence that the condition is warranted.  [[209]](#footnote-210)209 The court found that several of the conditions lacked substantial evidence in the record that the project would create an "adverse impact[] not normally generated by this type of use."  [[210]](#footnote-211)210 Accordingly, the Pennsylvania Commonwealth Court granted Mark West's application for a special exception and struck the conditions that it found lacked substantial evidence.  [[211]](#footnote-212)211

In *Gorsline v. Board of Supervisors of Fairfield Township*,  [[212]](#footnote-213)212 the Fairfield Township Board of Supervisors approved an energy company's application for a conditional-use permit to locate gas wells on land that was zoned for residential and agricultural use.  [[213]](#footnote-214)213 The township's zoning ordinance allowed exceptions for construction in the particular area for uses deemed either "public services" or "essential services."  [[214]](#footnote-215)214 The Pennsylvania Supreme Court held that the proposed gas wells failed to meet either of these definitions, and was not of the same general character as anything currently zoned for, or excepted, in that area. Accordingly, it reversed the decision of the zoning board.  [[215]](#footnote-216)215

In *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*,  [[216]](#footnote-217)216 the Pennsylvania Commonwealth Court affirmed the trial court's ruling that conflict and field preemption required dismissal of a complaint by a group of concerned citizens from the Delaware Riverkeeper Network.  [[217]](#footnote-218)217 The concerned citizens sought to challenge Sunoco's proposed construction of a pipeline that they claimed violates the West Goshen Township Zoning Ordinance.  [[218]](#footnote-219)218 The zoning ordinance regulated the location for gas pipelines in the township, arguably prohibiting Sunoco's proposed construction; however, the Public Utility Commission (PUC) approved the construction.  [[219]](#footnote-220)219 The court held that it was the General Assembly's intent that the PUC be *preeminent* in regulating utilities when zoning questions arise.

In *Frederick v. Allegheny Township Zoning Hearing Board*,  [[220]](#footnote-221)220 objectors raised a substantive validity challenge to a zoning ordinance that allowed ***oil*** and gas well operations in all zoning districts so long as they satisfied enumerated standards designed to protect the public health, safety, and welfare.  [[221]](#footnote-222)221 The objectors claimed that the zoning ordinance improperly instituted illegal spot zoning in violation of substantive due process, did not comport with the Environmental Rights Amendment in the Pennsylvania Constitution, and violated provisions in the Pennsylvania Municipalities Planning Code (MPC).  [[222]](#footnote-223)222 The Pennsylvania Commonwealth Court held that it was the Commonwealth's duty to regulate how gas drilling is conducted to protect Pennsylvania's waters and air from degradation, while it was the local governments' duty to regulate where ***oil*** and gas operations will take place with zoning ordinances.  [[223]](#footnote-224)223 The court held that the objectors did not specify how the standards and conditions in the zoning ordinance violated the Environmental Rights Amendment or deprived them of substantive due process, or the MPC.  [[224]](#footnote-225)224

In *Briggs v. Southwestern Energy Production Co.*,  [[225]](#footnote-226)225 landowners sued Southwestern for trespass stemming from hydraulic fracturing on a neighbor's property. Southwestern argued it could not be held liable for trespass because it never entered the landowners' property, while the landowners argued that extracting natural gas below their property, despite a lack of physical intrusion, was nonetheless a trespass. Southwestern additionally argued that the rule of capture precludes liability for trespass during ***oil*** drilling.  [[226]](#footnote-227)226 The Pennsylvania Superior Court disagreed with Southwestern's argument, holding that "the rule of capture does not preclude liability for trespass due to hydraulic fracturing."  [[227]](#footnote-228)227 The court further outlined instances when hydraulic fracturing constitutes a trespass: "where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property."  [[228]](#footnote-229)228 On November 20, 2018, the Supreme Court of Pennsylvania agreed to hear the case and review the superior court's decision.

In *Transcontinental Gas Pipe Line Co. v. Permanent Easements*,  [[229]](#footnote-230)229 the Third Circuit affirmed the issuance of a preliminary injunction effectively giving a pipeline company immediate possession of certain rights of way. The Third Circuit rejected arguments from landowners that granting immediate possession violated the constitutional principle of separation of powers because the taking of property by eminent domain is a legislative function and the Natural Gas Act did not grant "quick take" power that permits immediate possession.  [[230]](#footnote-231)230 The Third Circuit held that the Natural Gas Act's grant of standard condemnation powers to natural gas companies does not preclude federal courts from granting equitable relief in the form of a preliminary injunction when gas companies have obtained the substantive right to condemn and otherwise qualify for equitable relief.  [[231]](#footnote-232)231

In *EQT Production Co. v. Department of Environmental Protection*,  [[232]](#footnote-233)232 EQT initiated declaratory judgment proceeding after it faced civil penalties under Pennsylvania's Clean Streams Law. Under that law, the DEP may levy fines against anyone who allows industrial wastes to flow into the waters of the Commonwealth. EQT faced such fines because of "leaks from an impoundment used to contain impaired water flowing back from hydraulic fracture gas wells."  [[233]](#footnote-234)233 DEP justified its fines under the "soil-to-water" and "water-to-water" theories, which state that "every day that contaminants from the [facility] remain in the subsurface soil and passively enter groundwater and/or surface water," the violating party may be assessed fines for "continuing violations," and that fines may also be assessed when contaminants move from one body of water to another.  [[234]](#footnote-235)234 EQT argued that DEP's theories were so broad that they ran counter to the plain wording of the statute and to the legislative intent of an earlier environmental regulation, and were not supported by precedent.  [[235]](#footnote-236)235 The Pennsylvania Supreme Court agreed, holding that the Clean Streams Law was ambiguous, at least with respect to the "water-to-water" theory. EQT did not violate the regulation when pollutants moved from one body of water to another because neither the statute's plain language, nor the intent of the legislature, comprehended such movement.  [[236]](#footnote-237)236

In *Marcellus Shale Coalition v. Department of Environmental Protection*,  [[237]](#footnote-238)237 the Marcellus Shale Coalition, a membership organization, challenged several regulations relating to unconventional gas well operations as governed by Pennsylvania's ***Oil*** and Gas Act of 2012.  [[238]](#footnote-239)238 They argued that each new regulation was void, vague, and lacked statutory authority.  [[239]](#footnote-240)239 The Pennsylvania Supreme Court disagreed, holding that the Marcellus Shale Coalition failed to meet its burden in showing it was entitled to clear relief on each claim.  [[240]](#footnote-241)240

In *B&R Resources, LLC v. Department of Environmental Protection*,  [[241]](#footnote-242)241 the Pennsylvania Commonwealth Court reviewed an Environmental Hearing Board (EHB) adjudicatory decision regarding whether an officer of an ***oil*** and gas exploration company may be held personally liable under the participation theory for failing to plug dozens of abandoned wells pursuant to Pennsylvania state law.  [[242]](#footnote-243)242 Under Pennsylvania's 2012 ***Oil*** and Gas Act, DEP may require the plugging of non-producing wells.  [[243]](#footnote-244)243 The DEP directed the B&R exploration company, and one of its managing members, to plug 47 non-producing wells following safety violation notices; it failed to do so, arguing that they lacked the requisite financial resources.  [[244]](#footnote-245)244 At a hearing, the EHB found the managing member personally liable for failing to plug the wells. B&R appealed, arguing that the managing member could not be held personally liable "because his involvement consisted of inaction and that the EHB imposed liability on [him] based on his status as sole owner and manager of B&R, rather than his conduct."  [[245]](#footnote-246)245 The Pennsylvania Commonwealth Court agreed with B&R and reversed the EHB ruling, holding that because the company did not have the financial means to plug the wells, there could be no causal nexus between wrongful conduct and a violation.  [[246]](#footnote-247)246

In *Walney v. SWEPI LP*, [[247]](#footnote-248)247 a class action, several Pennsylvania landowners alleged that SWEPI, with whom they executed ***oil*** and gas leases, failed to pay bonuses due under their lease terms. [[248]](#footnote-249)248 While the lease bonuses were not usually specified in the leases themselves, they appeared in bank drafts between the parties. Accordingly, the landowners argued that the bank draft, coupled with the leases, created mutual intent and an enforceable contract regarding lease bonuses. [[249]](#footnote-250)249 SWEPI countered that there was no enforceable contract. The district court disagreed, finding that the correspondence between the landowners and SWEPI constituted an intent to be bound, with definite terms, and for valid consideration. [[250]](#footnote-251)250

*C. Administrative Developments*

In June 2018, DEP finalized a permitting program to reduce methane emissions from natural gas well sites, compressor stations, and along pipelines. The general permits establish Best Available Technology requirements and other applicable federal and state requirements including air emission limits, source testing, leak detection and repair, recordkeeping, and reporting requirements for the applicable air contamination sources. The GP-5A permit was developed under the authority of Section 6.1 of the Air Pollution Control Act (35 P.S. § 4006.1(f)) and 25 Pa. Code ch. 127, subch. H (relating to general plan approvals and operating permits), and is applicable to unconventional natural gas well site operations and remote pigging stations. The revised GP-5 permit was developed under the authority of section 6.1(f) of the Air Pollution Control Act and 25 Pa. Code ch. 127, subch. H, and is applicable to natural gas compressor stations and processing plants and transmission stations.

