# **Oil and Gas Update: Legal Developments in 2019 Affecting the Oil and Gas Exploration and Production Industry**

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**Text**

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

I. ALASKA

*A. Legislative Developments*

The 2019 legislative session resulted in virtually no ***oil*** and gas legislation being passed. Despite the uncharacteristic lack of ***oil*** and gas legislation, the legislature addressed the prevalent issue of ***oil*** and gas leasing in the Arctic National Wildlife Refuge (ANWR) through the passage of Senate Joint Resolution (SJR) No. 7.

In passing SJR No. 7, [[1]](#footnote-2)2the legislature resolved to request "that the United States Department of the Interior, Bureau of Land Management implement an ***oil*** and gas leasing program in the coastal plain of the Arctic National Wildlife Refuge" [[2]](#footnote-3)3(ANWR). The Resolution provides that 16 U.S.C. § 3143 (section 1003 of the Alaska National Interest Lands Conservation Act (ANILCA)) and 16 U.S.C. § 3142 (section 1002 of ANILCA) authorize both "***oil*** and gas development and production . . . and nondrilling exploratory activity within the coastal plain." [[3]](#footnote-4)4In passing SJR No. 7, the legislature noted that the "coastal plain . . . contains an estimated [7.687 billion] barrels of recoverable ***oil*** and [7 trillion] cubic feet of natural gas." [[4]](#footnote-5)5

*B. Judicial Developments*

In *All American Oilfield LLC v. Cook Inlet Energy, LLC*,   [[5]](#footnote-6)6the Alaska Supreme Court accepted certified questions from both the U.S. District Court and the U.S. Bankruptcy Court for the District of Alaska regarding the breadth of Alaska's mineral dump lien statute as it applies to natural gas development.

In response to the question of whether a "'dump lien' under [Alaska Statute (AS)] 34.35.125 *et seq.* [can] apply to gas stored in its natural reservoir,"   [[6]](#footnote-7)7the Alaska Supreme Court held that the statutory definition of "dump or mass" reflects that a mineral dump lien may extend only to gas extracted from its natural reservoir.   [[7]](#footnote-8)8Under the relevant statutory framework, there must be a "dump" to which the lien can attach for a claimant to obtain a dump lien.

In ruling on the second certified question, whether a mineral "dump" is created under AS 34.35.140 and AS 34.35.170(a)(1) each time natural gas is released from the natural reservoir and transported through a pipeline to the point of sale, the Alaska Supreme Court found that "[b]ecause gas in a pipeline has been extracted, hoisted, and raised and is in mass, it may constitute a dump if [it] [] is located adjacent to the mine or mining claim."   [[8]](#footnote-9)9However, whether gas is adjacent to a mine or mining claim must be decided on a case-by-case basis.   [[9]](#footnote-10)10

The supreme court answered the final question, "whether dump lien claimants must prove that produced gas is the product of their labor,"   [[10]](#footnote-11)11in the affirmative; however, whether a particular claimant's labor meets these requirements is case-specific and must be left to the trier of fact.   [[11]](#footnote-12)12

In *Kenai Landing, Inc. v. Cook Inlet Natural Gas Storage Alaska, LLC*,   [[12]](#footnote-13)13the Alaska Supreme Court affirmed a superior court ruling regarding compensation for producible native gas remaining in a reservoir at the time of a taking, as well as its valuation of gas storage rights. The Alaska Supreme Court held that Kenai Landing, the owner a parcel of land overlying the Sterling C Reservoir where natural gas is stored, was not entitled to compensation for either native or new gas in the Sterling C Reservoir at the time of the taking. Analyzing the principles of just compensation, the court determined that Kenai Landing lost nothing by virtue of Cook Inlet Natural Gas Storage Alaska, LLC's (CINGSA) condemnation of an easement   [[13]](#footnote-14)14because CINGSA held both production rights and a royalty interest by virtue of a lease assignment.   [[14]](#footnote-15)15

The Alaska Supreme Court further held that the lower court did not err in valuing Kenai Landing's pore space rights on the basis that the fullest extent rule, "which presumes that the appropriator will exercise [the rights acquired] and use and enjoy the property taken to the full extent,"   [[15]](#footnote-16)16undermines Alaska law on just compensation. It further found that the superior court properly valued pore space rights by including a "buffer area" in its valuation and by relying on one of CINGSA's experts with respect to the actual value of the storage space.   [[16]](#footnote-17)17

In *League of Conservation Voters v. Trump*,   [[17]](#footnote-18)18the U.S. District Court for the District of Alaska found that section 12(a) of the Outer Continental Shelf Lands Act (OCSLA) does not endow the President with the authority to revoke withdrawals of unleased land from the Outer Continental Shelf (OCS). Plaintiffs sued the federal defendants   [[18]](#footnote-19)19for an alleged violation of the federal Constitution's Property Clause, as well as an alleged violation of the statutory authority endowed by section 12(a) of OCSLA, after President Trump issued Executive Order No. 13,795,   [[19]](#footnote-20)20intended to revoke three memoranda and one executive order issued by President Obama in 2015 and 2016 withdrawing certain areas of the OCS from leasing.

The district court found that, while the plain language of section 12(a) does not expressly grant to "the President the authority to revoke [] prior withdrawal[s],"   [[20]](#footnote-21)21the statute created ambiguity. As a result, the court examined the context of section 12(a) to discern Congress's intent, including the structure, legislative history and prior statutes, purpose of, and subsequent legislative history of OCSLA.

Based on the context surrounding section 12(a), the district court granted plaintiffs' motion for summary judgment, declaring the revocation in Executive Order No. 13,795 invalid and unlawful, and vacating section 5 of the order. The defendants have since filed notices of appeal with respect to the district court's ruling to the U.S. Court of Appeals for the Ninth Circuit.   [[21]](#footnote-22)22

II. ARKANSAS

*A. Legislative Developments*

H.B. 1156 [[22]](#footnote-23)23globally reorganized Arkansas' formerly scattered collection of 42 administrative agencies into 15 cabinet-level departments whose directors report directly to the governor. The Arkansas ***Oil*** and Gas Commission is now included within the Department of Energy and Environment, along with the Arkansas Department of Environmental Quality, the Arkansas Pollution Control and Ecology Commission, and six smaller, formerly independent, agencies.

*B. Judicial Developments*

In *Stephens Production Co. v. Mainer*,   [[23]](#footnote-24)24the Arkansas Supreme Court affirmed a trial court's order certifying a class of royalty owners suing Stephens, alleging improper deduction of post-production expenses from their royalties. The class, as certified, will have around 36 members. In its interlocutory appeal, Stephens argued that the proposed class failed to satisfy the numerosity requirement of Arkansas' class action rule,   [[24]](#footnote-25)25which requires a finding that joinder of all individual class members is impractical.

A sharply divided supreme court affirmed the trial court's class certification order. The majority opinion, approved by four members of the seven-member court, relied upon Arkansas appellate courts' strong deference to trial courts on issues of class certification. In so doing, the majority distinguished the supreme court's earlier ruling in *City of North Little Rock v. Vogelgesang*,   [[25]](#footnote-26)26where it had disallowed a 17-member class. The majority observed that, unlike *Mainer*, the *Vogelgesang* trial court order had denied class certification. According to the majority, neither trial court order constituted abuse of discretion, which the Arkansas Supreme Court has established as its standard for reviewing such orders.

Justice Wood, writing for the dissenting three-justice minority, appeared critical of the supreme court's "hands-off" oversight of trial courts' management of putative class action lawsuits, writing that "the majority further relaxes our already liberal requirements for class certification."   [[26]](#footnote-27)27She observed that the *Mainer* class, thus certified, was apparently the smallest ever certified in Arkansas, though its record contained no proof that joinder of all class members was impractical. Specifically, Justice Wood stated: "Although our standard of review is deferential to the circuit court's discretion, we should not feel bound to affirm an unprecedented decision simply because the circuit court said so, without any indication that joinder is impracticable."   [[27]](#footnote-28)28

*Mainer* showcases the polar difference in the class action certification procedure between Arkansas' state and federal courts. Federal courts are required to conduct a "rigorous analysis" to confirm that each class action requirement has been met.   [[28]](#footnote-29)29Arkansas state trial courts have "wide discretion" regarding class certification. No such "rigorous analysis" is required.   [[29]](#footnote-30)30

*Turner v. XTO Energy Inc.*   [[30]](#footnote-31)31involved a mineral owner's claim that XTO Energy Inc. (XTO) had secretly commingled gas from a stratigraphic formation where he was a participant, and produced from a shallower zone where his interest is non-consent, so as to deprive him from revenue from its sale. The claimant, Turner, was an unleased mineral owner whose interest was subjected to separate Arkansas ***Oil*** and Gas Commission integration orders covering the shallow and deep zones and had elected to participate only in the deeper zone. Shortly before a scheduled bench trial, XTO moved for summary judgment, attaching affidavits from both a geologist and a reservoir engineer to support its defense that the deeper zone had "watered out" in 1982 and thus was incapable of contributing to production. Citing Turner's failure to rebut that proof, the district court granted the motion.

The court's primary ruling was fact-based and not of precedential value. However, the opinion commented upon other issues of interest to the mineral bar. Among those is the application of the statute of limitations to Turner's claim. Under Arkansas law,   [[31]](#footnote-32)32actions on written contracts are subject to a five-year limitation period, while a three-year period applies to implied contracts. Since Turner never executed the unit operating agreement, his rights arose only by virtue of the integration orders, and were thus subject to the shorter limitation period.

Turner argued that limitations should not apply because he was unaware of the "commingling." However, the court observed that Arkansas has rejected the "discovery rule" in its application of the statute of limitations even in cases involving underground minerals.   [[32]](#footnote-33)33

The court also rejected Turner's claim under Ark. Code Ann. §§ 15-74-601 to -604,   [[33]](#footnote-34)34statutes permitting a person wrongfully denied "proceeds" of ***oil*** and gas sales to recover penalties and attorneys' fees. According to the court, since Turner never executed an operating agreement he was, at best, only entitled to his share of any production of gas from the deeper zone in-kind, not its proceeds.

Finally, the court rejected Turner's attempt to assert a cause of action under Ark. Code Ann. § 15-73-207,   [[34]](#footnote-35)35a statute that defines an ***oil*** and gas lessee's "prudent operator" standard. The court ruled that the prudent operator standard is simply a measure of the lessee's duty to the lessor, not a separate cause of action.

The *Turner* decision is currently on appeal to the U.S. Court of Appeals for the Eighth Circuit. [[35]](#footnote-36)36That appeal is largely confined to Turner's contention that the district court improperly disregarded his own evidence, and does not challenge his rulings on the legal issues discussed above.

*C. Administrative Developments*

In an apparent effort to deter well operators from transferring marginal wells to avoid plugging liability, the Arkansas ***Oil*** and Gas Commission recently promulgated its General Rule B-4,   [[36]](#footnote-37)37regulating transfers of well operations. The rule sets forth a detailed procedure that must be followed in order to transfer an Arkansas ***oil*** and/or gas well to a new operator. Particularly impacted are "marginal gas wells," producing less than 25 thousand cubic feet (Mcf) per day, and shut-in gas wells that have been granted "temporarily abandoned" status by the commission. As a prerequisite to the transfer of any such well, the new and former operators must secure Commission approval of the transfer, after notice and hearing of an application brought for that purpose. The successor operator is also required to post a well-specific plugging bond in the amount of $ 35,000 for each such marginal well included in the transfer.

Since the Commission's regulations are constantly in revision, the practitioner is advised to regularly check these regulations online.   [[37]](#footnote-38)38Proposed rule changes as well as a tabulation of recently enacted, repealed, or amended rules are online.   [[38]](#footnote-39)39

III. CALIFORNIA

*A. Legislative Developments*

Both the legislature and Governor Gavin Newsom have committed to move California away from fossil fuels.   [[39]](#footnote-40)40To accomplish this objective, numerous bills were enacted in 2019, which intensify the regulation of California's ***oil*** and gas industry and reorganize the Division of ***Oil***, Gas and Geothermal Resources (DOGGR), the California agency that regulates exploration and production operations. DOGGR was renamed as the "Geologic Energy Management Division" (CalGEM) of the Department of Conservation by Assembly Bill 1057.   [[40]](#footnote-41)41Historically, the Division's mission has been to "encourage the wise development of ***oil*** and gas resources."   [[41]](#footnote-42)42Assembly Bill 1057 modified that mission statement to include protecting public health and safety and environmental quality and the reduction of greenhouse gas emissions.   [[42]](#footnote-43)43The bill also modified operators' bonding requirements and authorizes the Division Supervisor to request additional information from a new operator about its operation, including all current lease agreements for specified wells or production facilities. Statutory definitions of the terms "idle wells," "idle-deserted well," and a "deserted facility" were modified along with operators' reporting requirements for such wells.

Assembly Bill 1328   [[43]](#footnote-44)44added section 3206.2 to the Public Resources Code and amended section 3229 to require the submission of testing data conducted on idle and abandoned wells for publication on the DOGGR's (CalGEM) website.

Operators' reporting requirements of the chemical composition of leaks from natural gas storage wells in the event of a leak were modified by Senate Bill 463.   [[44]](#footnote-45)45DOGGR (CalGEM) was also directed by the bill to review and revise its natural gas storage well regulations.   [[45]](#footnote-46)46

Reacting to recent operator bankruptcies, Senate Bill 551   [[46]](#footnote-47)47was enacted to require ***oil*** and gas well operators to provide estimates of the cost to plug and abandon wells and decommission related ***oil*** and gas production facilities commencing July 1, 2022.

The California State Lands Commission manages the state's four million acres of tidelands, submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, as well as the state's "school lands." Currently, the Commission has jurisdiction over 17 ***oil*** and gas leases of offshore state lands. Responding to the recent bankruptcies of the operators of Platform Holly and Rincon Island in state waters off the coast, which left the state largely responsible for the decommissioning of the platforms, Assembly Bill 585   [[47]](#footnote-48)48was enacted to amend section 6804 of the California Public Resources Code to codify Commission requirements for the evaluation of a proposed assignee of an ***oil*** and gas lease or permit issued by the State for state lands. The bill deleted provisions releasing and discharging an assignor or transferor from obligations accruing under a lease or permit after the assignment, transfer, or sublease, and provides instead that an assignor of a lease or permit would remain liable for obligations under the lease or permit, including requirements to properly plug and abandon all wells, decommission all production facilities and related infrastructure, complete well site restoration and lease restoration, and remediate contamination at well and lease sites, except as provided. The bill requires assignments to be recorded in the office of the county recorder of the county in which the leased or permitted lands are located. The bill also provides for fines and imprisonment for certain violations.

Section 6827.5 was added to the California Public Resources Code by Assembly Bill 342   [[48]](#footnote-49)49to prohibit any state agencies, including the State Lands Commission and the California Department of Parks and Recreation, among others, or any local trustee from entering into a lease or other conveyance authorizing new construction of ***oil*** and gas related infrastructure facilities on federal lands administered by the U.S. Bureau of Land Management.

Assembly Bill 936 [[49]](#footnote-50)50will require operators to establish contingency planning under California's Lempert-Keene-Seastrand ***Oil*** Spill Prevention and Response Act [[50]](#footnote-51)51for all types of non-floating ***oil*** spills.

*B. Judicial Developments*

*Leiper v. Gallegos*   [[51]](#footnote-52)52held that, in situations where the mineral interest was assessed separately for property tax purposes from the surface estate, a tax sale deed of property subject to an ***oil*** and gas lease did not include the ***oil*** and gas rights where the deed was silent on the conveyance of those rights. However, the court also held that upon termination of the ***oil*** and gas lease, the ***oil***, gas, and mineral rights would revert to the surface owner under the tax sale deed.

*Vaquero Energy, Inc. v. County of* ***Kern***   [[52]](#footnote-53)53upheld a 2015 ***Kern*** County zoning ordinance requiring permits for new ***oil*** and gas exploration, drilling, and production, which was challenged on constitutional due process and equal protection grounds for requiring a lengthier and more expensive 120-day process when the permit applicant had not obtained the surface owner's advance consent to the proposed operation.

The California legislature enacted Senate Bill No. 4   [[53]](#footnote-54)54in 2013 directing DOGGR to prepare an environmental impact report (EIR) pursuant to the California Environmental Quality Act (CEQA)   [[54]](#footnote-55)55to address the need for additional information about the environmental effects of well stimulation treatments such as hydraulic fracturing and acid well stimulation. After DOGGR prepared and certified an EIR in 2015, the Center for Biological Diversity filed a petition for writ of mandate and complaint for declaratory and injunctive relief challenging the EIR. In *Center for Biological Diversity v. California Department of Conservation*,   [[55]](#footnote-56)56the court of appeal held that DOGGR's EIR complied with both Senate Bill No. 4 and CEQA.

The repeal [[56]](#footnote-57)57by the U.S. Department of Interior (DOI) of its "Valuation Rule" regulations governing the payment of royalties on ***oil***, gas, and coal produced from federal and Indian lands was invalidated by the district court in *Becerra v. U.S. Department of the Interior*, [[57]](#footnote-58)58on the grounds that the repeal rule violated the federal Administrative Procedure Act (APA), 5 U.S.C. § 706, by failing to address the inconsistencies between DOI's prior findings in enacting the Valuation Rule and its decision to repeal the Rule and by failing to adequately considered alternatives to a complete repeal or to comply with APA notice and comment requirements. Ultimately, the district court vacated the final repeal.

*C. Administrative Developments*

DOGGR's new Underground Injection Control (UIC) regulations   [[58]](#footnote-59)59took effect on April 1, 2019. The regulations impact the approximate 55,000 UIC wells in California used for water and steam injection for enhanced ***oil*** recovery and wastewater disposal. (Underground gas storage injection wells are covered by separate regulations.) Among other things, the new UIC regulations impose " stronger testing requirements to identify potential leaks . . . ; [new] data requirements . . . [for] project[] . . . evaluat[ions]; continuous well pressure monitoring; requirements to automatically [stop] injection when there is a risk to safety or the environment; [ and] [r]equirements to disclose chemical additives for injection wells close to water supply wells."   [[59]](#footnote-60)60On June 11, 2019, DOGGR issued a Notice to Operators   [[60]](#footnote-61)61(NTO 2019-10) directing operators to contact local DOGGR offices to request clarification if the operator identified any conflicts between its current project approval letters and the new regulations.

DOGGR regulates more than 28,000 idle wells in California. However, its regulations did not provide for a comprehensive and regular testing program for idle wells. The California Office of Administrative Law approved DOGGR's new Idle Well Testing and Management Regulations,   [[61]](#footnote-62)62which took effect on April 1, 2019, and updated testing requirements for idle wells and active observation wells, requiring more rigorous testing of idle wells and observation wells, operator evaluations of idle wells, and engineering analyses for wells that have been idle for 15 or more years. The regulations also added new definitions and established requirements related to the maintenance and abandonment of idle wells.

At Governor Newsom's direction, DOGGR imposed a moratorium on the permitting of new "wells that use a high-pressure cyclic steaming process to break apart a geological formation to extract."   [[62]](#footnote-63)63D OGGR also announced that pending applications to conduct hydraulic fracturing and other well stimulation practices will be independently reviewed by experts from the Lawrence Livermore National Laboratory "to ensure the state's technical standards for public health, safety and environmental protection are met prior to approval of each permit."   [[63]](#footnote-64)64On October 24, 2019, DOGGR issued Notice to Operators 2019-16, modifying the Division's requirements for CEQA compliance.

IV. COLORADO

*A. Legislative Developments*

The Colorado legislature enacted Senate Bill 19-181 (SB 181),   [[64]](#footnote-65)65a comprehensive revision of Colorado's ***oil*** and gas laws. Signed by Governor Jared Polis on April 16, 2019, SB 181 amended 10 sections of Colorado's ***Oil*** and Gas Act, as well as the Areas and Activities of State Interest Act, the Air Pollution Prevention and Control Act, the Local Land Use Control Enabling Act, and the County Police Power Statute.   [[65]](#footnote-66)66SB 181 trailed other efforts to more aggressively regulate the ***oil*** and gas industry in Colorado. In November 2018, Colorado residents voted down Proposition 112, which would have established a 2,500-foot setback for ***oil*** and gas development from all occupied buildings and "vulnerable areas," which, according to several studies, would have greatly reduced ***oil*** and gas activity in the state.   [[66]](#footnote-67)67SB 181 also followed the Colorado Supreme Court decision in *COGCC v. Martinez*   [[67]](#footnote-68)68that addressed whether the Colorado ***Oil*** and Gas Conservation Commission (COGCC) could prevent drilling based on impacts to climate change. The Colorado Supreme Court held that the COGCC's directive to foster ***oil*** and gas development could not be entirely eclipsed by the protection of public health and environment. Following this much-anticipated case and the defeated Proposition 112, the majority Democratic legislature (in both the Colorado House and Colorado Senate), with the Governor's support, made sweeping changes.

