# **Oil and Gas Update: Legal Developments in 2021 Affecting the Oil and Gas Exploration and Production Industry**

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**Reporter**

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**Text**

**[\*21]** 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*

No substantive ***oil*** and gas legislation was passed in this year's state legislative session. However, at least one federal bill, House Bill 5376, or the Build Back Better Act--passed by the House of Representatives on November 19, 2021--directly implicates ***oil*** and gas matters within the State of Alaska. If passed, the Act will nullify all existing leases sold in the Arctic National Wildlife Refuge (ANWR) on January 6, 2021, and refund all lease-related payments to the lessees within 30 days after it is signed into law.

*B. Judicial Developments*

In *Cook Inletkeeper v. Raimondo*,   [[2]](#footnote-3)2the plaintiffs moved for summary judgment seeking a determination that the National Marine Fisheries Service's (NMFS) biological opinion (BiOp), environmental impact study, and incidental take regulations, which concluded that "take is not likely" to occur from Hilcorp Alaska, LLC's (Hilcorp), proposed ***oil*** exploration and production activities utilizing **[\*22]** a tugboat in an endangered beluga whale habitat, were arbitrary and capricious under the Administrative Procedure Act (APA).   [[3]](#footnote-4)3

The court granted the plaintiffs' motion, in part, holding that because NMFS failed to explain how it arrived at its conclusion and contradicted itself,   [[4]](#footnote-5)4it failed to adequately consider the direct effects of underwater noise made by vessels on belugas in its BiOp, and failed to take a hard look at the effects of vessels on belugas in its environmental assessment (EA), which was arbitrary and capricious under the APA.   [[5]](#footnote-6)5The court, however, declined to vacate the NMFS's authorization entirely and, instead, utilized its discretion to limit Hilcorp's activities.   [[6]](#footnote-7)6

In 2018, ConocoPhillips applied to drill exploratory wells in the Bear Tooth Unit, west of Nuiqsut and the Greater Moose's Tooth Unit. In consideration of the application, the Bureau of Land Management (BLM) published an EA but did not subsequently issue an environmental impact statement (EIS). Instead, the 2018 EA purportedly incorporated by reference a 2012 integrated action plan (IAP)/EIS, the Greater Moose's Tooth First Supplemental Environmental Impact Statement (SEIS), and the Greater Moose's Tooth Second SEIS, which covered a greater area of land. Along with the final EA, the BLM also issued a "finding of no significant impact" for ConocoPhillips's 2018-2019 winter exploration program and did not subsequently issue a supplemental EIS for the program. The BLM also published an Alaska National Interest Lands Conservation Act (ANILCA) evaluation to approve the winter drilling exploration program. After receiving approval, ConocoPhillips carried out the program, including building ice pads, an ice airstrip, ice roads, and six new wells, which was completed on April 28, 2019.   [[7]](#footnote-8)7

Prior to the program's completion, the plaintiffs, on March 1, 2019, brought suit against the BLM, alleging violations of the APA, NEPA, and ANILCA. The plaintiffs' claims centered on the 2018 EA's explanations for impacts on caribou and subsistence, and the BLM's consideration of alternatives to ConocoPhillips's proposal. The district court granted ConocoPhillips's motion to intervene. The BLM and ConocoPhillips (collectively, defendants) and the plaintiffs filed cross-motions for summary judgment.   [[8]](#footnote-9)8

**[\*23]** The district court granted the defendants' motion for summary judgment in January 2020, finding that, while the 2018-2019 exploration activities could not be technically repeated, the BLM would authorize future winter exploration in the area using an EA that ties to the 2012 IAP/EIS and the GMT1 and GMT2 SEISs to support conclusions regarding impacts to caribou and subsistence land users.   [[9]](#footnote-10)9As such, the dispute was "capable of repetition yet evading review."   [[10]](#footnote-11)10The plaintiffs subsequently appealed the district court's ruling on the merits, and the defendants renewed their argument that the case was moot.   [[11]](#footnote-12)11

On appeal, the plaintiffs argued that the capable of repetition, yet evading review exception to mootness should be applied on the grounds that the 2018-2019 winter exploration program lasted only five months (which was not enough time for the case to be decided on the merits) and that the issue implicated a reasonable expectation of repetition.   [[12]](#footnote-13)12After considering these factors--premised on updates to relevant NEPA regulations, the fact that the BLM adopted an entirely new IAP/EIS that superseded the 2012 IAP/EIS, and ConocoPhillips's declaration that it does not plan to conduct additional winter exploration in the area--the Ninth Circuit held that the case was moot and that no relevant exception applied.   [[13]](#footnote-14)13As a result, the Ninth Circuit vacated the district court's decision and remanded with instructions to dismiss the case as moot.   [[14]](#footnote-15)14

In 2016, Hilcorp, LLC (Hilcorp), applied to expand the Falls Creek Participating Area to include an 80-acre portion of land leased by PLC, LLC (PLC), an overriding royalty interest (ORRI) holder.   [[15]](#footnote-16)15The Department of Natural Resources (DNR) denied the expansion, concluding it was not "reasonably estimated to be capable of producing" natural gas in paying quantities.   [[16]](#footnote-17)16PLC appealed DNR's decision to the Natural Resources Commissioner, then to the superior court, arguing that DNR was wrong not to approve the original application, which included Hilcorp's methodology utilized to determine the likelihood of hydrocarbon presence under the expanded area, and because Hilcorp "asserted PLC's acreage was 'proven to contribute' to the production of natural gas."   [[17]](#footnote-18)17Both the Commissioner and the superior court denied PLC's appeal on the basis that PLC lacked standing as an ORRI leaseholder to appeal a unit expansion decision.   [[18]](#footnote-19)18

The Alaska Supreme Court reversed the superior court's decision, holding that PLC had sufficient standing because it would have been entitled to a **[\*24]** share of the profits of production of natural gas from the entire participating area, and remanded the matter to the DNR.   [[19]](#footnote-20)19

*Sovereign Iñupiat for a Living Arctic v. BLM* stems from ConocoPhillips's proposed ***oil*** and gas development project under leaseholds in the northeast area of the National Petroleum Reserve called the "Willow Master Development Plan" ("Willow plan").   [[20]](#footnote-21)20In connection with ConocoPhillips's application to conduct the proposed activities, the U.S. Fish and Wildlife Service (FWS) issued a BiOp, concluding that the Willow plan was "not likely to jeopardize the continued existence of polar bears" or their habitat.   [[21]](#footnote-22)21The BLM subsequently authorized the Willow plan and issued an EIS. The plaintiffs filed an action and moved for summary judgment on the grounds that the review and approval of ConocoPhillips's Willow plan was improper under NEPA, the Clean Water Act, and the ESA.   [[22]](#footnote-23)22

The district court held that the BLM failed to analyze the effect of greenhouse gas emissions that result from consuming ***oil*** abroad or adequately explain why the analysis was not possible in its EIS.   [[23]](#footnote-24)23The district court further found that the BLM also failed to "adequately analyze a reasonable range of alternatives for the Willow Project--a process that is 'the heart of the [EIS].'"   [[24]](#footnote-25)24Additionally, the FWS's take analysis for polar bears violated the ESA, as it was deficient under relevant regulatory requirements.   [[25]](#footnote-26)25As a result, the court vacated both the BLM's approval and FWS's BiOp, effectively halting the Willow plan.   [[26]](#footnote-27)26

*Gwich'in Steering Committee v. Bernhardt*   [[27]](#footnote-28)27arises from three cases brought by the plaintiffs   [[28]](#footnote-29)28challenging the BLM's January 6, 2021, sale of leases **[\*25]** in ANWR and seeking a preliminary injunction that would enjoin the defendants   [[29]](#footnote-30)29from issuing ***oil*** or gas leases or authorizing seismic exploration in ANWR until the court entered final judgment on the merits of the plaintiffs' claims. The court denied the plaintiffs' motion for injunctive relief because the proposed seismic exploration application was pending at the time, and there was no established likelihood that the application would be authorized before the merits of the case were decided. As such, there was no agency action to review and the plaintiffs could not show irreparable harm. The court noted that, if the BLM approves the defendants' proposal in the future, the plaintiffs could seek an injunction for relief at that point.   [[30]](#footnote-31)30

In 2017, the Department of Revenue (Department) issued an advisory bulletin to address ***oil*** and gas tax code provisions specifically implicating the interaction between legislation enacted in 2006 that created a "minimum production tax that North Slope ***oil*** producers must pay" and legislation enacted in 2013 that prohibited a producer from "using the sliding scale tax credit to reduce its tax liability below zero."   [[31]](#footnote-32)31The Department concluded that, "based on the plain language of the tax credit statute, the relevant legislative history, the commutative property of math, and its regulations, a producer choosing to use a sliding scale tax credit to reduce its tax liability could not reduce its tax liability below the minimum tax."   [[32]](#footnote-33)32

***Oil*** producer Exxon Mobil Corporation challenged the bulletin, seeking a declaratory judgment that the interpretation was contrary to law. The Department moved for summary judgment, which the court granted on the basis that the challenge was not yet ripe, as no current tax dispute existed between the parties.   [[33]](#footnote-34)33

In 2021, the Trump administration approved a plan to allow ***oil*** leasing and development in more than 80% of the 23-million-acre National Petroleum Reserve. Specifically, the plan opened to leasing an additional 7 million acres, or about 30% of the reserve, making a total of about 18.5 million acres on the western North Slope open to development. However, the plan has been halted by the Biden administration, as officials in the BLM have announced plans to return to Obama-era rules for ***oil*** and gas development in the reserve.   [[34]](#footnote-35)34The **[\*26]** previous plan, approved in 2013 under the Obama administration, allowed the BLM to lease just more than 11.7 million acres--which is almost exactly half of the reserve. That plan closed to ***oil*** and gas leasing more than 3.5 million acres, much of which is a vast wetlands complex in the Teshekpuk Lake Special Area.

II. ARKANSAS

*A. Legislative Developments*

In its 2021 regular session, the Arkansas legislature enacted two new statutes that may be of interest to practitioners. First, Act No. 275, the ***Oil*** and Gas Owners' Lien Act of 2021,   [[35]](#footnote-36)35established a lien in favor of "interest owners" (persons entitled to proceeds of ***oil*** and gas sales) in severed minerals and proceeds thereof, with priority dating from the moment of severance, to secure payment of such proceeds. The act is substantially identical to Oklahoma's ***Oil*** and Gas Owners' Lien Act of 2010,   [[36]](#footnote-37)36which was designed to give interest owners priority against other creditors of a marketer in the event of the marketer's bankruptcy.

The second new statute is Act No. 668, which amended existing law with regard to the methodology for determining the assessed value of ***oil*** wells for purposes of ad valorem taxation.   [[37]](#footnote-38)37Valuation of ***oil*** in place must now be based upon the previous year's production. The act also provides for taxation of ***oil*** well production equipment as real property. It provides that such production equipment shall be assessed at a value of $ 1 per foot measured from the bottom of its casing to the surface.

*B. Judicial Developments*

*Turner v. XTO Energy, Inc.*,   [[38]](#footnote-39)38involved a gas well that was drilled in 1980 and that was dually completed so as to produce, separately, from a shallow formation (Hale) through its casing and a deeper zone (Viola) through its tubing. The well was initially proposed to be drilled only to the shallower Hale Zone. When Turner, who was an unleased mineral owner, refused to lease his interest, the interest was integrated in a proceeding before the Arkansas ***Oil*** and Gas Commission. The Commission's order gave Turner an array of alternatives from which he elected to be carried non-consent pending recovery of 400% of the well's costs. That cost recovery has not yet occurred.

After the well was successfully drilled to the initial objective Hale Zone, its operator proposed deepening it to the Viola Zone. Turner, whose interest was only integrated as to the Hale Zone, then elected to participate in the deepening. The well was dually completed, with gas from the two zones separately metered to account for the different ownership resulting from Turner's inconsistent **[\*27]** elections. The Hale Zone then continued to produce until this controversy arose in 2016. The Viola Zone also produced, initially, but it ceased production only a few months later, having "watered out."

In 2016, after many years of production from the well, Turner concluded that the Viola Zone had been producing gas all along that XTO Energy, Inc. (XTO), and its predecessors had commingled with production from the Hale Zone to deprive him of his interest in the well. Turner sued and the case was removed on the basis of diversity of citizenship to the U.S. District Court for the Western District of Arkansas, where XTO moved for summary judgment.

XTO's summary judgment motion was supported by affidavits of a geologist and engineer. Both affiants concluded that Turner's commingling theory was impossible, because the deep zone had long ago watered out. They attached multiple documents supporting that conclusion including the result of a recent wellbore integrity test showing water encroachment within the wellbore, well above the Viola Zone. XTO also attached another affidavit demonstrating that Turner was misinterpreting the few documents that he relied upon to rebut its motion. Finally, XTO argued that Turner's claim was also barred by the statute of limitations, since the "commingling events" upon which he relied occurred well outside the applicable three-year limitations window.

The district court granted XTO's summary judgment request and Turner appealed. The district court's summary judgment order was largely based upon limitations. That order was previously discussed in the 2019 edition of this report, where it was noted that the district court's opinion contained several important rulings that were not challenged in his appeal. More recently, XTO's summary judgment has been affirmed by the U.S. Court of Appeals for the Eighth Circuit. The appeals court did not disturb the district court's rulings on limitations but also ruled that XTO's affidavits in support of its motion were essentially unrebutted by Turner's response to the motion. He thus failed to raise a genuine issue of fact sufficient to defeat the motion. The district court's opinion remains the more important of the two, however, because of that court's ruling on issues that were not involved in the appeal.

*Fuller v. Atlantic Exploration*   [[39]](#footnote-40)39and *Fuller v. Lion* ***Oil*** *Trading & Transportation, LLC*,   [[40]](#footnote-41)40were cases filed by members of a family who claimed to be descendants of the owners of mineral interests located in units containing producing ***oil*** wells. The cases are essentially identical except for their different defendants. The plaintiffs asserted that mineral deeds divesting their ancestors of the mineral interests were forgeries. Both cases were referred to the United States Magistrate, whose recommendation was to grant summary judgment to the defendants in both cases because the plaintiffs' claims fell outside of the period of limitations.

The district court followed those recommendations and dismissed the plaintiffs' cases. The deeds at issue, whether forged or not, were recorded the 1990s and the lawsuits were not filed until 2020. Under Arkansas's three-year statute of limitations, the lawsuits were time-barred.

**[\*28]** The plaintiffs had argued that the limitations period was tolled by fraudulent concealment of the alleged forgery. However, under Arkansas law, fraudulent concealment only tolls limitations until the time that the plaintiff learns or through reasonable diligence should have learned of the fraud. As a matter of law, a publicly filed document cannot be considered "concealed." Thus knowledge of the alleged fraud was imputed to the plaintiffs when the documents were recorded in the 1990s.

*Pennington v. BHP Billiton Petroleum (Fayetteville), LLC*,   [[41]](#footnote-42)41is a royalty owners' suit based upon alleged unlawful deductions of post-production expenses. The defendant, BHP, moved to dismiss, asserting that since the deductions in question began outside the five-year period of limitations, the entire action was barred. The district court certified to the Arkansas Supreme Court the question of Arkansas law, whether limitations begins to run from date of the first improper payment as to the entire claim or whether each payment is considered separately for limitations purposes, so that only those payments made outside the five-year window are barred.

The Arkansas Supreme Court responded that each improper royalty payment gives rise to its own cause of action, so that suit may be maintained as to those made within the limitations window, though suit on earlier-made payments might be barred. BHP's motion to dismiss on that basis was thus denied.

*Bradley v. XTO Energy Inc.*   [[42]](#footnote-43)42is another pending diversity of citizenship case alleging unlawful deductions of post-production expenses from the lessors' royalty. The district court recently ruled upon multiple defenses raised by XTO in a motion to dismiss. One issue, thus adjudicated, is notable. XTO had asserted the "notice and cure" clauses within the plaintiffs' ***oil*** and gas leases presented a bar to a suit for their breach until six months after the required notice was given. Admittedly, no plaintiff had complied with that requirement. However, the district court ruled that notice was unnecessary under the circumstances. Relying upon the Arkansas Supreme Court's decision in the case of *TXO Production Corp. v. Page Farms, Inc.*,   [[43]](#footnote-44)43the court ruled that the "notice and cure" requirement only precluded suits for cancellation of the lease, not suits seeking damages for its breach.