Governor Tom Wolf again unsuccessfully introduced legislation to create a severance tax on ***oil*** and natural gas production. Senate Bill 1000 and House Bill 2253 called for between 4 cents and 7 cents per thousand cubic feet of natural gas, depending on the price, that would have begun on July 1. The proposed tax would have generated an estimated $ 248.7 million in the fiscal year following its proposal. Pennsylvania currently imposes no severance tax but does impose impact fees, which paid $ 209.6 million this year to counties and municipalities affected by shale wells

XI. TEXAS

*A. Judicial Developments*

Texas courts addressed numerous energy-related cases in 2018. Lease maintenance and deed construction remained hot areas, while the courts also examined a number of disputes between lessees. The following cases provide a highlight of recent decisions found to be worthy of noting.

In *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*,  [[251]](#footnote-252)251 the Texas Supreme Court affirmed the Eastland Court of Appeals ruling that a portion of Endeavor's mineral leases automatically terminated based on language of the leases' continuous-development and retained-acreage clauses. Specifically, the court analyzed whether Endeavor was bound by the proration unit identified in the initial plat Endeavor filed with the Railroad Commission. The retained-acreage clause, triggered by the cessation of continuous development, terminated the lease except with respect to the land "within a governmental proration unit assigned to a well" that complied with the Railroad Commission rules and regulation for "obtaining the maximum producing allowable for the particular well."  [[252]](#footnote-253)252 Although Endeavor had filed plats with the Railroad Commission assigning proration units of around 80 acres for four different wells, it later asserted that each well should be assigned 160 acres, as was sometimes allowed under the appropriate field rules. Accordingly, Endeavor claimed the full 160 acres under the leases.

The court found the language "assigned to" in the retained-acreage clause unambiguously referred to "the operator's assignment of a proration unit through its filing of a proration plat with the Commission," rather than the Commission's assignment of units based on special field rules.  [[253]](#footnote-254)253 Therefore, because the operator is typically required to designate a well's acreage and proration unit on a certified plat per statewide and/or special field rules, these designations had implications on the contract rights between the parties, including the acreage retained. Additionally, the court found that the retained-acreage clause language calling for the "maximum producing allowable" was intended to restrict the acreage filed in the plat such that it only contained the amount necessary to reach the maximum producing allowable for that particular well. Therefore, the 80-acre-per-well plat filed originally was the correct amount since Endeavor did not need the full 160 acres to achieve the maximum allowable.

In *Greeheyco, Inc. v. Brown*,  [[254]](#footnote-255)254 the Eastland Court of Appeals analyzed a lease's continuous drilling clause to determine whether the lease, as amended, had terminated. According to the continuous drilling clause, the lease would continue so long as the lessee engaged in continuous drilling operations, which it defined as "drilling which must be completed to a minimum depth of 1,000 feet following within no more than one hundred twenty (120) days after cessation of drilling operations from the previous well to its total depth on the Leased Premises."  [[255]](#footnote-256)255 The amendment to the lease, which relinquished formations above the Caddo formation, stated that "notwithstanding the release of the formations . . . a well drilled to a minimum depth of 1,000 feet shall still constitute 'continuous drilling operations' as defined in [the lease]."  [[256]](#footnote-257)256 The amendment also provided that its terms superseded any conflicting terms in the original lease.

On July 18, 2015, the lessee completed a well at a depth of 1,050 feet. On November 12, 2015, the lessee commenced actions to drill a second well. While the parties agreed that November 15, 2015 marked the expiration of the 120-day continuous-drilling period, they disagreed as to what constituted "continuous drilling operations," and, as a result, as to whether the lease had terminated. The lessor contended that the lessee's act of drilling the first well was ineffective to trigger the continuous drilling clause, because 1,050 feet was not a sufficient depth to reach the Caddo formation, and because the amendment released all formations above the Caddo formation. The court disagreed, stating that when parties to a contract use the term "notwithstanding," they "agree that the 'notwithstanding' provision must be given effect regardless of any contrary provisions of the contract."  [[257]](#footnote-258)257 Accordingly, because the lease amendment specified that drilling to a minimum depth of 1,000 feet constituted continuous drilling operations "notwithstanding" the fact that it released formations lying at that depth, the court held that the continuous drilling clause saved the lease from termination.

In *TEC Olmos, LLC v. Conoco Phillips Co.*,  [[258]](#footnote-259)258 the court construed a *force majeure* clause which contained the following "catch-all" provision: "*any* other *cause* not enumerated herein but which is *beyond the reasonable control of the Party whose performance is affected*, then the performance of any such obligation is suspended . . . ."  [[259]](#footnote-260)259 The court held that this "catch-all" language did not include events which were reasonably foreseeable, such as the drop in the price of ***oil*** which was at issue in this case. *TEC Olmos* stands for the proposition that courts will read doctrines such as foreseeability into "catch-all" provisions of *force majeure* clauses when a party attempts to rely on these provisions in a contract dispute.

In *Murphy Exploration & Production Co.--USA v. Adams*,  [[260]](#footnote-261)260 the Texas Supreme Court declined to apply a standard which would have required an operator to prove its horizontal offset well in the Eagle Ford Shale protected against drainage. Lessors and Murphy's predecessor-in-interest entered into leases containing an offset well provision that required completion of a well if a draining well was located within a certain distance from the lease line. The provision was silent as to the required location of the offset well.

An adjacent well was drilled within the triggering number of feet. Murphy timely drilled the offset well, which it located 1,800 feet from the lease boundary line. Lessors sued Murphy for breach of contract, asserting the well Murphy drilled was too far from the adjacent well to be considered an offset well to protect against drainage. The Texas Supreme Court declined to find a breach, reasoning that "imposing a location or proximity requirement that goes beyond the leases' express language--is an unreasonable interpretation of the language the parties chose."  [[261]](#footnote-262)261

In *TRO-X, L.P. v. Anadarko Petroleum Corp.*,  [[262]](#footnote-263)262 the Texas Supreme Court was called to decide whether a renegotiated series of leases constituted "top leases." TRO-X, L.P. owned a 5% back-in after-payout working interest in a series of 2007 leases owned by Anadarko. The agreement creating the back-in provided that the back-in would "extend to and be binding upon any renewal(s), extension(s), or top lease(s) taken within one (1) year of termination of the underlying interest."  [[263]](#footnote-264)263 In 2011, the lessors under the 2007 leases notified Anadarko that it had breached an offset well provision in the leases, thereby partially terminating the leases. Anadarko agreed, and purchased new leases in 2011 covering the same interest as the 2007 leases. It recorded the 2011 leases, and filed a release of the 2007 leases a few months later. The issue of whether TRO-X's back-in applied to the 2011 leases therefore depended on whether the 2011 leases were "top leases" of the 2007 leases.

Interestingly, TRO-X did not argue the 2011 leases were "renewals" or "extensions" of the 2007 leases. Rather, it argued that the 2011 leases were simply top leases. The court held that they were not, because the 2011 leases were not contingent on termination of the 2007 leases (a defining feature of a top lease). Rather, the 2011 leases terminated the 2007 leases entirely. The court explained the party contending that a new lease did not terminate a previous lease held the burden of proof "that the parties intended for the previous lease to survive execution of the new lease."  [[264]](#footnote-265)264

Because there was no specific language in the unambiguous 2011 leases showing an intent that the 2007 leases would survive execution of the 2011 leases, the court concluded that the 2011 leases terminated the 2007 leases. Thus, the 2011 leases were not top leases, because they were not contingent on termination of the 2007 leases--they themselves constituted both a termination of the 2007 leases and new leases since they covered the same mineral interest. As new leases, they were unburdened by TRO-X's back-in.

In *Devon Energy Production Co., L.P. v. Apache Co.*,  [[265]](#footnote-266)265 the Eastland Court of Appeals held that Section 91.402 of the Texas Natural Resources Code does not require a working interest owner to pay lease royalties to mineral interest owners who have leased to a different working interest owner. Apache and Devon held leases from separate mineral owners under the same lands, but could not agree on a JOA. Thereafter, Apache went on to drill seven producing ***oil*** and gas wells on the property, and, after payout, paid Devon its share of the net revenue from production as its cotenant. Neither Apache nor Devon paid the lessors under the Devon leases any royalty. Devon filed a claim against Apache, arguing that the statute requires Apache to directly pay the Devon lessors' royalties under Devon's leases. In part, the statute provides, the proceeds derived from the sale of ***oil*** or gas production from an ***oil*** or gas well located in this state must be paid to each payee by payor on or before 120 days after the end of the month of first sale of production from the well.