The most significant of SB 181's changes include a changed legislative mandate for the COGCC to regulate ***oil*** and gas operations to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources, without regard to cost-effectiveness and technical feasibility. [[68]](#footnote-69)69Local governments have much more control over ***oil*** and gas development, including approving facility siting and regulating environmental effects such as air emissions, water discharges, noise, odors, light, dust and reclamation. [[69]](#footnote-70)70Changes were made requiring local government siting before spacing and requiring a 45% working interest or consenting interests for compulsory pooling. [[70]](#footnote-71)71SB 181 also altered the COGCC makeup and reduced the number of commissioners with substantial experience in the ***oil*** and gas industry from three to one. [[71]](#footnote-72)72The bill called for rulemakings on specific topics, including those described in section C, *Administrative Developments*. The Colorado legislature required Colorado's Air Quality Control Commission (AQCC) to adopt rules to minimize "methane . . . hydrocarbons, volatile organic compounds, and nitrogen [] oxide" [[72]](#footnote-73)73emissions from ***oil*** and gas facilities, and implement continuous monitoring equipment at ***oil*** and gas facilities. The full impact of SB 181 will continue to play out as these rulemakings proceed.

*B. Judicial Developments*

On June 6, 2019, the Colorado Court of Appeals decided *Weld Air & Water v. COGCC*,   [[73]](#footnote-74)74vastly expanding the classes of persons who could claim standing to challenge COGCC decisions. The case revolved around a COGCC approval of ***oil*** and gas locations near a middle school. A non-profit environmental and community rights organization sought judicial review of the approval. Although not property owners, the Petitioners claimed to "have aesthetic, recreational, health, and environmental interests in the proposed development"   [[74]](#footnote-75)75that would be adversely impacted by air and noise pollution. While the COGCC argued that this was insufficient to establish standing, the Colorado Court of Appeals disagreed, explaining that "while the injury-in-fact cannot be overly indirect, incidental, or a remote, future possibility, the injury may be intangible, such as an aesthetic injury."   [[75]](#footnote-76)76The case is significant in that it expands the class of persons qualified to challenge approvals of well locations. The COGCC has appealed the decision to Colorado Supreme Court.

On September 23, 2019, the Colorado Supreme Court announced that it was granting certiorari in the case of *Bill Barret Corp. v. Lembke*. [[76]](#footnote-77)77The case involved mineral lessees who brought an action against the owners of a special metropolitan district to prevent the imposition of *ad valorem* taxation of ***oil*** and gas produced by the lessees. The lessees of the severed mineral estate had received no notice of and had not consented to the inclusion of the leased minerals within the special district. The court of appeals found that the mineral lessees were not "fee owners" of the severed mineral estate for purposes of the Colorado Special Districts Act because a lessee's interest is temporary. Also, the mineral interest holders did not own "real property capable of being served with facilities of the special district," [[77]](#footnote-78)78and therefore, their consent to the inclusion of the minerals within the special district was not required. The Colorado Supreme Court granted certiorari on the following questions: whether, for purposes of the Special Districts Act, only an owner, and not a lessee, of a severed mineral estate qualifies as a fee owner; and whether the Special Districts Act permits inclusion of real property into a special taxing district when (1) the inclusion occurred without notice to or consent by the property owners, and (2) that property is not capable of being served by the district.

*C. Administrative Developments*

Prompted by the passage of SB 181, the COGCC and AQCC underwent several rulemakings in 2019 and scheduled more for 2020.

1. 500 Series Rulemaking

On June 17-18, 2019, the COGCC held a hearing to consider proposed changes to the 500 Series, Rules of Practice and Procedure. The 500 series rules govern when and how parties are to file hearing applications, how the Commission processes applications, how to protest applications, and how hearings are conducted. The purpose of the rulemaking was (1) to authorize administrative law judges (ALJs) and hearing officers (HOs) to hear matters and issue orders that become final if uncontested, and (2) to adopt SB 181's statutory language concerning the evidentiary requirements for pooling and drilling and spacing units.   [[78]](#footnote-79)79The final rules provided that matters submitted to the Commission for adjudication will automatically be assigned to an ALJ or HO, unless the Commission otherwise orders.   [[79]](#footnote-80)80ALJs and HOs have the authority to hear all issues of fact and law concerning matters and to issue recommended orders that become final unless contested. Significant changes to spacing and pooling rules included requiring that lease offers contain clear and plain language and be made in good faith, and that involuntary pooling applications may be filed only upon securing the consent of owners of 45% of the mineral interest to be pooled.   [[80]](#footnote-81)81Previously, such application could be filed by "any interested person."

2. Flowline Rulemaking

On November 19-21, 2019, the COGCC held a hearing to adopt changes to its flowline rules. SB 181 required the Commission to allow public disclosure of flowline information, determine when deactivated flowlines must be inspected before being reactivated, and determine when inactive, temporarily abandoned, and shut-in wells must be inspected before being put back into production or used for injection.   [[81]](#footnote-82)82Despite the Commission undergoing an extensive revision of its flowline rules in 2018, which, among other things, established safety procedures for abandoning flowlines in the ground, issues surrounding abandonment became a flashpoint at the hearings.   [[82]](#footnote-83)83The final rules adopted by the Commission established a presumption that all flowlines be removed from the ground upon abandonment, although certain enumerated exceptions apply.   [[83]](#footnote-84)84If abandonment of a flowline in place is less impactful to public health, safety, and welfare, the environment, and wildlife resources, and one of the enumerated exceptions applies, the flowline may be safely and properly left in the ground, subject to the COGCC Director's review.   [[84]](#footnote-85)85The Commission also determined that it will make known to the general public, through a publicly accessible online map viewer, the location of flowlines at scales greater than or equal to 1:6,000 or 1 inch equals 500 feet.   [[85]](#footnote-86)86Members of the public may also visit the Commission's office to view special data at a closer scale.

3. Air Quality Rulemakings

On December 16-19, 2019, the AQCC held hearings to implement SB 181's directive to minimize methane, hydrocarbons, volatile organic compounds, and nitrogen oxide emissions from ***oil*** and gas facilities, and to require continuous monitoring equipment at ***oil*** and gas facilities. Some of the most significant changes made to the AQCC's Regulation Number 7 include decreasing the tons per year threshold for storage tanks that must install certain emissions control equipment, increasing the frequency with which operators must engage in leak detection and repair of facilities, and increasing controls for the loadout of storage tanks.

4. Upcoming Rulemakings

In 2020, the COGCC will undergo rulemakings on additional topics. They include how the Commission will implement its changed mission to "regulate ***oil*** and gas operations in a reasonable manner to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources."   [[86]](#footnote-87)87The Commission will address its mandate to "evaluate and address the potential cumulative impacts of ***oil*** and gas development."   [[87]](#footnote-88)88Another rulemaking is planned to "adopt an alternative location analysis process"   [[88]](#footnote-89)89for ***oil*** and gas locations near populated areas. A rulemaking will also establish rules ensuring proper wellbore integrity of all ***oil*** and gas production wells.

V. KANSAS

*A. Legislative Developments*

Kansas made a minor amendment to the Kansas Underground Utility Damage Prevention Act, codified at Kan. Stat. Ann. § 66-1802, which relieves ***oil*** and gas pipeline owners that qualify as public utilities from marking underground facilities located on another's property. Prior to the amendment, public utilities were responsible for marking all underground facilities within a designated "tolerance zone," before excavation projects. As a result, public utilities had to mark facilities on land they did not own. The amendment contains an additional caveat that the owner of the facility must also be an electric public utility to qualify for the marking exception. The law became effective April 18, 2019.

*B. Judicial Developments*

The Kansas Supreme Court had two influential decisions about term mineral interests in 2019. In *Jason* ***Oil*** *Co. v. Littler*, the court settled a debate on the application of the Rule Against Perpetuities on term mineral interests and found the rule did not apply.   [[89]](#footnote-90)90In 1967, Littler conveyed tracts to the Myers, reserving a term mineral interest for a "period of 20 years or as long thereafter" as minerals were produced. No minerals were produced during the term period. In 2016, Jason ***Oil*** Co. sought a quiet title action based on leases with the grantee's heirs. The grantor's heirs objected, claiming that the grantee's heirs had a springing executory interest subject to the Rule Against Perpetuities, and since the interests violated the Rule, they were void *ab initio* and remained in the grantors and their heirs. The district court relied on the intent of the parties to the original deeds to find that the grantee's heirs obtained ownership once 20 years passed. The Kansas Supreme Court affirmed, but on other grounds. The court indicated that the grantee's heirs did have a springing executory interest, but declined to apply the Rule Against Perpetuities or adopt the two-grant theory or other legal fiction as used in other states to avoid the results of the Rule. Instead, the court carved out a narrow exception to the Rule Against Perpetuities for term mineral interests based on the Rule's policy of promoting alienability of property.

In the second term mineral interest case, *Oxy USA Inc. v. Red Wing* ***Oil****, LLC*, the Kansas Supreme Court found that term mineral interest owners cannot adversely possess reversionary mineral interests by receiving royalties from a unitization agreement.   [[90]](#footnote-91)91The original property owner sold the property in 1943, reserving a 20-year term mineral interest ("Luther interest"). Eventually, the property was included in a unitization agreement, but there was no production on the lands subject to the Luther interest. The owner with the possibility of reverter was on notice that the Luther interest terminated, but did not take action to prevent royalty distribution to owners of the terminated interest. The Luther interest heirs argued that receiving royalties amounted to adversely possessing an interest to the minerals in place. The court rejected this theory on the grounds that royalties only represent a portion of the value of minerals after production and did not put the owner on notice for adversely possessing minerals *in situ*.

The Kansas Supreme Court issued an opinion affirming the Kansas Corporation Commission's denial of a unitization plan based on the agency's interpretation of the statutory definition for "pool."   [[91]](#footnote-92)92In *Lario* ***Oil***, the Commission denied Lario's unitization project because it failed to prove that all of the leased area communicated in a single pressure system. Under Kan. Stat. Ann. § 55-1302(b), properties may only be unitized if they are drawing from a common "pool" or "an underground accumulation of ***oil*** and gas in one or more natural reservoirs in communication so as to constitute a single pressure system so that production from one part of the pool affects the pressure throughout its extent."

After bottom-hole pressure tests, the Commission decided that it had not received empirical evidence that the proposed unit was one pressure system. Lario countered that the Commission's interpretation was too narrow and should instead focus on how the operator would extend the economic life of the included property. The court ruled in the Commission's favor, indicating that under the statute, the same standard for "pool" applies regardless of whether the production area is near the end of its economic life.

Turning to the ongoing *Northern Natural Gas* litigation, 2019 saw several orders from the state and federal courts over produced migrated storage gas. Three of the most significant orders were: *Northern Natural Gas Co. v. Approximately 9117.53 Acres, Northern Natural Gas Co. v. L.D. Drilling, Inc.*, and *Northern Natural Gas Co. v. ONEOK Field Services Co.*

In *Northern Natural Gas Co. v. Approximately 9117.53 Acres*, the federal district court tentatively resolved the condemnation compensation issue.   [[92]](#footnote-93)93The court's previous order awarding compensation for Northern Natural's condemnation of ***oil*** and gas rights was modified on appeal by the Tenth Circuit, substantially diminishing the award to defendants. Following the appeal, the court directed the parties to file dispositive motions on three remaining issues: (1) the proper amount of compensation, accounting for a reduction for the amount of Northern Natural's storage gas (in accordance with the Tenth Circuit's ruling); (2) the amount Northern Natural might set off against such award; and (3) other potential adjustments to the award, such as interest.

The court ruled that the report of the special commissioners, which identified the amount of recoverable gas (both native and storage gas) in the relevant property, provided a sufficient basis to determine just compensation. Based on the commissioners' report, Northern Natural submitted an affidavit of their expert witness, Randall Brush, advancing several conclusions for determining the economic value of the ***oil*** and native gas being condemned. The court found the methodology of Northern Natural's expert persuasive, and adopted it over the objections of the defendants, whom, the court noted, failed to present contrary evidence or a reliable substitute methodology to undermine the valuations urged in Brush's affidavit.

The court further found that Northern Natural was entitled to setoff from the compensation awarded to defendants for the value of storage gas produced by the defendants after June 2, 2010, when FERC issued its certificate. The court cited *Union Gas Systems, Inc. v. Carnahan*,   [[93]](#footnote-94)94which found that setoff may be appropriate, for subsurface migration of minerals, after certification but before condemnation. Relying on *Union Gas*, the court found the appropriate amount of setoff would be equal to the selling price of the gas, less the costs of production, including a reasonable rental for the use of the owner's land. The court then identified the tracts on which Northern Natural was entitled to a setoff for the amounts of storage gas produced after the certification date. The court further found that Northern Natural owed interest on that amount from the date of the taking until payment at a rate of 4.75%, compounded annually.

In the related unjust enrichment case seeking recovery for the value of the produced storage gas, *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, the federal district court issued an order on September 3, 2019, denying summary judgment for the defendants on their rule of capture and ultra-hazardous activity defenses.   [[94]](#footnote-95)95The defendants relied on Kansas Supreme Court opinion *Northern Natural Gas Co. v. ONEOK Field Services Co.* ( *ONEOK I*),   [[95]](#footnote-96)96to assert that rule of capture precluded unjust enrichment claims for producing migrated storage gas. The court rejected the argument because the effect of rule of capture on title to the gas was not conclusive for unjust enrichment claims.

The district court also awarded Northern Natural summary judgment on the defendants' counterclaims for nuisance, negligence, and ultra-hazardous activity. The court found subsurface migration of storage gas could not be reasonably viewed as hazardous or unreasonable interference with the surrounding area because it occurred deep within the earth and defendants presented no evidence of harm.

Three days later, the Kansas Supreme Court issued an opinion clarifying the effect of the rule of capture on storage gas in *Northern Natural Gas Co. v. ONEOK Field Services Co.* ( *ONEOK II*).   [[96]](#footnote-97)97This opinion resulted from a state action by Northern Natural seeking compensation for post-certification gas. The state district court had ruled for the defendants on three prongs: (1) the *Union Gas* ruling limiting rule of capture for storage gas was superseded in 1993 by Kan. Stat. Ann. § 55-1210; (2) *Martin, Pringle*   [[97]](#footnote-98)98overruled *Union Gas*; and (3) *Union Gas* constituted an unconstitutional taking of property.

First, the court clarified that Kan. Stat. Ann. § 55-1210(c) only protects gas beyond the certification area. As such, *Union Gas* applied to gas within the certification area and precluded rule of capture. Second, the court rejected the proposition that another Kansas opinion, *Martin, Pringle*, had overruled *Union Gas. Martin, Pringle* held that storage field owners lost title to migratory gas if third parties caught the gas before the enactment date for Kan. Stat. Ann. 55-1210. It did not analyze or attempt to overrule *Union Gas*. Third, the court declined finding a taking in light of the *Northern Gas* compensation cases. Certification cut off the common-law right to produce and was not a vested property interest.

Finally, in *Hitch Enterprises, Inc. v. Oxy USA Inc.*, the federal district court featured a detailed discussion of *Fawcett*'s effect on the marketable condition rule.   [[98]](#footnote-99)99The marketable condition rule requires operators to make gas marketable at their expense. In *Fawcett*,   [[99]](#footnote-100)100a dispute over natural gas processing costs, royalty owners argued that natural gas was not marketable until it reached an interstate pipeline. The *Fawcett* court disagreed, but indicated that a gas is only marketable "when the operator delivers the gas to the purchaser in a condition acceptable to the purchaser in a good faith transaction."

*Hitch* involved a class certification dispute over natural gas processing costs and its deductibility in payments to royalty owners. The royalty owners asserted that *Fawcett* modified the marketable condition rule to make gas marketable solely by the presence of a good faith sale. As such, operators could not deduct processing costs. The court rejected this argument, finding that *Fawcett* only dealt with operators' obligations after the gas is sold. It did not negate the previous rule that gas may be marketable at the wellhead because that gas could be acceptable to a purchaser in a good faith transaction. Thus, enhancement costs may be shared with royalty owners in such circumstances.

VI. LOUISIANA

*A. Legislative Developments*

Louisiana Mineral Code articles 164, 166, and 175 were amended by H.B. No. 350   [[100]](#footnote-101)101of the 2019 legislative session. Prior to Act No. 350, these articles prohibited ***oil*** and gas operations on a co-owned tract of land, co-owned mineral servitude, or under a mineral lease granted by some of the co-owners, unless 80% of the co-owners consented to the operations. Now, after the amendment, the threshold level of consent required is 75%.

H.B. 403 [[101]](#footnote-102)102of the 2019 legislative session enacted La. R.S. 30:127(H). In Louisiana, the State Mineral and Energy Board is charged with the duty of administering the mineral ownership rights of the State of Louisiana, including state agencies. [[102]](#footnote-103)103This amendment was a compromise that was aimed at resolving the problems posed by an insolvent or bankrupt ***oil*** and gas lessee who owes unpaid royalties to the State. Specifically, this amendment grants the Board the authority to include a continuing security interest, as contemplated by the Uniform Commercial Code, in mineral leases granted by the Board on State-owned properties after July 31, 2019. However, the specific language to be included must be submitted by the Board to both the House and Senate Committees on Natural Resources for review no later than 30 days prior to entering into the first lease containing that continuing security interest.

*B. Judicial Developments*

One of the most significant decisions of 2019 was handed down by a Louisiana federal district court, which made an *Erie* guess on an issue of first impression relating to the propriety of deducting post-production expenses from proceeds owed to unleased mineral owners under Louisiana law. In *Johnson v. Chesapeake Louisiana, LP*,   [[103]](#footnote-104)104Chief Judge Hicks of the U.S. District Court for the Western District of Louisiana concluded that Louisiana law disallowed the deduction of post-production expenses from the proceeds owed to an unleased mineral owner. The basis of this decision was the direction of La. R.S. 30:10(A)(3) to remit the "pro rata share of the proceeds of the sale of production"   [[104]](#footnote-105)105to an unleased mineral owner for his tract's share of the unitized production. In reaching this decision, the court implicitly interpreted "proceeds" as "gross proceeds" rather than "net proceeds" that would factor in post-production expenses. Chesapeake and several industry amici filed motions for reconsideration, which are currently pending. One of the primary bases of those motions is the failure to consider the Louisiana doctrine of *negotiorum gestio*, which would allow the manager of the affairs of another to be reimbursed for all necessary and useful expenses incurred in managing another's affairs. Even though this decision is not yet final and remains subject to future appeal, it has certainly had a palpable effect on operators in Louisiana.

The distinction between conduct undertaken in good faith or bad faith is often critical in terms of exposure to heightened penalties under Louisiana law, and ***oil*** and gas litigation is no exception. In *Mary v. QEP Energy Co.*,   [[105]](#footnote-106)106Plaintiff filed suit alleging that Defendant violated a pipeline servitude agreement because the pipeline on Plaintiff's property extended beyond the permissible area of the pipeline servitude agreement, and such deviations were in bad faith. Therefore, Plaintiff sought disgorgement of Defendant's profits or an order permitting removal of the pipeline. Plaintiff's claim turned on Article 486 and the standard of "good faith," as the term is used in the article. On appeal, the U.S. Court of Appeals for the Fifth Circuit reversed the district court's finding that Civil Code article 670 supplied the legal standard for good faith. The Fifth Circuit concluded that article 670 was inapplicable because the pipeline servitude holder was not a "landowner" and a pipeline is not a "building." Instead, the Fifth Circuit found that article 487 supplied the legal rule for a finding of good faith because the parties were fighting over the profits, i.e., fruits, of a thing, in this case land, in which the pipeline was located.