*C. Administrative Developments*

Since the Arkansas ***Oil*** and Gas Commission's regulations are constantly in revision, the practitioner is advised to regularly check these regulations, online at https://www.aogc.state.ar.us. Proposed rule changes as well as a tabulation of recently enacted, repealed, or amended rules are online at http://www.aogc.state.ar.us/rules/new.aspx.

III. CALIFORNIA

**[\*29]** *A. Legislative Developments*

The California legislature made a number of changes to the Public Resources Code for the purpose of enhancing public availability of records filed by ***oil*** and gas producers with the California Department of Conservation's Geologic Energy Management Division (CalGEM). Specifically, Senate Bill 406 added section 3108.5 to the Public Resources Code to require the Supervisor of CalGEM to make all information collected or maintained by CalGEM, including orders and notices of violation, available to the public on its website. Section 3213 was amended to require well histories filed by operators with CalGEM to include, among other things, all acid treatment data of any amount. Section 3227 was amended to require all operators to provide by July 1, 2023, the source, volume, treatment, and disposition of water produced and to submit that information electronically. Section 3203.5 was also added to require operators to provide CalGEM with a copy of the local land use authorization that allows the drilling of a well at the time an operator submits its notice of intention for the well. The investigatory responsibilities of CalGEM were expanded by the amendment to section 3235 to allow the supervisor to investigate a well or wells upon receipt of a written complaint from either a property owner or a person residing within a radius of one mile of any well or group of wells

Section 3226 of the Public Resources Code was amended by Assembly Bill 896 to strengthen the enforcement authority of the Supervisor to address orphan wells by permitting CalGEM to impose a lien against the real or personal property of an operator for an amount equal to an estimate of the cost of the work performed by CalGEM in situations in which the operator does not perform remedial work itself.

Senate Bills 47 and 84 amended sections 3206.3, 3237 and 3258 of the Public Resources Code to increase CalGEM's legislative reporting requirements for its idle well program and related matters.

*B. Judicial Developments*

In *Chevron U.S.A., Inc. v. County of Monterey*,   [[44]](#footnote-45)44***oil*** producers and mineral rights owners successfully challenged a Monterey County ordinance enacted by a voter initiative that sought to ban well stimulation treatments, wastewater injection and impoundment, and the drilling of new wells in the county. The court of appeal affirmed the trial court's holding that the ordinance was preempted by Cal. Pub. Res. Code § 3106, which gives the Supervisor of CalGEM the authority to permit and regulate ***oil*** and gas operations. In reaching that conclusion, the court expressly noted that its "narrow holding does not in any respect call into question the well-recognized authority of local entities to regulate the location of ***oil*** drilling operations . . . ."   [[45]](#footnote-46)45However, while local **[\*30]** agencies may have the ability under their zoning powers to regulate the location of wells, the court held that their ability to regulate the manner in which operations are actually conducted is limited and preempted by the provisions of the Public Resources Code.

*C. Administrative Developments*

*Permits for Hydraulic Fracturing and Well Stimulation Treatments*. On April 23, 2021, Governor Gavin Newsom directed CalGEM to initiate regulatory action to end the issuance of new permits for hydraulic fracturing by January 2024. Governor Newsom also directed the California Air Resources Board to analyze pathways to phase out ***oil*** extraction across the state by no later than 2045.   [[46]](#footnote-47)46In May 2021, CalGEM released pre-rulemaking draft regulations to receive public input on a rule that would end permitting for well stimulation treatments in 2024.   [[47]](#footnote-48)47

*Suspension of New CalGEM Permits in* ***Kern*** *County*. In 2015, ***Kern*** County, the largest ***oil*** producing region of California, in conjunction with CalGEM and industry stakeholders, approved an ordinance to streamline the permitting process for new ***oil*** and gas wells and certified an environmental impact report (EIR) as compliant with the California Environmental Quality Act (CEQA).   [[48]](#footnote-49)48The CEQA certification of the EIR and the approval of the ordinance was set aside on appeal in *King & Gardiner Farms, LLC v. County of* ***Kern***.   [[49]](#footnote-50)49***Kern*** County revised the ordinance in March 2021. However, a ***Kern*** County Superior Court in *Vaquero Energy Inc. v. County of* ***Kern***   [[50]](#footnote-51)50ordered the County to suspend the review and approval of ***oil*** and gas permits until the court determined that the 2021 ordinance complied with CEQA requirements. Since the court's order did not address how "responsible agencies" such as CalGEM that rely on the County's EIR under Cal. Pub. Res. Code § 21167.3 should proceed, CalGEM issued Notice to Operators 2021-06,   [[51]](#footnote-52)51advising operators seeking approval of new drilling and other operations that CalGEM's approval would only be conditional and would allow the operator to proceed only if the County's supplemental EIR supporting the 2021 ordinance was judicially determined to comply with CEQA. The effect of such a conditional approval was to potentially jeopardize any approval by CalGEM of any new drilling operations in the County.

*Engineer Signature Requirements for UIC Project Proposal*. CalGEM also issued Notice to Operators 2021-01   [[52]](#footnote-53)52in February 2021 requiring that data and **[\*31]** analysis for a disposal injection project be submitted under the signature and seal of a licensed civil engineer, rather than a petroleum engineer.

*Draft CalGEM Regulations for Potential Neighborhood Impact of* ***Oil*** *and Gas Operations*. On October 21, 2021, CalGEM released for public comment draft regulations intended to protect communities from the potential impacts of nearby ***oil*** and gas production operations.   [[53]](#footnote-54)53

IV. COLORADO

*A. Legislative Developments*

*County Regulations*. Senate Bill 19-181 (SB 181) expanded local governments' regulatory authority over ***oil*** and gas drilling operations. Pursuant to this bill, Adams County, City and County of Broomfield, and Larimer County all adopted new setbacks and increased regulatory control. In Adams County, ***oil*** and gas wells must now be drilled at least 2,000 feet from homes, schools, daycares, high occupancy building units, environmentally sensitive areas, parks, and open spaces.   [[54]](#footnote-55)54Adams County also expanded the definition of "environmentally sensitive areas," including wetlands, biological habitats, streams, lakes, rivers, national parks, tribal lands, drinking water sources, and wildlife areas.   [[55]](#footnote-56)55In Broomfield, the setback for pre-production ***oil*** and gas facilities increased to 2,000 feet from athletic fields, auditoriums, childcare facilities, correctional facilities, dwellings, event centers, hospitals and nursing facilities, and undeveloped residential lots.   [[56]](#footnote-57)56Broomfield also elevated the amounts required in financial assurances (including $ 25 million per pollution incident), exceeding the Colorado ***Oil*** and Gas Conservation Commission's (COGCC) current requirements.   [[57]](#footnote-58)57Similarly, Larimer County increased the setback regulations for ***oil*** and gas wells and production facilities to 2,000 feet from the property lines of any school, hospital, senior living or assisted living facility, multi-family dwelling, or daycare.   [[58]](#footnote-59)58Additionally, ***oil*** and gas facilities must be 2,000 feet from any public trail, park, public water supply, and building unit that is not subject to a waiver from all unit owners; however, Larimer County Board of County Commissioners may approve a variance from these setbacks through a special review process.   [[59]](#footnote-60)59

*Financial Assurance Rulemaking*. SB 181 directed the COGCC to conduct a rulemaking addressing operators' financial assurances.   [[60]](#footnote-61)60This rulemaking must address (1) increasing financial assurance for inactive wells and wells transferred to new owners; (2) requiring a financial assurance account, which **[\*32]** must remain tied to the well in the event of a transfer of ownership, to be fully funded in the initial years of operation for each new well to cover future costs to plug, reclaim, and remediate the well; and (3) creating a pooled fund to address orphaned wells for which no owner, operator, or responsible party is capable of covering the costs of plugging, reclamation, and remediation.   [[61]](#footnote-62)61The COGCC opened an informational docket, which allowed the public to provide comments on the financial assurance rulemaking. They also held hearings with industry and environmental groups, local governments, and community members. The COGCC released a new proposal for rules to govern the financial assurances from operators in December 2021. Under the latest draft of these rules, operators would be sorted into two tiers: (1) small, low-producing operators would be required to provide bonds between $ 35,000 and $ 105,000 per well, and (2) larger operators would be required to provide a higher blanket bond, potentially covering hundreds or thousands of active wells. The COGCC held formal hearings on the new rules in January and February 2022.

*B. Judicial Developments*

The Colorado Court of Appeals recently adopted the "commercial discovery" rule, permitting the discovery of ***oil*** or gas to satisfy the habendum clause in a lease.   [[62]](#footnote-63)62In *Crestone Peak*, Boulder County sued Crestone Peak Resources Operating LLC (Crestone), alleging Crestone's ***oil*** and gas leases terminated when two of their wells stopped producing. Both leases contained a habendum clause, which allowed the leases to remain in force for "as long thereafter as ***oil*** or gas . . . is produced."   [[63]](#footnote-64)63The leases also contained cessation of production clauses, which provided that re-working or drilling operations extended the lease after the primary term, and shut-in royalties clauses.   [[64]](#footnote-65)64

Boulder County argued that production stopped under the leases when the pipeline closed for maintenance.   [[65]](#footnote-66)65Boulder asserts that "production means extraction of hydrocarbons from the ground," and therefore the leases expired.   [[66]](#footnote-67)66The court disagreed and held that production under a habendum clause "is satisfied by discovery in commercial quantities."   [[67]](#footnote-68)67The terms of the leases support this conclusion: "[w]hen drilling or reworking operations are stipulated as a remedy for cessation of production, the parties must have intended that production meant capable of production, such that a well that was no longer capable of production could be remedied by reworking or new drilling."   [[68]](#footnote-69)68The court further noted the commercial discovery rule "protects lessees **[\*33]** who have invested millions of dollars . . . from losing that investment due to temporary extraction pauses," and protects lessors' "rights to royaltygenerating activity."   [[69]](#footnote-70)69The County filed a petition for writ of certiorari with the Colorado Supreme Court, which was granted on the issue of application of the commercial discovery rule.

On June 3, 2021, the Colorado Court of Appeals confirmed the judiciary's authority to resolve royalty payment disputes involving lease interpretation.   [[70]](#footnote-71)70In *Antero*, mineral owners sued Antero Resources Corporation and Ursa Operating Company, LLC, alleging the two companies improperly deducted postproduction costs and reduced their royalty payments. The two companies filed a motion to dismiss, arguing the mineral owners failed to exhaust administrative remedies by not taking the matter to the COGCC.

The COGCC asserted they lacked jurisdiction over the mineral disputes, since the claims involved bona fide disputes over lease interpretation. The court of appeals agreed and remanded the case back to the district court. Importantly, the Colorado ***Oil*** and Gas Conservation Act gives the COGCC jurisdiction to determine: (1) the "date on which payment of proceeds is due a payee"; (2) the "existence or nonexistence of an occurrence . . . which would justifiably cause a delay in payment"; and (3) the "amount of the proceeds plus interest, if any, due a payee by a payer."   [[71]](#footnote-72)71However, if the COGCC determines a "bona fide dispute exists regarding the interpretation of a contract," the COGCC shall decline jurisdiction and the case may be resolved in court.   [[72]](#footnote-73)72The mineral owners' petition for writ of certiorari to the Colorado Supreme Court was granted.

V. KANSAS

*A. Legislative Developments*

*Well-Plugging Funds*. House Bill 2022 consolidates the two funds for plugging abandoned wells so that all fees will be placed in a single abandoned ***oil*** and gas well fund. The statute further supplemented the current regulatory scheme for well-plugging enforcement and compensation. An "abandoned well" is now defined in Kan. Stat. Ann. §§ 55-178, 55-179, and 55-180 as a "well that is not claimed on an operator's license that is active with the commission and is unplugged, improperly plugged or no longer effectively plugged." The definition of well was also broadened to include abandoned cathodic wells.

Next, the bill amended section 55-179 to limit who may be held responsible for well plugging. The list is now limited to: (1) any person causing pollution or loss of usable water through the well, including injection or disposal well operators; (2) the most recent operator of the well; (3) if no production or injection occurred, the person responsible for drilling the well; (4) the person **[\*34]** who most recently accepted responsibility for the well by assignment or other agreement; (5) the last operator who filed a T-1 or well inventory with the Kansas Corporation Commission (KCC); (5) the operator who most recently plugged the well; and (6) any person who tampers with the well, intentionally destroys or damages the wells, or otherwise alters the well in a way that increases plugging costs.

Finally, the bill amended section 55-192 to remove the limitation of the Abandoned ***Oil*** and Gas Well Fund to be used only for investigating pre-1996 abandoned well sites. Third parties may now seek compensation for plugging any well that has been abandoned for five or more years.

*KDHE Penalties*. House Bill 2155 replaces and updates Kan. Stat. Ann. § 65-171v regarding soil and water pollutant cleanup. Previously, individuals or companies with a pollutant release were only responsible for cleanup costs. This bill defines "clean up" in such a way that the Kansas Department of Health and Environment (KDHE) may now charge companies for all parts of release response--including preliminary investigations and reports. The bill also allows the agency to fine individuals up to $ 15,000 for refusing to pay for agency investigation efforts. At this time, the KDHE and the KCC still have a memorandum of understanding in place that gives the KCC jurisdiction over any on-lease spill related to ***oil*** and gas production. But operators should be aware of this statute for any off-lease spill or for tank bottom disposal practices.

*Pipeline Safety*. House Bill 2329 amends Kan. Stat. Ann. § 66-1,150 to align the state's pipeline safety jurisdiction for intrastate pipelines with the jurisdiction of U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration. The bill also raises the maximum civil penalties for pipeline safety violations to match those available under federal law. Kansas has not raised its maximum penalty levels since the last time this statute was amended in 2012.

This bill is significant because it is part of a broader push by the agency to update its pipeline safety practices. In 2021, the KCC updated several regulations to match amendments to federal regulations on pipeline safety and reporting requirements.   [[73]](#footnote-74)73

*B. Judicial Developments*

*Tax Appraisals for Leaseholds and Shut-in Wells*. In contrast to the active year in the legislature, 2021 was a quiet year for ***oil*** and gas in the courts. The Kansas Supreme Court issued an opinion in the tax appeal matter *In re River Rock Energy Co.*   [[74]](#footnote-75)74River Rock Energy Co. (River Rock) appealed a Kansas Board of Tax Appeals' (BOTA) order using minimum lease values to value its gas wells and related equipment for tax year 2016. The operator had acquired the wells through a bankruptcy sale. After the sale, River Rock learned the relevant counties appraised the wells using the minimum lease value, which creates an **[\*35]** assessed value higher than the actual gross working interest value--particularly for stripper and shut-in wells. The operator challenged the Board's decision on a number of grounds, including: (1) the BOTA erred in upholding the counties' valuation of certain wells based on the minimum lease values set forth in the Kansas Department of Revenue's ***Oil*** and Gas Appraisal Guide; (2) BOTA's decision led to an arbitrary and erroneous valuation of its wells; (3) BOTA's characterization of the effect of the minimum lease value was contrary to the evidence in the record; (4) BOTA's valuation of the equipment used in the wells was legally and factually erroneous; and (5) BOTA erred in refusing to grant an abatement of the filing fee and declining to docket and decide the appeals of 1,945 of River Rock's 2,150 wells.

In 2020, the Kansas Court of Appeals found for River Rock, holding that BOTA's decision to affirm the minimum lease value appraisals was arbitrary. The court of appeals also sided with River Rock on the filing fee question as the total amount would have equaled over 60% of the total taxes owned--making the filing fees an unconstitutional tax and revenue-generating measure.

The Kansas Supreme Court rejected the court of appeals' rationale, finding that the court of appeals' outcome "means the working interest's share of natural gas reserves serviced by a [nonproducing] gas well . . . is simply not taxable."   [[75]](#footnote-76)75The court further rejected River Rock's argument that the bankruptcy sale price or other methods of appraising the wells were correct. As such, all wells will continue to be valued with the Department of Revenue's ***Oil*** and Gas Appraisal Guide methodology subject to the discretion of county appraisers. Operators should take these tax considerations into account when purchasing wells in the future.