Finding in favor of Apache, the court held that Apache and Devon's lessors did not have a payor-payee relationship under the statute, since Apache did not undertake to pay the Devon lessors by entering into leases with them. Therefore, even though Apache was the operator of the producing well, it was not a payor under the statute. Thus, the obligation for payment of lease royalties to Devon's lessors lay squarely on Devon, not Apache.

In *Eagle* ***Oil*** *& Gas Co., v. Shale Exploration, LLC*,  [[266]](#footnote-267)266 the court affirmed a $ 14.3 million jury verdict for lost profits resulting from the theft of an operator's leasing information. Along with its two partners, Shale Exploration, LLC wanted to develop an ***oil*** and gas prospect in Daniels County, Montana. During negotiations to develop the prospect, Shale shared the following with Eagle ***Oil*** & Gas Company: (1) a map identifying areas of interest and the anticipated value placed on each area; (2) lease schedules; and (3) maps distinguishing between land where Shale negotiated mineral leases from land not yet leased. Although Eagle formerly had a confidentiality agreement with Shale's parent company, that company had divested Shale, and Eagle and Shale never reached an agreement. After learning Shale agreed to develop the prospect with Apache, Eagle used Shale's information to conduct its own leasing activities in the prospect, causing Shale to spend more money to fulfill contractual obligations it owed to a third party.

Despite the lack of a formal agreement, the court found that a jury could have reasonably found that Eagle agreed to hold Shale's information in confidence and use it only for negotiating the deal with Shale because Shale relied on multiple assurances from Eagle representatives that it would not share the information prior to the initial meeting between the parties. The opinion recognized that Shale spent extensive resources developing the information because the mineral ownership interests were highly fractionalized and the title research was done manually at the county courthouse. As such, there were over a hundred Shale employees working at the county courthouse for over a year to determine the prospect mineral owners' identities. Further, Shale used specialized software to generate the information it shared with Eagle. By using the information, Eagle unjustly capitalized on Shale's labor-intensive efforts to uncover the prospect mineral owners' identities. For these reasons, the court held that the information constituted a trade secret.

In *Pacific Energy & Mining Co. v. Fidelity Exploration & Production Co.*,  [[267]](#footnote-268)267 the court determined that the relationship created between two ***oil*** and gas companies under the assignment of an asset purchase agreement (APA) for the sale of ***oil*** and gas assets was only an assignment, not a joint venture or a partnership. As part of the APA assignment, the purchaser and the assignee executed a memorandum of understanding (MOU), which stated the following relevant points:

(1)  the assignee would fund 100% of the acquisition price under the terms of the APA;

(2)  all assets from the APA would be assigned from purchaser to assignee;

(3)  assignee would own 100% of the assets acquired under the APA;

(4)  both parties would enter into an operating agreement in which purchaser would be the operator; and

(5)  purchaser would receive 30% net profit.

The court concluded that this arrangement created an assignment to the assignee, and the fact that the purchaser still retained its obligations under the APA did not change the relationship. Furthermore, the court decided that the assignment did not create a partnership between the purchaser and assignee for the following reasons under a totality of the circumstances test: (1) profit sharing paid as wages or compensation does not indicate a partnership interest; (2) the MOU did not have language indicating intent to be partners; (3) there was no evidence that both parties had mutual control of the business; and (4) the MOU did not address loss sharing. As such, the assignee could not breach a fiduciary duty to the purchaser because there was no partnership or joint venture relationship giving rise to such a duty.

In *Perryman v. Spartan Texas Six Capital Partners, Ltd.*,  [[268]](#footnote-269)268 the Texas Supreme Court emphasized that a reservation of minerals in a deed's "less, save except" clause must be drafted with clear language; otherwise it will be construed as an exception. The clause at issue saved and excepted "an undivided one-half (1/2) of all royalties from the production of ***oil***, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor."  [[269]](#footnote-270)269 Because the clause did not use the word "reserve," it was not a reservation, but an exception. The court further determined that the phrase, "which are now owned by the Grantor," modified the word "premises," and not "royalties" or "minerals" because there is no comma after "premises." Accordingly, the court concluded that the deed conveyed 1/2 and excepted 1/2 of *all* of the parcel's royalty interests, not just 1/2 of the royalty interests the grantor *then owned*.

In *U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*,  [[270]](#footnote-271)270 the Texas Supreme Court interpreted a royalty reservation in a 1951 deed to determine whether it was fixed (a fixed percentage of total production), or floating (a fraction of the royalty amount in the applicable ***oil*** and gas lease). The double-fraction deed reserved an undivided 1/2 interest in the ***oil*** and gas royalty, "the same being equal to one-sixteenth (1/16) of the production."  [[271]](#footnote-272)271 The court held that the deed reserved a floating 1/2 interest. First, no lease was in effect at the time of the deed's execution. As a result, the deed's language reserving 1/2 of a "royalty" must have referred to some royalty "that could come into being at some point in the future."  [[272]](#footnote-273)272 Second, the grammatical structure supported the interpretation of a floating 1/2 interest, because the second fraction was offset by a comma, which indicated a nonrestrictive dependent clause. According to the court, such clauses provide mere additional information incidental to the central meaning of a sentence. Thus, the nonrestrictive dependent clause in this case did not modify the first fraction, which clearly intended to reserve a floating 1/2 interest.

In the case of *In re Primera Energy, LLC*,  [[273]](#footnote-274)273 a group of investors sued an investment firm for Deceptive Trade Practice Act (DTPA) violations and other claims based upon investments in ***oil*** wells that did not yield any return. The owner of the investment firm that marketed these wells took millions of dollars in investor funds as *owner draws*, making the venture unprofitable and leaving the company unable to pay vendors.

The investors claimed the DTPA applied based upon services provided by the firm under a management and operating fee provision in the investment contracts. In order to qualify for protection under the DTPA, the plaintiff must be a consumer and the complaint must be related to goods or services. The lower court held that the plaintiff here was a non-operating interest owner, and based upon previous case law, held that a non-operating interest holder was not a consumer under the DTPA. The court reasoned that simply being the front-man incurring debts related to a well for which it was to be reimbursed was not a service. The plaintiff tried to distinguish previous precedent by pointing to the fact that it paid an upfront fee before any costs were incurred on the part of the investment firm, and thus it was not reimbursing the firm. Further, the plaintiff pointed to the fee for supervision during the well operations that the firm charged. The court held that pre-billing for projected costs did not affect the analysis of whether the operator was providing a service and that an operator charging a management fee to non-operating interest holders did not make their actions a service relative to the non-operating interest owners. Thus, the court found that the plaintiff did not qualify for protection under the DTPA.

XII. WEST VIRGINIA

*A. Legislative Developments*

The 2018 West Virginia Legislature passed the highly publicized and noteworthy House Bill 4268, involving mineral development by a majority of cotenants. This Act affected various sections of the West Virginia Code, including §§ 22C-9-3, 22C-9-4, and 37-7-2, as well as creating Chapter 37B entitled "Mineral Development."

Section 22C-9-3 speaks to the application of the article and exclusions therefrom, while Section 22C-9-4 sets forth the creation, terms, duties, and authority of the ***Oil*** and Gas Conservation Commission. Furthermore, Section 2, entitled "Waste by cotenant," was added to Chapter 37, Article 7 of the West Virginia Code.

The majority of House Bill 4268 sets forth Chapter 37B pertaining to Mineral Development. The purpose of this chapter is to encourage and promote exploration for and development, production and conservation of ***oil***, natural gas and their constituents. This chapter is applicable in situations in which there are seven or more royalty owners. If an operator or owner makes or has made reasonable efforts to negotiate with all royalty owners in an ***oil*** or natural gas mineral property and royalty owners vested with at least three fourths of the right to develop, operate, and produce ***oil***, natural gas, or their constituents consent to the lawful use or development of the ***oil*** or natural gas mineral property, the operator's or owner's use or development of the ***oil*** or natural gas mineral property is permissible, is not waste, and is not trespass. A nonconsenting cotenant is entitled to receive, based on his or her election, either: (i) a prorata share of production royalty; or (ii) may elect to participate in the development and receive his or her prorata share of the revenue and cost equal to his or her share of production attributable to the tract or tracts being developed. The Chapter further sets out how payments will be made to the non-consenting owners, as well as those with unknown or unlocatable interests.

Within the first 120 days after any amount is reserved for those unknown or unlocatable interest owners, the consenting cotenants, along with their lessees, operators, agents, etc., are required to make a report to the State Treasurer as the Unclaimed Property administrator. The reports are then to be made every quarter, along with the remittance of the funds for the owners. Section 37B-1-4(g) allows for a bona fide surface owner to file an action to quiet title to the interests of all unknown and unlocatable owners after seven years has elapsed since the date of the first report to the State Treasurer.