While environmental lawsuits alleging contamination from historical, i.e., legacy, operations are not new in Louisiana, plaintiffs have embraced novel legal theories in response to a number of successful defenses raised by defendants. In *Guilbeau v. BEPCO, L.P.*,   [[106]](#footnote-107)107plaintiff filed an ***oil*** and gas legacy lawsuit, seeking an injunction to require the defendants, who previously conducted ***oil*** and gas activities on or around plaintiff's property, to remediate the alleged present-day contamination caused by their past operations. The injunctive relief sought was grounded in La. R.S. 30:16, which provides a person adversely affected by another person "violating or [] threatening to violate a law of this state with respect to the conservation of ***oil*** or gas, or both"   [[107]](#footnote-108)108with the right to seek an injunction when the Commissioner of Conservation fails to do so. As the court acknowledged, the use of section 30:16 to remedy past violations of conservation law is a recent development largely due to a series of judicial decisions that tapered the viability of legacy lawsuits in Louisiana. Thus, whether section 30:16 applies to past violations remains an open question under Louisiana law. As such, the federal court abstained from exercising jurisdiction over the case under the Burford doctrine, citing the nature of the state law cause of action and its unsettled status, along with the unique state interests implicated, in support of the court's decision.

The Parish of Plaquemines and the State of Louisiana sued the ***oil*** and gas industry for restoration of Louisiana's coastal wetlands, which they contend are being lost as a result of historical ***oil*** and gas operations dating back to the 1940s along the coast. The Eastern District of Louisiana granted the plaintiffs' motions to remand this matter to state court in *Parish of Plaquemines v. Riverwood Production Co.*   [[108]](#footnote-109)109The primary basis of this removal was federal question and the federal officer removal jurisdiction. The removing defendants argued they were under federal supervision and direction during World War II, which was included within the petition's time frame of alleged violations. However, the court construed the pleadings to exclude any claim arising under federal law. Further, the court rejected documents showing some federal direction of ***oil*** and gas activities during the World War II time frame. Ultimately, the court found that compliance by private ***oil*** companies with wartime federal laws and regulations failed to fall within the ambit of "acting under the color of federal office," as required for federal officer jurisdiction. The removing defendants immediately appealed the remand order as to the federal officer jurisdiction, and the matter is currently pending before the Fifth Circuit.   [[109]](#footnote-110)110

VII. NEW MEXICO

*A. Judicial Developments*

*Marathon* ***Oil*** *Permian, LLC v. Ozark Royalty Co.*   [[110]](#footnote-111)111involves the perils of failing to follow basic substantive requirements when executing deeds. Ozark acquired an ***oil*** and gas lease that it sold to Black Mountain which, in turn, flipped that lease to Marathon. The Lea County Clerk recorded the assignment from Black Mountain to Marathon but rejected the Ozark to Black Mountain assignment because of a defective notary acknowledgment.   [[111]](#footnote-112)112Ozark refused to execute a corrected assignment and sold the lease to Tap Rock. Marathon sued and sought partial summary judgment that Tap Rock's title was inferior as it was on constructive notice of Marathon's claim based on the recorded assignment from Black Mountain to Marathon. The district court observed that New Mexico statutes provide that a writing not properly recorded of which a party does not have actual knowledge does not impart constructive notice of a claim of title   [[112]](#footnote-113)113and that improperly acknowledged instruments are not entitled to be recorded and, even if recorded, do not impart constructive notice of its contents.   [[113]](#footnote-114)114No evidence was presented that Tap Rock had actual notice of any portion of the Ozark to Black Mountain to Marathon transfers. Observing that County Clerks in New Mexico index assignments in a grantor-grantee index,   [[114]](#footnote-115)115the court ruled that Tap Rock did not have constructive notice of Marathon's claim to title: "[t]he lease [sic] from Black Mountain to Marathon, though recorded, did not impart constructive notice to Tap Rock because it was not a recorded link in Tap Rock's chain of title from Ozark."   [[115]](#footnote-116)116Apparently no evidence or argument was presented that competent title searches in New Mexico also involve review of "tract books" maintained by private title companies, which presumably would have revealed to Tap Rock the Black Mountain to Marathon assignment and resulted in a different result.

In *TDY Industries, LLC v. BTA* ***Oil*** *Producers, LLC*,   [[116]](#footnote-117)117the federal district court addressed whether laches can be used offensively to establish title. In 1968, U.S. Borax issued four deeds to CARCO (TDY's predecessor in title) of Eddy County as part of a larger transaction. The tracts at issue were described in a "surface only" deed to CARCO even though Borax owned all minerals except potassium and sodium. TDY found various unrecorded documents from the 1968 transaction that suggested that Borax intended to convey all its New Mexico property, real and personal, to CARCO. BTA leased a 40-acre tract from TDY and later discovered the break in title. It asked TDY to get a quitclaim deed from or file a quiet title action against Borax. TDY refused. BTA then obtained two deeds to the minerals from Borax. TDY sued and, among other theories, sought to claim that laches divested Borax and its assignee, BTA, from claiming title. BTA moved to dismiss that claim as laches is a defense, not a claim, citing the general rule that laches "never runs in favor of one claiming real property, by or through a void deed, who is not in possession or against a duly recorded title."   [[117]](#footnote-118)118Citing a New Mexico Court of Appeals decision, the court ruled that there was no good reason why laches cannot be used offensively when the issues are already joined in other valid causes of action such as declaratory judgment.   [[118]](#footnote-119)119

In *Epic Energy LLC v. Encana* ***Oil*** *& Gas (USA) Inc.*,   [[119]](#footnote-120)120the federal district court considered whether New Mexico would allow parties to contractually reduce a limitation period. Encana sold various ***oil*** and gas producing properties and associated equipment to Epic in a contract that warranted no known, undisclosed environmental issues and provided that the warranties survived for six months after closing. About one year prior to closing, one of the tank batteries leaked and Encana repaired and engaged in cleanup operations that the regulatory agency subsequently deemed incomplete. The leak and cleanup was not disclosed to Epic and was not visible to Epic in its inspection of the property and tank. After closing, the regulatory agency required Epic to undertake various testing, delineation, and remediation activities. More than six months after closing Epic sued Encana for breach of warranty. Epic argued that New Mexico case law that "time to sue" provisions in automobile insurance policies that shorten statutory limitations periods violate public policy showed that New Mexico would not enforce the six-month survival clause.   [[120]](#footnote-121)121Noting the absence of New Mexico authority on the issue, the federal district court made the " *Erie* guess" that New Mexico would follow the line of cases from Delaware that the public policy of freedom of contract permits parties to contractually modify a statute of limitations and dismissed Epic's suit.

In the class action royalty case of *Anderson Living Trust v. XTO Energy, Inc.*,   [[121]](#footnote-122)122the federal district court considered issues relating to royalty owed on both gas consumed in lease operations and drip condensate   [[122]](#footnote-123)123retained by a downstream service provider, the effect of the implied duty good faith on royalty calculations, and the retroactivity of the ***Oil*** and Gas Proceeds Payment Act   [[123]](#footnote-124)124passed in 1985. The court analyzed the lease terms of the class representatives and determined that each lease contained a free use clause that permitted XTO and its gas gatherer to consume gas on a royalty free basis. The court ruled that the provisions of royalty clauses requiring that the gas be marketed or sold and the free use provisions allowed XTO to permit downstream service providers to recover and use drip condensate on a royalty free basis.   [[124]](#footnote-125)125In response to plaintiffs' contention that the duty of good faith and fair dealing required disclosure of information about the nature of various deductions in royalty calculations, the court ruled that the implied duty could not be used to impose affirmative obligations on a party to a contract. Addressing the issue of whether the Act could be applied retroactively to royalties owing under instruments that predated the Act, the court declined to follow a prior district court opinion and ruled that the language of the Act evinced a clear legislative intent to require payors of proceeds under older instruments to pay in accordance with the requirements of the Act.

In *Ulibarri v. Southland Royalty Co.*, [[125]](#footnote-126)126the federal district court was confronted with a royalty clause providing for royalty on gas based on the "proceeds of the gas, as such." Plaintiff claimed that the clause unambiguously provide for royalty to be calculated and paid at the point of sale without adjustment for post-production costs. Defendant claimed the opposite. The court denied both parties motions for summary judgment holding that the language was ambiguous and extrinsic evidence concerning the meaning of the provision was disputed. Similar to the Anderson Living Trust case discussed above, the court declined to follow a prior district court opinion and ruled that the language of the Act evinced a clear legislative intent to require payors of proceeds under older instruments to pay in accordance with the requirements of the Act.

*B. Administrative Developments*

The New Mexico ***Oil*** Conservation Commission enacted a revised rule   [[126]](#footnote-127)127concerning financial assurance bonds that operators are required to post. First, operators are required to maintain blanket financial assurance bonds in amounts dependent on the number of wells operated on state or fee lands as follows: "(a) $ 50,000 for one to ten wells; (b) $ 75,000 for 11 to 50 wells; (c) $ 125,000 for 51 to 100 wells and; (d) $ 250,000 for more than 100 wells."   [[127]](#footnote-128)128Additionally, if the operator has one or more wells that are inactive or temporarily abandoned (no production or injection for two years or more), then the operator is required to post an additional financial assurance bond for those wells with the amount required based on the number of such wells operated: "(a) $ 150,000 for one to five wells; (b) $ 300,000 for six to 10 wells; (c) $ 500,000 for 11 to 15 wells; and, (d) $ 1,000,000 for more than 25 wells."   [[128]](#footnote-129)129

VIII. OHIO

*A. Legislative Developments*

In July 2019, the Governor signed House Bill 166, [[129]](#footnote-130)130which created Ohio's operating budget for 2020 and 2021. [[130]](#footnote-131)131The Bill is significant for ***oil*** and gas producers in Ohio for several reasons. First, the Bill clarified language in Ohio's unitization statute (R.C. 1509.28 et seq.) by expressly stating that a producer can count the entire interest in a lease towards the minimum 65% statutory threshold. Second, the Bill eliminated the $ 100 per well transfer fee, which will allow conventional producers in particular to recognize significant savings when they sell inventory. Last, the minimum severance tax was eliminated, effective as of January 1, 2020, which could save producers anywhere from a few thousand dollars per year, to well over $ 50,000 annually.

*B. Judicial Developments*

Ohio courts continued to tackle challenging ***oil*** and gas issues in 2019. In *Browne v. Artex* ***Oil*** *Co.*,   [[131]](#footnote-132)132the Supreme Court of Ohio clarified that a declaratory judgment claim that an ***oil*** and gas lease terminated for lack of production is subject to the 21-year statute of limitations for recovery of title to or possession of real property in Ohio Rev. Code Ann. (ORCA) § 2305.04. The lessee argued such claim was subject to the 15-year statute of limitations for actions upon written contracts in former ORCA § 2305.06.   [[132]](#footnote-133)133The court disagreed, noting that the lessors were not alleging a breach of the ***oil*** and gas lease, but were simply requesting a declaration that the ***oil*** and gas lease had terminated by its terms through operation of law. This claim was more like an action to quiet title than one upon a written contract, as the lessee had no obligation to produce under the lease and the parties did not dispute the lease's provisions. Relying heavily on the notion that in Ohio an ***oil*** and gas lease vests a real property interest in the lessee, the court held that ORCA § 2305.04 was the controlling limitations statute.   [[133]](#footnote-134)134The court reasoned that because the ***oil*** and gas lease vested the lessee with a real property interest and the lessors sought recognition of their reversionary interest in that real property, ORCA § 2305.04 applied.   [[134]](#footnote-135)135The court remanded the matter to the trial court for an evaluation of the parties' claims given the correct statute of limitations.

The court took up Ohio's Marketable Title Act (OMTA)   [[135]](#footnote-136)136in *Blackstone v. Moore*.   [[136]](#footnote-137)137Under that statute, an owner's marketable record title is "subject to . . . interests . . . inherent in the change of record title . . . , provided that a general reference . . . to . . . interests created prior to the root of title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such . . . interest."   [[137]](#footnote-138)138The court held that under the OMTA, a deed reference to a previously reserved royalty interest is sufficiently specific to preserve that interest from being extinguished where the reference identifies the type of interest created and the person to whom the interest was granted.

Courts also wrestled with issues involving Ohio's statutory unitization law, ORCA § 1509.28. In ***Kerns*** *v. Chesapeake Exploration, L.L.C.*,   [[138]](#footnote-139)139the U.S. Court of Appeals for the Sixth Circuit addressed whether the state's issuance of a statutory unit order effected an unconstitutional taking of property. The court affirmed unanimous precedent from other producing jurisdictions that compulsory unitization and pooling statutes are valid, constitutional exercises of the state's police power to protect correlative rights; additionally, it found that this precedent applies in the context of modern horizontal development.

Two courts of appeals dealt with the interplay between ***oil*** and gas leases and ORCA § 1509.28. In *American Energy-Utica, LLC v. Fuller*,   [[139]](#footnote-140)140the original parties to a 1981 lease struck a voluntary pooling clause and inserted the phrase "UNITIZATION BY WRITTEN AGREEMENT ONLY!"   [[140]](#footnote-141)141Unable to reach an agreement with the lessors to include their property in a voluntary unit, the successor lessee applied for a statutory unitization order. Based upon the conclusion that the Division's action constituted a retroactive impairment of contract, Ohio's Fifth District Court of Appeals held: "While we do not disagree that R.C. 1509.28 permits unitization of the lease, we do find that in this case, doing so without [the lessor's] written agreement was a breach of the lease agreement."   [[141]](#footnote-142)142

Ohio's Seventh District Court of Appeals distinguished *Fuller* in *Paczewski v. Antero Resources Corp*.   [[142]](#footnote-143)143There, the original contracting parties struck a voluntary unitization clause from the lease. The successor parties could not come to terms on voluntary pooling, prompting the lessee to seek a statutory unitization order. The lessors claimed the lessee breached the lease by applying for the unitization order, and that the resulting order effected an unconstitutional taking of property. Finding for the lessee, the court held that striking the voluntary unitization clause from the lease merely rendered the lease silent on the subject of unitization. Thus, that "deletion does not prohibit the parties from engaging in the action that is the subject of the voided clause."   [[143]](#footnote-144)144And *Fuller* did not lead to a different result: "The handwritten provision in *Fuller* . . . makes the lease in that case wholly distinct from the lease at issue here . . . ."   [[144]](#footnote-145)145The court also rejected the lessors' takings claim, noting that consistent with ***Kerns*** and decisions from other producing states, Ohio's statutory unitization process protects correlative property rights in ***oil*** and gas--rather than taking such rights away--and serves as a proper exercise of the state's police power.   [[145]](#footnote-146)146

Courts of appeals continued to hear cases involving the OMTA and Ohio's Dormant Mineral Act (ODMA). In *West v. Bode*,   [[146]](#footnote-147)147the Seventh District Court of Appeals reaffirmed that claimants can use either statute to terminate severed mineral interests. The surface owners attempted to extinguish a severed ***oil*** and gas royalty interest under the OMTA. The putative royalty owners argued, in part, that the OMTA did not extinguish the royalty interest because, as between the OMTA and ODMA, the ODMA is the more specific statute when terminating mineral interests and the ODMA did not abandon the royalty interest under the case's specific facts. The court disagreed, holding that there was no irreconcilable conflict between the OMTA and ODMA such that the latter would control.   [[147]](#footnote-148)148It noted the different look-back periods, savings events, and termination procedures under the two acts and found that each applies independent of the other.   [[148]](#footnote-149)149

Turning to the ODMA, in *Sharp v. Miller*,   [[149]](#footnote-150)150the Seventh Appellate District discussed the "reasonable due diligence" standard that a surface owner must employ to locate and notify the mineral holders or their heirs by certified mail before turning to notice by newspaper publication. The appellant challenged the reasonableness of the surface owner's efforts because the surface owner did not conduct an internet search for the mineral holder's heirs along with his search of the public records.   [[150]](#footnote-151)151But the court found that an internet search is not always required, and that here, there was no evidence that an internet search would have revealed any potential heirs since there was little information available for the appellant to use as a basis of an internet search.   [[151]](#footnote-152)152

Ohio's Fifth Appellate District also addressed the surface owner's ODMA due diligence efforts in *Gerrity v. Chervenak*.   [[152]](#footnote-153)153As in *Miller*, the severed mineral owner's heirs argued that reasonable diligence required the surface owner to search the internet for the address of the heirs and their whereabouts.   [[153]](#footnote-154)154The court of appeals disagreed. The court cited the state's plain language, which only requires certified mail service at the holder's last known address.   [[154]](#footnote-155)155In this particular case, the surface owner attempted certified mail service at mineral interest holder's last known address. Additionally, after certified mail service failed, the surface owner searched two counties' property and probate records.   [[155]](#footnote-156)156That search too failed to identify the heirs. The court found the surface owner's efforts to be reasonable under the circumstances.

The Supreme Court of Ohio agreed to hear *Gerrity* on October 15, 2019. The court will consider these propositions of law: (1) whether ORCA § 5301.56 requires strict compliance and whether a surface owner seeking to capture a severed mineral interest must first attempt service by certified mail before resorting to publication, and (2) whether, in order to satisfy due process and the publication provision of ORCA § 5301.56(E), a surface owner must employ reasonable search methods conforming to due diligence designed to locate all holder(s) of a severed mineral interest.

In *Henceroth v. Chesapeake Exploration, L.L.C.*,   [[156]](#footnote-157)157the Northern District of Ohio addressed whether a lessee could take certain deductions when calculating its lessors' royalties under specific lease language. The court found that the lessee properly paid royalties on the netback price the lessee received on sales to an affiliate at the well; conversely, the lessee did not owe royalties on the price that the lessee's affiliate received from third parties in downstream sales.

In *Pavsek v. Wade*, [[157]](#footnote-158)158the Seventh District Court of Appeals considered whether a lessor must serve notice upon its lessee demanding that the lessee drill additional wells before seeking a partial forfeiture of the lease for breach of the lessee's implied covenant of reasonable development. The court held that the lessor must give this notice. [[158]](#footnote-159)159The lessor must also provide its lessee with a reasonable amount of time to develop the remaining leasehold before seeking forfeiture. The court refused to excuse the lessor's failure to serve notice upon its lessee simply because a long period has passed since the lessee drilled its last producing well.

*C. Administrative Developments*

In 2019, the Division of Real Estate & Professional Licensing issued new guidance for Ohio's ***oil*** and gas land professionals (i.e., ***oil*** and gas landmen).   [[159]](#footnote-160)160First, the Division updated its land professional disclosure form, which is required to be provided to landowners prior to or at their first meeting. Second, the Division is requesting that all land professionals complete the disclosure form in its entirety, including the address and tax parcel number of the subject property. The Division also recommends that land professionals remind landowners to return the disclosure form to the land professional and not the Division.   [[160]](#footnote-161)161

IX. Oklahoma

*A. Judicial Developments*

In *Naylor Farms, Inc. v. Chaparral Energy, LLC*,   [[161]](#footnote-162)162the plaintiff royalty owners (collectively, Naylor Farms) contended that Chaparral systematically underpaid royalties on production from approximately 2,500 Oklahoma ***oil*** and gas wells by improperly deducting from royalty payments certain costs that the plaintiffs contended should have been borne solely by Chaparral under Oklahoma royalty law. The district court granted Naylor Farms' motion seeking certification of a class of royalty owners under Rule 23 of the Federal Rules of Civil Procedure. In appealing the district court s order granting class certification,   [[162]](#footnote-163)163Chaparral asserted three primary arguments in support of its effort to obtain a reversal of the class certification order. First, Chaparral contended that *marketability* constitutes an individual question under the implied duty to market (IDM) that required a "well-by-well" analysis that would predominate over any common questions. The district court in *Chaparral* was found to have not "abused its discretion by concluding that the marketability question *in this particular case* is subject to common, class wide proof for purposes of satisfying Rule 23 s commonality and predominance requirements.   [[163]](#footnote-164)164

Second, Chaparral argued that distinctions in lease language also give rise to individual questions that likewise predominated in the case. The district court rejected that argument and found that "its decision to limit the class to leases containing a *Mittelstaedt* Clause renders such an individualized analysis unnecessary."   [[164]](#footnote-165)165Most of the U.S. Court of Appeals for the Tenth Circuit's discussion addressing this particular area of the appellants' arguments focuses on which issues were presented and preserved below. The Tenth Circuit was not persuaded that the district court abused its discretion in certifying the class despite the existence of what the court characterized as *minor* variations in ***oil*** and gas lease language.