*Fawcett and the Marketable Product Rule*. Finally, in the ongoing *Fawcett* litigation, the Kansas Supreme Court heard oral arguments in October on the plaintiffs' amended petition.   [[76]](#footnote-77)76 *Fawcett* is a class action by royalty owners based on Kansas's marketable product rule. After the Kansas Supreme Court rejected the plaintiffs' theory of recovery in 2015, the class amended its petition on the basis that the court "changed the law on what it means to be marketable."   [[77]](#footnote-78)77The class now challenges the producer's and third-party gas marketers' use of net-back formulas to determine royalty payments--essentially alleging that such formulas suggest bad faith toward lessors.

VI. LOUISIANA

*A. Legislative Developments*

This year Louisiana joined 30 other states in adopting an environmental audit law when the Louisiana legislature enacted Act No. 481. This new law, which amends and reenacts La. Rev. Stat. §§ 30:2018(C) and 30:2030(A)(2) **[\*36]** and enacts La. Rev. Stat. §§ 30:2030(A)(3) and 30:2044, aims "to require the secretary to promulgate regulations allowing for voluntary environmental selfaudits; to provide for the confidentiality of information contained in a voluntary environmental self-audit; to provide for exceptions to confidentiality requirements; to provide for incentives to facilities conducting voluntary environmental self-audits; and to provide for related matters."   [[78]](#footnote-79)78Prior to Act No. 481, there was no procedure through which a Louisiana industrial facility could opt to self-audit pollution events when they otherwise would not be required to report such occurrences. The only reporting requirements faced by these organizations was in the form of mandatory reporting requirements for pollution violations that met a set standard of severity.

This new law urges plants to disclose pollution events that would not usually qualify for mandatory reporting in an "environmental audit." This legislation is intended to allow plants to report toxic spills that would otherwise go wholly unreported in order to provide the Louisiana Department of Environmental Quality (LDEQ) with information on minor accidents that it would not normally receive. The incentives provided by this new law encouraging plants to participate in self-reporting their minor pollution incidents are twofold. First, the new law provides that self-audits made under its provisions will be held confidential and withheld from public disclosure for a period of time until a final decision is made by the LDEQ. Second, the new law incentivizes self-reporting with the promise of "reduction or elimination, or both, of civil penalties for violations disclosed to the [LDEQ] in a voluntary environmental self-audit."   [[79]](#footnote-80)79

*B. Judicial Developments*

In a tumultuous year when the nation faced yet another chapter of uncertainty amid the COVID-19 pandemic, there were a number of significant developments in legacy litigation. This type of litigation is relatively recent in vintage compared to more traditional ***oil*** and gas disputes insofar as it began to dominate ***oil*** and gas law in Louisiana in the early 2000s. Legacy litigation refers to lawsuits involving claims of oilfield contamination to land, including soil and groundwater, which allegedly arises arising from historical ***oil*** and gas operations.

Importantly, the Louisiana Supreme Court turned heel on its previous rule regarding the availability of damages in excess of the cost to remediate the property to regulatory standards by concluding that in the absence of an express contractual obligation, such damages are not allowed under La. Rev. Stat. § 30:29 (otherwise referred to as Act No. 312). In *State v. Louisiana Land & Exploration Co.*,   [[80]](#footnote-81)80the State of Louisiana and the Vermilion Parish School Board brought an action against various ***oil*** companies seeking remediation of allegedly contaminated property owned by the State and managed by the school board. In an earlier ruling in this case handed down in 2013, the Louisiana **[\*37]** Supreme Court indicated that section 30:29 provided authority for a jury to award damages in excess of the cost to remediate the property.   [[81]](#footnote-82)81By contrast, now the Louisiana Supreme Court reasoned that "there is not, and never was, statutory support" for excess remediation damages under section 30:29.   [[82]](#footnote-83)82Therefore, the Louisiana Supreme Court found that in the absence of an express contractual obligation, section 30:29 does not authorize damages in excess of the remediation plan, and such plan should be determined by the trial court, as opposed to a jury. An application for rehearing was filed and remains pending at this time.

The recent decision in *Grace Ranch, L.L.C. v. BP America Production Co.* by the U.S. Court of Appeals for the Fifth Circuit is another development in the area of legacy litigation.   [[83]](#footnote-84)83The plaintiff in this case relied upon the citizen suit provision in La. Rev. Stat. § 30:16 to seek an injunction for remediation. Among other issues, the Fifth Circuit was tasked with determining whether the potential state involvement under the statute defeated diversity jurisdiction in federal court. The Fifth Circuit ultimately determined that diversity jurisdiction existed insofar as the State of Louisiana was not a proper party under section 30:16. The Fifth Circuit reasoned that a plaintiff under the statutory provision was not authorized to sue in the State's name, and a final judgment must be entered despite the State's absence.

Aside from the recent developments over the last year in the realm of legacy litigation, the Western District of Louisiana issued a critical interlocutory ruling in the landmark case of *Louisiana v. Biden*.   [[84]](#footnote-85)84This lawsuit takes aim at an executive order issued by President Biden that paused new ***oil*** and gas leases on public lands and in offshore federal waters pending completion of a comprehensive review.   [[85]](#footnote-86)85Louisiana and 12 other states filed suit against the President and federal agency officials for declaratory and injunctive relief, claiming the executive order violated the U.S. Constitution, Administrative Procedure Act (APA), Outer Continental Shelf Lands Act, and Mineral Leasing Act. Most recently, the states moved for a preliminary injunction in the case.

The Western District of Louisiana granted the preliminary injunction as to President Biden's executive order, concluding that the preliminary injunction "shall remain in effect pending the final resolution of this case, or until further orders from this Court, the United States Court of Appeals for the Fifth Circuit, or the United States Supreme Court."   [[86]](#footnote-87)86In doing so, the district court held that the states had standing to bring the lawsuit challenging President Biden's executive order. Further, the court found that the states had a substantial likelihood of success on various claims that the executive order in question was **[\*38]** issued in violation of the APA.   [[87]](#footnote-88)87This decision is the subject of appeal, but in the meantime, the preliminary injunction issued by the Western District of Louisiana thwarts President Biden's attempt to pause new ***oil*** and gas leasing.

VII. NEW MEXICO

*A. Legislative Developments*

The New Mexico ***Oil*** Conservation Commission enacted revised rules significantly altering the regulations related to venting and flaring of natural gas and regarding the operation of natural gas gathering systems. In general these rules seek to significantly reduce both venting and the non-energy generating flaring of natural gas.

The new rules define the venting and flaring of natural gas as waste, prohibiting those activities unless authorized by rule so that "[an] operator has a general duty to maximize the recovery of natural gas" by minimizing the release of natural gas to the atmosphere.   [[88]](#footnote-89)88In all circumstances, venting is prohibited in the absence of "an emergency or malfunction" and for the limited purpose of "unload[ing] or clean[ing]-up liquid holdup in a well to atmospheric pressure."   [[89]](#footnote-90)89During completion operations, venting is only permitted "[d]uring initial flowback" and only if flaring is not "technically feasible under the applicable well conditions."   [[90]](#footnote-91)90

During drilling operations an operator must capture or combust natural gas escaping from the well using best available control technologies.   [[91]](#footnote-92)91An operator is permitted to flare during drilling operations only with "[a] properlysized flare stack" that, absent express permission from the New Mexico ***Oil*** Conservation Division (NMOCD), must be located at least 100 feet from the nearest surface hole.   [[92]](#footnote-93)92

During the completion activities after initial flowback, the strong regulatory preference is to capture gas for collection and sale, reinjection, use as an onsite fuel source, or used for some "other purpose that a purchased fuel or raw material would serve."   [[93]](#footnote-94)93If none of those uses are available without "a risk to safe operation or personnel safety" during separation flowback, flaring is permitted.   [[94]](#footnote-95)94Thereafter, flaring can occur for 60 days or until the gas meets pipeline quality specifications, whichever is sooner.   [[95]](#footnote-96)95

Flaring during production operations is prohibited except for the limited circumstances described above when venting is also allowed. Flaring is permitted for a period not to exceed 12 months if the well is able to meet the very **[\*39]** restrictive requirements of an "exploratory well" and the operator is in good standing with the NMOCD as to certain requirements.   [[96]](#footnote-97)96After production operations commence, the operator is required to perform regular audio, visual, and olfactory (AVO) tests on its production facilities associated with natural gas production, separation, and capture equipment.   [[97]](#footnote-98)97The frequency of the AVO tests is weekly for the first year the well produces and thereafter depends on the well's current production volumes. Additionally, all facilities constructed after May 25, 2021, "shall be designed to minimize waste," with some specific requirements for certain equipment.   [[98]](#footnote-99)98

These rules also impose requirements that each operator in New Mexico adopt a "gas management plan" beginning April 1, 2022, with a goal of reducing flaring and venting so that 98% of natural gas produced is captured by December 31, 2026.   [[99]](#footnote-100)99Annually, beginning in 2022, operators are required to "increase [their] annual percentage of natural gas captured in each reporting area."   [[100]](#footnote-101)100The rules contain detailed requirements for accounting for the reductions and for the contents of an appropriate gas management plan.

Similarly, operators of natural gas gathering systems have "a general duty to maximize the gathering of natural gas by minimizing the waste of natural gas through venting and flaring."   [[101]](#footnote-102)101Even if venting or flaring is permitted by the rules, the operator must flare rather than vent unless "flaring is technically infeasible or would pose a risk to safe operations or personnel safety, and venting is a safer alternative than flaring."   [[102]](#footnote-103)102Flaring or venting can only occur during an "emergency or malfunction" or during certain specified operations that may occur from time to time.   [[103]](#footnote-104)103The gathering system operator must also measure (or estimate) and then report volumes of gas flared or vented to the NMOCD.   [[104]](#footnote-105)104As to each non-contiguous gathering system, an operations plan is required.   [[105]](#footnote-106)105

VIII. OHIO

Ohio's courts continued to grapple with a diverse range of ***oil*** and gas issues in 2021, from the use of the state's Dormant Mineral and Marketable Title Acts, to contested mineral ownership disputes, deed construction, and ***oil*** and gas leases.

**[\*40]** *Ohio's Marketable Title Act and Dormant Mineral Act*. In *Erickson v. Morrison*,   [[106]](#footnote-107)106the Supreme Court of Ohio clarified an exception to the Ohio Marketable Title Act (MTA).   [[107]](#footnote-108)107The exception, found in Ohio Rev. Code § 5301.49(A), provides that marketable record title is taken subject to interests inherent in the record chain of 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." The defendants, owners of the surface, argued that the MTA extinguished a reservation of coal, gas, and ***oil*** because references to the severed rights in their root of title and later deeds in their title chain were not specific under section 5301.49(A). The plaintiffs, successors to the severed minerals, disagreed, claiming that the references in these deeds were specific even though the references did not identify the severed mineral owner.

The court agreed with the plaintiffs, holding that the references were specific, which prevented the MTA from extinguishing the mineral severance. In reaching that decision, the court clarified its earlier ruling in *Blackstone v. Moore*.   [[108]](#footnote-109)108 *Blackstone* found that a reference to severed minerals constituted a "specific identification" under section 5301.49(A) when it identified the nature of the interest and the interest owner. The *Erickson* court explained that *Blackstone* should not be read to require that a reference include the name of the interest owner in order to be a "specific" reference. The court found the references in the surface owners' root of title and later deeds were specific, even though they did not identify the interest's owner. The references in these deeds were not vague allusions to prior reservations that may or may not exist. "Rather, the [surface owners'] root of title and subsequent conveyances are made subject to a specific, identifiable reservation of mineral rights recited throughout their chain of title using the same language as the recorded title transaction that created it."   [[109]](#footnote-110)109

*Pernick v. Dallas*   [[110]](#footnote-111)110clarified the meanings of the terms "root of title" and "title transaction" under the MTA. Under that statute, ancient interests in land can be extinguished provided certain statutory elements are met, including, chiefly, that the claimant seeking to employ the MTA must have a "root of title," that is, the conveyance or other title transaction purporting to create the interest claimed by such person, and that is the most recent to be recorded as of a date 40 years prior to the time that marketability is being determined. Additionally, the interest sought to be extinguished must have been created before the recording of the root of title and cannot be specifically referenced or identified in the root of title or any instruments within the claimant's chain of title recorded 40 years thereafter. The appeals court held that a deed at issue qualified as a root of title because it described the property being claimed without reference to any ***oil*** and gas reservations or exceptions.

**[\*41]** *Roberts v. Roberts*   [[111]](#footnote-112)111considered the definition of the term "mineral interest" under Ohio's Dormant Mineral Act (DMA).   [[112]](#footnote-113)112The DMA provides a mechanism to reunite abandoned severed mineral interests. At issue was an ***oil*** and gas lease for a perpetual term executed in 1895. A dispute arose over the lease's viability. The lessee-appellee asserted that the lease was preserved by the DMA's savings provisions. The narrow issue was whether the lease qualified as a "mineral interest" under the statute, i.e., "a fee interest in at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided."   [[113]](#footnote-114)113The court found that since the ***oil*** and gas lease in question granted an exclusive right for an indefinite period to all of the ***oil*** and gas under the property, it constituted a fee interest in the mineral rights. The lease was thus a "mineral interest" to which the DMA applied.

In *O'Kelley v. Rothenbuhler*,   [[114]](#footnote-115)114the appeals court considered whether the reference "and also excepting the ***oil*** and gas minerals including coal underlying the same heretofore conveyed" in the root of title deed and a later conveyance constituted a specific reference that preserved the appellant's severed minerals under the MTA. The court found that the reference in the deed was not specific because it neither described the severed minerals nor identified the name of the grantee to whom the minerals were granted. And compared to the specific references in *Erickson*, the reference "lack[ed] any 'narrow precise considerations,' 'limited details,' or 'particulars.'"   [[115]](#footnote-116)115Thus, the language in the deed was not sufficiently specific to save the interest from being extinguished by the MTA.

In *Beckett v. Rosza*,   [[116]](#footnote-117)116the appeals court addressed the due diligence that a surface owner must undertake to notify severed mineral owners of an abandonment under the DMA. The court held that there is no bright-line test for due diligence, rather, sufficiency is determined case-by-case and measured by reasonableness and common sense. In this case, the surface owners' search began and ended with the public records of the Ohio county where the minerals were located, but those county records reflected addresses for mineral holders in Connecticut and Illinois. The court ruled that it was unreasonable for the surface owner to ignore these addresses and fail to search for identifiable mineral holders in those states.

*Deed Construction*. In *O'Bradovich v. Hess Ohio Developments, LLC*,   [[117]](#footnote-118)117the court of appeals considered a deed from 1940 that "included language '[e]xcepting and reserving, however, to the Grantor herein, its successors and assigns, from all the underlying above described Tracts Nos. 2 and 3 all the **[\*42]** coal and other minerals in, upon or underlying all of the same.'"   [[118]](#footnote-119)118The issue before the court was whether the phrase "coal and other minerals" included ***oil*** and gas. The court noted that, given the deed's vintage, ***oil*** and gas were presumed to be included within the phrase "other minerals" as long as the deed language can be reasonably seen to include these minerals and other language did not exclude ***oil*** and gas. The court found nothing in the deed was repugnant to the inclusion of "***oil*** and gas" within the phrase "other minerals."

*Adverse Possession*. In *Tomechko v. Garrett*,   [[119]](#footnote-120)119an Ohio appeals court addressed the elements that a cotenant must satisfy to adversely possess a severed ***oil*** and gas interest against his or her cotenants. The court considered whether the appellants--fractional mineral interest owners--adversely possessed their cotenants' (appellees') ***oil*** and gas when, in 1989, the appellants entered into an ***oil*** and gas lease with a producer that leased the entirety of the ***oil*** and gas under the property as to all depths. In Ohio, "[a] tenant in common cannot assert title by adverse possession against his co-tenant unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the co-tenant."   [[120]](#footnote-121)120The court held that the appellants adversely possessed the appellees' ***oil*** and gas because they leased and produced the appellees' ***oil*** and gas and the lessee paid the appellants for such production. Further, although the two wells drilled on the appellants' property were only producing from shallow formations, the court held that the appellants also adversely possessed the deep formations because "[a]dverse possession of the deep rights should follow the shallow rights due to the alteration of the surface and subsurface from drilling and removing the ***oil*** and gas."   [[121]](#footnote-122)121In this case, the appellants adversely possessed the deep formations based on their "adverse possession of the shallow rights, the permeating nature of the drilling and production of ***oil*** and gas, and the lease . . . which provided for drilling to all strata."   [[122]](#footnote-123)122

***Oil*** *and Gas Leases*. In *Browne v. Artex* ***Oil*** *Co.*,   [[123]](#footnote-124)123the court considered whether testimony of people with first-hand knowledge could serve as evidence of production in paying quantities in lieu of production reporting to Ohio's Department of Natural Resources. The court found that deposition testimony, an affidavit, and witness testimony amounted to significant evidence that the well was producing in paying quantities during the disputed period. Further, the producer's failure to report production is not the same as reporting "zero" production and did not strip a lessee of its lease rights.