B. *Judicial Developments*

In *L&D Investments, Inc. v. Mike Ross, Inc.*,  [[274]](#footnote-275)274 the Supreme Court of Appeals of West Virginia reversed the order of the Circuit Court of Harrison County granting summary judgment to Mike Ross, Inc. (MRI) on the grounds that the plaintiffs' (L&D) claims were barred by the three-year statute of limitation set forth in W. Va. Code § 11A-4-4. In this case, the ***oil*** and gas interests had been severed from the surface and coal interests in 1903. A real property tax assessment for 100% of the ***oil*** and gas interest remained on the landbooks until 1999 (master assessment). Additional assessments were entered on the landbooks as early as 1988 when a personal property assessment was transferred over to the real property landbooks. Those assessments were based on a gas producer's report of income from production. The personal property assessments that were transferred to the real property landbooks were further separated in 1990 with descriptions of "leased O&G," and containing well references therein. The result of the transfer of the personal property assessments led to real property tax tickets being issued, and taxes being paid on both those tickets and the master assessment.

In 1999, the owners of a 1/20th interest requested separation of their respective interests in the subject property from the master assessment. However, the master assessment remained on the landbooks for the year 2000, being noted as 80% interest in ***oil*** and gas, and the real property taxes were not paid and became delinquent. In 2003, a tax sale deed was issued to MRI conveying an eighty percent undivided interest in the ***oil*** and gas based on the delinquent master assessment. L&D purchased certain ***oil*** and gas interests in 2013 and notified the entities then extracting ***oil*** and gas from the property of its purchase and its right to receive any royalty payments. Those producers then proceeded to inform L&D that the interest it was claiming had been previously sold in 2001 to MRI for delinquent taxes.

The parties in this case disputed the validity of the tax deed issued to MRI in 2003. L&D contended that the taxes with respect to their ***oil*** and gas interests were never delinquent because it and its predecessors in interest paid and continued to pay the real property tax tickets they received from the Assessor thereby making the tax deed issued to MRI void. On the other hand, MRI argued that the payments made by the L&D, and its predecessors in interest, were for erroneous assessments of royalty based personal property and were therefore improperly placed on the landbooks.

The supreme court of appeals reversed, holding that the mineral interests were never delinquent, and therefore, the sale of the subject mineral interests for delinquent taxes was void as a matter of law; and that L&D's claims were not barred by the three-year statute of limitation set forth in W. Va. Code § 11A-4-4 for tax sale deeds resulting from duplicate assessment that were void ab initio. Further, in the case of two assessments of the same land under the same claim of title for any year, one payment of taxes under either assessment is all the state can require. The case was remanded for further proceedings consistent with the opinion of the court.

In *Berghoff v. Chesapeake Appalachia, LLC*,  [[275]](#footnote-276)275 the court reversed the order below granting summary judgment to Chesapeake Appalachia, LLC (Chesapeake), and its successor in interest, SWN Production Company, LLC (SWN), holding that: (1) there was not sufficient fact finding to satisfy the burden of summary judgment concerning the habendum clause of the mineral lease; and (2) Chesapeake did not extend the lease beyond its primary term pursuant to the its pooling provision. The lease, in addition to the habendum clause, contained a pooling provision requiring the mailing of notice to the lessors and an addendum provision requiring the lessors' reasonable approval in well pad location. Initial preparations of locating a well pad on the leased premises were abandoned due to a dispute on the location of the access road, and Chesapeake subsequently drilled a well pad on land adjoining the leased premises. The leased premises were included in a unit before the primary term expired, but Chesapeake did not mail the notice of the unitization to the lessors until after the primary term expired.

The parties disputed whether the lease was extended beyond its primary term pursuant to the habendum clause, and whether the leased premises were properly pooled in a unit. The district court granted summary judgment to Chesapeake and SWN, holding that: (1) although Chesapeake abandoned locating the well pad on the leased premises, the lessors disputing the location of the access road location was unreasonable and constituted equitable estoppel for the benefit of Chesapeake; and (2) Chesapeake's operation of the pooled unit without the mailing of notice satisfied the doctrine of substantial performance and properly unitized the leased premises.

The Fourth Circuit reversed both of the district court's findings. First, it held that determining whether the lessors unreasonably rejected the proposed access road location was a question of fact for the jury, especially considering the inclusion of the addendum provision requiring such approval by the lessors. Second, it held that the mailing of notice to the lessors was a stated prerequisite to pooling, not a minor occurrence that was impossible or impractical; thus, Chesapeake failing to do so resulted in the leased premises not being properly unitized. The case was vacated and remanded for further proceedings consistent with those of the Fourth Circuit.

In *Kupfer v. Chesapeake Appalachia, LLC*,  [[276]](#footnote-277)276 the West Virginia Supreme Court affirmed the order of the lower court holding that the circuit court did not err in determining that the deed in question did not reserve the ***oil*** and gas within and underlying the subject property. By deed dated May 2, 1990, the Petitioners (Kupfer) conveyed unto C. Michael Blair, predecessor in title to Respondent, Zachary Blair, nine tracts of land, including the 60-acre subject property. The subject deed first describes the conveyance as being the following described real estate, whose Tax Map Number is 21, Parcels 4, 13, 14, 15, 16, 17, 18, 19, and 20, to-wit, followed by the first eight unrelated tracts of land and their respective legal descriptions. Immediately following these descriptions, the subject deed stated that there was excepted and reserved from said parcels all the coal, ***oil***, gas and other minerals, on, within and underlying the property hereby conveyed. After this reservation language, the subject deed described the ninth tract of land, being the subject property, and its legal description; however, no reservation of the ***oil*** or gas followed the subject property and its legal description.

The parties disputed whether the subject deed reserved the ***oil*** and gas within and underlying the subject property in addition to the first eight unrelated tracts of land. The circuit court concluded that the deed unambiguously reserved the ***oil*** and gas within and underlying the first eight tracts of land but did not reserve any ***oil*** or gas within and underlying the subject property. On appeal, Kupfer argued that the initial language referring to the following described real estate, whose Tax Map Number is 21, Parcels 4, 13, 14, 15, 16, 17, 18, 19, and 20, to-wit, completed the conveyance of the nine tracts of land, and that the subsequent parcel by parcel descriptions in the subject deed were unnecessary, resulting in the remaining reservation language being applicable to the initial language conveying all nine tracts of land. Further, the phrase "said parcels" in the reservation language should be liberally construed to refer to the initial language of the nine tracts of land and not just the eight tracts of land immediately preceding the reservation language. The Supreme Court of Appeals of West Virginia disagreed with Kupfer and affirmed the order of the circuit court, criticizing Kupfer's limited scope of analysis in determining the intent of the parties and their interpretation of words beyond their plain and ordinary meaning.

In *Richards v. EQT Production Co.*, [[277]](#footnote-278)277 a federal jury found that EQT Production Company (EQT Production) breached the terms of three ***oil*** and gas leases by failing to pay the Richards the full amount of royalties due. The three leases in question contained royalty wording obligating the lessee to pay one-eighth (1/8) of the market price of the gas from each and every gas well drilled on said premises, the product from which is marketed and sold off the premises, said gas to be measured by a meter. EQT Production, successor in interest to the original lessee, sold the natural gas produced from the leased premises to an affiliate, EQT Energy, LLC (EQT Energy), pursuant to a Gas Sales Contract. The Gas Sales Contract established a pricing formula which defined the wellhead as the relevant valuation point of the royalty payments, applying a work-back method to deduct certain post-production costs from the Richards. The Richards brought suit, alleging that EQT Production breached the royalty provision of the three leases by not remitting payments based on the price of the downstream market, which would not factor in the deduction of post-production costs to royalty payments. EQT Production argued that although the three leases did not contain *at the wellhead* language, there are markets at multiple potential points of sale, and the Richards had failed to show that the price paid by EQT Energy at the wellhead was not, in fact, the market price of the gas at that point of sale. The case was tried before a jury, who agreed with the Richards and found that EQT Production had failed to pay the Richards the full amount of the royalties due.

C. *Administrative Developments*

Effective April 1, 2018, the West Virginia Department of Environmental Protection modified and amended legislative rule 60CSR3 titled The Voluntary Remediation and Redevelopment Rule relating to the eligibility, procedures, standards, and legal documents required for voluntary remediation activities and brownfield revitalization. This Rule is applicable to properties involved in, but not limited to, the extraction of ***oil*** and gas and pipeline transportation.