Finally, Chaparral urged on appeal that "Naylor Farms failed to demonstrate that Chaparral uses a uniform payment methodology to calculate royalty payments,"   [[165]](#footnote-166)166and that such failure warranted the denial of class certification. However, while the existence of a uniform payment methodology, *alone*, was found by the Tenth Circuit to be insufficient to meet the predominance requirement, the court rejected the notion that such a methodology is a necessary component for satisfying predominance. Moreover, the court noted that "[t]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification."   [[166]](#footnote-167)167The Tenth Circuit further noted that the district court could also, if needed, "divide the class into subclasses for purposes of determining damages."   [[167]](#footnote-168)168The district court was found to have not abused its discretion in concluding that individual questions about damages do not defeat predominance. The Tenth Circuit affirmed the district court's order granting Naylor Farms' motion for class certification subject to certain modifications of the class definition consistent with its opinion.

In late December 2019, the U.S. Bankruptcy Court for the Southern District of Texas (Houston Division) in *Alta Mesa Holdings, LP v. Kingfisher Midstream, LLC* ( *In re Alta Mesa Res., Inc.*),   [[168]](#footnote-169)169held that certain ***oil*** and gas gathering agreements between Alta Mesa (as producer) and Kingfisher (as gatherer) "ran with the land" under the applicable Oklahoma law and were *not* subject to rejection under section 365 of the Bankruptcy Code.   [[169]](#footnote-170)170The court entered summary judgment in favor of Kingfisher on the issue of rejection.   [[170]](#footnote-171)171

In the case of *Blue Dolphin Energy, LLC v. Devon Energy Production Co.*,   [[171]](#footnote-172)172the plaintiffs appealed the district court's order granting partial summary judgment in favor of the defendant Devon. The "[p]laintiffs [had] entered into a 'Term Assignment of ***Oil*** and Gas Leases' with Felix Energy, LLC [predecessor to the defendant] in April 2014."   [[172]](#footnote-173)173In January of 2016, Felix merged with Devon, and Devon assumed the interests covered by the assignments. The Blue Dolphin plaintiffs alleged:

[T]hat the assignments contained a "primary term of three (3) years, commencing on the first day of the calendar month that immediately follows the Effective Date, which was April 30, 2014." Plaintiffs [Blue Dolphin] state in the petition that the Assignments "required the assignee to complete a well capable of producing in paying quantities prior to May 1, 2017, which is the expiration of the primary term." Plaintiffs [Blue Dolphin] contend that because Defendant failed to complete the well by May 1, 2017, the primary term in the lease "expired and the secondary term never commenced."   [[173]](#footnote-174)174

The plaintiffs asserted that the leasehold interests covered by the subject assignment reverted back to the Blue Dolphin plaintiffs because Devon did not complete any well by the end of the May 1, 2017 primary term. Devon contended, among other allegations, that the assignments were extended because Devon was engaged in drilling or completion operations as of May 1, 2017.

The Oklahoma Court of Appeals agreed with the trial court "that the assignments [only] required the *commencement* of the well within the primary term or any extension thereof,"   [[174]](#footnote-175)175and the diligent continuation of drilling operations through the completion of the well as a commercial producer. It affirmed the trial court's grant of partial summary judgment in favor of Devon, and held that the primary term of the lease was extended under the language of the term assignment to allow Devon to continue ongoing drilling operations through to their completion.

The case of *TexasFile, LLC v. Boevers*   [[175]](#footnote-176)176presented TexasFile's appeal of the trial court's denial of its motion for summary judgment and the court's granting of summary judgment in favor of the defendant County Clerks of Kingfisher County and Garvin County, Oklahoma. TexasFile is in the business of providing (via internet) "remote access to images of county land records to its subscribers."   [[176]](#footnote-177)177TexasFile submitted a request to the County Clerk of Kingfisher County, "pursuant to the Oklahoma Open Records Act, [for] a complete electronic copy of all the Kingfisher County land records that [were at that time] available in electronic format."   [[177]](#footnote-178)178The County Clerk responded and denied Texas File's request. TexasFile commenced the present declaratory judgment and mandamus action against the County Clerk "asking the trial court to enter an order determining TexasLink was entitled to an electronic copy of the Kingfisher County public land records maintained by the County Clerk, pursuant to the Oklahoma Open Records Act, and compelling the County Clerk of Kingfisher County to make available the land records of the Kingfisher County Clerk's office in an electronic format at a reasonable fee."   [[178]](#footnote-179)179

The Oklahoma Court of Appeals stated that "[t]he issue presented on appeal is whether a county clerk is required to provide an entity with an electronic copy of the county land records maintained by the county clerk when the copies will be used for commercial purposes."   [[179]](#footnote-180)180After proceeding through a detailed review of the issues and pertinent authorities (which we will not attempt to outline in this brief summary), the court of appeals held that the trial court did not err in denying TexasFile's request for the county land records of the two County Clerks and *affirmed* the trial court's summary judgment ruling in favor of the County Clerks.

The case of *Hobson v. Cimarex Energy Co.*   [[180]](#footnote-181)181presented the question of "whether a vested remainderman is a *surface owner* under the [Oklahoma] Surface Damages Act."   [[181]](#footnote-182)182The Oklahoma Supreme Court held that a vested remainderman is not a "surface owner" under the Act. Rather, the term "surface owner" under the Surface Damages Act (SDA) refers to one who holds a current possessory interest.   [[182]](#footnote-183)183The court observed at the outset of its opinion that the present appeal "concerns the interpretation of 'surface owner' under the SDA."   [[183]](#footnote-184)184It noted that "[t]he SDA defines 'surface owner' as 'the owner or owners of record of the surface of the property on which the drilling operation is to occur."   [[184]](#footnote-185)185The court recognized that the SDA's definition of "surface owner" was ambiguous.   [[185]](#footnote-186)186The court stated, "[t]his Court is persuaded by the common meaning, expressed legislative intent, and interests of justice that the SDA's use of *surface owner* applies only to those holding a current possessory interest. Under the SDA, a mineral lessee must negotiate surface damages with those who hold a current possessory interest in the property. A vested remainderman does not hold a current possessory interest until the life estate has come to its natural end."   [[186]](#footnote-187)187The Oklahoma Supreme Court vacated the decision of the court of appeals and affirmed the order of the trial court. Four justices dissented from the majority opinion.

In *Meier v. Chesapeake Operating L.L.C.*,   [[187]](#footnote-188)188the plaintiff "homeowners brought a class-action lawsuit against operators of wastewater disposal wells for hydraulic fracturing operations, alleging the injection wells were significantly increasing seismic activity across larger portions of Oklahoma. The only damages the homeowners sought were the increased costs of obtaining and maintaining earthquake insurance."   [[188]](#footnote-189)189The defendants removed the case to the U.S. District Court for the Western District of Oklahoma under the Class Action Fairness Act. 28 U.S.C. § 1332(d). The federal district court dismissed the suit for failure to state a claim. It predicted that "the Oklahoma Supreme Court, if confronted with the issue, would find the relief requested by plaintiffs not legally cognizable under the circumstances present in the case at bar."   [[189]](#footnote-190)190

On appeal, the Tenth Circuit found that, while no Oklahoma authority specifically addressed the question at issue, "other states have consistently failed to recognize a cause of action for increased insurance premiums based on a tortfeasor's negligence."   [[190]](#footnote-191)191It concluded that it was "highly unlikely the Oklahoma Supreme Court would allow proportional recovery for unmaterialized risk here, given its refusal to extend the loss-of-a-chance doctrine elsewhere."   [[191]](#footnote-192)192The Tenth Circuit concluded that, "[b]ecause the homeowners pleaded no legally cognizable claim for relief, the district court properly dismissed their complaint under Rule 12(b)(6)."   [[192]](#footnote-193)193

The dispute presented in *Davilla v. Enable Midstream Partners L.P*.   [[193]](#footnote-194)194arose in connection with the expiration of a 20-year pipeline easement that covered certain Native American allotted lands in Oklahoma. Enable Intrastate Transmission, LLC owned and operated a natural gas pipeline that traversed the lands. After the easement expired, Enable did not remove the pipeline, but rather continued to operate it. Enable ultimately approached certain of the allottees and sought a new 20-year easement. It also applied to the Bureau of Indian Affairs (BIA) for approval of a new easement. However, Enable failed to obtain approval for the proposed new easement from the allottees of a majority of the equitable interests in the land, as required by applicable regulations. As a result, the BIA cancelled Enable's right-of-way application. As Enable continued to operate the pipeline, a large group of individuals who held certain rights in the subject lands (the Allottees) filed suit in federal court alleging that Enable was trespassing on their land. They asked the court to enter an injunction compelling Enable to remove its pipeline. The Allottees moved for summary judgment on the issues of liability for trespass and injunctive relief. The court granted the Allottees' motion. Enable appealed.

The Tenth Circuit found "that Enable lack[ed] a legal right to keep the pipeline in the ground."   [[194]](#footnote-195)195However, Enable argued that, even if the easement had expired, no duty to remove the pipeline ever arose since the Allottees never demanded that Enable remove it. The Tenth Circuit found that "Enable acquired the pipeline *already knowing* the right-of-way would eventually expire. It therefore cannot--and indeed does not--claim it lacked notice of its duty to remove or intent to maintain the trespass."   [[195]](#footnote-196)196The Tenth Circuit affirmed the district court's grant of summary judgment in favor of the Allottees.

The case of *Urban* ***Oil*** *& Gas Partners B-1 v. Devon Energy Production Co.*[[196]](#footnote-197)197presented a dispute over "ownership of certain 'deep formation' drilling rights in an ***oil*** and gas lease known as the 'Alig Lease.'" [[197]](#footnote-198)198The defendant "asserted an interest adverse to the plaintiffs in the deep formation rights." [[198]](#footnote-199)199After reviewing the complex conveyancing and title history, the court found that the essential issue presented was whether a prior 1991 assignment from Amoco to MW reserved to Amoco an interest in the ***oil*** and gas leasehold rights below 9,414 feet as a matter of law. Devon contended that the 1991 assignment unambiguously limited Amoco's assignment of the Alig Lease to the first 9,414 feet below the surface. However, the court disagreed. It found "no clear expression within any provision of the 1991 assignment that Amoco intended to limit, reserve or except any part of its interest in the mineral leasehold from its conveyance to MW." [[199]](#footnote-200)200The court of appeals agreed with the trial court that the 1991 assignment assigned Amoco's entire interest to MW Petroleum, without reservation. The court affirmed that ruling and further affirmed the trial court's award to the plaintiffs of attorney fees, costs and expenses under the Nonjudicial Marketable Title Procedures Act. [[200]](#footnote-201)201

*B. Administrative Developments*

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission's website. Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission's ***Oil*** & Gas Conservation Rules,   [[201]](#footnote-202)202were addressed in Cause RM No. 201900002. Following is a brief summary of the amendments that became effective on August 1, 2019:

OAC 165:10-1-2 was amended regarding definitions; OAC 165:10-1-4 to update the list of effective dates for OAC 165:10 rulemakings; OAC 165:10-1-7 to update the list of ***Oil*** & 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 165:10-3-4 concerning casing and cementing of wells; OAC 165:10-3-5 with respect to underground gas storage facilities; OAC 165:10-3-10 regarding hydraulic fracturing operations; OAC 165:10-3-10.1 is a new rule concerning notice of temporary lines that may be used to transport produced water; OAC 165:10-3-15 with respect to venting and flaring of wells; OAC 165:10-3-16 regarding operations in hydrogen sulfide areas; OAC 165:10-3-28 concerning horizontal drilling; OAC 165:10-5-5 with respect to applications for approval of enhanced recovery injection wells and disposal wells; OAC 165:10-5-6 regarding testing and monitoring requirements for enhanced recovery injection wells and disposal wells; OAC 165:10-5-7 concerning monitoring and reporting requirements for enhanced recovery injection wells, disposal wells and storage wells; and OAC 165:10-5-10 with respect to transfer of authority to operate enhanced recovery wells, saltwater disposal wells, commercial saltwater disposal wells and hydrocarbon storage wells.   [[202]](#footnote-203)203

In addition, OAC 165:10-7-5 was amended regarding reporting of nonpermitted discharges of deleterious substances; OAC 165:10-7-7 concerning informal complaints pertaining to alleged violations of Commission orders or OAC 165:10; OAC 165:10-7-16 with respect to use of noncommercial pits; OAC 165:10-7-19 regarding land application of water-based fluids from earthen pits, tanks and pipeline construction; OAC 165:10-7-20 concerning noncommercial disposal or enhanced recovery well pits used for temporary storage of salt water; OAC 165:10-7-24 with respect to waste management practices; OAC 165:10-7-26 regarding land application of contaminated soils and petroleum hydrocarbon based drill cuttings; OAC 165:10-7-33 concerning truck wash pits; OAC 165:10-9-1 with respect to operation of commercial pits; OAC 165:10-9-2 regarding commercial soil farming; OAC 165:10-9-3 concerning commercial disposal well surface facilities; OAC 165:10-9-4 with respect to operation of commercial recycling facilities; OAC 165:10-10-4 regarding determination of eligibility for the Brownfield Program; OAC 165:10-10-7 concerning the Commission's Brownfield Program site list, and OAC 165:10-11-6 was amended with respect to plugging and plugging back procedures for wells.   [[203]](#footnote-204)204

OAC 165:10-21-21, OAC 165:10-21-22, OAC 165:10-21-23, OAC 165:10-21-24, OAC 165:10-21-35, OAC 165:10-21-36, OAC 165:10-21-37, OAC 165:10-21-38, OAC 165:10-21-45, OAC 165:10-21-47, OAC 165:10-21-47.1, OAC 165:10-21-55, OAC 165:10-21-56, OAC 165:10-21-57, OAC 165:10-21-58, OAC 165:10-21-65, OAC 165:10-21-66, OAC 165:10-21-67, OAC 165:10-21-68, OAC 165:10-21-69, OAC 165:10-21-75, OAC 165:10-21-76, OAC 165:10-21-77, OAC 165:10-21-78, OAC 165:10-21-79, OAC 165:10-21-80, OAC 165:10-21-82, OAC 165:10-21-82.1, OAC 165:10-21-82.2, OAC 165:10-21-82.3, OAC 165:10-21-82.4, and OAC 165:10-21-85, in Subchapter 21, Applications for Tax Exemptions, were revoked in accordance with amendments to 68 O.S. § 1001 in Second Extraordinary Session, Enrolled House Bill No. 1010 (2018).   [[204]](#footnote-205)205

In addition, OAC 165:10-21-90 was amended regarding sales tax exemptions for electricity and associated delivery and transmission services sold for operation of reservoir dewatering projects and/or units pursuant to 68 O.S. § 1357; OAC 165:10-21-91 concerning reservoir dewatering projects in accordance with amendments to 68 O.S. § 1001 in Second Extraordinary Session, Enrolled House Bill No. 1010 (2018); OAC 165:10-21-92 with respect to qualification for sales tax exemptions for electricity and associated delivery and transmission services sold for operation of reservoir dewatering projects and/or units pursuant to 68 O.S. § 1357; OAC 165:10-21-95 regarding sales tax exemptions for electricity sold for operation of enhanced recovery methods on a spacing unit or lease pursuant to 68 O.S. § 1357; OAC 165:10-21-97 concerning qualification for sales tax exemptions for electricity sold for operation of enhanced recovery methods on a spacing unit or lease pursuant to 68 O.S. § 1357, and OAC 165:10-29-2 was amended with respect to alternative location requirements for horizontal well units.   [[205]](#footnote-206)206

Amendments to Title 165, Chapter 5 of the OAC, which comprises the Commission's Rules of Practice, were addressed in Cause RM No. 201900001. Following is a brief summary of the amendments that became effective on August 1, 2019:

OAC 165:5-1-4.1 was amended regarding open records requests; OAC 165:5-1-5 with respect to filing of documents; OAC 165:5-1-9 concerning telephonic and videoconferencing testimony; OAC 165:5-3-1 regarding fees; OAC 165:5-3-2 with respect to Petroleum Storage Tank Division fees; OAC 165:5-3-40 is a new rule concerning assessment of fees on wind energy facilities to provide funding to the Public Utility Division (PUD) in the execution of duties and responsibilities required by the Oklahoma Wind Energy Development Act, 17 O.S. § 160.11 et seq.; OAC 165:5-3-41 is a new rule regarding definitions pertaining to assessment of fees on wind energy facilities to provide funding to the PUD in the execution of duties and responsibilities required by the Oklahoma Wind Energy Development Act; OAC 165:5-3-42 is a new rule with respect to assessment of fees on wind energy facilities to provide funding to the PUD to implement the provisions of the Oklahoma Wind Energy Development Act, and OAC 165:5-3-43 is a new rule concerning assessment of fines and penalties against wind energy facilities that fail to pay required fees, which fees are to be used to provide funding to the PUD in the execution of duties and responsibilities required by the Oklahoma Wind Energy Development Act.   [[206]](#footnote-207)207

In addition, OAC 165:5-7-6.2 was amended regarding multiunit horizontal wells in targeted reservoirs; OAC 165:5-7-9 with respect to well location exceptions; OAC 165:5-7-20 concerning unitized management of a common source of supply; OAC 165:5-7-27 regarding applications for approval of enhanced recovery injection wells and disposal wells; OAC 165:5-7-29 with respect to applications for exceptions to underground injection well requirements; OAC 165:5-9-2 concerning subsequent pleadings, including dismissals; OAC 165:5-13-2 regarding setting of causes; OAC 165:5-13-3 with respect to hearings; OAC 165:5-13-3.1 concerning an optional procedure for spacing related applications; OAC 165:5-13-4 regarding Administrative Law Judge reports; OAC 165:5-15-1 with respect to Commission orders; OAC 165:5-21-1 concerning procedures for the Petroleum Storage Tank Docket, and OAC 165:5-21-3.1 was amended regarding applications for variances to Petroleum Storage Tank Division rules.   [[207]](#footnote-208)208

X. PENNSYLVANIA

*A. Legislative Developments*

The Pennsylvania Department of Environmental Protection's (DEP) Environmental Quality Board (EQB), which approves Pennsylvania's environmental regulations, gave preliminary approval to rules imposing limits on emissions of volatile organic compounds in December 2019. [[208]](#footnote-209)209The new regulations would require monthly and quarterly inspections of facilities for leaks. These requirements would apply to conventional ***oil*** and gas wells, unconventional wells, gas compressors, processing plants, and transmission stations (depending on their potential emissions). Natural gas processing plants would be required to have zero leaks in their pumps and pneumatic controllers if the regulations are passed. The proposed regulations will be open for public comment in 2020 before a final version is considered by the EQB.

*B. Judicial Developments*

In *Marcellus Shale Coalition v. DEP*,   [[209]](#footnote-210)210the Commonwealth Court considered a challenge by the Marcellus Shale Coalition to the DEP's September 2016 regulations concerning unconventional ***oil*** and gas wells in the Commonwealth. There have been a series of opinions with regard to those regulations, but this specific decision relates to rules requiring drillers to identify and monitor abandoned well sites within a certain distance of proposed sites, establishing standards for restoring well sites after drilling, setting new requirements for impoundments used in water storage, and increasing the frequency of required reporting submitted to the DEP. First, striking down the regulations with regard to abandoned wells, the court determined that the DEP "failed to identify any statutory authority to justify regulations that impose entry, inspection, and monitoring obligations with respect to wells on the lands of others and over which the stimulating well operator has no control . . . ."   [[210]](#footnote-211)211Next, the court concluded that while the DEP has the statutory authority to impose new standards on impoundments at well sites, it opined that it could not yet make a determination as to whether the regulation violated the Pennsylvania Constitution's prohibition of special laws, and permitted the case to move past summary relief on that claim.   [[211]](#footnote-212)212The court also granted, in part, the Coalition's challenge to the regulation setting forth standards for restoring well sites after drilling.   [[212]](#footnote-213)213In particular, the court struck the portion of the regulation requiring restoration of well sites to their approximate original condition within nine months, finding that the provision conflicted with the standards set forth in Act 13 permitting the time for restoration to be extended by up to two years. The court, however, declined to strike the entirety of the restoration regulations. The court also rejected the Coalition's claims with regard to waste reporting requirements, concluding that the regulation did not conflict with statutory authority as to production reporting.