In *Eaton v. Ascent Resources Utica, LLC*,   [[124]](#footnote-125)124the federal district court considered whether the lessee could deduct post-production costs when calculating **[\*43]** royalties under an ***oil*** and gas lease. The lease's royalty provided that the lessee would pay "as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the wellhead price paid to [the lessee] per thousand cubic feet of such gas so marketed and used."   [[125]](#footnote-126)125The court held that this language allowed the lessee to calculate the value of gas at the wellhead by deducting post-production costs, even though the lessee's gas was not sold at the wellhead. The court stated that "[t]he plain text of the royalty provision unambiguously references the value of gas at the wellhead--not the value of the gas at the wellhead only if the gas is sold there."   [[126]](#footnote-127)126

*Talmage v. Bradley*   [[127]](#footnote-128)127determined whether an overriding royalty interest (ORRI) burdened the defendant lessee's ***oil*** and gas leases and wells covering properties in Noble County, Ohio, when the ORRI was not recorded in that county. The court noted that under Ohio law, "all leases, licenses, and assignments thereof, or of any interest therein," must be recorded in the county records, and that "[n]o such lease or license is valid until it is filed for record, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession."   [[128]](#footnote-129)128The ORRI was not recorded in Noble County and thus was invalid unless one of the statutory exceptions applied--"actual and open possession" or enforcement "between the parties thereto." The former exception did not apply. As to the latter, the court found that ordinarily an assignee steps into the assignor's shoes. But here, the defendant assignee of the original lessee was not bound by the ORRIs because under the subject assignments the defendant's leases were only burdened by properly recorded ORRIs.

IX. OKLAHOMA

*A. Judicial Developments*

In *Strack v. Continental Resources, Inc.*,   [[129]](#footnote-130)129an objector appealed a $ 19 million attorney fee award and a $ 400,000 incentive award in an ***oil*** and gas class action lawsuit. The court of civil appeals reversed the district court's awards, and the case was appealed to the Oklahoma Supreme Court.

Without describing the holdings in the appeal in detail, the supreme court found that "the class representatives and class counsel must act in a fiduciary relationship on behalf of the silent class members in a class action. Oklahoma's class action attorney fee statute places the district court also in a fiduciary role to the class when awarding fees."   [[130]](#footnote-131)130"In granting attorney's fees and incentive awards in this case, the district court failed to consider this role to the royalty owners whose mineral interests are at the heart of this litigation **[\*44]** and to ensure that not only class counsel but also the royalty owners benefited from this litigation."   [[131]](#footnote-132)131

However, the Oklahoma Supreme Court held that, although Oklahoma's class action attorney fee statute gives courts flexibility and discretion in calculating fee awards under the percentage-of-common-fund method, "[t]he district court abused its discretion when it awarded an unreasonable attorney fee award and an incentive award not supported by evidence."   [[132]](#footnote-133)132The decision of the district court was reversed and remanded by the supreme court.

In *Slatten v. Range Resources Corp.*,   [[133]](#footnote-134)133the plaintiffs appealed the judgment on a jury verdict in favor of the defendants. The plaintiffs also appealed an order denying their motion for judgment notwithstanding the verdict (NOV).

The plaintiffs claimed that the defendants had not paid all royalties due on the plaintiffs' gas wells. The plaintiffs maintained that the defendants' sales to midstream companies were not market sales, but rather service contracts where the midstream companies process the raw gas from the wells for sale to a consumer of processed gas and its constituents. The plaintiffs claimed that the midstream companies deducted the processing costs, the value of fuel gas, and the fees charged for processing the gas, and that these charges were not permitted according to the law and the leases. The defendants claimed that the sales to the midstream companies were market sales and that the sales took place in a marketplace. The defendants claimed that they did not deduct anything and paid royalties on the amount they received for sale of the gas.

The cause was tried before a jury. The jury returned a verdict for the defendants. The plaintiffs moved for judgment NOV. Under the standard of review of judgments entered on jury verdicts and on orders denying motions for judgment NOV, the court affirmed the judgment on the jury verdict and the order denying the motion for judgment NOV.

Gomaco, Inc. (Gomaco), and Baytide Petroleum, Inc. (Baytide), appealed an Oklahoma Corporation Commission (OCC) order granting EOG Resources, Inc.'s (EOG), motion to dismiss the other two parties' application to vacate a pooling order. EOG argued that the application to vacate was an impermissible collateral attack on the final, unappealed pooling order and should be dismissed. The OCC granted EOG's motion to dismiss. Gomaco and Baytide appealed.

In *Gomaco, Inc. v. Corporation Commission*,   [[134]](#footnote-135)134the court of civil appeals reviewed the factual history and found that the Gomaco and Baytide appellants and their counsel received a copy of the OCC's pooling order within the 20-day period for them to make an election. Thus, the court saw no prejudice resulting to those appellants from not receiving a copy at an earlier date. Because the appellants received the required notice, there was no jurisdictional defect apparent on the face of the record. The final, unappealed pooling order **[\*45]** remained in effect. The court concluded that the OCC properly dismissed the appellants' application to vacate the pooling order because this case presented an impermissible collateral attack on a final order.

In *Missouri Gas Energy v. Grant County Assessor*,   [[135]](#footnote-136)135the appellants, Grant County Assessor and Grant County Board of Equalization (collectively, County), appealed the entry of summary judgment in favor of Missouri Gas Energy (MGE) in their challenge to the assessment of tax on natural gas temporarily stored in Grant County.

This case was previously remanded to the trial court with directions to determine the amount of gas exempt from ad valorem tax under the Freeport Exemption. The record shows no dispute of the material facts that the amount claimed by MGE as being exempt was purchased outside Oklahoma, stored in Oklahoma for nine months or less, and sold outside Oklahoma. MGE was entitled to judgment as a matter of law and [the Court of Civil Appeals] affirm[ed].

. . . .

County first argues the trial court erred in granting judgment to MGE based on its amended Form 901-F, the form used to seek the Freeport Exemption. County cites 68 O.S.2011 § 2902.2 which provides that an untimely application for the exemption is void. . . . [T]his argument is barred by the doctrine of res judicata.

County's remaining arguments address whether MGE showed it was entitled to judgment as a matter of law on its claim for an exemption for 87.53% of the gas it stored in Grant County. County contends MGE cannot show what amount of its gas originated outside of Oklahoma nor what amount was stored in Grant County for less than nine months.

. . . .

In *MGE I*, the Supreme Court made clear that it is the quantity of gas shipped in and out of Oklahoma that is determinative of the first element of the Freeport Exemption, not the particular molecules. In *MGE I*, MGE sought to have its gas, which originated in Oklahoma, declared exempt because it commingled with other's gas shipped from outside the state. The Supreme Court rejected that argument. County is now making the same argument reversed-that because MGE's gas originating out of state was commingled with gas owned by others which originated in Oklahoma, the exemption cannot apply. *MGE I* requires our finding that the quantity of gas owned by MGE which originated outside Oklahoma qualifies for the exemption so long as it was stored here less than nine months.   [[136]](#footnote-137)136

**[\*46]** In addressing a series of issues on appeal, the court noted that

MGE presented evidentiary materials establishing that 87.53% of the gas it owned that was stored in County originated out of Oklahoma, was stored in Oklahoma nine months or less, and was sold in Missouri. County did not present evidentiary materials creating a dispute of these material facts and therefore MGE was entitled to judgment as a matter of law.   [[137]](#footnote-138)137

In *True Steel, LLC v. Great Salt Plains Midstream, LLC*,   [[138]](#footnote-139)138True Steel filed an action to foreclose an ***oil*** and gas lien or for money damages related to unjust enrichment and other claims. True Steel appealed the trial court's dismissal of its foreclosure action.

True Steel raised many allegations of error on appeal. The court found that the allegations of error regarding True Steel's quantum meruit/unjust enrichment claim had merit, and the portion of the trial court's order dismissing True Steel's quantum meruit/unjust enrichment claim must be reversed.

The court of Appeals found that True Steel adequately stated a claim against Great Salt Plains Midstream, LLC (Midstream), for quantum meruit/ unjust enrichment. The court concluded that "a subcontractor who has lost his lien claim against the property owner may still state a claim against the owner for money damages under the theory of quantum meruit/unjust enrichment when the owner has not paid the general contractor."   [[139]](#footnote-140)139That portion of the trial court's order was reversed and remanded for further proceedings related to the unjust enrichment claim. The trial court's dismissal of True Steel's remaining claims against Midstream was affirmed.

The case of *Highpointe Energy, LLC v. Viersen*,   [[140]](#footnote-141)140presented the court with a quiet title action. The property at issue consisted of mineral interests from two different chains of title. One chain followed from a bankruptcy proceeding. The other chain arose from a mortgage foreclosure proceeding. The trial court determined that the chain resulting from the foreclosure and sheriff's sale was superior to the bankruptcy chain. The Viersens appealed and the court retained the case. The Oklahoma Supreme Court held that because the bankruptcy purchasers could secure no greater rights in the disputed property than the bankruptcy trustee held, the purchasers from the mortgage foreclosure proceeding held the superior title.

Before reaching its conclusions, the court engaged in a detailed discussion of the various issues that impacted its analysis of this case. Among other rulings, in affirming the decision of the trial court the court found as follows:

The bankruptcy purchasers held no greater rights than the bankruptcy trustee held. . . . The Trustee had notice of the foreclosure proceedings and neglected to take any action to clear the title and sell the disputed **[\*47]** property interest free and clear of all liens. Consequently, pursuant to the rationale of *Viersen v. Boettcher*, 1963 OK 262, 387 P.2d 133, the purchasers under the Sheriff's deed chain of title hold the superior title.   [[141]](#footnote-142)141

In *Stamps Brothers* ***Oil*** *& Gas, LLC v. Western* ***Oil*** *& Gas Development Corp.*,   [[142]](#footnote-143)142Western ***Oil*** and Gas Development Corp. (Western) appealed from the trial court's judgment in favor of the plaintiff-appellee, Stamps Brothers ***Oil*** and Gas, LLC (Stamps), in a suit to quiet title to certain ***oil*** and gas leases in Grady County. The court of appeals affirmed the trial court's ruling as corrected in the appellate decision.

The trial court concluded that the well alleged to be keeping the Western ***oil*** and gas leases alive expired on or before December 31, 2015. The court quieted title in Stamps and denied Western's counterclaim. Western appealed.

The appellate court noted many of the trial court's findings on appeal in its appellate decision. For example,

the trial court found that during the 37-month, pre-litigation period from July 2013 through July 2016, the [subject well] did not produce in quantities sufficient to yield a return of proceeds in excess of lifting costs; and that, by December 2013 the well had had "negative returns" for 12 consecutive months. The court found the length of time the well was not [producing in paying quantities] was unreasonable and that the equitable considerations advanced by Western did not justify the failure to produce, resulting in expiration of the Western leases as of December 31, 2015.   [[143]](#footnote-144)143

Based on the record in this case, the court of appeals found that the trial court's determination of lifting expenses (i.e., that the subject well failed to yield a return in excess of lifting expenses, and that it thus failed to produce in paying quantities for an unreasonable period of time), was not against the clear weight of the evidence.

The court of appeals stated in its concluding findings that, to satisfy the habendum clause and continue the Western leases, the [subject well] must have been actually producing in paying quantities, and its failure to do so for an unreasonable period of time would result in termination of the leases. . . . [T]he trial court's determination that the leases terminated for failure to produce in paying quantities is not against the clear weight of the evidence or an abuse of discretion.   [[144]](#footnote-145)144

**[\*48]** *B. Administrative Developments*

Documents filed in the 2021 rulemakings referred to below can be viewed on the OCC's website at https://www.oklahoma.gov/occ.

***Oil*** *and Gas Conservation Rules*. Amendments to title 165, chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the OCC's ***Oil*** & Gas Conservation Rules, were addressed in Cause RM No. 202100003. Following is a brief summary of the amendments that became effective on October 1, 2021:

• OAC 165:10-3-28 was amended to modify allowables for horizontal gas wells;

• OAC 165:10-17-6 was amended to extend the time period to submit initial test results for gas wells;

• OAC 165:10-17-7 was amended to reduce the frequency of gas well tests, and

• OAC 165:10-17-11 was amended to clarify permitted rates of production for unallocated gas wells.

*Rules of Practice*. Amendments to title 165, chapter 5 of the Oklahoma Administrative Code, which comprises the OCC's Rules of Practice, were addressed in Cause RM No. 202100002. The amendments became effective on October 1, 2021. The amendments primarily relate to the forthcoming electronic case filing (ECF) system, including the authorization for the creation of an ECF user manual. Additionally, the amendments remove the ability to file documents by fax and replace it with the ability to file by electronic mail, clarify the computation of time for periods greater than and less than five days, amend the process for dismissing orders, create a discovery process for proceedings on the Oklahoma Universal Service Fund docket, and establish procedures for the Motor Carrier Citation Docket.

X. PENNSYLVANIA

*A. Legislative Developments*

Governor Tom Wolf again unsuccessfully introduced a plan to create a severance tax on ***oil*** and natural gas production. House Bill 1242 proposed amending title 58 (***Oil*** and Gas) of the Pennsylvania Consolidated Statutes to include a variable rate for the new tax depending on the average Pennsylvania hub price for the prior calendar year.

*B. Judicial Developments*

In *Commonwealth v. Chesapeake Energy Corp.*,   [[145]](#footnote-146)145the Pennsylvania Supreme Court determined that the Office of the Attorney General (OAG) could **[\*49]** not bring claims under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL).   [[146]](#footnote-147)146On behalf of private landowners, the OAG brought claims against Chesapeake Energy Corp., a natural gas exploration and production company, for alleged deceptive, misleading and unfair practices in obtaining natural gas leases.   [[147]](#footnote-148)147Writing for the 6 to 1 majority, Justice Sallie Updyke Mundy clarified that the UTPCPL only allowed for claims against *sellers* and thus could not be brought to bear on the driller, which had acted more in the role of a *buyer* when it acquired mineral rights from the landowners.   [[148]](#footnote-149)148Justice Mundy wrote that despite an ordinary meaning of the terms "trade" and "commerce" that could allow for reading the UTPCPL's provisions to apply to both sellers and buyers, the specific statutory definitions within the UTPCPL "prohibit[] unfair and deceptive practices in the conduct of 'the advertising, offering for sale, sale or distribution' of goods. Thus, the legislature chose to define trade and commerce as only acts of selling for purposes of the UTPCPL . . . ."   [[149]](#footnote-150)149As a result, the court could not disregard that policy choice.   [[150]](#footnote-151)150

In *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*,   [[151]](#footnote-152)151the Pennsylvania Supreme Court ruled 6 to 1 that where an ***oil*** and gas lease provides remedies for certain conduct, a judicial abandonment analysis would be improper.   [[152]](#footnote-153)152Defendant drilling company Mitch-Well Energy, Inc., failed to produce ***oil*** or gas from the leased properties, but did not make the minimum required rental payments to the landowners. The Pennsylvania Superior Court had previously held that such failures would constitute an "abandonment" of the leases under the "doctrine of abandonment," thereby automatically terminating the drilling company's rights under the lease as an equitable remedy. However, in this case, the supreme court held that a judicial determination of the termination of the rights under the lease would be inappropriate.   [[153]](#footnote-154)153Justice Mundy, writing for the court, reasoned that before resorting to the "doctrine of abandonment," the lower court should have first determined whether there was an adequate remedy through contract analysis of the lease agreements. The supreme court held that "an essential initial step was skipped"   [[154]](#footnote-155)154--the trial judge had prematurely voided the leases before determining whether they held an opportunity for remedy through a breach of contract action, and remanded the case for further consideration.   [[155]](#footnote-156)155