XIII. WYOMING

*A. Legislative Developments*

During its 2018 Budget Session, the Wyoming State Legislature addressed four issues important to the ***oil*** and gas industry. Through S.F. 27, the legislature enacted new procedures for Wyoming sales and use tax audits. Along with other provisions, the statute sets time limits for commencement of audits by the Wyoming Department of Audit.  [[278]](#footnote-279)278

Second, through S.F. 18, the legislature established an Orphan Site Remediation Account to fund reclamation activities when an operator does not reclaim lands.  [[279]](#footnote-280)279

Third, addressing ad valorem and gross products tax practices, the legislature passed H.B. 72, a bill allowing Wyoming counties to deduct court costs, attorney's fees, and other extraordinary costs before distributing tax revenues. In addition, the bill protects a county treasurer from claims by other governmental entities if the treasurer is unable to collect taxes because the taxpayer declares bankruptcy or is otherwise unable to pay taxes.  [[280]](#footnote-281)280

Finally, passing S.F. 16, the legislature required the Wyoming Department of Environmental Quality to initiate a rulemaking process to address the plugging, abandonment, post-closure monitoring and corrective actions for underground injection wells and related facilities. [[281]](#footnote-282)281

*B. Judicial Developments*

*Berenergy Corp. v. BTU Western Resources, Inc.*, was a dispute between a mining company operating under federal coal leases and a party holding a federal ***oil*** and gas leases in the same area of northeastern Wyoming. Considering summary judgment rulings by a district court, the Wyoming Supreme Court held that under federal law BLM was the only entity that could decide about how the minerals under federal leases should be developed. The supreme court remanded the case to the district court to determine whether BLM would participate. If not, the supreme court concluded that the district court would likely be required to dismiss the lawsuit.  [[282]](#footnote-283)282

Addressing a complex probate case involving overriding royalty interests (ORRI), *Lon V. Smith Foundation v. Devon Energy Corp.*, the Wyoming Supreme Court affirmed a lower district court's summary judgment ruling in favor of an ***oil*** and gas company. [[283]](#footnote-284)283 The court determined that the plaintiff, a foundation that was recipient of the ORRI under a will, was not entitled to disputed funds held by the ***oil*** and gas company. The court ruled the defendant ***oil*** and gas company did not violate the Wyoming Royalty Payment Act (WRPA) by holding the funds in an internal account instead of depositing the funds in an escrow account, as required by the WRPA. The court ruled the plaintiff had no authority to make a claim under the escrow provision of the WRPA and therefore the escrow requirement was inapplicable. [[284]](#footnote-285)284

*C. Administrative Developments*

In early 2018, the Wyoming ***Oil*** and Gas Conservation Commission (WOGCC) revised its rules to: (1) increase filing fees to $ 250 per application; (2) establish a $ 150 fee for hearing continuances; and (3) enact new public records disclosure and copying requirements.  [[285]](#footnote-286)285

Rocky Mountain Mineral Law Foundation Journal

Copyright © 2024 Rocky Mountain Mineral Law Foundation.

All Rights Reserved.