On November 5, 2019, the Pennsylvania Environmental Defense Foundation (PEDF) filed a petition for review in the Pennsylvania Commonwealth Court's original jurisdiction challenging the State Forest Resource Management Plan (Plan) adopted by the Department of Conservation and Natural Resources (DCNR) in 2016.   [[213]](#footnote-214)214PEDF alleges that the Plan requires the DCNR to impermissibly balance the economic value of the ***oil*** and gas resources that are withdrawn from state land against the value of the ecosystem in which the wells are placed, including the value of the rights contained in the Environmental Rights Amendment, article I, section 27, of the Pennsylvania Constitution "to clean air, pure water, and the preservation of the natural, scenic, historic and aesthetic values of the environment."   [[214]](#footnote-215)215PEDF requests that the Commonwealth Court direct DCNR to fulfill its responsibilities as a trustee of the Commonwealth's natural resources under the Environmental Rights Amendment consistent with the Pennsylvania Supreme Court's 2017 decision in *PEDF v. Commonwealth*.   [[215]](#footnote-216)216

In *Mitch v. XTO Energy, Inc.*,   [[216]](#footnote-217)217a three-judge panel of the superior court determined that a well drilled horizontally below a landowner's property did not trigger a provision in his lease addendum that would entitle him to either run a gas line to the wellhead for his own personal use or take extra payments in lieu of the gas. The provision would only be triggered where a well was drilled "on the lease premises."   [[217]](#footnote-218)218Predominantly, the provision at issue was intended to compensate landowners for disruptions caused by well operations on their surface. Senior Judge Eugene Strassburger concluded that reading the lease and addendum as a whole, the "only reasonable interpretation of 'on the lease premises' is to mean on the surface of the lease premises."   [[218]](#footnote-219)219

In *McCready v. Dep't of Commerce & Economic Development*,   [[219]](#footnote-220)220the Commonwealth Court contemplated claims concerning a 1990 purchase by the Pennsylvania Turnpike Commission of a tract of land for a highway project. The deed transferring the land did not explicitly address the status of the subsurface rights. In 2012, Sarah O'Layer McCready, the landowner from whom the Turnpike Commission purchased the land, filed an action alleging that the deed's silence with regard to the subsurface rights indicates that she reserved the subsurface rights or, in the alternative, that she intended to reserve those rights and the Turnpike Commission owed her additional compensation for the subsurface rights. A three-judge panel of the Commonwealth Court rejected McCready's contentions. Writing for the court, Judge Michael Wojcik observed, "[a]s conceded by McCready in her complaint, there is absolutely no retention of the mineral rights by her through an exception or reservation that is stated in the deed."   [[220]](#footnote-221)221Accordingly, the court concluded that McCready neither reserved the subsurface rights nor did the Turnpike Commission owe her additional compensation.   [[221]](#footnote-222)222

In *Andarko Petroleum Corp. v. Commonwealth*,   [[222]](#footnote-223)223the Pennsylvania Attorney General brought actions against energy companies operating in northeast Pennsylvania alleging violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL). In particular, the Attorney General claimed that the companies made false promises to landowners concerning royalty and bonus payments by deducting post-production costs and other costs from the payments. The Attorney General also alleged that the companies were engaged in a joint venture to occupy the portion of the "Marcellus shale gas play" in northeast Pennsylvania so as to avoid competing offers to landowners in violation of antitrust protections under the UTPCPL.   [[223]](#footnote-224)224

In a 6-1 decision, an *en banc* panel of the Commonwealth Court concluded that even though the energy companies would be the "consumer" in these circumstances, the leasing of land for subsurface development fits within the definition of "trade or commerce" protected by the UTPCPL.   [[224]](#footnote-225)225The majority further opined that the UTPCPL may protect against monopolistic activity, but the protections are not as expansive as those under federal law and, in order for the claims to remain viable, the complaint must allege specific monopolistic behavior that has been defined as "unfair methods of competition" or "unfair or deceptive acts or practices" by the legislature or the Attorney General through the rulemaking process. The court determined that entering into a joint venture did not intrinsically constitute an unfair method of competition or unfair or deceptive act or practice, as suggested by the Attorney General, nor was it defined as such in the UTPCPL. Therefore, the Attorney General's antitrust claim was dismissed in that regard. However, the court further concluded that where the Attorney General averred that the energy companies deceived lessors with regard to whether their leases were competitive and fair, allegedly committing an antitrust violation under the UTPCPL, the claim could survive preliminary objections.   [[225]](#footnote-226)226The Pennsylvania Supreme Court has granted allowance of appeal.   [[226]](#footnote-227)227

In *In re Appeal of Penneco Environmental Solutions, LLC*,   [[227]](#footnote-228)228Environmental Solutions, LLC (Penneco) sought to convert an ***oil*** and gas well it operated in Plum Borough into a disposal well for storing wastewater from drilling operations. After applying for the required EPA permits for the project, Penneco filed a petition with Plum challenging its local land-use ordinance, arguing that the ordinance improperly excludes the operation of injection wells in all districts and is preempted by federal and state law.   [[228]](#footnote-229)229Plum's Zoning Hearing Board dismissed Penneco's challenge, concluding that it would not be ripe until Penneco obtained all necessary permits from the EPA and the DEP. A unanimous panel of the Commonwealth Court rejected this position, noting that in order to obtain a permit from the DEP, Penneco was required to demonstrate that it complied with all local ordinances. Further, the court opined that Penneco alleged that the ordinance did not permit the proposed use on its face, and so Penneco's substantive validity challenge was sufficiently developed for review by the Board.   [[229]](#footnote-230)230

In *EQT Production Co. v. Jefferson Hills*,   [[230]](#footnote-231)231EQT and ET Blue Grass Clearing, LLC, an affiliate of EQT (collectively EQT) filed a conditional use application with the Borough of Jefferson Hills, seeking to construct, operate, and maintain the first unconventional gas well site complex in the Borough.   [[231]](#footnote-232)232The Borough held a public hearing on the application at which eight objectors testified in opposition.   [[232]](#footnote-233)233Three of the objectors were residents of Union Township, adjoining township, where EQT has operated an unconventional natural gas well site since 2007 (Trax Farm).   [[233]](#footnote-234)234Another objector had recently moved to the Borough from Union Township, where he lived in close proximity to the Trax Farm well site. These four objectors testified to their personal experiences living in close proximity to Trax Farm, including their perceptions that the well site had negative impacts on them and the environment. The Borough denied EQT's application and credited the objectors' testimony, including the testimony of the Union Township objectors and EQT appealed to the Court of Common Pleas of Allegheny County, which reversed.   [[234]](#footnote-235)235The trial court concluded that the objectors' testimony of potential harms was too speculative, including the testimony regarding the four objectors' personal experiences of the Trax Farms site. The Commonwealth Court affirmed.   [[235]](#footnote-236)236The Pennsylvania Supreme Court vacated the Commonwealth Court's holding in a 6-1 decision, and remanded to that court with instructions to remand the matter to the trial court to reconsider its decision.   [[236]](#footnote-237)237The majority concluded that the objectors' testimonies detailing their personal experiences with the Trax Farm well site were relevant and probative where the entirety of the evidence presented established that the Trax Farm well site was of a similar nature to the proposed well site at issue.   [[237]](#footnote-238)238As such, it was proper for the Borough to receive and rely upon the testimony, and the Commonwealth Court "improperly characterized this firsthand experiential evidence as 'speculative.'"   [[238]](#footnote-239)239Justice Sallie Mundy dissented stating, "The Objectors presented no evidence that EQT's ***oil*** and gas operations at the Bickerton well site would have any effect on the community other than those normally associated with such activities. Instead, they presented speculative objections of a kind that courts have deemed insufficient to grant relief."   [[239]](#footnote-240)240

In *Briggs v. Southwestern Energy Production Co.*, the plaintiffs claim that Southwestern Energy Production Company trespassed on their property by extracting gas from their 11-acre parcel through drilling and hydraulically fracturing a well on a nearby property.   [[240]](#footnote-241)241The trial court granted summary judgment in favor of Southwestern, citing the rule of capture. The Pennsylvania Superior Court, however, found that the rule of capture does not apply to hydraulically fractured wells. The case is now before the Pennsylvania Supreme Court, where oral arguments were heard in September. At oral argument, Southwestern's counsel argued that the case should be dismissed because the plaintiffs cannot prove that the produced gas came from their property specifically, and further cannot prove that Southwestern's fracking proppants crossed property lines. Plaintiffs' counsel compared fracking to slant drilling, for which the rule of capture does not absolve liability, in arguing that Southwesthern consciously injected proppants into the plaintiffs' property to extract gas without consent. Further, the plaintiffs' counsel argued that the landowners can prove trespass through expert testimony that the defendant drillers knew where the wells were located relative to the property lines and could estimate how far fracking fluid and proppants travel. This decision, which is still pending, may have serious impacts on litigation in the ***oil*** and gas industry.

In *In re PennEast Pipeline Co.*, PennEast Pipeline Company (PennEast) had initiated an eminent domain action pursuant to the Natural Gas Act (NGA) to allow it to acquire property interests necessary for a pipeline being built through Pennsylvania and New Jersey.   [[241]](#footnote-242)242PennEast sought condemnation orders for easements across properties along the pipeline route, and 42 of those properties were owned by New Jersey. New Jersey objected to the taking, invoking its Eleventh Amendment immunity. PennEast argued that they were vested with eminent domain power through the federal government and therefore the Eleventh Amendment immunity did not apply.   [[242]](#footnote-243)243The Third Circuit ultimately upheld the State's argument and found that the federal government cannot delegate its exemption from immunity to private parties, as the language of the NGA does not unambiguously show that Congress intended it.   [[243]](#footnote-244)244Moreover, pipeline companies may now have difficulty using eminent domain to acquire easements across state lands in certain jurisdictions.

In *Orion Drilling Co. v. EQT Prod. Co.*, the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's motion for a new trial and motion for judgment as a matter of law following a jury verdict in favor of EQT for breach of contract claims.   [[244]](#footnote-245)245The court held that the trial evidence was sufficient for the jury to conclude that EQT did not breach the drilling contracts when it terminated the deals early because the drilling rigs made by Orion had safety issues.   [[245]](#footnote-246)246The court also found that there was sufficient trial evidence to support the jury's conclusion that Orion breached the contracts for safety violations.   [[246]](#footnote-247)247Orion failed to meet the high burden required to overturn a jury verdict.   [[247]](#footnote-248)248Further, the court granted EQT's motion for attorney fees and costs per a provision in the contracts, leaving Orion responsible for over $ 2.7 million in fees and costs.   [[248]](#footnote-249)249

In *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, the Pennsylvania Superior Court affirmed a trial court's grant of summary judgment, holding that leases were abandoned by the defendant drilling company.   [[249]](#footnote-250)250The habendum clause in the leases provided that the leases had a primary term of five years, "and for as long thereafter as ***oil*** or gas . . . can be produced in paying quantities."   [[250]](#footnote-251)251Further, the leases stated that if the drilling company fails to meet its drilling obligations, the lease is terminated, but the drilling company shall retain 20 acres surrounding the wells that are capable of producing.   [[251]](#footnote-252)252Amendments to the leases later reduced the acreage to five acres. The court explained that the record established no shut-in payments were paid to the appellees under the leases and ***oil*** and gas were not produced in paying quantities for over 25 years. Due to this failure to maintain their drilling commitment or make any delay rental payments, the court found that the leases had been abandoned.   [[252]](#footnote-253)253Further, the court held that the drilling company has no rights to the acreage surrounding the wells.   [[253]](#footnote-254)254The court reasoned that since the leases were abandoned, any right to enter the property was also extinguished.

In *Northeast Natural Energy LLC v. Larson*, the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's motion to vacate and dismiss the suit on jurisdictional grounds.   [[254]](#footnote-255)255The court had initially concluded that subject matter jurisdiction existed due to diversity of citizenship, and issued an order confirming an arbitration award of over $ 7.8 million against the plaintiff under the Federal Arbitration Act.   [[255]](#footnote-256)256Less than three weeks after the order regarding the arbitration award was issued, the plaintiff asked the court to vacate the order and dismiss the lawsuit because the court lacked subject matter jurisdiction over the case. The plaintiff, a limited liability company, alleged that it was composed of two limited liability companies that had members that were citizens of the states of defendants to the suit. However, the plaintiff presented no evidence in support of its contention and the state records of West Virginia, where the plaintiff company was organized, showed that no members were limited liability companies.   [[256]](#footnote-257)257The plaintiff failed to identify the LLCs that were alleged members, the members of the LLCs and their citizenships, or the dates the LLCs became members. Accordingly, the court held that the plaintiff's mere allegation that the court lacks diversity of citizenship is insufficient to establish a lack of jurisdiction. The court denied the defendant's motion for sanctions for bad faith and vexatious conduct because the plaintiff had a right to challenge subject matter jurisdiction at any time.   [[257]](#footnote-258)258

In *Sunoco Pipeline L.P. v. Dinniman*, a state senator filed a complaint with the Public Utility Commission seeking an injunction to halt the operation of one pipeline and construction of two other pipelines in the township he represents, claiming that the pipelines were creating sinkholes and water contamination throughout the township. [[258]](#footnote-259)259The Public Utility Commission granted an injunction as to the construction of the two pipelines. [[259]](#footnote-260)260However, the Commonwealth Court reversed this decision, holding that the senator lacked standing. [[260]](#footnote-261)261The court reasoned that to have personal standing to pursue claims before the Public Utility Commission, the complainant must demonstrate that he is aggrieved by showing he has a "direct, immediate, and substantial interest in the subject matter of the controversy" and has been negatively impacted in some real way. [[261]](#footnote-262)262The court found that the senator failed to meet this burden. Notwithstanding the senator personally resided in the township two miles away from the pipelines, the construction of the pipelines had no adverse effects on his property or water. Accordingly, there was insufficient evidence to show that the construction harmed his person or his property, and thus he lacked personal standing to bring the claims. In addition, the court held that the senator lacked legislative standing because his complaint did not allege any injury to his ability to act as a legislator or vote for or against legislation as required to prove such standing. [[262]](#footnote-263)263

*C. Administrative Developments*

Governor Tom Wolf again unsuccessfully introduced a plan to create a severance tax on ***oil*** and natural gas production. The proposed tax rates in Senate Bill 725 and House Bill 1585 doubled from those introduced last year, and would have ranged from 9.1 to 15.7 cents per 1,000 cubic feet of natural gas.

XI. TEXAS

*A. Judicial Developments*

In *HJSA No. 3, Ltd. P'ship v. Sundown Energy LP*,   [[263]](#footnote-264)264the court of appeals interpreted the meaning of continuous drilling program language used in a lease. The lease contained two relevant provisions:

P 7(b). The first such continuous development well shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and commencement of drilling operations on the next ensuing well.

P 18. Whenever used in this lease the term "drilling operations" shall mean: actual operations for drilling, testing, completing and equipping a well (spud in with equipment capable of drilling to Lessee's object depth); reworking operations, including fracturing and acidizing; and reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well.   [[264]](#footnote-265)265

The lessor, HJSA No. 3, Limited Partnership, contended that pursuant to paragraph 7(b), the lessee, Sundown Energy LP, "was required to spud-in a new well in a non-producing area within 120 days of completion or abandonment of a prior well to maintain the lease in the areas not held by production."   [[265]](#footnote-266)266Sundown argued that the definition of "continuous drilling" in Paragraph 18 controlled and should be applied to paragraph 7(b). The court held that Sundown was required to engage in a continuous development program to maintain the lease under Paragraph 7(b) and that program required Sundown to spud in a continuous development well within 120 days of completion or abandonment of a prior well, reasoning that the specific provisions in Paragraph 7(b) control over the general provisions in Paragraph 18.

In *Endeavor Energy Resources, L.P. v. Energen Resources Corp.*,   [[266]](#footnote-267)267the court of appeals considered whether the continuous-development clause (CDC) of an ***oil*** and gas lease should be interpreted to allow unused days to extend any subsequent well-drilling term under the program or only the directly succeeding term. The CDC provided in relevant part, "[l]essee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the *next allowed* 150-day term between the completion of one well and the drilling of a subsequent well."   [[267]](#footnote-268)268The issue was whether the days only carried forward to the next well or if such extension could be accumulated across multiple wells. The court held that "next allowed" in the continuous-development provision meant immediately following in time, and held that unused days could only roll over from the immediately preceding to the immediately following term. The court rejected the lessee's argument that such an interpretation would render the words "accumulate" and "extend" meaningless, reasoning that Endeavor still had the ability to accumulate unused days to extend the next 150-day well term.   [[268]](#footnote-269)269

In *Barrow-Shaver Resources Co. v. Carrizo* ***Oil*** *& Gas, Inc.*,   [[269]](#footnote-270)270Carrizo entered into a farmout agreement with Barrow-Shaver Resources Co., which provided that the rights provided to Barrow-Shaver under the Farmout Agreement could not be "assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo."   [[270]](#footnote-271)271Barrow-Shaver agreed to this provision after reassurance on more than one occasion that Carrizo would provide its consent to assign. Eventually, Barrow-Shaver wanted to assign its interest in the farmout. When Carrizo refused to provide consent unless Barrow-Shaver paid Carrizo $ 5 million, Barrow-Shaver filed suit, alleging breach of contract and fraud. Barrow-Shaver contended that the provision must be construed to mean that consent cannot be unreasonably or arbitrarily withheld and that Carrizo's refusal to consent was for an "illegitimate" reason and that it was inconsistent with industry custom. Rejecting this argument, the court held that the consent-to-assign provision unambiguously provided Carrizo with the unrestricted right to withhold consent.

In *Sojitz Energy Venture, Inc. v. Union* ***Oil*** *Co. of California*,   [[271]](#footnote-272)272the court addressed the allocation of decommissioning liability with respect to the defendant Union ***Oil***, who was the sole lessee and record title owner of two properties located in the Outer Continental Shelf (the Properties), and Sojitz. Union ***Oil*** assigned shallow operating rights to the Properties to ATP, pursuant to which ATP agreed to assume all costs of decommissioning and to indemnify Union ***Oil*** for all liability associated with its operations. Subsequently, ATP assigned 20% of its shallow operating rights in the Properties to Sojitz, which the court interpreted to mean that Sojitz acquired 20% of decommissioning liability. Thereafter, Sojitz reassigned its 20% shallow operating rights in the Properties back to ATP, pursuant to which Sojitz paid consideration for ATP to assume all of Sojitz's duties and obligations and to release Sojitz from any liability for plugging and abandonment. After ATP filed for bankruptcy, the Bureau of Safety and Environmental Enforcement sent a letter ordering both Sojitz and Union to decommission the Properties. Sojitz paid the entire cost of decommissioning the Properties. Based on the foregoing, Sojitz filed suit against Union asserting claims for equitable subrogation and a declaratory judgment, among other claims.

Ultimately, the court held that Sojitz could recover 100% of the decommissioning costs from Union. While both Union and Sojitz had an obligation to the government, Sojitz contracted around its liability, which, as the court explained, it was permitted to do: "The regulations govern the parties' joint and several liabilities vis-à-vis the government, not amongst themselves. [P]arties will always be jointly and severally liable to the government for the cost of decommissioning, no matter what their contract provides, but they are free to reallocate the sharing of costs among themselves in their contract."   [[272]](#footnote-273)273Because Sojitz was contractually released, only ATP, and secondarily Union, remained liable to pay for decommissioning. Accordingly, Sojitz paid a debt for which Union was primarily liable when Sojitz paid for the decommissioning of the Properties, and, as a result, Sojitz was entitled to recover 100% of the decommissioning costs from Union.

In *Glassell Non-Operated Interests, Ltd. v. EnerQuest* ***Oil*** *& Gas, L.L.C.*,   [[273]](#footnote-274)274the U.S. Court of Appeals for the Fifth Circuit applied Texas law and held that a party to an AMI agreement did not breach the agreement by refusing to offer certain interests within the AMI to the other parties to the AMI agreement. In this case, a group of ***oil*** companies entered into an AMI Agreement to cooperatively develop ***oil*** and gas prospects in Texas. Under the AMI Agreement, if a party acquired any ***oil*** and gas interest within the AMI area, the AMI Agreement required the buyer to offer a *pro rata* share of such interests to the other parties to the agreement. Any interest owned by a party within the AMI area before the effective date of the AMI Agreement, however, was excluded from the agreement. One of the companies, EnerQuest ***Oil*** & Gas, L.L.C., bought an interest in the AMI area from two other parties to the agreement, and those parties had owned those interests prior to the effective date of the agreement. When EnerQuest refused to offer a *pro rata* share of those interests to other parties to the AMI Agreement, the other parties filed suit seeking their share of the interests acquired by EnerQuest. The court held that EnerQuest did not breach the AMI Agreement because the agreement excluded interests already owned by parties prior to its effective date. Because EnerQuest's sellers were parties to the AMI Agreement and because they had owned those interests prior to the effective date of the AMI Agreement, EnerQuest was under no obligation to offer any portion of those interests to the other parties.