In *Coastal Forest Resources Co. v. Chevron USA, Inc.*,   [[156]](#footnote-157)156the U.S. District Court for the Western District of Pennsylvania granted Chevron USA, Inc.'s **[\*50]** (Chevron) motion to dismiss in a suit brought by mineral real estate owner Coastal Forest Resources Co. (Coastal Forest), which accused lessees of wrongfully subtracting post-production costs from its royalty payments. The lease agreement provided that the relevant royalties would be paid from the gross sales price received by lessee "at the wellhead."   [[157]](#footnote-158)157Coastal Forest asserted that the "net-back" method of calculating royalties would be inappropriate under the "at the wellhead" terminology used in the lease.   [[158]](#footnote-159)158However, the district court determined that the lease "expressly and unequivocally" authorized the lessee to deduct costs associated with bringing the ***oil*** to market from royalty payments.   [[159]](#footnote-160)159As a result, the court held that the net-back method should be applied more broadly, and that Chevron was authorized to deduct post-production costs when calculating payments under the lease.   [[160]](#footnote-161)160

In *Yaw v. Delaware River Basin Commission*,   [[161]](#footnote-162)161the U.S. District Court for the Eastern District of Pennsylvania dismissed a challenge by two Pennsylvania state senators to a moratorium on hydraulic fracturing in the Delaware River Basin, holding that plaintiffs lacked standing. On February 25, 2021, the four states comprising the Delaware River Basin Commission--Delaware, New Jersey, New York, and Pennsylvania--voted to memorialize a 2009 ban on highvolume hydraulic fracturing for natural gas in hydrocarbon-bearing rock formations in the Delaware River Basin.   [[162]](#footnote-163)162To support the renewed ban, the Delaware River Basin Commission cited studies indicating that hydraulic fracturing pollutes drinking water, surface water, and groundwater. In evaluating their challenge, the court held that the Senate plaintiffs failed to meet the "especially rigorous" legislative standing requirements as they neither (1) suffered a cognizable injury in their own right, nor (2) qualified as "ERA Trustees" of the commonwealth's natural resources because they are individual legislators, not commonwealth agencies or entities.   [[163]](#footnote-164)163The court further noted that the lack of standing reinforced that this dispute, "which is primarily between two political parties," would best be resolved through the political process.   [[164]](#footnote-165)164

In *Cole v. Pennsylvania Department of Environmental Protection*,   [[165]](#footnote-166)165the Commonwealth Court of Pennsylvania determined that the federal Natural Gas Act does not preempt state administrative reviews of certain permitting decisions.   [[166]](#footnote-167)166In the case, the commonwealth court examined whether section 19(d)(1) of the federal Natural Gas Act, amended in 2005 to be 15 U.S.C. § 717r(d)(1), divests the Pennsylvania Environmental Hearing Board (EHB) of its subject matter jurisdiction to hear an appeal of the Pennsylvania Department **[\*51]** of Environmental Protection's (DEP) approval of a plan to construct a natural gas compressor station.   [[167]](#footnote-168)167Under the "judicial review" provisions of the Act, the court addressed whether the approval of a permitting plan issued pursuant to state regulations constitutes a type of "civil action" over which the federal circuit courts should retain exclusive jurisdiction.   [[168]](#footnote-169)168In this case, the commonwealth court concluded that the term "civil actions" in the federal act does not include state administrative agency reviews of state permitting decisions, such as those by the EHB under the DEP.   [[169]](#footnote-170)169Such collateral administrative reviews remain available, if desired, and are not preempted by the federal jurisdictional act.   [[170]](#footnote-171)170

In *Pennsylvania Environmental Defense Foundation v. Commonwealth Department of Conservation & Natural Resources*,   [[171]](#footnote-172)171the Commonwealth Court of Pennsylvania was asked to consider whether certain statements in the Department of Conservation and Natural Resources' (DCNR) 2016 State Forest Resource Management Plan (2016 SFRMP) were in violation of Pennsylvania's Environmental Rights Amendment (ERA). Specifically, in bringing suit against the DCNR, the Pennsylvania Environmental Defense Foundation (Foundation) claimed that certain statements in the 2016 SFRMP evidence "DCNR's breach of its fiduciary duties under the ERA to protect, conserve, and maintain [Pennsylvania's] State Forest public natural resources."   [[172]](#footnote-173)172Writing for the three-judge panel, Judge Patricia McCullough ultimately sustained DCNR's preliminary objections and dismissed the Foundation's claims. Judge McCullough first held that the claims for declaratory relief were not ripe, finding that "the Foundation has failed to articulate any imminent injuries occasioned by adoption of the 2016 SFRMP, and has failed to anchor its amended position for review on any particular action taken by DCNR."   [[173]](#footnote-174)173The court also found that the Foundation was not entitled to mandamus relief.   [[174]](#footnote-175)174As the court explained, while the Foundation sought to compel the DCNR to amend the 2016 SFRMP in various ways, the Foundation "points to no legislative enactments or regulatory provisions, and we have found none, that mandate DCNR to develop and maintain a forest resource management plan in the first place. Because the Foundation seeks to compel DCNR to do something it is not mandated to do, mandamus will not lie . . . ."   [[175]](#footnote-176)175As such, the court did not reach the merits of the dispute, and the question of whether the DCNR can consider economic factors, such as ***oil*** and gas development, in its management of state forest land remains open.

**[\*52]** In *Tennant v. Range Resources - Appalachia, LLC*,   [[176]](#footnote-177)176the U.S. District Court for the Western District of Pennsylvania granted the defendant's motion to dismiss the plaintiff landowners' breach of contract claim. The landowners had originally brought suit against Range Resources, a natural gas producer, alleging that the company "breached certain ***oil*** and gas leases between the parties by failing to demonstrate that post-production costs deducted from their royalty payments resulted in a net increase in the value of gas produced under those leases."   [[177]](#footnote-178)177Under the royalty clause of the parties' lease agreements, Range Resources was allowed to charge certain deductions to the lessor, but only if "they result in a net increase in the value of the ***oil*** and/or gas or other products produced from the leased premises, or any property pooled therewith."   [[178]](#footnote-179)178After the commencement of natural gas drilling and production, the landowners alleged that Range Resources breached the leases by deducting post-production costs without demonstrating that those costs "resulted in a 'net increase in the value' of the produced hydrocarbons."   [[179]](#footnote-180)179In rejecting plaintiffs' breach of contract claim, the court explained that, under Pennsylvania law, "the plain and unambiguous language of [the royalty clause] does not impose upon Defendant a duty to demonstrate that post-production costs deducted from Plaintiffs' royalty payments resulted in a net increase in value of gas produced under the Leases."   [[180]](#footnote-181)180Moreover, "[e]ven if the Court were to construe Plaintiffs' breach of contract claim as alleging that Defendant improperly deducted post-production costs from their royalty payments, Plaintiffs have not met their summary judgment burden on such claim."   [[181]](#footnote-182)181The court therefore granted Range Resource's motion for summary judgment.   [[182]](#footnote-183)182

In *JJK Mineral Co. II, LLC v. Morris*,   [[183]](#footnote-184)183the U.S. District Court for the Western District of Pennsylvania granted the defendants' motion to dismiss, rejecting the plaintiff's claim that it owned an interest in the ***oil*** and gas rights of a property located in Washington Township, Greene County, Pennsylvania. In considering the issue, the court analyzed both an 1897 lease and ***oil*** and gas production agreement, as well as an 1897 royalty deed that was granted to a third party and served as the basis of the plaintiff's claim. Ultimately, the court found that the production agreement had terminated, and with it, so had the interests granted under the royalty deed.   [[184]](#footnote-185)184In its analysis of the issue, the court first declined to apply the Estate Misconception Theory as requested by the plaintiff, reasoning that the theory "has never been applied in Pennsylvania to interpret an ***oil*** and gas mineral lease."   [[185]](#footnote-186)185Next, the court analyzed the underlying **[\*53]** 1897 lease and production agreement, finding that "[t]here is no dispute that the South Penn Lease terminated and is no longer in effect."   [[186]](#footnote-187)186Finally, the court construed the 1897 royalty deed instrument.   [[187]](#footnote-188)187In so doing, the court found that the royalty deed "sold a personal property royalty interest to [the plaintiff's predecessor-in-interest]. It did not sell any real estate interest in the [defendants' predecessor's] possibility of reverter in the ***oil*** and gas estate."   [[188]](#footnote-189)188Given that

[u]pon termination of the South Penn Lease, the [defendants' predecessor's] possibility of reverter interest in the ***oil*** and gas mineral estate reverted and vested the fee simple ***oil*** and gas mineral interest back to the [defendants' predecessor] . . . . Neither [of plaintiff's predecessors-in-interest] owned any remaining mineral ***oil*** and gas estate or royalty interest.   [[189]](#footnote-190)189

As such, "JJK Mineral owns no property interest in the property's ***oil*** and gas estate."   [[190]](#footnote-191)190The court also rejected the plaintiff's unjust enrichment claim and its accounting claim.   [[191]](#footnote-192)191

In *PennEnergy Resources, LLC v. Armstrong Cement & Supply Corp.*,   [[192]](#footnote-193)192the Superior Court of Pennsylvania was asked to consider the proper venue for bringing a "declaratory action" in a dispute between a horizontal well developer and the lessors of the property. PennEnergy Resources, LLC (PennEnergy), entered into ***oil*** and gas leases with landowners in Butler County and Armstrong County, Pennsylvania, which the landowners claimed that PennEnergy breached. The landowners thereafter restricted the company's access to the property. Subsequently, PennEnergy brought suit against the landowners in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking injunctive relief, declaratory judgment, and claims for defamation per se. The defendant lessors subsequently objected to the venue of the case, arguing that the action "is substantively an action to quiet title," thus making Allegheny County an improper venue since none of the properties were located there.   [[193]](#footnote-194)193In its analysis, the court considered whether PennEnergy's claims lay in rem or in personam, ultimately finding that "the subject matter of PennEnergy's claims for injunctive relief and for a declaratory judgment is based upon the Leases and Agreements, and is therefore *in personam*, and not *in rem*."   [[194]](#footnote-195)194Moreover, "PennEnergy's defamation action is clearly *in personam* and does not seek to quiet title to the Leased Properties."   [[195]](#footnote-196)195As such, the court held that "venue is not restricted **[\*54]** to the county in which the Leased Properties are situated" and affirmed the order of the lower court that venue was proper in Allegheny County.   [[196]](#footnote-197)196

In *Hughes v. UGI Storage Co.*,   [[197]](#footnote-198)197the Supreme Court of Pennsylvania held that "a public or quasi-public entity need not possess a *property-specific* power of eminent domain in order to implicate inverse condemnation principles."   [[198]](#footnote-199)198The underlying dispute that gave rise to this question involved UGI Storage Company's (UGI) acquisition and operation of a 1,216-acre underground natural gas storage field in Tioga County, Pennsylvania. In its application with the Federal Energy Regulatory Commission (FERC) to acquire and operate the field, UGI sought to include a 2,980-acre protective zone around the storage field as part of the certified facilities. FERC ultimately granted UGI's application for the storage field, but denied its request to certificate a cohesive 2,980-acre buffer zone. Instead, FERC only certified those portions of the buffer zone where UGI had acquired the necessary property rights or would be able to acquire such rights from the prior owner of the storage field. The plaintiffs in *Hughes*, whose properties were excluded by FERC from the partially certified buffer zone, brought suit against UGI, alleging that the company "pursued a course of conduct that is tantamount to and consistent with the issuance of [a FERC] certificate."   [[199]](#footnote-200)199Specifically, the plaintiffs alleged that "[b]y virtue of [UGI's] application for certification of the proposed buffer zone . . . the company had effectively prohibited all hydraulic fracturing activities on properties within the proposed buffer zone."   [[200]](#footnote-201)200As a result, the plaintiffs claimed that they "had been deprived of their right to obtain financial benefits from the natural gas lying beneath their lands."   [[201]](#footnote-202)201In its defense, UGI asserted that "to be liable for a *de facto* taking, an entity must possess the power of eminent domain relative to the plaintiffs' property."   [[202]](#footnote-203)202UGI further stressed that it had never been granted such a certificate in relation to plaintiffs' property.   [[203]](#footnote-204)203

The Supreme Court of Pennsylvania ultimately held for the plaintiffs that "a public or quasi-public entity need not possess a *property-specific* power of eminent domain in order to implicate inverse condemnation principles."   [[204]](#footnote-205)204In reaching that conclusion, the court construed Pennsylvania's Eminent Domain Code.   [[205]](#footnote-206)205Noting that "the statute simply does not signify a requirement of a property-specific power of eminent domain," the court found that the "plain terms of the enactment" best supported the plaintiffs' position.   [[206]](#footnote-207)206The court **[\*55]** also found that "[t]his understanding is also most consonant with federal and state constitutional law."   [[207]](#footnote-208)207

In *Seneca Resources Corp. v. City of St. Marys Zoning Hearing Board*,   [[208]](#footnote-209)208the Commonwealth Court of Pennsylvania considered whether a 2016 zoning ordinance in the City of St. Marys, which had amended several of the City's Zoning Code provisions regarding ***oil*** and gas production activities, was valid. Seneca Resources Corp. (Seneca) challenged several provisions in the ordinance, which distinguished "unconventional" wells and mandated various siting and setback limitations, the submission of a water management plan and well permit application, and that certain "best practices" be employed for such wells.   [[209]](#footnote-210)209In challenging the ordinance, Seneca raised nine issues before the commonwealth court, including claims that the ordinance creates an unlawful floating overlay zone by its reference to a Census Bureau population density map, the ordinance exceeds the city's authority under the Pennsylvania Municipalities Planning Code, and the ordinance resulted in a de facto taking and violated Seneca's due process rights.   [[210]](#footnote-211)210In analyzing these issues, the commonwealth court found that only one merited reversal--the "floating overlay zone" issue.   [[211]](#footnote-212)211Specifically, the court found the ordinance's requirement that

[t]he well pad, compression station or disposal well shall not be located within any area having a population density at the time of application in excess of 1,086.07 persons per square mile as delineated on the population density map for the City . . . issued by the United States Census Bureau, as from time to time amended,

was an unlawful delegation of legislative authority.   [[212]](#footnote-213)212Given that "the City seeks to delegate a portion of its legislative authority to amend the Zoning Code to the Census Bureau by referencing a map which is subject to being updated without further action by the City. . . . this provision of the Ordinance is impermissible."   [[213]](#footnote-214)213Moreover, the court was troubled by the fact that the City failed "to actually publish or present the map at any time prior to or during the adoption of the Ordinance."   [[214]](#footnote-215)214Therefore, the court found the floating zone provision of the ordinance in violation of the Pennsylvania Constitution and severed the provision.   [[215]](#footnote-216)215

**[\*56]** *C. Administrative Developments*

In December, Pennsylvania regulators released a final draft rule that would limit the methane emissions from older ***oil*** and gas infrastructure, but would exempt a vast number of low-producing wells. The new Pennsylvania rule would require some well owners to perform searches for leaks several times a year and update equipment already in the field. The rule is expected to move forward to additional state oversight committees. Pennsylvania has a June 2022 deadline to finalize and submit the rule to federal regulators.

XI. TEXAS

Texas courts issued several opinions in 2021 clarifying ***oil*** and gas leases. Mineral owners and lessees now have additional guidance on the calculation of royalties, allowable deductions, continuous development clauses, force majeure, and the scope of the leased premises. In *BlueStone Natural Resources II, LLC v. Randle*,   [[216]](#footnote-217)216the Texas Supreme Court addressed two contractconstruction issues impacting the calculation of gas royalty payments from the lessee (BlueStone) to the lessors. First, the court analyzed potentially conflicting language in the contract regarding the basis for royalty payments. In one paragraph, BlueStone was to pay royalties based on "the market value at the well . . . of the gas so sold." In an addendum to the contract, however, BlueStone would pay royalties on "the gross value received." BlueStone argued that the two clauses could be harmonized and combined. If the parties combined the provisions, it would deduct postproduction costs from the royalty payments by measuring the payments "at the mouth of the well" or before BlueStone incurs expenses in preparing the raw gas for sale. The court stated that a basic royalty clause has three parts: (1) the royalty fraction; (2) the measurement method (market value, proceeds, price); and (3) the valuation point (at the well, at the point of sale). BlueStone argued that the addendum language lacked a valuation point, and so they should use "at the mouth of the well" as the valuation point and deduct postproduction costs. However, the lessor argued that "gross value received" includes both a measurement method and valuation point, with "received" referring to proceeds earned at the point of sale and "gross" signifying no postproduction cost deductions. The court concluded that combining the two contract provisions would create an inherent conflict because "at the mouth of the well" is equivalent to a netproceeds calculation that includes deductions, while "gross value" implies the opposite. This conflict was enough for the court to conclude the royalty provision was ambiguous. The addendum expressly stated it would control if it conflicted with the body of the lease (where the "market value at the well" language was located), and so the court held that BlueStone wrongfully deducted postproduction costs from its royalty payments.