**End of Document**

1. 1 The lead editor for this report is Mark D. Christiansen of Edinger Leonard & Blakley PLLC, Oklahoma City, OK. The contributors of the state reports are: George R. Lyle and Adam D. Harki of Guess & Rudd P.C., Anchorage, AK; Thomas A. Daily of Daily & Woods, P.L.L.C., Fort Smith, AR; John J. Harris of Locke Lord LLP, Los Angeles, CA; Jean Feriancek of Holland & Hart LLP, Denver, CO; Chris Steincamp and Joseph A. Schremmer, Depew Gillen Rathbun & McInteer, LC, Wichita, KS; April L. Rolen-Ogden and Michael H. Ishee of Liskow & Lewis, Lafayette, LA; Andrew J. Cloutier, Hinkle Shanor LLP, Roswell, NM; Gregory D. Russell, Timothy J. Cole and Ilya Batikov of Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Mark D. Christiansen of Edinger Leonard & Blakley PLLC, Oklahoma City, OK (Part A) and Susan Dennehy Conrad of the Oklahoma Corporation Commission, Oklahoma City, OK (Part B); Nicolle R. Snyder Bagnell, Kevin C. Abbott and Alex G. Mahfood, Reed Smith LLP., Pittsburgh, PA; Jolisa Dobbs, Conrad Hester and Gaye Lentz of Thompson & Knight LLP, Dallas and Austin, TX; Brittany Alston, Katie Monroe and Matthew Chase of Jackson Kelly PLLC, Morgantown, WV; and Walter F. Eggers, III and Sami Falzone of Holland & Hart LLP, Cheyenne, WY. [↑](#footnote-ref-2)
2. 2 Case No. 1JU-18-00699 Civil, available at https://records.courts.alaska.gov. [↑](#footnote-ref-3)
3. 3 Nos. S-16308/16417, slip op. (Alaska Aug. 31, 2018), https://public.courts.alaska.gov/web/appellate/opinions/sp-7283.pdf. [↑](#footnote-ref-4)
4. 4 Nos. S-16974/S-17043 (consolidated) (Alaska filed Jan. 31, 2018 and Mar. 28, 2018), information available at http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=S16974 and http://www.appellate.courts.state.ak.us/frames1.asp?Bookmark=S17043. [↑](#footnote-ref-5)
5. 5 564 S.W.3d 248 (Ark. 2018). [↑](#footnote-ref-6)
6. 6 535 S.W.3d 616 (Ark. 2018). [↑](#footnote-ref-7)
7. 7 Ark. Code Ann. § 25-15-212. [↑](#footnote-ref-8)
8. 8 2017 WL 5653873 (E.D. Ark. Feb. 10, 2017) and 2017 WL 3612857 (E.D. Ark. Aug. 22, 2017). [↑](#footnote-ref-9)
9. 9 2017 WL 6459566 (E.D. Ark. Oct. 27, 2017). [↑](#footnote-ref-10)
10. 10 No. 4:16-cv-00226-KGB (E.D. Ark. dismissed Dec. 19, 2018). [↑](#footnote-ref-11)
11. 11 Defined by the "affiliate sales" clause as an entity having 10% common ownership. [↑](#footnote-ref-12)
12. 12 2018 WL 6252504 (E.D. Ark. Sept. 20, 2018). [↑](#footnote-ref-13)
13. 13 883 F.3d 1015 (8th Cir. 2018). [↑](#footnote-ref-14)
14. 14 Linton Coal Co., Inc. v. S. Cent. Res., Inc., 590 So. 2d 911, 912 (Ala. 1991). [↑](#footnote-ref-15)
15. 15 Roberts v. Unimin Corp., 214 F. Supp. 3d 743 (E.D. Ark. 2016). [↑](#footnote-ref-16)
16. 16 Assembly Bill No. 1775, Stats. 2018, ch. 310. [↑](#footnote-ref-17)
17. 17 Senate Bill No. 834, Stats. 2018, ch. 309. [↑](#footnote-ref-18)
18. 18 Senate Bill No. 1147, Stats. 2018, ch. 607. [↑](#footnote-ref-19)
19. 19 Senate Bill No. 1493, Stats. 2018, ch. 742. [↑](#footnote-ref-20)
20. 20 236 Cal. Rptr. 3d 729 (Ct. App. 2018) (review denied Oct. 24, 2018). [↑](#footnote-ref-21)
21. 21 Cal. Code Regs. tit. 14, §§ 1760.1, 1779.1. [↑](#footnote-ref-22)
22. 22 286 F. Supp. 3d 1054 (N.D. Cal. 2018). [↑](#footnote-ref-23)
23. 23 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017). [↑](#footnote-ref-24)
24. 24 81 Fed. Reg. 83,008 (Nov. 18, 2016). [↑](#footnote-ref-25)
25. 25 S.B. 887, Stats. 2016, ch. 673, 2015-2016 Reg. Sess. (Cal. 2016). [↑](#footnote-ref-26)
26. 26 Adding a new article 4 to Title 14, division 2, chapter 4, subchapter 1 of the California Code of Regulations, entitled "Requirements for Underground Gas Storage Projects." [↑](#footnote-ref-27)
27. 27 A.B. 1420, 2015-2016 Reg. Sess. (Cal. 2015), adding Cal. Health & Safety Code § 101042, and Cal. Pub. Res. Code §§ 3270.5 and 3270.6. [↑](#footnote-ref-28)
28. 28 Cal. Code Regs. tit. 14, §§ 1760, 1774, 1774.1, 1774.2. [↑](#footnote-ref-29)
29. 29 See July 16, 2018, DOGGR press release at https://www.conservation.ca.gov/index/Documents/news/2018-07%20new%20DOGGR%20enforcement%20unit%20%20announced.pdf. [↑](#footnote-ref-30)
30. 30 Cal. Code Regs. tit. 14, §§ 817.04 et seq. [↑](#footnote-ref-31)
31. 31 *Id.* §§ 791 et seq. [↑](#footnote-ref-32)
32. 32 *Id.* § 802. [↑](#footnote-ref-33)
33. 33 Senate Bill 18-230 (approved June 1, 2018), modifying Colo. Rev. Stat. § 34-60-116. [↑](#footnote-ref-34)
34. 34 Colo. Rev. Stat. § 34-60-116(3), as modified by S.B. 18-230. [↑](#footnote-ref-35)
35. 35 *Id.* § 34-60-116(7)(a)(III) (added by S.B. 18-230). [↑](#footnote-ref-36)
36. 36 *Id.* § 34-60-116(7)(a)(I), as modified by S.B. 18-230. [↑](#footnote-ref-37)
37. 37 *Id.* § 34-60-116(7)(d)(I), as modified by S.B. 18-230. [↑](#footnote-ref-38)
38. 38 2018 COA 40, 428 P.3d 657, *cert. denied*, No. 18SC315, 2018 WL 5053134 (Colo. Oct. 15, 2018). [↑](#footnote-ref-39)
39. 39 COGCC Rule 204. [↑](#footnote-ref-40)
40. 40 The exception was developed in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972). [↑](#footnote-ref-41)
41. 41 *Maralex*, 428 P.3d at 662 (quoting Eddie's Leaf Spring Shop & Towing LLC v. Colo. Pub. Utils. Comm'n, 218 P.3d 326, 332 (Colo. 2009)). [↑](#footnote-ref-42)
42. 42 *Id.* [↑](#footnote-ref-43)
43. 43 *Id.* [↑](#footnote-ref-44)
44. 44 *Id.* [↑](#footnote-ref-45)
45. 45 Colo. Rev. Stat. §§ 34-60-101 to -130. [↑](#footnote-ref-46)
46. 46 428 P.2d at 663-64. [↑](#footnote-ref-47)
47. 47 *Id.* at 664. [↑](#footnote-ref-48)
48. 48 *Id.* [↑](#footnote-ref-49)
49. 49 *Id.* (quoting Donovan v. Dewey, 452 U.S., 594, 599 (1981)). [↑](#footnote-ref-50)
50. 50 *Id.* at 665. [↑](#footnote-ref-51)
51. 51 887 F.3d 1003 (10th Cir. 2018). [↑](#footnote-ref-52)
52. 52 *Id.* at 1010. [↑](#footnote-ref-53)
53. 53 *Id.* at 1018. [↑](#footnote-ref-54)
54. 54 *Id.* at 1018-19. [↑](#footnote-ref-55)
55. 55 *Id.* at 1019. [↑](#footnote-ref-56)
56. 56 *Id.* at 1019-20. [↑](#footnote-ref-57)
57. 57 342 F. Supp. 3d 1145 (D. Colo. 2018). [↑](#footnote-ref-58)
58. 58 *Id.* at 1156. [↑](#footnote-ref-59)
59. 59 *Id.* at 1167. [↑](#footnote-ref-60)
60. 60 322 F. Supp. 3d 1134, 1148 (D. Colo. 2018). [↑](#footnote-ref-61)
61. 61 40 C.F.R. §§ 51.851, 93.150-.165. [↑](#footnote-ref-62)
62. 62 322 F. Supp. 3d at 1141. [↑](#footnote-ref-63)
63. 63 *Id.* at 1143. [↑](#footnote-ref-64)
64. 64 2018 COA 134, 2018 WL 4225030 (Colo. Ct. App. Sept. 6, 2018) (unpublished) (reh'g denied Oct. 4, 2018). [↑](#footnote-ref-65)
65. 65 *Id.* at \*7. [↑](#footnote-ref-66)
66. 66 Colo. Rev. Stat. §§ 32-1-101 et seq. [↑](#footnote-ref-67)
67. 67 2018 WL 4225030, at \*10. [↑](#footnote-ref-68)
68. 68 *Id.* at \*8. [↑](#footnote-ref-69)
69. 69 *See* COGCC Rule 1101.a(2)A. [↑](#footnote-ref-70)
70. 70 *See* COGCC Rule 1101.a(2)B. [↑](#footnote-ref-71)
71. 71 *See* COGCC Rule 1101.a(4). [↑](#footnote-ref-72)
72. 72 *See* COGCC Rule 1101.b. [↑](#footnote-ref-73)
73. 73 *See* COGCC Rule 1101.c. [↑](#footnote-ref-74)
74. 74 *See* COGCC Rule 1102. [↑](#footnote-ref-75)
75. 75 *See* COGCC Rule 1102.n. [↑](#footnote-ref-76)
76. 76 *See* COGCC Rules 1103 and 1104. [↑](#footnote-ref-77)
77. 77 *See* COGCC Rule 1105. [↑](#footnote-ref-78)
78. 78 422 P.3d 1166 (Kan. 2018). [↑](#footnote-ref-79)