In *Texan Land & Cattle II, Ltd. v. ExxonMobil Pipeline Co.*,   [[274]](#footnote-275)275the court of appeals held that by transporting gasoline and diesel through a pipeline, a pipeline operator did not breach a 1919 easement agreement that authorized the transportation of "***oil*** or gas" only. After collecting definitions from various dictionaries written contemporaneously with the relevant agreement, and noting that they broadly contemplated constituent substances of crude ***oil*** and natural gas, the court concluded that the agreement authorized the transportation of gasoline and diesel.

In *Murphy Land Group, LLC v. Atmos Energy Corp.*,   [[275]](#footnote-276)276Murphy owned 48 acres in Houston County, Texas. The land was burdened by three easements that granted Atmos the right-of-way and easement to construct, maintain, and operate pipelines and appurtenances thereto along with ingress to and egress from the premises, for the purpose of constructing, inspecting, repairing, maintaining, and replacing the property of Lone Star and its successors. In May 2012, Murphy granted Atmos a road lease, which included the right-of-way and easement to construct and maintain a roadway 40 feet in width, on a route to be selected by Atmos, together with the right in Atmos to free and uninterrupted use, liberty, privilege and easement in, on and over said roadway to extend on, over, through and across Murphy's 48-acre tract. The road lease expired in May 2015. Murphy believed the pipeline easements merged into the road lease when the parties signed the road lease, and that those easements ceased to exist as independent interests in land. After Atmos entered the land under the pipeline easement to conduct pipeline maintenance, Murphy sued Atmos for injunctive relief and damages.

The court noted that the "merger doctrine" in contract cases refers to the absorption of one contract into another, later contract between the same parties. Before one contract can merge into another, the plaintiff must prove that (1) the contracts are between the same parties, (2) the later contract involves the same subject matter as the prior contract, and (3) the parties intended a merger to result. The court held that the two contracts did not cover the same subject matter, so no merger occurred. Namely, the easement agreements granted the permanent right to operate and maintain pipeline easements, while the road lease granted Atmos the right to build a road of a specified width, for any purpose, during a limited time period.

In *Burlington Resources* ***Oil*** *& Gas Co. v. Texas Crude Energy, LLC*,   [[276]](#footnote-277)277the court interpreted granting and valuation clauses in an overriding royalty assignment to determine whether post-production costs were deductible from that royalty. The granting clause provided for in-kind delivery of the royalty "into the pipelines, tanks or other receptacles with which the wells may be connected," while the royalty valuation clause provided for royalty to be paid on the "amount realized" for the sale of the product.   [[277]](#footnote-278)278The court held that the "into the pipelines" language indicated that Texas Crude's royalty interest was valued at the wellhead, and thus post-production costs could be deducted from the royalty payment. The court rejected Texas Crude's argument that the "amount realized from such a sale" language in the valuation clause meant that the royalty should be paid on the price received for the product at market.

*BlueStone Natural Resources II, LLC v. Randle*   [[278]](#footnote-279)279involved the allocation of post-production costs between parties to various ***oil*** and gas leases. The leases had two components. The first component was the lease itself (the Printed Lease), and the second component was a three-page exhibit (Exhibit A) attached to the lease. The Printed Lease contained a royalty clause that provided a royalty on gas based on "the market value at the well." Exhibit A, however, contained two important provisions. First, the introductory paragraph of Exhibit A stated that the Exhibit A superseded any provisions to the contrary in the Printed Lease. Second, paragraph 26 of Exhibit A provided for a method of calculating royalties and specifically stated:

LESSEE AGREES THAT all royalties accruing under this Lease (including those paid in kind) shall be without deduction, directly or indirectly, for the cost of producing, gathering, storing, separating, treating, dehydrating, compressing, processing, transporting, and otherwise making the ***oil***, gas[,] and other products hereunder ready for sale or use. Lessee agrees to compute and pay royalties on the gross value received, including any reimbursements for severance taxes and production related costs.   [[279]](#footnote-280)280

The court first analyzed the royalty clause in the Printed Lease, finding that the language "at the well" acts as a clear indication that the lessor must pay post-production costs. However, when the court analyzed Exhibit A, it found that the language created a "pure-proceeds" measure of royalty that alters the burden and causes the lessee to pay post-production costs. Because the Printed Lease and Exhibit A were clearly in conflict, and Exhibit A stated that it superseded the Printed Lease when the terms conflict, the court held that Exhibit A superseded, and thus, the lessee was required to pay the post-production costs.

In *Cimarex Energy Co. v. Anadarko Petroleum Corp.*,   [[280]](#footnote-281)281the court held that production by a cotenant on a lease does not perpetuate the lease for a non-participating cotenant in the absence of specific language to the contrary. Cimarex leased an undivided 1/6th mineral interest in a tract of land on which Anadarko subsequently acquired the remaining undivided 5/6th interest. During the primary term of Cimarex's lease, Anadarko drilled two wells on the premises without offering Cimarex the opportunity to participate in operations and without paying Cimarex's cotenant share of net proceeds. Cimarex sued, the parties settled, and Anadarko then paid Cimarex's share of net proceeds on the wells until the primary term of Cimarex's lease expired. When Cimarex sued Anadarko again, the court determined that Cimarex's failure to establish its own production extinguished its leasehold interest after the primary term expired. Invoking precedent in which other courts repeatedly construed leases as requiring the lessee itself to cause production, the court rejected Cimarex's arguments that it was entitled to rely on Anadarko's production to extend its own lease into the secondary term. The court also disagreed that the parties' original settlement functioned as a joint operating agreement, noting the failure of the agreement to designate an operator. The court also determined Anadarko was not estopped from asserting that the primary term had ended based on the original lessor's acceptance of royalties from Cimarex during the primary term.

In *Archer v. Tregellas*,   [[281]](#footnote-282)282the Texas Supreme Court analyzed the notice provision of a right of first refusal. Members of the Cook family executed a warranty deed to convey the surface estate of a tract of land in Hansford County, Texas to the trustees of the Carl M. Archer Trust No. Three and the Mary Frances G. Archer Trust No. 3. The Cooks retained the mineral interest underlying the tract, but they granted the Trustees a right of first refusal to purchase the mineral interest in the event they intended to sell their interest. Later, the Cooks executed a mineral deed conveying their interest in the aforementioned tract. Before executing the mineral deed, however, the Cooks did not offer the minerals to the Trustees as required by the right of first refusal. The Trustees did not learn of the conveyance until four years later and sued the grantee seeking specific performance. The Texas Supreme Court held that the grantee of the mineral interest that does not have actual or constructive notice of the right of first refusal stands in the shoes of the original seller, the Cooks, when the rightholder seeks specific performance. The court further held that the four-year statute of limitations certainly applied, but refused to hold that rightholders should continually monitor the public records to ensure that their interest is not impaired. As a result, when a grantor conveys property subject to a right of first refusal without first offering the property to the rightholder, such a sale is inherently undiscoverable. Therefore, the discovery rule defers accrual of the rightholder's claim until the rightholder knew or should have known of the injury.

*Verde Minerals, LLC v. Burlington Resources* ***Oil*** *& Gas Co*.   [[282]](#footnote-283)283centered on the distinction between mineral and royalty deeds. The relevant language granted a surface estate, but at issue was language purportedly granting:

[S]uch an undivided interest in an undivided one-half of any and all ***oil***, gas or minerals that may be found to be in, under or upon any part of said tract of 2,092 acres . . . as the number of acres purchased by said [grantee] bears to the entire number of acres in said tract.   [[283]](#footnote-284)284

The deed further specified:

[C]onsideration paid for said above described land is in payment only for the ownership thereof, exclusive of the ownership of any and all ***oil***, gas, minerals, mineral ***oils***, mineral paints, fossils or ores that may be in or upon said land, except as an interest therein is granted in the grant of an undivided interest in one-half of the ***oil***, gas, or minerals that may be found on the 2,092.08 acres . . . and that the ownership of all such ***oil***, gas or minerals, mineral ***oils***, mineral paints, fossils or ores that may be in, upon, or under said land is not sold, paid for, or conveyed to said second party, and that said ownership is retained by said first party and his grantors.   [[284]](#footnote-285)285

Finally, the deed specified that the grantor:

[C]ovenants on behalf of himself, his heirs, executors, administrators and assigns, that he will deliver and pay to said party of the second part; his heirs or assigns, such proportion of all moneys that may be received by him for one-half of all ***oil***, gas or minerals that may be found by said first party upon said entire tract and sold by him, after paying the expenses of refining, marketing, shipping, storing and other necessary expense on same, as the number of acres conveyed to said party of the second part bears to the entire number of acres . . . .   [[285]](#footnote-286)286

While the plaintiff argued that the deed conveyed mineral interests, the court held that the deed merely granted a royalty interest. The court reasoned that, despite the language conveying "an undivided interest" in the mineral estate, the instrument must be considered in its entirety and subsequent deed language clarified that the undivided interest is merely an interest in royalties produced. The court then construed the deeds to grant a floating royalty despite the defendants' assertion that the use of the word "covenant" and lack of "royalty" created an unenforceable personal covenant. The court reasoned that such language was common in the early-twentieth century to convey a royalty interest and that the creation of a royalty interest did not require the use of the word "royalty" in the conveyance.

In *Yates Energy Corp. v. Broadway National Bank*,   [[286]](#footnote-287)287the court of appeals considered the validity of an amended correction deed executed solely by the original parties despite contemporaneous interests of an original party's successors and assigns at the time of correction. The court interpreted section 5.029 of the Texas Property Code, which requires a correction instrument to be "executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, if applicable, a party's heirs, successors, or assigns."   [[287]](#footnote-288)288Appellee argued that by its plain language the statute allows a correction instrument to be signed by either the original parties to the deed, or if an original party is unavailable, the party's heirs, successors, or assigns. Nevertheless, the court held that the assignment or conveyance of an interest by an original party triggers the "if applicable" requirement that the correction instrument be signed by successors in interest. The court reasoned that simply allowing a choice between the first and second options would render the conditional clause "if applicable" meaningless.

In *OBO, Inc. v. Apache Corp.*,   [[288]](#footnote-289)289the court was required to distinguish being a "Unit Operator" from just having operator duties. OBO and Permian Basin Joint Venture (PBJV) both owned a working interest in a West Texas unit, with PBJV owning the majority. The unit's governing documents required the "Unit Operator" to be a working interest owner; PBJV was designated as the Unit Operator and then delegated certain operator duties to Apache. OBO failed to pay its portion of operating expenses to Apache, resulting in Apache and PBJV both filing suit against OBO. OBO argued it was not obligated to pay Apache because Apache was not permitted to act as the Unit Operator since it did not own a working interest. However, the court found OBO was required to pay Apache for operating expenses. OBO was mistaken in believing Apache was acting as the Unit Operator; instead, the Unit Operator PBJV had simply contracted with Apache to provide operator services, meaning OBO still had an obligation to pay Apache. OBO also attempted to countersue Apache for breach of contract and gross negligence based on Apache's breaches of the Unit Operating Agreement, however, Apache was not a party to the Unit Operating Agreement and the court of appeals affirmed the trial court's summary judgment in favor of PBJV and Apache on all issues.

In *Occidental Energy Marketing, Inc. v. West Texas LPG Pipeline L.P.*,   [[289]](#footnote-290)290an energy marketing company, Occidental Energy Marketing Company (Oxy), sued the pipeline operator, West Texas LPG Pipeline L.P. (West Texas), over whether adjustments to gas volume included adjustments for component imbalance. West Texas owns a pipeline that transports natural gas liquids (NGLs), and operates the pipeline as a common carrier. The tariff West Texas filed with the Railroad Commission of Texas contained the rates West Texas charges and the terms and conditions for transporting NGLs on the pipeline. Oxy ships NGLs on West Texas's pipeline and claimed West Texas violated its tariff for failure to deliver Oxy's consignee a volume of "NGL Mix." Under the tariff, West Texas is obligated to deliver a volume of Mix equal to the net volume of receipts less adjustments provided therein, which West Texas argued included component imbalances. When West Texas delivered a volume of NGLs to the consignee that was less than the volume of NGLs that Oxy nominated for delivery, West Texas argued this component imbalance fell under the definition of "adjustments provided herein." The court disagreed and reversed the trial court's summary judgment in favor of West Texas for Oxy's breach of contract claim.

In *Texas Outfitters Ltd. v. Nicholson*,   [[290]](#footnote-291)291the Texas Supreme Court clarified when an executive breaches its duty to a non-executive. Texas Outfitters, the executive, refused to lease after receiving multiple lease offers despite knowing that the Carters, the non-executives, wanted their interest leased. The court held that Texas Outfitters breached its duty of utmost good faith and fair dealing by refusing the lease offers. The court noted that while an executive duty breach inquiry is necessarily fact dependent, the unfair self-dealing standard laid out in *KCM Financial LLC v. Bradshaw*   [[291]](#footnote-292)292controlled. That is, the executive breaches its duty by engaging in acts of self-dealing that unfairly diminish the value of the non-executive interest. The court reasoned that Texas Outfitters chose to reap the benefits of an undeveloped surface to the detriment of the non-executive. Furthermore, the harm from refusing the lease offers was not limited to lost bonuses from one lease. Rather, the refusal unfavorably affected a pool of potential lessees. The court found that there was some evidence that Texas Outfitters engaged in self-dealing.

*Bell v. Chesapeake Energy Corp*.   [[292]](#footnote-293)293involved the amount of compensatory royalty due under the terms of an offset-well clause under ***oil*** and gas leases. Chesapeake drilled wells within the distance established by the leases' offset well provisions as triggering Chesapeake's offset well obligation. The dispute focused on whether compensatory royalties were due on all production from the entire length of the wellbores, or only those portions of the wellbores that were within the distance established by the offset well clauses. Based on the plain language of the leases, the court concluded that compensatory royalties were due on all production from the adjacent wells, even on portions of the wellbores that were not within the distance prescribed by the offset well clause as triggering the compensatory royalty obligation.

XII. WEST VIRGINIA

*A. Legislative Developments*

The 2019 West Virginia legislature approved HB 2673, [[293]](#footnote-294)294a bill that would create a fund for plugging abandoned ***oil*** and gas wells. In recent years, abandoned and unplugged gas wells in West Virginia have become a prevalent issue across the state--though some of the "orphaned wells" are over 100 years old. HB 2673, a high priority for the industry, would have eliminated the severance tax for wells producing less than 60 Mcf per day. The money previously paid in severance tax would instead be directed to a new fund designated for plugging abandoned wells. However, Governor Jim Justice vetoed the bill citing "technical" problems and that the funds for plugging the abandoned wells should come from general revenue instead of through elimination of severance tax for low-producing wells. The governor and the legislature intended to "fix" the technical issue during one of the special legislative sessions. However, because no further action was taken during said sessions, this may be an issue to look out for in future legislative sessions.

*B. Judicial Developments*

In *EQT Production Co. v. Crowder*,   [[294]](#footnote-295)295the West Virginia Supreme Court of Appeals affirmed a grant of summary judgment holding that although a mineral owner or lessee has an implied right to use the surface of a tract in any way reasonable and necessary to the development of minerals underlying said tract, said mineral owner or lessee does not have the implied right to use the surface to benefit mining or drilling operations on other lands.

Plaintiff surface owners filed suit against EQT Production Company (EQT) alleging that although EQT had the right to enter and reasonably use their surface land pursuant to a 1901 ***oil*** and gas lease (the Lease) to extract natural gas from a 351-acre parent tract (the Parent Tract), the Lease did not grant that right concerning neighboring properties not covered by the Lease. Plaintiffs then filed a motion for partial summary judgment asserting that there was no genuine issue of material fact that EQT had trespassed on their surface tracts to extract natural gas from neighboring properties. EQT then filed its own motion for summary judgment asserting among many arguments that horizontal drilling was reasonable and necessary for natural gas production in the shale formations under the Parent Tract; thus, it was reasonable and necessary to extend that drilling under neighboring properties to produce natural gas from beneath those properties. The circuit court granted the plaintiffs' motion and denied EQT's motion, and EQT appealed.

On appeal, the West Virginia Supreme Court of Appeals affirmed the grant of summary judgment by the circuit court.   [[295]](#footnote-296)296The court recognized the implicit right of the owner of the mineral estate to use the surface estate overlying the minerals to access and remove those minerals, but only to the extent those uses are demonstrably reasonable, necessary, and can be exercised without substantial burden on the surface owner. However, that implicit right only applies to that specified tract of land and does not extend to benefit mining or drilling on adjacent, adjoining, or other tracts of land. The court ruled such additional burdens on the surface estate to conduct drilling or mining operations under neighboring lands are considered to be trespass, and must be expressly obtained, addressed, or reserved in the parties' deeds, leases, or other writings.

In *Andrews v. Antero Resources Corp.*,   [[296]](#footnote-297)297the West Virginia Supreme Court of Appeals affirmed, in a 3-2 decision, a grant of summary judgment ruling that the lessee's activities to develop its mineral estate were reasonably necessary and were carried out without substantial burden to property owners.

Various surface owners of several tracts of land (the Property Owners) filed a complaint alleging claims for nuisance and negligence against Antero Resources Corporation (Antero) and its contractor, contending that their use and enjoyment of their land was being improperly and substantially burdened by activity caused by the horizontal wells being used to develop the Marcellus shale underlying their properties, even though the wells were not physically located on their properties. After the circuit court transferred the claims to the Mass Litigation Panel (MLP), Antero and its contractor filed motions for summary judgment. The Property Owners responded and voluntarily withdrew their negligence claim, leaving only their nuisance claim. However, the MLP in its summary judgment order declined to apply principles of nuisance law, and instead ruled on the summary judgment motions based upon Antero's contractual and property rights, ruling that the Property Owners' grievances were reasonable and necessarily incident to Antero's development of the underlying minerals.

On appeal, the West Virginia Supreme Court of Appeals first addressed the Property Owners' contention that a mineral owner does not have the right to extract natural gas using methods that were uncontemplated when the operative severance deeds were executed.   [[297]](#footnote-298)298After recognizing the implied right of reasonable use of surface includes the evolution of technology over time, the court distinguished that right from the Property Owners' arguments, which relied on case law where the court previously rejected implied rights to methods of removing minerals that caused complete destruction of the surface. The court also noted that the Property Owners did not fulfill their burden of proving any damage, let alone complete destruction, of their surface estates. The court then balanced the rights of surface and mineral owners in relation to implied uses of the surface estate. Utilizing this balancing test to review whether summary judgment was proper, the court ruled that (1) the Property Owners did not offer evidence to establish that there was a genuine issue of material fact as to whether Antero's activities to develop its mineral estate were reasonably necessary, and (2) the various burdens the Property Owners had established did not rise to the level of a substantial burden as set by case precedent. The concurring and dissenting opinions mainly focused on the lack of analysis as to the nuisance claim in addition to the claim of property and contractual rights.   [[298]](#footnote-299)299

In *Steager v. Consol Energy, Inc.*,   [[299]](#footnote-300)300the West Virginia Supreme Court of Appeals (1) agreed that the Tax Department acted in violation of the applicable regulations by improperly imposing a cap on Respondents' operating expense deductions, and (2) found error in rejecting the Tax Department's interpretation of the applicable regulations concerning the inclusion of post-production expenses in the calculation of the annual industry average operating expenses.

Respondents Consol Energy, Inc. d/b/a CNX Gas Company, LLC and Antero Resources Corporation owned various gas wells, which are appraised for *ad valorem* tax purposes, and their values were determined "through the process of applying a yield capitalization model to the net receipts (gross receipts less royalties paid less operating expenses) for the working interest and a yield capitalization model applied to the gross royalty payments for the royalty interest."   [[300]](#footnote-301)301Each tax year, the West Virginia State Tax Department issued an Administrative Notice, which states what the average annual industry operating expense is for that tax year, expressing it by way of a percentage of the well's gross receipts and a "not to exceed" amount, or "cap."