Second, the court held that the lease's "free use" clause restricted Blue-Stone's royalty-free use of gas to uses on the leased premises. BlueStone argued **[\*57]** that any use of gas that benefits or furthers the lease operations, even if conducted off the leased premises, was free from royalty payments. Under this assumption, BlueStone used plant fuel off the leased premises. Based on the free use clause stating that the "Lessee shall have free from royalty or other payment the use of . . . gas . . . produced from said land in all operations which Lessee may conduct hereunder," the court concluded that the lease did not authorize off-lease royalty-free gas use. The court specifically honed in on the term "hereunder" as qualifying the free-use clause to include only operations "under or in accordance with the lease." Moreover, the lack of any language permitting off-lease gas use further confirmed the court's decision. This issue was one of first impression for the Texas Supreme Court.

In *BlueStone Natural Resources II, LLC v. Nettye Engler Energy, LP*,   [[217]](#footnote-218)217the court examined whether a certain non-participating royalty interest allowed the deduction of post-production costs related to gathering and compression services. The court of appeals held that the interest could be charged with these deductions, relying on the Texas Supreme Court's opinion in *Burlington Resources* ***Oil*** *& Gas Co. v. Texas Crude Energy, LLC*   [[218]](#footnote-219)218and distinguishing *Chesapeake Exploration, LLC v. Hyder*.   [[219]](#footnote-220)219The Texas Supreme Court affirmed the decision in February 2022.

*Endeavor Energy Resources, L.P. v. Energen Resources Corp.*   [[220]](#footnote-221)220involved a dispute over the timing requirements in a continuous development clause. After the primary term expired, the lease allowed the lessee (Endeavor) to avoid partial termination of the lease if no more than 150 days elapsed between the completion of one well and the spudding of the next successive well. If Endeavor spudded the next well sooner than 150 days after completion of the prior well, the lease allowed Endeavor "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." If Endeavor failed to continuously develop in accordance with this language, the lease would terminate except for any tracts where wells were located. Eventually, Endeavor waited 320 days between the completion of a well and the spudding of the next well based on the position that unused days accumulate during, and may be applied across, multiple drilling periods. Endeavor alternatively argued that the language was ambiguous. The lessor argued that any unused days could only be carried forward once, to the *next succeeding* 150-day period, and Endeavor delayed operations beyond the allowable accumulated days. The Texas Supreme Court found that the quoted language was reasonably susceptible to more than one interpretation, making the language ambiguous. The court went on to say that "it has long been the rule that contractual language will not be held to automatically terminate the leasehold estate unless that 'language . . . can be given no other reasonable **[\*58]** construction than one which works such result.'"   [[221]](#footnote-222)221Since the disputed provision here was reasonably susceptible to an interpretation that would not force a termination, Endeavor's delay did not automatically result in termination. While the Texas Supreme Court has shifted away recently from resorting to "default" rules of construction, this case may mark one exception.

In *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*,   [[222]](#footnote-223)222the Texas Supreme Court analyzed whether a lessee had conducted "drilling operations" under the continuous development clause of a lease, sufficient to avoid partial termination of the lease. The disputed provision triggered termination and required reassignment of certain non-producing tracts if the lessee failed to engage in "drilling operations" in a timely manner. According to the lease, the phrase "drilling operations," wherever used, referred not only to spudding a new well, but also to an array of other productive activities including fracturing, acidizing, and testing a well. However, the lessor urged that "drilling operations," as used in the continuous development clause, was limited to spudding new wells, which the lessee had not done within the 120-day period. The lessee argued that the broader, express definition of "drilling operations" applied, and the supreme court agreed with the lessee as the lessor provided no textual basis for restricting the definition for the provision.

In *MRC Permian Co. v. Point Energy Partners Permian LLC*,   [[223]](#footnote-224)223the El Paso Court of Appeals addressed whether MRC's invocation of the force-majeure clause avoided termination of its lease when MRC failed to spud a new well before the continuous-drilling deadline expired.   [[224]](#footnote-225)224The force-majeure clause in issue allowed MRC to extend its continuous-drilling deadlines if its "operations are delayed by an event of force majeure, being a non-economic event beyond Lessee's control." According to MRC, the rig it planned to use to spud a new well on the leased tract was unavailable as a result of an off-lease wellbore instability issue that caused a thirty-hour delay in its overall operations.

The parties' force-majeure dispute focused on four issues: (1) whether an off-lease event could invoke the force-majeure clause; (2) whether the triggering event must have been the cause of MRC missing its continuous-drilling deadline (or whether a mere delay in its operations sufficed); (3) whether MRC's choices after it encountered the off-lease wellbore instability issue were driven by financial considerations, rendering the off-lease wellbore instability issue outside the scope of the force-majeure clause; and (4) whether MRC provided proper notice to successfully invoke the force-majeure clause. For the first issue, the court held that, because the lease did not state that a forcemajeure event must be on-lease, an off-lease event could invoke the forcemajeure clause. Second, the court held that the lease did not require the forcemajeure event be a substantial factor or the direct link for MRC's failure to timely drill, so all that was required is that MRC's operations be delayed by a **[\*59]** non-economic event beyond its control. The court noted that even if there were a causal-link requirement, there would be fact issues regarding causation that would have precluded summary judgment on this issue. Third, the court held that a genuine issue of fact existed on the extent of MRC's control over the triggering event, the extent of the delay encountered, and the motivation for its decisions, which should have prohibited the trial court from rendering judgment. And fourth, the court held that there are open fact questions on what date the triggering event occurred and whether MRC's notice provided a reasonable description of the problem encountered, such that summary judgment on whether MRC successfully invoked the force-majeure clause was inappropriate. Because the court held that there are outstanding fact questions surrounding the continued existence of MRC's lease, it declined to address how much acreage MRC would have retained if the lease expired.

In *King Operating Corp. v. Double Eagle Andrews, LLC*,   [[225]](#footnote-226)225the court addressed whether a lease could be held by production from a tract that was listed in the definition of "leased premises" when the lease failed to convey any mineral interest in the subject tract (and the operator held the executive rights to that tract under a separate lease). The lease in question (the "Robinson Lease") purported to lease four tracts. However, because the lessors (the Robinsons) did not own the executive rights to Tract One, they did not have the right to lease those minerals. The parties did not dispute that the Robinson Lease failed to convey any mineral interest in Tract One. However, the parties disputed whether, by including Tract One in the description of "leased premises," the Robinson Lease intended that production on Tract One under any lease would hold the Robinson Lease as to the remaining three tracts described in the "leased premises." The court held that the natural reading of "leased premises" referred to those tracts of land that were actually leased through the Robinson Lease, not tracts of land that were not actually conveyed thereunder. Thus the court affirmed the trial court's summary judgment ruling that the operator's production on Tract One under a separate lease did not hold the Robinson Lease by production. One interesting holding to note is that the court also reversed the awarded attorney's fees for the declaratory-judgment claims, holding that these claims were in essence trespass-to-try-title claims for which fees are unavailable.

Texas courts resolved disputes involving the validity of top leases and actions that might ratify unauthorized pooling. In *MEI Camp Springs, LLC v. Clear Fork, Inc.*,   [[226]](#footnote-227)226the trial court granted summary judgment for Clear Fork on its declaratory judgment claim seeking a determination that it had a valid bottom lease and held superior title to the mineral estate. The Eastland Court of Appeals affirmed. The court determined that Clear Fork satisfied the pleading requirements for a trespass to try title action, and thus, the trial court did not abuse its discretion by overruling MEI's special exceptions challenging the propriety of a declaratory judgment action. The court then considered MEI's arguments that the bottom lease was void because it violated the statute of **[\*60]** frauds and that subsequent documents could not supply a missing element to a void conveyance. The court held that any deficiency in the original lease was remedied by the subsequent memorandum of lease and amendments, which acted to ratify the existence of the Clear Fork's leasehold estate. Because the court held that summary judgment was appropriate on the basis that Clear Fork holds superior title, the court did not reach the question of whether MEI's top lease violated the rule against perpetuities.

In *BPX Operating Co. v. Strickhausen*,   [[227]](#footnote-228)227the Texas Supreme Court considered whether the cashing of royalty checks impliedly ratified a pooling that was prohibited by the underlying ***oil*** and gas lease. The lessee drilled a horizontal well that included the leased premises and other lands pooled therewith. The lessee requested that the lessor consent to the pooling, but the lessor refused. The lessee sent royalty checks to the lessor that were calculated on a pooled basis. The lessor cashed the checks, even though she was aware of this fact. The court rejected the bright-line rule urged by the lessee, where *any* act that is inconsistent with an intent to reject the pooling would constitute a ratification. Rather, the court explained that implied ratification should be found only if the lessor's behavior clearly and unequivocally evidenced an intent to ratify the unauthorized pooling. On the record before it, the court could not hold as a matter of law that the lessor had impliedly ratified the pooling.

Texas courts also addressed the accommodation doctrine. In *Lyle v. Midway Solar, LLC*,   [[228]](#footnote-229)228the court addressed whether the operation of a large-scale solar facility inappropriately obstructed a mineral estate holder's ability to drill for ***oil*** and gas on the land housing the solar array. The accommodation doctrine balances the rights of a surface owner and mineral owner in the use of a surface when a contract is silent or unclear about the parties' respective surface use rights. The court held that the accommodation doctrine could apply in this case as there was a chance for substantial disagreement about what rights were granted to the mineral estate holder. Further, because the mineral owner was not developing his minerals, the surface owner owed no duty to the mineral owner respecting the surface usage . . . yet. As the mineral owner never attempted to enter the property, the court held that the breach of contract and trespass claims therefrom were premature until the mineral owners sought development of their mineral estate.

A federal court allowed claims for breach of fiduciary duty and Texas Deceptive Trade Practices Act (DTPA) violation in the context of the soured relationship between an operator and its land company. In *R.P. Small Corp. v. Land Department, Inc.*   [[229]](#footnote-230)229an ***oil*** and gas operator sued its land service brokers over incorrect, duplicate, and improper joint operating agreement (JOA)-related charges. The operator sued the brokers and their owner for, among other theories, breach of fiduciary duty, fraud, and a violation of the DTPA. The court allowed a claim for fiduciary duty based upon the confidential relationship between the plaintiff and defendant that resulted from a decades-long business **[\*61]** and personal relationship, the plaintiff's deep reliance on the defendant, and the defendant taking advantage of the relationship to engage in self-dealing. Additionally, the court found that the plaintiff had not alleged that the defendant-owner, an officer of the defendant business entity, conducted the fraudulent actions for his direct personal benefit. Therefore, he could not be personally liable under the theory of fraud in Texas. Finally, the court found that the plaintiff had sufficiently pled to be a DTPA "consumer," such that the court refused to dismiss the plaintiff's DTPA claim. The court distinguished precedent holding that parties to a JOA were not "consumers" within the meaning of the DPTA, where the would-be consumers were injured by bad investment advice from the JOA counter-parties, rather than fake or incorrect JOA billings. Because defendant was receiving payment beyond reimbursement for its services, the plaintiff was a consumer.

Texas courts affirmed the gross negligence and willful misconduct protections afforded to the operator under a JOA. In *Crimson Exploration Operating, Inc. v. BPX Operating Co.*,   [[230]](#footnote-231)230the court of appeals supported the exculpatory clause of gross negligence and willful misconduct in a JOA as the applicable standard of care for a breach of contract action between the parties to the JOA. Crimson and BPX entered into an operating agreement to govern drilling for a horizontal well (the McCarn well). The operating agreement specified that "BPX shall conduct its activities" as a "reasonably prudent operator." But the agreement also included an exculpatory clause stating that BPX "shall have no liability . . . except such as may result from gross negligence or willful misconduct." After the McCarn well experienced a blowout, it was abandoned and BPX sued Crimson for its share of the expenses. Crimson alleged that it was not liable for the costs because BPX failed to perform as a "reasonably prudent operator," therefore placing BPX in prior material breach. BPX, however, argued that it is not liable for Crimson's share because it did not commit gross negligence or willful misconduct as defined under the exculpatory clause. Due to this dispute, Crimson objected to the court's broad-form jury charge questions and proposed its own instructions based on the reasonably prudent operator standard. The trial court denied the proposed instructions, and the jury found that Crimson breached the agreement and BPX did not breach the agreement. On appeal, the court held that the applicable standard of care for breach of the agreement was established in the exculpatory clause (gross negligence or willful misconduct). Thus, the court held that Crimson had failed to prove that the trial court abused its discretion in rejecting Crimson's proposed instruction based on the reasonably prudent operator standard.

Finally, Texas courts provided guidance as to the scope of conveyances and releases. In *Ross v. Flower*, the court of appeals ruled that a "subject to" clause in a conveyance was insufficient to reserve a mineral interest to a grantor and instead functioned as a disclaimer of liability for potential encumbrances **[\*62]** that existed on the land.   [[231]](#footnote-232)231The Rosses executed a general warranty deed with the provision that the conveyance "is made and accepted subject to any ***oil***, gas, and other minerals, including but not limited to building stone, lime stone . . . and to any and all validly existing encumbrances, conditions, and restrictions." At issue in the case was whether the Rosses, as sellers, retained the mineral interest due to the "subject to" clause. The court started by recounting case law that bound it to construe deeds as conferring the greatest possible estate to the grantee as the instrument would allow. Without clear language that specifically reserves a portion of the grantor's interest, deeds pass all of the grantor's interest to the grantee. The court reasoned that, typically, the purpose of a "subject to" clause is to protect the grantor from a claim for breach of warranty if the mineral interest was outstanding. As such, the instant clause was meant to avoid a breach of warranty caused by conveying more interest in the land than the grantor had. The "subject to" provision was therefore not meant to reserve the mineral rights for the Rosses. There was no other indication that the clause served another purpose besides notifying the grantees of possible burdens on the property. Furthermore, the Rosses did not dispute that the deed conveyed all of their surface rights. Because the "subject to" clause also applied to stones and limestone, which would be found on the surface, this position created an inconsistency in the Rosses' argument. They claimed that the "subject to" provision did reserve their rights in ***oil*** and gas but not the stone. As such, the court decided that the "subject to" clause did not exclude anything from the conveyance but instead referred to encumbrances on the property. Without a clear provision reserving the mineral interests for the Rosses, the appellate court affirmed the district court's ruling on the motion for summary judgment in favor of the Flowers.

In *Hoffman v. Thomson*,   [[232]](#footnote-233)232the court of appeals interpreted a 1956 mineral deed to determine whether the deed reserved a fixed or floating nonparticipating royalty interest. Grantor conveyed a 1,070-acre tract of land to Grantee, reserving "an undivided three thirty-second's (3/32's) interest (same being three-fourths (3/4's) of the usual one-eighth (1/8th) royalty)" in all of the ***oil***, gas, and other minerals produced from the conveyed land. The trial court found that the deed conveyed a fixed interest, and the Grantor appealed. In reversing, the appeals court focused on discerning the intent of the parties as expressed by the "four corners" of the deed and harmonizing the reservation with all parts of the deed. In doing so, the court found: (1) in 1956, when the deed was executed, the use of a one-eighth royalty was so pervasive that it was seen as the standard and customary royalty, and thus, the deed should be construed accordingly; (2) applying a floating construct gave meaning to all the language of the deed; and (3) using a floating construct did not create any conflicts and harmonized the entire deed. On the other hand, the court found that a fixed construct could not be harmonized with the entire deed because it **[\*63]** would fail to give effect to all the deed's provisions. Therefore, the appeals court held that the deed reserved a floating royalty interest for Grantor.

In *Headington Royalty, Inc. v. Finley Resources, Inc.*,   [[233]](#footnote-234)233the court addressed whether an agreement that purported to waive certain claims against the "predecessors" of one of the parties released only the prior corporate forms of the releasee, or whether on the other hand, it encompassed predecessors *in title* of the releasee. The court held the former. The agreement provided: "[Headington] waives, releases, acquits and discharges *Petro Canyon [Energy LLC] and its* affiliates and their respective officers, directors, shareholders, employees, agents, *predecessors* and representatives for any liabilities, claims . . . or obligations . . . that [Headington] has or may have in the future" related to certain lands in Loving County, Texas.