79. 79 409 P.3d 874 (table) (Kan. Ct. App. Jan. 26, 2018) (unpublished) (petition for review denied). [↑](#footnote-ref-80)
80. 80 423 P.3d 1062 (table) (Kan. Ct. App. Aug. 24, 2018) (unpublished). [↑](#footnote-ref-81)
81. 81 293 F. Supp. 3d 615 (W.D. La. 2018). [↑](#footnote-ref-82)
82. 82 561 F. App'x 322 (5th Cir. 2014). [↑](#footnote-ref-83)
83. 83 2018 WL 5816971 (La. App. 1 Cir. 11/6/18). [↑](#footnote-ref-84)
84. 84 153 So. 3d 1209 (La. App. 1 Cir. 9/9/14), *writ denied*, 173 So. 3d 1164 (La. App. 1 Cir. 4/23/15). [↑](#footnote-ref-85)
85. 85 252 So. 3d 546 (La. App. 3 Cir. 7/18/18). [↑](#footnote-ref-86)
86. 86 240 So. 3d 986 (La. App. 3 Cir. 3/7/18), *writ denied*, 243 So. 3d 569 (La. 5/25/2018). [↑](#footnote-ref-87)
87. 87 2018 WL 1463529 (W.D. La. Mar. 22, 2018). [↑](#footnote-ref-88)
88. 88 2017 WL 8809775 (W.D. La. Dec. 13, 2017). [↑](#footnote-ref-89)
89. 89 514 F. App'x 459 (5th Cir. 2013). [↑](#footnote-ref-90)
90. 90 206 So. 3d 885 (La. App. 3 Cir. 2016). [↑](#footnote-ref-91)
91. 91 252 So. 3d 431 (La. 6/27/18), *reh'g granted on other grounds*, 251 So. 3d 292 (La. 9/7/18). [↑](#footnote-ref-92)
92. 92 293 F. Supp. 3d 615 (W.D. La. 2018). [↑](#footnote-ref-93)
93. 93 561 F. App'x 322 (5th Cir. 2014). [↑](#footnote-ref-94)
94. 94 413 P.3d 866 (N.M. 2018). [↑](#footnote-ref-95)
95. 95 *Id.* at 872-73. [↑](#footnote-ref-96)
96. 96 *Id.* at 874. [↑](#footnote-ref-97)
97. 97 886 F.3d 826 (10th Cir. 2018). [↑](#footnote-ref-98)
98. 98 *Id.* at 832. [↑](#footnote-ref-99)
99. 99 *Id.* at 834-39 (citing Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091 (10th Cir. 2005)). [↑](#footnote-ref-100)
100. 100 *Id.* at 840-42 (citing N.M. Stat. Ann. § 7-33-4(A) (1999); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)). [↑](#footnote-ref-101)
101. 101 *Id.* at 842-47 (primarily citing ConocoPhillips Co. v. Lyons, 299 P.3d 844 (N.M. 2012), and Bice v. Petro-Hunt, L.L.C., 768 N.W.2d 496 (N.D. 2009)). [↑](#footnote-ref-102)
102. 102 *Id.* at 848-49 (primarily citing Garman v. Conoco, Inc., 886 P.2d 652 (Colo. 1994)). [↑](#footnote-ref-103)
103. 103 Anderson Living Trust v. WPX Energy Production, LLC, 904 F.3d 1135 (10th Cir. 2018). [↑](#footnote-ref-104)
104. 104 2018 WL 1183360 (D.N.M. Mar. 6, 2018). [↑](#footnote-ref-105)
105. 105 *Id.* at \*2. [↑](#footnote-ref-106)
106. 106 *Id.* at \*3. Although not discussed, the longest possible statute of limitations in New Mexico is the six-year statute of limitations for breach of written contract. N.M. Stat. Ann. 1978, § 37-1-3. [↑](#footnote-ref-107)
107. 107 *Id.* (citing City of Carlsbad v. Grace, 966 P.2d 1178, 1183-87 (N.M. Ct. App. 1998)). [↑](#footnote-ref-108)
108. 108 2018 WL 2337137 (D.N.M. May 23, 2018). [↑](#footnote-ref-109)
109. 109 *Id.* at \*2. [↑](#footnote-ref-110)
110. 110 *Id.* at \*6. [↑](#footnote-ref-111)
111. 111 Order No. R-14689 (with a copy of the red-lined changes to the rules attached), http://www.emnrd.state.nm.us/OCD/documents/CommissionOrder.pdf. [↑](#footnote-ref-112)
112. 112 N.M. Code R. § 19.15.16.15(C)(1)(b). [↑](#footnote-ref-113)
113. 113 *Id.* at (C)(1)(a). [↑](#footnote-ref-114)
114. 114 *Id.* at (B)(1)-(4). [↑](#footnote-ref-115)
115. 115 *Id.* at (B)(9)(b). [↑](#footnote-ref-116)
116. 116 Order No. R-14751, http://www.emnrd.state.nm.us/OCD/documents/Florene.pdf. [↑](#footnote-ref-117)
117. 117 N.M. Code R. § 19.15.29. [↑](#footnote-ref-118)
118. 118 Order No. R-14751 at P 9. [↑](#footnote-ref-119)
119. 119 2018-Ohio-1602, 109 N.E.3d 1184. [↑](#footnote-ref-120)
120. 120 2018-Ohio-3708, 119 N.E.3d 358. [↑](#footnote-ref-121)
121. 121- [↑](#footnote-ref-122)
122. 122 2018-Ohio-8, 95 N.E.3d 382. [↑](#footnote-ref-123)
123. 123 *Id.* at 308. [↑](#footnote-ref-124)
124. 124 2018-Ohio-3826, 120 N.E.3d 758. [↑](#footnote-ref-125)
125. 125 *Id.* at 761. [↑](#footnote-ref-126)
126. 126 *Id.* [↑](#footnote-ref-127)
127. 127 2018-Ohio-256, 101 N.E.3d 430. [↑](#footnote-ref-128)
128. 128 *Id.* at 434. [↑](#footnote-ref-129)
129. 129 2018-Ohio-3746, 116 N.E.3d 687 (5th Dist.). [↑](#footnote-ref-130)
130. 130 *Id.* at 693. [↑](#footnote-ref-131)
131. 131 *Id.* [↑](#footnote-ref-132)
132. 132 2018-Ohio-4099, 2018 WL 4913821 (7th Dist.). [↑](#footnote-ref-133)
133. 133 *Id.* at \*5. [↑](#footnote-ref-134)
134. 134 *Id.* [↑](#footnote-ref-135)
135. 135 *Id.* at \*7. [↑](#footnote-ref-136)
136. 136 *Id.* at \*9. [↑](#footnote-ref-137)
137. 137 2018-Ohio-3250, 2018 WL 3868119 (5th Dist.). [↑](#footnote-ref-138)
138. 138 No. 5:18-cv-00389, 2018 WL 2952662 (N.D. Ohio June 13, 2018), *aff'd*, No. 18-3636 (6th Cir. Feb. 4, 2019), *petition for cert. filed*, No. 18-1278 (Apr. 3, 2019). [↑](#footnote-ref-139)
139. 139 *Id.* at \*5, 12. [↑](#footnote-ref-140)
140. 140 *Id.* at \*11-12. [↑](#footnote-ref-141)
141. 141 Ohio Rev. Code §§ 5301.56 et seq. [↑](#footnote-ref-142)
142. 142 2018-Ohio-863, 2018 WL 1225745 (7th Dist.). [↑](#footnote-ref-143)
143. 143 *Id.* at \*4. [↑](#footnote-ref-144)
144. 144 *Id.* [↑](#footnote-ref-145)
145. 145 2018-Ohio-3733, 109 N.E.3d 1265 (7th Dist.). [↑](#footnote-ref-146)
146. 146 *Id.* at 1274. [↑](#footnote-ref-147)
147. 147 *Id.* [↑](#footnote-ref-148)
148. 148 2018-Ohio-1934, 113 N.E.3d 133 (5th Dist.). [↑](#footnote-ref-149)
149. 149 *Id.* at 137. [↑](#footnote-ref-150)
150. 150 *Id.* at 139. [↑](#footnote-ref-151)
151. 151 No. 4:09-cv-02256, 2018 WL 4853328 (N.D. Ohio Oct. 5, 2018), *appeal docketed*, No. 19-3315 (6th Cir. Apr. 10, 2019). [↑](#footnote-ref-152)
152. 152 *Id.* at \*6. [↑](#footnote-ref-153)
153. 153 295 F. Supp. 3d 776 (N.D. Ohio 2018). [↑](#footnote-ref-154)
154. 154 *Id.* at 758. [↑](#footnote-ref-155)
155. 155 2018 OK CIV APP 48, 419 P.3d 1268. [↑](#footnote-ref-156)
156. 156 *Id.* P 2. The "marketable product" standard was recognized in the landmark Oklahoma Supreme Court decision in Mittelstaedt v. Santa Fe Minerals, Inc., 1998 OK 7, 954 P.2d 1203. [↑](#footnote-ref-157)
157. 157 Pummill II, 2018 OK CIV APP 48, P 25. [↑](#footnote-ref-158)
158. 158 *Id.* PP 26, 27, 28. [↑](#footnote-ref-159)
159. 159 2018 OK CIV APP 65, 429 P.3d 703. [↑](#footnote-ref-160)
160. 160 2018 OK CIV APP 65, P 5. [↑](#footnote-ref-161)
161. 161 *Id.* P 11. [↑](#footnote-ref-162)
162. 162 *Id.* [↑](#footnote-ref-163)
163. 163 1998 OK 7, 954 P.2d 1203. [↑](#footnote-ref-164)
164. 164 *Whisenant*, 2018 OK CIV APP 65, P 15 (alteration in original) (quoting Strack v. Cont'l Res., Inc., 2017 OK CIV APP 53, P 32, 405 P.3d 131). [↑](#footnote-ref-165)
165. 165 *Id.*, specially concurring opinion, P 2. [↑](#footnote-ref-166)
166. 166 2018 OK 59, 427 P.3d 1052. [↑](#footnote-ref-167)
167. 167 *Id.* P 23. [↑](#footnote-ref-168)
168. 168 Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc., 861 S.W.2d 427 (Tex. App. 1993). The Texas Supreme Court is cited as having later approved that definition of "capability" in its decision in Anadarko Petroleum Corp. v. Thompson, 94 S.W.3d 550, 558 (Tex. 2002). [↑](#footnote-ref-169)
169. 169 869 P.2d 323, 1994 OK 23. [↑](#footnote-ref-170)
170. 170 *Id.* P 37. [↑](#footnote-ref-171)
171. 171 *Id.* P 39. [↑](#footnote-ref-172)
172. 172 *Id.* P 42. [↑](#footnote-ref-173)
173. 173 89 O.B.J. 548 (Okla. App. 2018 - # 115,490) (Not for Publication). [↑](#footnote-ref-174)
174. 174 89 O.B.J. 1101 (Okla. App. 2018 - # 116,721) (Not for Publication). [↑](#footnote-ref-175)