Respondents appealed their respective gas well valuations, claiming that (1) their actual expenses were in excess of the stated percentages, and that the cap resulted in an artificial operating expense reduction where their expenses exceeded the cap; and (2) with respect to the Marcellus wells, post-production expenses were not factored into the average industry operating expenses. The Tax Department responded that (1) the application of caps served to treat higher-producing wells differently from lower-producing wells, resulting in certain wells with higher gross receipts not realizing a full operating expense deduction; and (2) "operating expenses" included only "ordinary expenses which are directly related to the maintenance and production of natural gas and/or ***oil***" and not "extraordinary expenses" such as post-production expenses.   [[301]](#footnote-302)302The Circuit Court of Lewis County, Business Court Division, first concluded that the Tax Department failed to assess the wells at their true and actual value because the "not to exceed" amount or "cap" ultimately used two separate and distinct averages depending on the amount of gross receipts for a particular well. The business court also found that the Tax Department's method of calculating the average industry expense was under-inclusive of operating expenses by not including post-production expenses and therefore overvalued the wells.

On appeal, the West Virginia Supreme Court of Appeals first ruled that the regulations made no provision for an upper limit or "cap," both by the plain and unambiguous language of the rules and by the rules providing no discretion for the Tax Department to employ its own methodology for expressing and applying the annual industry average expense deduction. The court also agreed with the business court in rejecting the Tax Department's argument that the "cap" and percentage are merely two expressions of "the same" average figure. However, concerning the inclusion of post-production expenses in "operating expenses," the court reversed the business court's ruling, holding that the Tax Department's exclusion of post-production expenses from its average expense calculation was a reasonable construction of the regulation and not facially inconsistent with the enabling statute. Unlike the rejection of the upper limit or "cap," the court ruled that "operating expenses" as defined in the rules, in particular that part of the definition concerning "maintenance and production," were ambiguous and thus necessitated applying the standards set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*. [[302]](#footnote-303)303Applying the *Chevron* analysis, the court concluded that the Rule was ambiguous, and that the Tax Department's exclusion of post-production expenses from "operating expenses" was based on a permissible construction of the enabling taxation statute and not arbitrary, capricious, or manifestly contrary to said statute.

*C. Administrative Developments*

Effective May 10, 2019, Senate Bill 240 repealed the Division of Environmental Protection--Office of ***Oil*** and Gas legislative rule 35 CSR 7 relating to the certification of a gas well.   [[303]](#footnote-304)304

On January 30, 2019, the West Virginia State Tax Department issued an Administrative Notice relating to the valuation variables contained in 110 CSR 1J-1 et seq., ***oil*** and gas operating expenses, setting forth criteria for the direct and ordinary operating expenses in relation to the gross receipts from production.   [[304]](#footnote-305)305

XIII. WYOMING

*A. Legislative Developments*

During its 2019 budget session, which convened on January 8, 2019, the Wyoming legislature addressed two issues of interest to the ***oil*** and gas industry. First, in Senate Enrolled Act 14,   [[305]](#footnote-306)306the legislature merged two existing entities, the Wyoming Pipeline Authority and the Wyoming Infrastructure Authority, into the new Wyoming Energy Authority (WEA). The WEA will continue the work of the Pipeline Authority and Infrastructure Authority by promoting ***oil*** and gas and other mineral production, transportation, and distribution, as well as transmission projects and other energy-related projects, in Wyoming.

Second, the legislature revised the statutes governing Wyoming's tax liens on mineral production through Senate Enrolled Act 82. [[306]](#footnote-307)307Under the new law, counties are not required to file and perfect liens before they become effective.

*B. Judicial Developments*

*SWC Production, Inc. v. Wold Energy Partners, LLC*,   [[307]](#footnote-308)308was an appeal from a trial court's summary judgment order in favor of an operator of an enhanced ***oil*** recovery unit known as the Powell Pressure Maintenance Unit in Converse County, Wyoming. The operator sued a non-operating working interest owner for failure to pay operating costs under the unit operating agreement. The trial court entered summary judgment for the operator. After judgment, the interest owner claimed newly discovered evidence showed the operator's predecessor had not properly paid revenues to the interest owner. The trial court denied the interest owner's motion to set aside the judgment and the Wyoming Supreme Court affirmed, concluding the interest owner could have discovered the evidence before judgment if it had exercised due diligence.

*Finley Resources, Inc. v. EP Energy E&P Co*.   [[308]](#footnote-309)309involved a lawsuit over a purchase and sale of ***oil*** and gas leases in northeastern Wyoming. The Wyoming Supreme Court ultimately affirmed the lower trial court's dismissal of the suit, ruling that the forum-selection clause in the purchase and sale agreement required that the action be filed in Texas.

*BTU Western Resources, Inc. v. Berenergy Corp*. [[309]](#footnote-310)310was a second opinion in two years by the Wyoming Supreme Court addressing a dispute between a coal operator and an ***oil*** and gas operator in Wyoming's Powder River Basin. The supreme court held the Bureau of Land Management was not a necessary party to a dispute over a private lease and held the accommodation doctrine applied to private lease disputes.

*C. Administrative Developments*

Effective December 20, 2019, the Wyoming ***Oil*** and Gas Conservation Commission (WOGCC) revised its rules   [[310]](#footnote-311)311governing applications for permits to drill wells (APDs). The WOGCC's intent in revising the APD rules was to address and reduce the large number of APD filings and protests. The new rules establish a detailed procedure for challenging APDs and permit renewals.