Headington ultimately asserted certain claims against Finley Resources, one of Petro Canyon's predecessors in title to certain leases. Petro Canyon intervened, arguing that Headington had waived its claims against Finley, via the above language, since Finley was Petro Canyon's "predecessor" in title. Headington responded that the release language only applied to corporate predecessors of Petro Canyon. The court of appeals agreed with Headington and held that the release only applied to corporate predecessors, and not to predecessors in title more broadly. The court noted that categorical releases are to be narrowly construed. Releases also must specifically identify the party to whom they apply, or otherwise describe such party with enough particularity that "a stranger could readily identify the released party."   [[234]](#footnote-235)234Given also that the release mentioned only entity-related groups (e.g., officers, directors, and shareholders), the court refused to expand the term "predecessors" to encompass predecessors in the chain of title.

XII. WEST VIRGINIA

*A. Legislative Developments*

The 2021 legislative session in West Virginia saw the enactment of Senate Bill 404 that modifies the Natural Gas Horizontal Well Control Act to allow the Department of Environmental Protection (DEP) Secretary to approve modifications to permits issued under the Act. The legislature addresses taxation related to minerals by removing salt from the list of minerals subjected to a severance tax with House Bill 2808, and by directing the State Tax Department to create an updated methodology for the valuation of properties that produce ***oil*** or gas with House Bill 2581. House Bill 2581 directed that the new methodology determine fair market value using actual receipts and costs, rather than industry averages; however, in early 2022 the legislature rejected the proposed rule presented by the State Tax Department and appears set to pass clarifying legislation on the topic during the 2022 session.

**[\*64]** *B. Judicial Developments*

The West Virginia Supreme Court of Appeals reaffirmed and clarified case law related to void tax deeds in *Orville Young, LLC v. Bonacci*.   [[235]](#footnote-236)235The court did not create any new syllabus points, instead reiterating points 1 and 2 from the 1909 case of *State v. Allen*,   [[236]](#footnote-237)236which established the principle that the state is not entitled to double taxation on the same land under the same title.

This was a quiet title action brought by the Bonacci brothers related to a 202-acre tract in Marshall County. The Bonacci brothers' title originated in 1906 with their grandfather, who owned a 500+ acre tract of which the 202-acre tract was a part. The ***oil*** and gas underlying the 500+ acre tract was never severed from the surface, and at all times from 1906 to present, the 500+ acre tract had been properly assessed with the taxes being paid as due. In 1919, the owner of the 500+ acre tract leased the ***oil*** and gas under the 202-acre portion to a third party. When a well was drilled on the property in 1935, the Marshall County Assessor improperly entered two assessments on the tract, adding an entry reading "202 Royalty Wells # 629-630 Nat Gas Co. W. Va." to the preexisting 500+ acre assessment. The court noted that the "Assessor had made this assessment pursuant to his practice of separately assessing mineral interests once a lease of such interests had been entered into and royalties had been paid in accordance therewith."   [[237]](#footnote-238)237The first year, in 1935, the owners paid both assessments, but subsequently resumed only paying the original 500+ acre assessment. Subsequently, the taxes on the 202-acre ***oil*** and gas assessment became delinquent and were sold by the sheriff multiple times, before eventually coming to be claimed by Orville Young, LLC.

The court held that the 202-acre assessment was erroneous under relevant statutes and could not serve as the basis for a tax sale, as the mineral estate had never been severed from the surface. The court further held that even if the assessment had been proper, it was duplicative and still could not have been the basis for a tax sale because the state received a payment on the land from the other assessment.

In *Smith v. Chestnut Ridge Storage, LLC*,   [[238]](#footnote-239)238the West Virginia Supreme Court of Appeals (1) affirmed that the litigation privilege applies to statements made by lessors as intervenors in quasi-judicial proceedings, and (2) held that intervening in a FERC proceeding is an attempt to petition the government and so is also protected by *Noerr-Pennington* immunity. ***Oil*** and gas owners who had granted certain rights, including storage rights, which were eventually assigned to Chestnut Ridge, intervened in Chestnut Ridge's application to FERC for approval of a storage project pursuant to their lease. The ***oil*** and gas owners opposed the project based on contract provisions that only allowed storage in depleted strata, arguing that Chestnut Ridge intended to store gas in non-depleted strata. FERC approved the project, with stipulations, but when the **[\*65]** permit expired after two years FERC declined to grant an extension that was sought by Chestnut Ridge and opposed by the ***oil*** and gas owners. Subsequently, the ***oil*** and gas owners sued Chestnut Ridge for breach of contract, and Chestnut Ridge brought counterclaims for slander of title, breach of contract, and civil conspiracy. The trial court denied the ***oil*** and gas owners' motion for summary judgment on the counterclaims, and they brought an interlocutory appeal to the supreme court. Chestnut Ridge argued that the litigation privilege should only apply to parties and not to intervenors, or if it did apply to intervenors, it would not apply to breach of contract or slander of title claims. The court disagreed and found that the litigation privilege does apply to intervenors and does cover breach and slander claims. The court also agreed that *Noerr-Pennington* immunity, developed to accord first amendment protections to citizens petitioning federal agencies and courts, attached to the statements made by the ***oil*** and gas owners as intervenors in FERC proceedings. Because all of Chestnut Ridge's claims were based on statements made in the FERC proceedings, the court remanded the case with instructions to grant summary judgment to the ***oil*** and gas owners.

*C. Administrative Developments*

The legislature, in House Bill 2382, authorized a rule put forward by the DEP that adopted the national primary and secondary ambient air quality standards promulgated by the U.S. Environmental Protection Agency under 40 C.F.R. pts. 50 and 53.

XIII. WYOMING

*A. Legislative Developments*

During Wyoming's 45-day legislative general session, the legislature created or amended several Wyoming statutes involving the ***oil*** and gas industry, including three substantive taxation statutes relating to mineral production. First, House Enrolled Act 189 imposed a tax on natural gas consumed at natural gas production sites. The Act defined a qualifying well and made those subject to the imposition statutes establishing a basis for the tax. The Act, however, does exempt natural gas that would have otherwise been flared or vented.

Second, Senate Enrolled Act 41 eliminated provisions related to tax liens that can be imposed on mineral production. Pursuant to the changes, new owners of mineral extraction sites cannot escape a prior lien based on certification from applicable taxing authorities.

Third, Senate Enrolled Act 60 made a large change to the timing for the payment of ad valorem taxes. Pursuant to the Act, ad valorem taxes owed on or after January 1, 2022, are due monthly. The Act also contained provisions for when to pay ad valorem taxes in the period up to the monthly payment start date.

One other notable piece of ***oil*** and gas legislation passed during the 2021 session. The legislature empowered the Wyoming Energy Authority to support efforts to maintain and expand critical minerals and rare earth minerals. The **[\*66]** legislation came in response to the Biden administration's suspension of ***oil*** and gas leasing.

*B. Judicial Developments*

*EME Wyoming, LLC v. BRW East, LLC*,   [[239]](#footnote-240)239was an appeal of a trial court's order that allowed EME to access private property pursuant to the survey access provisions of Wyoming's Eminent Domain Act but denied EME the ability to use the survey data in applications for permits to drill (APDs). EME attempted to survey land belonging to BRW East, LLC, to use in APDs. BRW denied access, forcing EME to petition the court for survey access. The court allowed the surveys to move forward but temporarily precluded EME from using that data pending arguments about whether survey data gathered under the Eminent Domain Act could be used in APDs. The trial court ultimately found using survey data for APDs did not fit the parameters of the Act. The Wyoming Supreme Court affirmed the denial of EME's ability to use survey data but for different reasons. The supreme court found EME had not proven it owned landlocked minerals and thus would not qualify for access to do surveys in the first place.

*C. Administrative Developments*

The Wyoming ***Oil*** and Gas Conservation Commission implemented emergency rules related to pooling. The emergency rules dealt with length of pooling orders and the interaction between pooling orders and drilling and spacing units. Public comment has also begun final rulemaking.

The Wyoming Department of Environmental Quality (WDEQ), Water Quality Division, revised Water Quality Rules Chapter 24, Class VI Injection Wells and Facilities Underground Injection Control Program. The revisions to chapter 24 include updates to definitions, area of review requirements, reporting requirements, and public participation requirements to meet the stringency of the Code of Federal Regulations; updates to the requirements for financial assurance instruments for consistency with other divisions within the WDEQ and banking statutes and regulations; and edits to or removal of passages for consistency with Wyoming statutes.