175. 175 52 Okla. Stat. §§ 318.2-.9. [↑](#footnote-ref-176)
176. 176 No. 117,303, original action before the Oklahoma Supreme Court. [↑](#footnote-ref-177)
177. 177 *Id.* Order issued on rehearing Dec. 17, 2018, *reh'g denied* Jan. 22, 2019. [↑](#footnote-ref-178)
178. 178 *See* 52 Okla. Stat. § 137.1. [↑](#footnote-ref-179)
179. 179 888 F.3d 455 (10th Cir. 2017) (amended Apr. 11, 2018). [↑](#footnote-ref-180)
180. 180 886 F.3d 1308, 1318 (10th Cir. 2018). [↑](#footnote-ref-181)
181. 181 89 O.B.J. 97 (Okla. App. 2018 - # 115,541) (Not for Publication). [↑](#footnote-ref-182)
182. 182 52 Okla. Stat. § 570.14. [↑](#footnote-ref-183)
183. 183 218 OK CIV APP 1, 419 P.3d 337. [↑](#footnote-ref-184)
184. 184 No. 3:17-cv-00914, 2018 WL 1524881 (M.D. Pa. Mar. 27, 2018). [↑](#footnote-ref-185)
185. 185 *Id.* at \*2. [↑](#footnote-ref-186)
186. 186 *Id.* at \*5. [↑](#footnote-ref-187)
187. 187 2017 WL 1078184, at \*20 (M.D. Pa. Mar. 22, 2017), *reconsideration denied*, 2017 WL 2535941 (M.D. Pa. June 12, 2017). [↑](#footnote-ref-188)
188. 188 No. 2:17-cv-00928, 2018 WL 1471978 (W.D. Pa. Mar. 26, 2018). [↑](#footnote-ref-189)
189. 189 *Id.* at \*1. [↑](#footnote-ref-190)
190. 190 *Id.* at \*2. [↑](#footnote-ref-191)
191. 191 *Id.* [↑](#footnote-ref-192)
192. 192 *Id.* [↑](#footnote-ref-193)
193. 193 *Id.* [↑](#footnote-ref-194)
194. 194 *Id.* at \*5. [↑](#footnote-ref-195)
195. 195 584 F.3d 513 (3d Cir. 2009). [↑](#footnote-ref-196)
196. 196 *Jesmar*, 2018 WL 1471978, at \*6. [↑](#footnote-ref-197)
197. 197 No. 2:18-cv-01164, 2018 WL 3092365 (E.D. Pa. June 22, 2018). [↑](#footnote-ref-198)
198. 198 *Id.* at \*1. [↑](#footnote-ref-199)
199. 199 *Id.* at \*3. [↑](#footnote-ref-200)
200. 200 *Id.* at \*7. [↑](#footnote-ref-201)
201. 201 727 F. App'x 749, 2018 WL 1295736 (3d Cir. Mar. 13, 2018). [↑](#footnote-ref-202)
202. 202 *Id.* at \*2. [↑](#footnote-ref-203)
203. 203 *Id.* at \*3. [↑](#footnote-ref-204)
204. 204 *Id.* [↑](#footnote-ref-205)
205. 205 *Id.* at \*5-6. [↑](#footnote-ref-206)
206. 206 184 A.3d 1048 (Pa. Commw. Ct. 2018). [↑](#footnote-ref-207)
207. 207 *Id.* at 1055. [↑](#footnote-ref-208)
208. 208 *Id.* at 1054. [↑](#footnote-ref-209)
209. 209 *Id.* at 1057-58. [↑](#footnote-ref-210)
210. 210 *Id.* at 1059 (emphasis omitted) (citation omitted). [↑](#footnote-ref-211)
211. 211 *Id.* at 1080-81. [↑](#footnote-ref-212)
212. 212 186 A.3d 375 (Pa. 2018). [↑](#footnote-ref-213)
213. 213 *Id.* at 377. [↑](#footnote-ref-214)
214. 214 *Id.* at 382. [↑](#footnote-ref-215)
215. 215 *Id.* at 388-90. [↑](#footnote-ref-216)
216. 216 179 A.3d 670 (Pa. Commw. Ct. 2018). [↑](#footnote-ref-217)
217. 217 *Id.* at 673. [↑](#footnote-ref-218)
218. 218 *Id.* [↑](#footnote-ref-219)
219. 219 *Id.* at 695. [↑](#footnote-ref-220)
220. 220 196 A.3d 677 (Pa. Commw. Ct. 2018). [↑](#footnote-ref-221)
221. 221 *Id.* at 679. [↑](#footnote-ref-222)
222. 222 *Id.* [↑](#footnote-ref-223)
223. 223 *Id.* at 701. [↑](#footnote-ref-224)
224. 224 *Id.* at 701-02. [↑](#footnote-ref-225)
225. 225 184 A.3d 153 (Pa. Super. Ct. 2018). [↑](#footnote-ref-226)
226. 226 *Id.* at 155. [↑](#footnote-ref-227)
227. 227 *Id.* at 163. [↑](#footnote-ref-228)
228. 228 *Id.* at 163-64. [↑](#footnote-ref-229)
229. 229 907 F.3d 725 (3d Cir. 2018), *petition for cert. docketed*, No. 18-1206 (Mar. 18, 2019). [↑](#footnote-ref-230)
230. 230 *Id.* at 734-35. [↑](#footnote-ref-231)
231. 231 *Id.* at 741. [↑](#footnote-ref-232)
232. 232 181 A.3d 1129 (Pa. 2018). [↑](#footnote-ref-233)
233. 233 *Id.* at 1130. [↑](#footnote-ref-234)
234. 234 *Id.* [↑](#footnote-ref-235)
235. 235 *Id.* at 1131. [↑](#footnote-ref-236)
236. 236 *Id.* at 1149. [↑](#footnote-ref-237)
237. 237 185 A.3d 985 (Pa. 2018). [↑](#footnote-ref-238)
238. 238 *Id.* at 985-86. [↑](#footnote-ref-239)
239. 239 *Id.* at 986. [↑](#footnote-ref-240)
240. 240 *Id.* at 1004. [↑](#footnote-ref-241)
241. 241 180 A.3d 812 (Pa. Commw. Ct. 2018). [↑](#footnote-ref-242)
242. 242 *Id.* at 814. [↑](#footnote-ref-243)
243. 243 *Id.* [↑](#footnote-ref-244)
244. 244 *Id.* at 815. [↑](#footnote-ref-245)
245. 245 *Id.* at 817. [↑](#footnote-ref-246)
246. 246 *Id.* at 821-22. [↑](#footnote-ref-247)
247. 247 311 F. Supp. 3d 696 (W.D. Pa. 2018). [↑](#footnote-ref-248)
248. 248 *Id.* at 700. [↑](#footnote-ref-249)
249. 249 *Id.* at 707. [↑](#footnote-ref-250)
250. 250 *Id.* at 725. [↑](#footnote-ref-251)
251. 251 554 S.W.3d 586 (Tex. 2018). [↑](#footnote-ref-252)
252. 252 *Id.* at 600. [↑](#footnote-ref-253)
253. 253 *Id.* at 601. [↑](#footnote-ref-254)
254. 254 565 S.W.3d 309 (Tex. App.--Eastland 2018, no pet.). [↑](#footnote-ref-255)
255. 255 *Id.* at 322. [↑](#footnote-ref-256)
256. 256 *Id.* [↑](#footnote-ref-257)
257. 257 *Id.* at 324. [↑](#footnote-ref-258)
258. 258 555 S.W.3d 176 (Tex. App.--Houston [1st Dist.] 2018, pet. filed). [↑](#footnote-ref-259)
259. 259 *Id.* at 179. [↑](#footnote-ref-260)
260. 260 560 S.W.3d 105 (Tex. 2018). [↑](#footnote-ref-261)
261. 261 *Id.* at 111. [↑](#footnote-ref-262)
262. 262 548 S.W.3d 458 (Tex. 2018). [↑](#footnote-ref-263)
263. 263 *Id.* at 460. [↑](#footnote-ref-264)
264. 264 *Id.* at 464. [↑](#footnote-ref-265)
265. 265 550 S.W.3d 259 (Tex. App.--Eastland 2018, pet. denied). [↑](#footnote-ref-266)
266. 266 549 S.W.3d 256 (Tex. App.--Houston [1st Dist.] 2018, pet. dism'd). [↑](#footnote-ref-267)
267. 267 No. 01-17-00594-CV, 2018 WL 3543103 (Tex. App.--Houston [1st Dist.] July 24, 2018, no pet.). [↑](#footnote-ref-268)
268. 268 546 S.W.3d 110 (Tex. 2018). [↑](#footnote-ref-269)
269. 269 *Id.* at 114. [↑](#footnote-ref-270)
270. 270 551 S.W.3d 148 (Tex. 2018). [↑](#footnote-ref-271)
271. 271 *Id.* at 150. [↑](#footnote-ref-272)
272. 272 *Id.* at 153. [↑](#footnote-ref-273)
273. 273 579 B.R. 75 (Bankr. W.D. Tex. 2017). Note: The Committee's annual update for 2017 did not discuss this opinion due to the opinion's issuance on December 29, 2017. [↑](#footnote-ref-274)
274. 274 818 S.E.2d 872 (W. Va. 2018). [↑](#footnote-ref-275)
275. 275 747 F. App'x 120 (4th Cir. 2018). [↑](#footnote-ref-276)
276. 276 No. 17-0527, 2018 WL 2175553 (W. Va. May 11, 2018) (unpublished). [↑](#footnote-ref-277)
277. 277 No. 1:17-cv-00050, 2018 WL 3321441 (N.D. W. Va. July 6, 2018) (Memorandum Opinion and Order Denying Plaintiffs' Motion for Partial Summary Judgment). [↑](#footnote-ref-278)
278. 278 Wyo. Stat. Ann. §§ 39-15-108(a), 39-16-108(a); S. Enrolled Act 23, 2018 Leg., 64th Budget Sess. (Wyo. 2018). [↑](#footnote-ref-279)
279. 279 Wyo. Stat. Ann. §§ 16-1-206, 35-11-1701; S. Enrolled Act 1, 2018 Leg., 64th Budget Sess. (Wyo. 2018). [↑](#footnote-ref-280)
280. 280 Wyo. Stat. Ann. § 39-13-111(a)(i), (c); H. Enrolled Act 3, 2018 Leg., 64th Budget Sess. (Wyo. 2018). [↑](#footnote-ref-281)
281. 281 Wyo. Stat. Ann. § 35-11-302(a)(viii); S. Enrolled Act 2, 2018 Leg., 64th Budget Sess. (Wyo. 2018). [↑](#footnote-ref-282)
282. 282 2018 WY 2, PP 36-39, 43, 408 P.3d 396, 403-05. [↑](#footnote-ref-283)
283. 283 2017 WY 121, 403 P.3d 997. [↑](#footnote-ref-284)
284. 284 *Id.* PP 52, 55, 403 P.3d at 1012-13. [↑](#footnote-ref-285)
285. 285 055-0001-5 Wyo. Code R. § 2 (available at http://pipeline.wyo.gov/wogcchelp/commission. html);*see* Ch. 5, § 2, and Ch. 6. [↑](#footnote-ref-286)