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1. 2  S.J. Res. 7, 31st Leg., 1st Sess. (Alaska 2019). [↑](#footnote-ref-2)
2. 3   *Id.* [↑](#footnote-ref-3)
3. 4   *Id.* [↑](#footnote-ref-4)
4. 5   *Id.* [↑](#footnote-ref-5)
5. 6  No. 3:17-cv-000127, 2018 WL 648351 (D. Alaska Jan. 29, 2018), *certifying questions to* All Am. Oilfield LLC v. Cook Inlet Energy LLC, 446 P.3d 767 (Alaska 2019). [↑](#footnote-ref-6)
6. 7   *Id.* at \*1. [↑](#footnote-ref-7)
7. 8   *All Am. Oilfield*, 446 P.3d at 773. [↑](#footnote-ref-8)
8. 9   *Id.* at 780. [↑](#footnote-ref-9)
9. 10   *Id.* at 777, 780. [↑](#footnote-ref-10)
10. 11   *Id.* at 780. [↑](#footnote-ref-11)
11. 12   *Id.* at 781. [↑](#footnote-ref-12)
12. 13  41 P.3d 954 (Alaska 2019). [↑](#footnote-ref-13)
13. 14   *Id.* at 960. [↑](#footnote-ref-14)
14. 15   *Id.* at 960-61. CINGSA, a private company building a natural gas facility for storage of natural gas, filed a condemnation action to obtain necessary property rights. [↑](#footnote-ref-15)
15. 16   *Id.* at 963 (citing Coos Bay Logging Co. v. Barclay, 79 P.2d 672, 677 (Or. 1938)). [↑](#footnote-ref-16)
16. 17   *Id.* at 965. [↑](#footnote-ref-17)
17. 18  63 F. Supp. 3d 1013 (D. Alaska 2019). [↑](#footnote-ref-18)
18. 19  The authors' firm, Guess and Rudd, P.C., represented Intervenor-Defendant, American Petroleum Institute. [↑](#footnote-ref-19)
19. 20  Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017). [↑](#footnote-ref-20)
20. 21   *League of Conservation Voters*, 63 F. Supp. 3d at 1022. [↑](#footnote-ref-21)
21. 22   *See* Notice of Appeal, League of Conservation Voters v. Trump, No. 3:17-cv-00101 (D. Alaska May 28, 2019). [↑](#footnote-ref-22)
22. 23  H.B. 1156, 92d Gen. Assemb., 2019-2020 Reg. Sess. (Ark. 2019). [↑](#footnote-ref-23)
23. 24  571 S.W.3d 905 (Ark. 2019). [↑](#footnote-ref-24)
24. 25  ARK. CODE ANN. § 23(a) (2019) ("Arkansas Class Action Rule"). [↑](#footnote-ref-25)
25. 26  619 S.W.2d 652 (Ark. 1981). [↑](#footnote-ref-26)
26. 27   *Stephens Prod. Co.*, 591 S.W.3d at 910. [↑](#footnote-ref-27)
27. 28   *Id.* [↑](#footnote-ref-28)
28. 29  Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 157 (1982). [↑](#footnote-ref-29)
29. 30  Beverly Enters.-Ark. Inc. v. Thomas, 259 S.W.2d 445 (W.D. Ark. 2007). [↑](#footnote-ref-30)
30. 31  No. 2:18-CV-00217, 2019 WL 3577676 (W.D. Ark. Aug. 6, 2019), *appeal docketed*, No. 19-2867 (8th Cir. Aug. 30, 2019). [↑](#footnote-ref-31)
31. 32  ARK. CODE. ANN. § 16-56-105 (2019). [↑](#footnote-ref-32)
32. 33   *See* Atlanta Expl. Inc. v. Ethyl Corp., 784 S.W.2d 150 (Ark. 1990). [↑](#footnote-ref-33)
33. 34  ARK. CODE. ANN. §§ 15-74-601 to -604 (2019). [↑](#footnote-ref-34)
34. 35   *Id.* § 15-73-207. [↑](#footnote-ref-35)
35. 36  Turner v. XTO Energy Inc., No. 19-2867 (8th Cir. filed Aug. 30, 2019). [↑](#footnote-ref-36)
36. 37  Ark. ***Oil*** & Gas Comm'n, Gen. R. B-4: App. to Transfer a Well (June 16, 2019). [↑](#footnote-ref-37)
37. 38   *See* Ark. ***Oil*** & Gas Comm'n, *General Rules and Regulations*, http://aogc.state.ar.us/rules/rulesregs.aspx (last visited Mar. 2, 2019). [↑](#footnote-ref-38)
38. 39   *See* Ark. ***Oil*** & Gas Comm'n, *New and Proposed Rules*, http://aogc.state.ar.us/rules/new.aspx (last visited Mar. 2, 2019). [↑](#footnote-ref-39)
39. 40  Press Release, Cal. Office of the Gov., *Governor Gavin Newsom Signs Six Bills to Move California Away from Fossil Fuels* (Oct. 12, 2019). [↑](#footnote-ref-40)
40. 41  A.B. No. 1057, 2019-2020 Cal. Leg. Sess. (2019). [↑](#footnote-ref-41)
41. 42  A.B. No. 1141, 2019-2020 Cal. Leg. Sess. (2020) (amending CAL. PUB. RES. CODE § 3011(a)). [↑](#footnote-ref-42)
42. 43   *Id.* [↑](#footnote-ref-43)
43. 44  A.B. No. 1328, 2019-2020 Cal. Leg. Sess. (2019) (adding CAL. PUB. RES. CODE. § 3206.2). [↑](#footnote-ref-44)
44. 45  S.B. 463, 2019 Reg. Sess. (Cal. 2019) (amending CAL. PUB. RES. CODE §§ 3160, 3183). [↑](#footnote-ref-45)
45. 46  CAL. PUB. RES. CODE §§ 3160, 3183, 3206.2 (2019). [↑](#footnote-ref-46)
46. 47  S.B. 551, 2019 Reg. Sess. (Cal. 2019) (amending CAL. PUB. RES. CODE §§ 3206.3, 3257). [↑](#footnote-ref-47)
47. 48  A.B. 585, 2019 Reg. Sess. (Cal. 2019) (amending CAL. PUB. RES. CODE § 6804; adding § 6829.4). [↑](#footnote-ref-48)
48. 49  A.B. 342, 2019 Reg. Sess. (Cal. 2019) (adding CAL. PUB. RES. CODE § 6827.5). [↑](#footnote-ref-49)
49. 50  A.B. 936, 2019 Reg. Sess. (Cal. 2019). [↑](#footnote-ref-50)
50. 51  CAL. GOV'T CODE § 8670.1 et seq. (2019). [↑](#footnote-ref-51)
51. 52  42 Cal. App. 5th 394, 398, 255 Cal. Rptr. 3d 293 (Ct. App. 2019). [↑](#footnote-ref-52)
52. 53  42 Cal. App. 5th 312, 317, 22 Cal. Rptr. 3d 221 (Ct. App. 2019). [↑](#footnote-ref-53)
53. 54  S.B. 4, 2013 Reg. Sess. (Cal. 2013). [↑](#footnote-ref-54)
54. 55  CAL. PUB. RES. CODE § 21000 et seq. (2019). [↑](#footnote-ref-55)
55. 56  26 Cal. App. 5th 210, 217, 248 Cal. Rptr. 3d 449, 455 (Ct. App. 2019). [↑](#footnote-ref-56)
56. 57  Repeal of Consolidated Federal ***Oil*** & Gas and Federal & Indian Coal Valuation Reform, 82 Fed. Reg. 36,934 (Aug. 7, 2017) (to be codified at 30 C.F.R. pts. 1202 and 1206). [↑](#footnote-ref-57)
57. 58  276 F. Supp. 3d 953 (N.D. Cal. 2017). [↑](#footnote-ref-58)
58. 59  Cal. Dep't of Conservation, *Underground Injection Control*, https://www.conservation.ca.gov/calgem/general\_information/Pages/UndergroundinjectionControl(UIC) .aspx (last visited Mar. 2, 2020). [↑](#footnote-ref-59)
59. 60   *Id.* [↑](#footnote-ref-60)
60. 61  Cal. Dep't of Conservation, NTO 2019-10 (June 11, 2019). [↑](#footnote-ref-61)
61. 62  Requirements for Idle Well Testing and Management, 14 C.C.R. §§ 1723.9 and 1752 et seq. (2019). [↑](#footnote-ref-62)
62. 63  News Release, Cal. Dep't of Conservation, *California Announces New* ***Oil*** *and Gas Initiatives* (Nov. 19, 2019). [↑](#footnote-ref-63)
63. 64   *Id.* [↑](#footnote-ref-64)
64. 65  S.B.19-18, 1st Reg. Sess., 72d Gen. Assemb. (Colo. 2019). [↑](#footnote-ref-65)
65. 66   *Id.* [↑](#footnote-ref-66)
66. 67  John Aguilar, *Prop 112 Fails as Voters Say No to Larger Setbacks for* ***Oil*** *and Gas*, THE DENVER POST (last updated Nov. 7, 2018, 8:52 AM). [↑](#footnote-ref-67)
67. 68  433 P.3d 22, 25 (Colo. 2019). [↑](#footnote-ref-68)
68. 69  COLO. REV. STAT. § 34-60-102(1)(a) (2019). [↑](#footnote-ref-69)
69. 70   *Id.* § 29-20-104(1)(h)(I)-(VI). [↑](#footnote-ref-70)
70. 71   *Id.* § 34-60-116(6)(a)-(b). [↑](#footnote-ref-71)
71. 72   *Id.* § 34-60-104.3(2)(c). [↑](#footnote-ref-72)
72. 73   *Id.* § 25-7-109(10)(a). [↑](#footnote-ref-73)
73. 74  2019 COA 86, 457 P.3d 727. [↑](#footnote-ref-74)
74. 75   *Id.* P 17. [↑](#footnote-ref-75)
75. 76   *Id.* P 11. [↑](#footnote-ref-76)
76. 77  2018 COA 134. The author's law firm, Davis Graham & Stubbs LLP, represents HighPoint Resources Corporation (f/k/a Bill Barret Corporation) and Bonanza Creek Energy, Inc. in this litigation. [↑](#footnote-ref-77)
77. 78   *Id.* P 47. [↑](#footnote-ref-78)
78. 79  Prehearing Statement, COGCC, Cause No. 1R, No. 180900646 (2018). [↑](#footnote-ref-79)
79. 80  2 C.C.R. § 404-1:503(c) (2019). [↑](#footnote-ref-80)
80. 81   *Id.* § 404-1:530(a), (b). [↑](#footnote-ref-81)
81. 82  COLO. REV. STAT. § 34-60-106(19)(a)(b) (2019). [↑](#footnote-ref-82)
82. 83   *See* Rep. of the Comm'n, COGCC, Cause No. 1R, No. 171200767 (2018). [↑](#footnote-ref-83)
83. 84  2 C.C.R. § 404-1:1105 (2019). [↑](#footnote-ref-84)
84. 85   *Id.* § 404-1:1105.d.(2). [↑](#footnote-ref-85)
85. 86   *Id.* § 404-1:1101.e.(1). [↑](#footnote-ref-86)
86. 87  COLO. REV. STAT. § 34-60-106(2.5)(a) (2019). [↑](#footnote-ref-87)
87. 88   *Id.* § 34-60-106(11)(c)(II). [↑](#footnote-ref-88)
88. 89   *Id.* § 34-60-106(11)(c)(I). [↑](#footnote-ref-89)
89. 90  446 P.3d 1058 (Kan. 2019). [↑](#footnote-ref-90)
90. 91  442 P.3d 504, 507 (Kan. 2019). [↑](#footnote-ref-91)
91. 92  Lario ***Oil*** & Gas Co. v. Kan. Corp. Comm'n, 450 P.3d 353 (Kan. Ct. App. 2019). [↑](#footnote-ref-92)
92. 93  No. 6:10-cv-01232, 2019 WL 1427415, at \*6 (D. Kan. Mar. 29, 2019), *reconsideration denied*, No. 6:10-cv-01232, 2019 WL 2473831 (D. Kan. June 13, 2019). [↑](#footnote-ref-93)
93. 94  774 P.2d 962 (Kan. 1989). [↑](#footnote-ref-94)
94. 95  405 F. Supp. 3d 981 (D. Kan. 2019). [↑](#footnote-ref-95)
95. 96  296 P.3d 1106 (Kan. 2013). [↑](#footnote-ref-96)
96. 97  448 P.3d 383 (Kan. 2019). [↑](#footnote-ref-97)
97. 98  N. Nat. Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 217 P.3d 966 (Kan. 2009). [↑](#footnote-ref-98)
98. 99  No. 6:18-cv-01030, 2019 WL 3202257 (D. Kan. July 16, 2019), *reconsideration denied*, No. 6:18-cv-01030, 2019 WL 6310156 (D. Kan. Nov. 25, 2019). [↑](#footnote-ref-99)
99. 100  Fawcett v. ***Oil*** Producers, Inc. of Kan., 352 P.3d 1032 (Kan. 2015). [↑](#footnote-ref-100)
100. 101  H.B. 350, 2019-2020 Reg. Sess. (2019) (amending LA. STAT. ANN. §§ 31:164, :166, :175). [↑](#footnote-ref-101)
101. 102  H.B. 403, 2019 Leg. Sess. (enacting LA. STAT. ANN. § 30:127(H) (2019)). [↑](#footnote-ref-102)
102. 103  LA. STAT. ANN. § 30:121 et seq. (2019). [↑](#footnote-ref-103)
103. 104  No. 5:16-cv-01543, 2019 WL 1301985 (W.D. La. Mar. 21, 2019). [↑](#footnote-ref-104)
104. 105  LA. STAT. ANN. § 30:10(A)(3) (2019). [↑](#footnote-ref-105)
105. 106  787 F. App'x 203 (5th Cir. 2019), *withdrawn and superseded*, 798 F. App'x 811 (5th Cir. 2020). [↑](#footnote-ref-106)
106. 107  No. 1:18-cv-00551, 2019 WL 3801647 (W.D. La. Aug. 12, 2019). [↑](#footnote-ref-107)
107. 108   *Id.* at \*3 (citing LA. STAT. ANN. § 30:16 (2019)). [↑](#footnote-ref-108)
108. 109  No. 2:18-cv-05217, 2019 WL 2271118 (E.D. La. May 28, 2019). [↑](#footnote-ref-109)
109. 110   *Id.* (notice of appeal filed June 12, 2019). [↑](#footnote-ref-110)
110. 111  No. 1:18-cv-00548, 2019 WL 1433363 (D.N.M. Mar. 29, 2019). [↑](#footnote-ref-111)
111. 112   *Id.* at \*1. [↑](#footnote-ref-112)
112. 113   *Id.* at \*4 (citing N.M. STAT. ANN. § 14-9-3). [↑](#footnote-ref-113)
113. 114   *Id.* at \*5 (citing N.M. STAT. ANN. § 14-8-4). [↑](#footnote-ref-114)
114. 115   *Id.* at \*4 (citing N.M. STAT. ANN. § 14-10-3). [↑](#footnote-ref-115)
115. 116   *Id.* at \*5. [↑](#footnote-ref-116)
116. 117  No. 2:18-cv-00296, 2019 WL 4014852 (D.N.M. Feb. 15, 2019). [↑](#footnote-ref-117)
117. 118   *Id.* at \*4 (citing Mosely v. Magnolia Petroleum Co., 114 P.2d 740 (N.M. Ct. App. 1941)). [↑](#footnote-ref-118)
118. 119   *Id.* at \*4-5 (citing Vill. of Wagon Mound v. Mora Tr., 62 P.3d 1255, 1265 (N.M. Ct. App. 2002)). [↑](#footnote-ref-119)
119. 120  No. 1:19-cv-00131, 2019 WL 4303325 (D.N.M. Sept. 11, 2019). [↑](#footnote-ref-120)
120. 121   *Id.* at \*6 (discussing Whelan v. State Farm Mutual Auto. Ins., 329 P.3d 646 (N.M. 2014)). [↑](#footnote-ref-121)
121. 122  No. 1:13-cv-00941, 2019 WL 4015210 (D.N.M. May 15, 2019). [↑](#footnote-ref-122)
122. 123  The court defines term "drip condensate" as "[natural gas liquids] that condense into liquid form in the gathering system, *i.e.*, after the gas has left the wellhead, but before it gets processed.'" *Id.* at \*16 (quoting Anderson Living Trust v. WPX Energy Prod., LLC, 306 F.R.D. 312, 323 (D.N.M. 2015)). [↑](#footnote-ref-123)
123. 124  N.M. STAT. ANN. § 70-10-1 et seq. [↑](#footnote-ref-124)
124. 125   *Anderson Living Tr.*, 2019 WL 4015210, at \*17-18. [↑](#footnote-ref-125)
125. 126  409 F. Supp. 3d 1264 (D.N.M. 2019). [↑](#footnote-ref-126)
126. 127  N.M.A.C. § 19.15.8.9(C)(2) (rev. Jan. 15, 2019). [↑](#footnote-ref-127)
127. 128   *Id.* [↑](#footnote-ref-128)
128. 129   *Id.* § 19.15.8.9(D)(2) (rev. Jan. 15, 2019). [↑](#footnote-ref-129)
129. 130  H.B. 166, 2019-2020 Leg. Sess. (Ohio 2019). [↑](#footnote-ref-130)
130. 131   *See, e.g.*, Matthew Hammond, *State Budget Features Cost-Saving Measures for Our Members*, OHIO ***OIL*** & GAS ASS'N (Sept. 2019). [↑](#footnote-ref-131)
131. 132  2019-Ohio-4809, 144 N.E.3d 378. [↑](#footnote-ref-132)
132. 133   *Id.* P 7. [↑](#footnote-ref-133)
133. 134   *Id.* P 42. [↑](#footnote-ref-134)
134. 135   *Id.* [↑](#footnote-ref-135)
135. 136  OHIO REV. CODE ANN. § 5301.49 (1963). [↑](#footnote-ref-136)
136. 137  2018-Ohio-4959, 122 N.E.3d 132. [↑](#footnote-ref-137)
137. 138  OHIO REV. CODE ANN. § 5301.49 (1963). [↑](#footnote-ref-138)
138. 139  762 F. App'x 289 (6th Cir. 2019). [↑](#footnote-ref-139)
139. 140  2018-Ohio-3250 (5th Dist.). [↑](#footnote-ref-140)
140. 141   *Id.* P 7. [↑](#footnote-ref-141)
141. 142   *Id.* P 37. [↑](#footnote-ref-142)
142. 143  2019-Ohio-2641 (7th Dist.). [↑](#footnote-ref-143)
143. 144   *Id.* P 34. [↑](#footnote-ref-144)
144. 145   *Id.* P 33. [↑](#footnote-ref-145)
145. 146   *Id.* P 45. [↑](#footnote-ref-146)
146. 147  2019-Ohio-4092 (7th Dist.). [↑](#footnote-ref-147)
147. 148   *Id.* P 47. [↑](#footnote-ref-148)
148. 149   *Id.* [↑](#footnote-ref-149)
149. 150  2018-Ohio-4740, 114 N.E.3d 1285 (7th Dist.). [↑](#footnote-ref-150)
150. 151   *Id.* P 14. [↑](#footnote-ref-151)
151. 152   *Id.* P 21. [↑](#footnote-ref-152)
152. 153  2019-Ohio-2771, 140 N.E.3d 164 (5th Dist.). [↑](#footnote-ref-153)
153. 154   *Id.* P 4. [↑](#footnote-ref-154)
154. 155   *Id.* P 18. [↑](#footnote-ref-155)
155. 156   *Id.* [↑](#footnote-ref-156)
156. 157  No. 4:15-cv-02591, 2019 WL 4750661, at \*1, \*4 (N.D. Ohio Sept. 30, 2019). [↑](#footnote-ref-157)
157. 158  2019-Ohio-5250, 136 N.E.3d 1283 (7th Dist.). [↑](#footnote-ref-158)
158. 159   *Id.* P 35. [↑](#footnote-ref-159)
159. 160   *See* Jay Carr, *Update for Ohio's* ***Oil*** *and Gas Land Professionals*, VORYS ENERGY & ENVTL. L. BLOG (Sept. 10, 2019). [↑](#footnote-ref-160)
160. 161   *Id.* [↑](#footnote-ref-161)
161. 162  923 F.3d 779, 782-83 (10th Cir. 2019). [↑](#footnote-ref-162)
162. 163  Certain of the class certification proceedings in this case occurred *after* Chaparral filed for bankruptcy. The bankruptcy court lifted the automatic stay on the underlying proceedings so that the district court could rule on Naylor Farms' motion for class certification. [↑](#footnote-ref-163)
163. 164   *Naylor Farms*, 923 F.3d at 782-83. [↑](#footnote-ref-164)
164. 165   *Id.* at 795. [↑](#footnote-ref-165)
165. 166   *Id.* at 798. [↑](#footnote-ref-166)
166. 167   *Id.* (quoting Menocal v. GEO Grp., Inc., 882 F.3d 905, 916-17 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143 (2018)). [↑](#footnote-ref-167)
167. 168   *Id.* [↑](#footnote-ref-168)
168. 169  No. 4:19-bk-35133, Adv. No. 19-03609 (Bankr. S.D. Tex. Dec. 20, 2019) (memorandum opinion). [↑](#footnote-ref-169)
169. 170   *Id.* at 1. [↑](#footnote-ref-170)
170. 171   *Id.* For another decision reaching a similar conclusion under Utah law, see Midlands Midstream, LLC v. Badlands Energy, Inc. ( *In re* Badlands Energy, Inc.), 608 B.R. 854 (Bankr. D. Colo. 2019). *But see* Sabine ***Oil*** & Gas Corp., v. HPIP Gonzales Holdings, LLC ( *In re* Sabine ***Oil*** & Gas Corp.), 550 B.R. 59 (Bankr. S.D.N.Y. 2016), applying Texas law, for a case reaching an opposing outcome. [↑](#footnote-ref-171)
171. 172  No. SD-117334, 90 O.B.J. 779 (Okla. Civ. App. May 30, 2019) (unpublished). [↑](#footnote-ref-172)
172. 173   *Id.* at 2-3. [↑](#footnote-ref-173)
173. 174   *Id.* at 3, 5, 13-14. [↑](#footnote-ref-174)
174. 175   *Id.* at 10. [↑](#footnote-ref-175)
175. 176  2019 OK CIV APP 20, 437 P.3d 211. [↑](#footnote-ref-176)
176. 177   *Id.* at 212-13. [↑](#footnote-ref-177)
177. 178   *Id.* at 214-15. [↑](#footnote-ref-178)
178. 179   *Id.* at 212. [↑](#footnote-ref-179)
179. 180   *Id.* at 214-15. [↑](#footnote-ref-180)
180. 181  2019 OK 58, 453 P.3d 482 (reh'g denied Nov. 4, 2019). [↑](#footnote-ref-181)
181. 182  OKLA. STAT. ANN. tit. 52, §§ 318.2-.9 (2019). [↑](#footnote-ref-182)
182. 183   *Hobson*, 453 P.3d at 483. [↑](#footnote-ref-183)
183. 184   *Id.* at 484. [↑](#footnote-ref-184)
184. 185   *Id.* (discussing OKLA. STAT. ANN. tit. 52, § 318.2 (2019)). [↑](#footnote-ref-185)
185. 186   *Id.* at 485. [↑](#footnote-ref-186)
186. 187   *Id.* [↑](#footnote-ref-187)
187. 188  778 F. App'x 561 (10th Cir. 2019). [↑](#footnote-ref-188)
188. 189   *Id.* at 563. [↑](#footnote-ref-189)
189. 190   *Id.* at 563-64. [↑](#footnote-ref-190)
190. 191   *Id.* at 566. [↑](#footnote-ref-191)
191. 192   *Id.* at 567-68. [↑](#footnote-ref-192)
192. 193   *Id.* [↑](#footnote-ref-193)
193. 194  913 F.3d 959 (10th Cir. 2019). [↑](#footnote-ref-194)
194. 195   *Id.* at 964. [↑](#footnote-ref-195)
195. 196   *Id.* at 968, 970-71. [↑](#footnote-ref-196)
196. 197  2019 OK CIV APP 54, 451 P.3d 218, 220. [↑](#footnote-ref-197)
197. 198   *Id.* at 220-21. [↑](#footnote-ref-198)
198. 199   *Id.* at 224. [↑](#footnote-ref-199)
199. 200   *Id.* at 226. [↑](#footnote-ref-200)
200. 201   *Id.* at 224-26; OKLA. STAT. ANN. tit. 12, §§ 1141.1-.5 (2019). [↑](#footnote-ref-201)
201. 202  36 OK REG. 22, tit. 165, ch. 10: ***Oil*** and Gas Conservation, 485-1092 (2019) (unofficial version). [↑](#footnote-ref-202)
202. 203   *Id.* [↑](#footnote-ref-203)
203. 204   *Id.* [↑](#footnote-ref-204)
204. 205  H.B. 1010, 55th Leg., 2d Ex. Sess. (Okla. 2018). [↑](#footnote-ref-205)
205. 206  36 OK REG. 22, tit. 165, ch. 10: ***Oil*** and Gas Conservation, 485-1092 (2019) (unofficial version). [↑](#footnote-ref-206)
206. 207   *Id.* [↑](#footnote-ref-207)
207. 208   *Id.* [↑](#footnote-ref-208)
208. 209   *See also* Approval and Promulgation of Air Quality Approval Plans; Pa.; Removal of Dep't of Envtl. Prot. Gasoline Volatility Requirements for the Pittsburg-Beaver Valley Area, 83 Fed. Reg. 65,301 (Dec. 20, 2018) (codified at 40 C.F.R. pt. 52). [↑](#footnote-ref-209)
209. 210  216 A.3d 448 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-210)
210. 211   *Id.* at 467. [↑](#footnote-ref-211)
211. 212   *Id.* at 473-74. [↑](#footnote-ref-212)
212. 213   *Id.* at 486. [↑](#footnote-ref-213)
213. 214  Justin Werner, *PEDF Files New Petition for Review Based on Environmental Rights Amendment Case Law*, LAW.COM (Nov. 21, 2019). [↑](#footnote-ref-214)
214. 215   *See* PEDF v. Commonwealth, 214 A.3d 748, 754-56 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-215)
215. 216  161 A.3d 911 (Pa. 2017). [↑](#footnote-ref-216)
216. 217  212 A.3d 1135 (Pa. Super. 2019). [↑](#footnote-ref-217)
217. 218   *Id.* at 1139. [↑](#footnote-ref-218)
218. 219   *Id.* at 1143. [↑](#footnote-ref-219)
219. 220  204 A.3d 1009 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-220)
220. 221   *Id.* at 1017. [↑](#footnote-ref-221)
221. 222   *Id.* at 1018. [↑](#footnote-ref-222)
222. 223  206 A.3d 51 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-223)
223. 224   *Id.* at 53-54. [↑](#footnote-ref-224)
224. 225   *Id.* at 57-58. [↑](#footnote-ref-225)
225. 226   *Id.* at 60-61. [↑](#footnote-ref-226)
226. 227  Commonwealth v. Chesapeake Energy Corp., 218 A.3d 1205 (Table) (Pa. Oct. 30, 2019). [↑](#footnote-ref-227)
227. 228  205 A.3d 401 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-228)
228. 229   *Id.* at 402-03. [↑](#footnote-ref-229)
229. 230   *Id.* at 403, 410-12. [↑](#footnote-ref-230)
230. 231  208 A.3d 1010 (Pa. 2019). [↑](#footnote-ref-231)
231. 232   *Id.* at 1011-12. [↑](#footnote-ref-232)
232. 233   *Id.* at 1012. [↑](#footnote-ref-233)
233. 234   *Id.* at 1013. [↑](#footnote-ref-234)
234. 235   *Id.* at 1017-18. [↑](#footnote-ref-235)
235. 236   *Id.* at 1018-19. [↑](#footnote-ref-236)
236. 237   *EQT Prod. Co.*, 208 A.3d at 1028. [↑](#footnote-ref-237)
237. 238   *Id.* at 1027. [↑](#footnote-ref-238)
238. 239   *Id.* at 1028. [↑](#footnote-ref-239)
239. 240   *Id.* at 1031 (Mundy, J., dissenting). [↑](#footnote-ref-240)
240. 241  184 A.3d 153 (Pa. Super. Ct. 2018). [↑](#footnote-ref-241)
241. 242  938 F.3d 96, 99 (3d Cir. 2019). [↑](#footnote-ref-242)
242. 243   *Id.* at 104. [↑](#footnote-ref-243)
243. 244   *Id.* at 111. [↑](#footnote-ref-244)
244. 245  No. 16-1516, 2019 WL 4267386 (W.D. Pa. Sept. 10, 2019), *appeal docketed*, No. 19-3307 (3d Cir. Oct. 11, 2019). [↑](#footnote-ref-245)
245. 246   *Id.* at \*19. [↑](#footnote-ref-246)
246. 247   *Id.* at \*20. [↑](#footnote-ref-247)
247. 248   *Id.* at \*35. [↑](#footnote-ref-248)
248. 249   *Id.* at \*2-3. [↑](#footnote-ref-249)
249. 250  217 A.3d 1258, 1269 (Pa. Super. 2019). [↑](#footnote-ref-250)
250. 251   *Id.* at 1264. [↑](#footnote-ref-251)
251. 252   *Id.* at 1265. [↑](#footnote-ref-252)
252. 253   *Id.* at 1266. [↑](#footnote-ref-253)
253. 254   *Id.* at 1268. [↑](#footnote-ref-254)
254. 255  No. 3:18-cv-00240, 2019 WL 6311101, at \*2 (W.D. Pa. 2019). [↑](#footnote-ref-255)
255. 256   *Id.* at \*1. [↑](#footnote-ref-256)
256. 257   *Id.* at \*2. [↑](#footnote-ref-257)
257. 258   *Id.* at \*3. [↑](#footnote-ref-258)
258. 259  217 A.3d 1283, 1285 (Pa. Commw. Ct. 2019). [↑](#footnote-ref-259)
259. 260   *Id.* at 1287. [↑](#footnote-ref-260)
260. 261   *Id.* at 1283. [↑](#footnote-ref-261)
261. 262   *Id.* at 1288-89. [↑](#footnote-ref-262)
262. 263   *Id.* at 1291. [↑](#footnote-ref-263)
263. 264  587 S.W.3d 864 (Tex. App.--El Paso 2019, pet. filed). [↑](#footnote-ref-264)
264. 265   *Id.* at 869. [↑](#footnote-ref-265)
265. 266   *Id.* at 870. [↑](#footnote-ref-266)
266. 267  563 S.W.3d 449 (Tex. App.--Eastland 2018, pet. granted). [↑](#footnote-ref-267)
267. 268   *Id.* at 452 (emphasis added). [↑](#footnote-ref-268)
268. 269   *Id.* at 455. [↑](#footnote-ref-269)
269. 270  590 S.W.3d 471 (Tex. 2019). [↑](#footnote-ref-270)
270. 271   *Id.* at 476. [↑](#footnote-ref-271)
271. 272  394 F. Supp. 3d 687 (S.D. Tex. 2019). [↑](#footnote-ref-272)
272. 273   *Id.* at 699 (internal citations and quotation marks omitted). [↑](#footnote-ref-273)
273. 274  927 F.3d 303 (5th Cir. 2019). [↑](#footnote-ref-274)
274. 275  579 S.W.3d 540, 544 (Tex. App.--Houston [14th Dist.] 2019). [↑](#footnote-ref-275)
275. 276  No. 12-18-00138-CV, 2019 WL 1716359 (Tex. App.--Tyler Apr. 17, 2019). [↑](#footnote-ref-276)
276. 277  573 S.W.3d 198 (Tex. 2019). [↑](#footnote-ref-277)
277. 278   *Id.* at 201-02. [↑](#footnote-ref-278)
278. 279  No. 02-18-00271-CV, 2019 WL 1716415 (Tex. App.--Fort Worth Apr. 18, 2019, pet. granted) (mem. op.). [↑](#footnote-ref-279)
279. 280   *Id.* at \*2. [↑](#footnote-ref-280)
280. 281  574 S.W.3d 73 (Tex. App.--El Paso 2019, pet. filed). [↑](#footnote-ref-281)
281. 282  566 S.W.3d 281, 287 (Tex. 2018). [↑](#footnote-ref-282)
282. 283  360 F. Supp. 3d 600 (S.D. Tex. 2019). [↑](#footnote-ref-283)
283. 284   *Id.* at 613. [↑](#footnote-ref-284)
284. 285   *Id.* at 614. [↑](#footnote-ref-285)
285. 286   *Id.* at 614-15. [↑](#footnote-ref-286)
286. 287  No. 04-17-00310-CV, 2018 WL 6626605 (Tex. App.--San Antonio Dec. 19, 2018, pet. filed) (mem. op.). [↑](#footnote-ref-287)
287. 288   *Id.* at \*5. [↑](#footnote-ref-288)
288. 289  566 S.W.3d 26, 34 (Tex. App.--Houston [14th Dist.] 2018). [↑](#footnote-ref-289)
289. 290  563 S.W.3d 465 (Tex. App.--Houston [14th Dist.] 2018). [↑](#footnote-ref-290)
290. 291  572 S.W.3d 647 (Tex. 2019). [↑](#footnote-ref-291)
291. 292  457 S.W.3d 70 (Tex. 2015). [↑](#footnote-ref-292)
292. 293  No. 04-18-00129-CV, 2019 WL 1139584 (Tex. App.--San Antonio Mar. 13, 2019, pet. denied). [↑](#footnote-ref-293)
293. 294  H.B. 2673, Reg. Sess. 2019 (W. Va. 2019). [↑](#footnote-ref-294)
294. 295  828 S.E.2d 800 (W. Va. 2019). [↑](#footnote-ref-295)
295. 296   *Id.* at 811. [↑](#footnote-ref-296)
296. 297  828 S.E.2d 858 (W. Va. 2019). [↑](#footnote-ref-297)
297. 298   *Id.* at 864. [↑](#footnote-ref-298)
298. 299   *Id.* at 877-78. [↑](#footnote-ref-299)
299. 300  832 S.E.2d 135 (W. Va. 2019). [↑](#footnote-ref-300)
300. 301   *Id.* at 141 (citing W. VA. CODE R. § 110-1-J-4.1 (2019)). [↑](#footnote-ref-301)
301. 302   *Id.* at 140, 142. [↑](#footnote-ref-302)
302. 303  467 U.S. 837 (1984). [↑](#footnote-ref-303)
303. 304  S.B. 240, Reg. Sess. 2019 (W. Va. 2019). [↑](#footnote-ref-304)
304. 305  W. VA. CODE R. § 110-1-J-1 (2019). [↑](#footnote-ref-305)
305. 306  S. Enrolled Act 14, SF0037, 2019 Gen. Sess. (Wyo. 2019) (creating WYO. STAT. ANN. §§ 37-5-501 to -509, and 37-5-601 to -607). [↑](#footnote-ref-306)
306. 307  S. Enrolled Act 82, SF0118, 2019 Gen. Sess. (Wyo. 2019) (enacting WYO. STAT. ANN. § 39-13-108(d)(vi)). [↑](#footnote-ref-307)
307. 308  448 P.3d 856, 857-58, 861 (Wyo. 2019). [↑](#footnote-ref-308)
308. 309  443 P.3d 838, 847 (Wyo. 2019). [↑](#footnote-ref-309)
309. 310  442 P.3d 50, 54 (Wyo. 2019); *see* BTU W. Res., Inc. v. Berenergy Corp., 408 P.3d 396 (Wyo. 2018) ("Berenergy I"). [↑](#footnote-ref-310)
310. 311  WYO. CODE R. § 8 (2019); *see generally* WOGCC Rules, ch. 3, § 8. [↑](#footnote-ref-311)