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1. 1 The lead editor for this report is Mark D. Christiansen of Mark D. Christiansen, PLLC, Oklahoma City, OK. The contributors work in the state for which they report: George R. Lyle, Adam D. Harki, Traci N. Bunkers, and Rikki Burns-Riley of Guess & Rudd, P.C., Anchorage, AK; Thomas A. Daily of Daily & Woods, P.L.L.C., Fort Smith, AR; John J. Harris of Casso & Sparks, LLP, City of Industry, CA; Sam Niebrugge and Kelsey Johnson of Davis Graham & Stubbs, LLP, Denver, CO; Chris Steincamp and Diana Stanley of Depew Gillen Rathbun & McInteer, LC, Wichita, KS; April L. Rolen-Ogden, Michael H. Ishee, and John Parker of Liskow & Lewis, New Orleans, LA; Andrew Cloutier of Hinkle Shanor LLP, Roswell, NM; Gregory D. Russell, Timothy J. Cole, Ilya Batikov, and Jordan C. Patterson of Vorys, Sater, Seymour and Pease LLP, Columbus, OH; Mark D. Christiansen (Parts A & B) and Susan Dennehy Conrad (Part C) of the Oklahoma Corporation Commission, Oklahoma City, OK; Nicolle R. Snyder Bagnell, Emily A. Davis, and Nicole Jensen Morgan of Reed Smith LLP, Pittsburgh PA, and special appreciation to Emily C. Costantinou and Andrew E. Kintner for their research assistance; Jolisa M. Dobbs, Aaron C. Powell, and Emily A. Fitgerald of Holland & Knight, Dallas, TX; Brittany J. Alston and Matthew Morgan of Jackson Kelly PLLC, Morgantown, WV; and Jeffrey S. Pope of Holland & Hart, LLP, Cheyenne, WY. The 2021-2022 Co-Chairs of the Committee are Rebecca W. Pritchett of Adams and Reese LLP and Ghislaine G. Torres Bruner of Polsinelli PC. [↑](#footnote-ref-2)
2. 2 533 F. Supp. 3d 739 (D. Alaska 2021). [↑](#footnote-ref-3)
3. 3  *Id.* at 745-48, 753-54, 766-67. The plaintiffs' action was based upon the Marine Mammal Protection Act (MMPA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and APA. The defendants filed a cross-motion for summary judgment and responded to the plaintiffs' motion. Given that Hilcorp's proposed development activities would "produce significant levels of underwater noise," its application required a determination whether the contemplated activities would "take" beluga whales, which are protected by the ESA, by harassment under the ESA and whether the "take" was authorized under the MMPA. *Id.* at 746-49; *see* 84 Fed. Reg. 37,442, 37,443 (July 31, 2019). [↑](#footnote-ref-4)
4. 4  *Cook Inletkeeper*, 533 F. Supp. 3d at 753-58, 763-67, 770. [↑](#footnote-ref-5)
5. 5  *See id.* at 753 ("NMFS disregarded take caused by tugs towing the drill rig and other vessel noise in its small numbers and negligible impact determinations by 'summarily claiming that such take is not likely.'"). [↑](#footnote-ref-6)
6. 6  *See* Cook Inletkeeper v. Raimondo, 541 F. Supp. 3d 987 (D. Alaska 2021). [↑](#footnote-ref-7)
7. 7  *See* Native Vill. of Nuiqsut v. BLM, 9 F.4th 1201, 1206-07 (9th Cir. 2021). [↑](#footnote-ref-8)
8. 8  *Id.* at 1207. [↑](#footnote-ref-9)
9. 9  *Id.* at 1207-08. [↑](#footnote-ref-10)
10. 10  *Id.* at 1208. [↑](#footnote-ref-11)
11. 11  *Id.* [↑](#footnote-ref-12)
12. 12  *Id.* at 1209-10. [↑](#footnote-ref-13)
13. 13  *Id.* at 1215-16. [↑](#footnote-ref-14)
14. 14  *Id.* at 1216. [↑](#footnote-ref-15)
15. 15 PLC, LLC v. State, 484 P.3d 572, 574 (Alaska 2021). [↑](#footnote-ref-16)
16. 16  *Id.* at 575. [↑](#footnote-ref-17)
17. 17  *Id.* [↑](#footnote-ref-18)
18. 18  *Id.* at 575-76. [↑](#footnote-ref-19)
19. 19  *Id.* at 581. [↑](#footnote-ref-20)
20. 20 555 F. Supp. 3d 739 (D. Alaska 2021). The project included a complex "series of interconnected infrastructure components that would be constructed over approximately nine years . . . ." *Id.* at 751. The anticipated peak production was 586 million barrels of ***oil*** over 30 years; however, completion of the project would require several drill sites, ice and gravel roads, bridges, boat ramps for subsistence users and an airstrip, a gravel mine, a 55-million-gallon freshwater reservoir, and the transportation of construction materials and prefabricated modules. *Id.* [↑](#footnote-ref-21)
21. 21  *Id.* at 753. [↑](#footnote-ref-22)
22. 22  *Id.* The plaintiffs also filed motions for injunctive relief, which were denied. *See* Sovereign Iñupiat for a Living Arctic v. BLM, 516 F. Supp. 3d 943 (D. Alaska 2021). However, the plaintiffs appealed to the Ninth Circuit, which did not reach a decision before the U.S. District Court for the District of Alaska decided the case on its merits. *See* Sovereign Iñupiat for a Living Arctic v. BLM, Nos. 21-35085, 21-35095, 2021 WL 4228689 (9th Cir. Feb. 13, 2021). [↑](#footnote-ref-23)
23. 23  *Sovereign Iñupiat*, 555 F. Supp. 3d at 762-67. [↑](#footnote-ref-24)
24. 24  *Id.* at 804 (quoting 40 C.F.R. § 1502.14); *see also id.* at 768 ("The existence of a viable but unexamined alternative renders an [EIS] inadequate." (quoting Westlands Water Dist. v. U.S. Dep't of the Interior, 376 F.3d 853, 868 (9th Cir. 2004))). [↑](#footnote-ref-25)
25. 25  *Id.* at 804; *see also id.* at 801 (The BLM relied on future MMPA mitigation measures to reach its conclusions that polar bears were in no jeopardy and that no-adverse-habitat modifications would occur, which are not specific enough "to meet the statutory and regulatory requirement that the [incidental take statement] 'specifies [ ] reasonable and prudent measures' and 'sets forth the terms and conditions . . . that must be complied with[.]'"). [↑](#footnote-ref-26)
26. 26  *Id.* at 805. [↑](#footnote-ref-27)
27. 27 No. 3:20-cv-00204, 2021 WL 46703 (D. Alaska Jan. 5, 2021). [↑](#footnote-ref-28)
28. 28 The plaintiffs are Gwich'in Steering Committee, Alaska Wilderness League, Alaska Wildlife Alliance, Canadian Parks & Wilderness Society-Yukon, Defenders of Wildlife, Environment America, Inc., Friends of Alaska National Wildlife Refuges, National Wildlife Federation, National Wildlife Refuge Association, Northern Alaska Environmental Center, Sierra Club, The Wilderness Society, and Wilderness Watch. [↑](#footnote-ref-29)
29. 29 The defendants are David L. Bernhardt (in his official capacity of Secretary of the Interior), U.S. Department of the Interior, BLM, and FWS. The intervenor defendants include Alaska ***Oil*** and Gas Association, the American Petroleum Institute, North Slope Borough, Native Village of Kaktovik, and Kaktovik Inupiat Corporation. [↑](#footnote-ref-30)
30. 30  *Id.* at \*6. [↑](#footnote-ref-31)
31. 31 Exxon Mobil Corp. v. Alaska Dep't of Rev., 488 P.3d 951, 952-53 (Alaska 2021). [↑](#footnote-ref-32)
32. 32  *Id.* at 954 (footnote omitted). [↑](#footnote-ref-33)
33. 33  *Id.* at 958-59. It appears that no additional parties have challenged the Department's bulletin. [↑](#footnote-ref-34)
34. 34  *See* Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021). [↑](#footnote-ref-35)
35. 35 Ark. Code Ann. §§ 15-72-1101 to -1112. [↑](#footnote-ref-36)
36. 36 Okla. Stat. tit. 52, § 549.1. [↑](#footnote-ref-37)
37. 37 Ark. Code Ann. § 26-26-1110. [↑](#footnote-ref-38)
38. 38 989 F.3d 625 (8th Cir. 2021). [↑](#footnote-ref-39)
39. 39 No. 1:20-cv-01019, 2021 WL 2431925 (W.D. Ark. Jan. 22, 2021). [↑](#footnote-ref-40)
40. 40 848 F. App'x 223 (8th Cir. 2021) (unpublished). [↑](#footnote-ref-41)
41. 41 631 S.W.3d 555 (Ark. 2021). [↑](#footnote-ref-42)
42. 42 No. 3:21-cv-00079, 2021 WL 3040758 (E.D. Ark. July 19, 2021). [↑](#footnote-ref-43)
43. 43 698 S.W.2d 791 (Ark. 1985). [↑](#footnote-ref-44)
44. 44 285 Cal. Rptr. 3d 247 (Ct. App. 2021). [↑](#footnote-ref-45)
45. 45  *Id.* at 250. [↑](#footnote-ref-46)
46. 46 Press Release, Office of Gov'r Gavin Newsom, "Governor Newsome Takes Action to Phase Out ***Oil*** Extraction in California" (Apr. 23, 2021). [↑](#footnote-ref-47)
47. 47 Notice of Public Comment Period, CalGEM, Pre-Rulemaking Public Comment Period on the Development of a for Well-Stimulation Treatment Permitting Phase Out (May 21, 2021). [↑](#footnote-ref-48)
48. 48 Cal. Pub. Res. Code §§ 21000-21189.57. [↑](#footnote-ref-49)
49. 49 259 Cal. Rptr. 3d 109 (Ct. App. 2020). [↑](#footnote-ref-50)
50. 50 Nos. BCV-15-101645-GP, -10053-GP, and -100536-GP (***Kern*** Cty. Super. Ct.). [↑](#footnote-ref-51)
51. 51 NTO 2021-06, "Determining CEQA Compliance for Proposed Operations in ***Kern*** County" (Nov. 2, 2021). [↑](#footnote-ref-52)
52. 52 NTO 2021-01, "Licensed Professional Signature and Stamp Requirements for UIC Water Disposal Projects" (Feb. 2, 2021). [↑](#footnote-ref-53)
53. 53 Notice of Public Comment Period & Workshop, CalGEM, Pre-Rulemaking Public Comment Period for Public Health Rulemaking (Oct. 21, 2021). [↑](#footnote-ref-54)
54. 54 Adams County Development Standards and Regulations § 4-11-02-03-03-03(4). [↑](#footnote-ref-55)
55. 55  *Id.* § 11-02-187. [↑](#footnote-ref-56)
56. 56 Broomfield Municipal Code § 17-54-070(c). [↑](#footnote-ref-57)
57. 57  *Id.* § 17-54-060(HH). [↑](#footnote-ref-58)
58. 58 Larimer County Land Use Code § 11.3.2(B). [↑](#footnote-ref-59)
59. 59  *Id.* § 11.3.2(C). [↑](#footnote-ref-60)
60. 60 Colo. Rev. Stat. § 34-60-106(13). [↑](#footnote-ref-61)
61. 61  *Id.* [↑](#footnote-ref-62)
62. 62 Bd. of Cty. Comm'rs v. Crestone Peak Res. Operating LLC, 2021 COA 67, 493 P.3d 917, *cert. granted in part*, No. 21SC477, 2022 WL 103333 (Colo. Jan. 10, 2022). [↑](#footnote-ref-63)
63. 63  *Id.* PP 3-4. [↑](#footnote-ref-64)
64. 64  *Id.* PP 5-6. [↑](#footnote-ref-65)
65. 65  *Id.* PP 10-14. [↑](#footnote-ref-66)
66. 66  *Id.* P 14. [↑](#footnote-ref-67)
67. 67  *Id.* P 19 (quoting Davis v. Cramer, 837 P.2d 218, 222 (Colo. App. 1992)). [↑](#footnote-ref-68)
68. 68  *Id.* P 25. [↑](#footnote-ref-69)
69. 69  *Id.* P 34. [↑](#footnote-ref-70)
70. 70 Antero Res. Corp. v. Airport Land Partners Ltd., No. 19CA1799, 2021 WL 2365973 (Colo. App. June 3, 2021) (unpublished), *cert. granted*, No. 21SC533, 2022 WL 103334 (Colo. Jan. 10, 2022). [↑](#footnote-ref-71)
71. 71 Colo. Rev. Stat. § 34-60-118.5(5). [↑](#footnote-ref-72)
72. 72  *Id.* § 34-60-118.5(5.5). [↑](#footnote-ref-73)
73. 73  *See* Kan. Admin. Regs. §§ 82-11-2 to -4, -6, -7, -10. [↑](#footnote-ref-74)
74. 74 492 P.3d 1157 (Kan. 2021). [↑](#footnote-ref-75)
75. 75  *Id.* at 1172. [↑](#footnote-ref-76)
76. 76 L. Ruth Fawcett Tr. v. ***Oil*** Producers, Inc. of Kan., 475 P.3d 1268 (Kan. App. 2020), *rev. granted* (Mar. 25, 2021). [↑](#footnote-ref-77)
77. 77  *Id.* at 1274. [↑](#footnote-ref-78)
78. 78 Act No. 481, at Preamble. [↑](#footnote-ref-79)
79. 79 La. Rev. Stat. § 30:2044(A). [↑](#footnote-ref-80)
80. 80 2020-00685 (La. 6/30/21), 2021 WL 2678913. [↑](#footnote-ref-81)
81. 81 State v. La. Land & Expl. Co., 2012-0884 (La. 1/30/13), 110 So. 3d 1038. [↑](#footnote-ref-82)
82. 82  *La. Land & Expl. Co.*, 2021 WL 2678913, at \*8. [↑](#footnote-ref-83)
83. 83 989 F.3d 301 (5th Cir. 2021). [↑](#footnote-ref-84)
84. 84 543 F. Supp. 3d 388 (W.D. La. 2021), *appeal docketed*, No. 21-30505 (5th Cir. Aug. 17, 2021). [↑](#footnote-ref-85)
85. 85 Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). [↑](#footnote-ref-86)
86. 86 543 F. Supp. 3d at 419. [↑](#footnote-ref-87)
87. 87  *Id.* [↑](#footnote-ref-88)
88. 88 N.M. Code R. § 19.15.27.8. [↑](#footnote-ref-89)
89. 89  *Id.* [↑](#footnote-ref-90)
90. 90  *Id.* [↑](#footnote-ref-91)
91. 91  *Id.* [↑](#footnote-ref-92)
92. 92  *Id.* [↑](#footnote-ref-93)
93. 93  *Id.* [↑](#footnote-ref-94)
94. 94  *Id.* [↑](#footnote-ref-95)
95. 95  *Id.* [↑](#footnote-ref-96)
96. 96  *Id.* [↑](#footnote-ref-97)
97. 97  *Id.* [↑](#footnote-ref-98)
98. 98  *Id.* [↑](#footnote-ref-99)
99. 99  *Id.* § 19.15.28.10. [↑](#footnote-ref-100)
100. 100  *Id.* [↑](#footnote-ref-101)
101. 101  *Id.* § 19.15.28.8. [↑](#footnote-ref-102)
102. 102  *Id.* [↑](#footnote-ref-103)
103. 103  *Id.* [↑](#footnote-ref-104)
104. 104  *Id.* [↑](#footnote-ref-105)
105. 105  *Id.* [↑](#footnote-ref-106)
106. 106 2021-Ohio-746, 176 N.E.3d 1. [↑](#footnote-ref-107)
107. 107 Ohio Rev. Code §§ 5301.47-.55. [↑](#footnote-ref-108)
108. 108 2018-Ohio-4959, 122 N.E.3d 132. [↑](#footnote-ref-109)
109. 109  *Erickson*, 2021-Ohio-746, P 32. [↑](#footnote-ref-110)
110. 110 2021-Ohio-4635 (7th Dist.). [↑](#footnote-ref-111)
111. 111 2021-Ohio-3857, 180 N.E.3d 51 (6th Dist.). [↑](#footnote-ref-112)
112. 112 Ohio Rev. Code § 5301.56. [↑](#footnote-ref-113)
113. 113  *Pernick*, 2021-Ohio-3857, P 16 (quoting Ohio Rev. Code § 5301.56(A)(3)). [↑](#footnote-ref-114)
114. 114 2021-Ohio-1167, 171 N.E.3d 775 (7th Dist.). [↑](#footnote-ref-115)
115. 115  *Id.* P 44. [↑](#footnote-ref-116)
116. 116 2021-Ohio-4298, 181 N.E.3d 1216 (7th Dist.). [↑](#footnote-ref-117)
117. 117 2021-Ohio-1287, 170 N.E.3d 1240 (7th Dist.). [↑](#footnote-ref-118)
118. 118  *Id.* P 2 (alteration in original). [↑](#footnote-ref-119)
119. 119 2021-Ohio-1377, 172 N.E.3d 1087 (7th Dist.). [↑](#footnote-ref-120)
120. 120  *Id.* P 50 (alteration in original) (quoting Gill v. Fletcher, 78 N.E. 433, 436 (Ohio 1906)). [↑](#footnote-ref-121)
121. 121  *Id.* P 57. [↑](#footnote-ref-122)
122. 122  *Id.* [↑](#footnote-ref-123)
123. 123 2021-Ohio-2239 (5th Dist.). [↑](#footnote-ref-124)
124. 124 No. 2:19-cv-03412, 2021 WL 858517 (S.D. Ohio Mar. 8, 2021). [↑](#footnote-ref-125)
125. 125  *Id.* at \*1. [↑](#footnote-ref-126)
126. 126  *Id.* at \*3. [↑](#footnote-ref-127)
127. 127 No. 2:17-cv-00544, 2022 WL 263057 (S.D. Ohio Jan. 28, 2022). [↑](#footnote-ref-128)
128. 128  *Id.* at \*7 (quoting Ohio Rev. Code § 5301.09). [↑](#footnote-ref-129)
129. 129 2021 OK 21, 507 P.3d 609. [↑](#footnote-ref-130)
130. 130  *Id.* P 2; *see* Okla. Stat. tit. 12, § 2023(G)(4)(b). [↑](#footnote-ref-131)
131. 131  *Strack*, 2021 OK 21, P 2. [↑](#footnote-ref-132)
132. 132  *Id.* P 40. [↑](#footnote-ref-133)
133. 133 No. 118,171 (Okla. Civ. App. Mar. 3, 2021) (unpublished). [↑](#footnote-ref-134)
134. 134 No. 118,874 (Okla. Civ. App. Mar. 26, 2021) (unpublished). [↑](#footnote-ref-135)
135. 135 2021 OK CIV APP 30, 497 P.3d 704. [↑](#footnote-ref-136)
136. 136  *Id.* PP 2-9 (citations omitted). [↑](#footnote-ref-137)
137. 137  *Id.* P 10. [↑](#footnote-ref-138)
138. 138 No. 119,103 (Okla. Civ. App. July 7, 2021) (unpublished), *cert. denied* (Feb. 28, 2022). [↑](#footnote-ref-139)
139. 139  *Id.* P 11. [↑](#footnote-ref-140)
140. 140 2021 OK 32, 489 P.3d 28. [↑](#footnote-ref-141)
141. 141  *Id.* P 26. [↑](#footnote-ref-142)
142. 142 No. 117,608 (Okla. Civ. App. Jan. 29, 2021) (companion case with No. 118,024). [↑](#footnote-ref-143)
143. 143  *Id.* [↑](#footnote-ref-144)
144. 144  *Id.* [↑](#footnote-ref-145)
145. 145 247 A.3d 934 (Pa. 2021). [↑](#footnote-ref-146)
146. 146  *Id.* at 936. [↑](#footnote-ref-147)
147. 147  *Id.* [↑](#footnote-ref-148)
148. 148  *Id.* [↑](#footnote-ref-149)
149. 149  *Id.* (citations omitted) (quoting 73 Pa. Stat. § 201.2(3)). [↑](#footnote-ref-150)
150. 150  *Id.* at 946. [↑](#footnote-ref-151)
151. 151 249 A.3d 888 (Pa. 2021). [↑](#footnote-ref-152)
152. 152  *Id.* at 890. [↑](#footnote-ref-153)
153. 153  *Id.* [↑](#footnote-ref-154)
154. 154  *Id.* at 894. [↑](#footnote-ref-155)
155. 155  *Id.* at 897. [↑](#footnote-ref-156)
156. 156 No. 2:20-cv-01119, 2021 WL 1894596 (W.D. Pa. May 11, 2021). [↑](#footnote-ref-157)
157. 157  *Id.* at \*1. [↑](#footnote-ref-158)
158. 158  *Id.* at \*4 (citing Kilmer v. Elexco Land Servs., Inc., 990 A.2d 1147, 1149 (Pa. 2010)). [↑](#footnote-ref-159)
159. 159  *Id.* at \*6. [↑](#footnote-ref-160)
160. 160  *Id.* [↑](#footnote-ref-161)
161. 161 No. 2:21-cv-00119, 2021 WL 2400765 (E.D. Pa. June 11, 2021). [↑](#footnote-ref-162)
162. 162  *Id.* at \*2. [↑](#footnote-ref-163)
163. 163  *Id.* at \*9. [↑](#footnote-ref-164)
164. 164  *Id.* at \*10. [↑](#footnote-ref-165)
165. 165 257 A.3d 805 (Pa. Commw. Ct. 2021). [↑](#footnote-ref-166)
166. 166  *Id.* at 805. [↑](#footnote-ref-167)
167. 167  *Id.* at 808. [↑](#footnote-ref-168)
168. 168  *Id.* at 811. [↑](#footnote-ref-169)
169. 169  *Id.* at 821. [↑](#footnote-ref-170)
170. 170  *Id.* [↑](#footnote-ref-171)
171. 171 263 A.3d 51 (Table) (Pa. Commw. Ct. Aug. 6, 2021) (unpublished), *aff'd*, 271 A.3d 876 (Pa. 2022) (mem.). [↑](#footnote-ref-172)
172. 172  *Id.* slip op. at 2. [↑](#footnote-ref-173)
173. 173  *Id.* at 16. [↑](#footnote-ref-174)
174. 174  *Id.* at 17. [↑](#footnote-ref-175)
175. 175  *Id.* [↑](#footnote-ref-176)
176. 176 561 F. Supp. 3d 522 (W.D. Pa. 2021). [↑](#footnote-ref-177)
177. 177  *Id.* at 524-25. [↑](#footnote-ref-178)
178. 178  *Id.* at 526. [↑](#footnote-ref-179)
179. 179  *Id.* [↑](#footnote-ref-180)
180. 180  *Id.* at 533-34. [↑](#footnote-ref-181)
181. 181  *Id.* at 534. [↑](#footnote-ref-182)
182. 182  *Id.* [↑](#footnote-ref-183)
183. 183 No. 2:20-cv-02025, 2021 WL 4594675 (W.D. Pa. Oct. 6, 2021). [↑](#footnote-ref-184)
184. 184  *Id.* at \*5. [↑](#footnote-ref-185)
185. 185  *Id.* [↑](#footnote-ref-186)
186. 186  *Id.* [↑](#footnote-ref-187)
187. 187  *Id.* [↑](#footnote-ref-188)
188. 188  *Id.* at \*6. [↑](#footnote-ref-189)
189. 189  *Id.* [↑](#footnote-ref-190)
190. 190  *Id.* [↑](#footnote-ref-191)
191. 191  *Id.* at \*20. [↑](#footnote-ref-192)
192. 192 268 A.3d 399 (Table) (Pa. Super. Ct. Nov. 4, 2021) (unpublished). [↑](#footnote-ref-193)
193. 193  *Id.* slip op. at 4. [↑](#footnote-ref-194)
194. 194  *Id.* at 6. [↑](#footnote-ref-195)
195. 195  *Id.* [↑](#footnote-ref-196)
196. 196  *Id.* [↑](#footnote-ref-197)
197. 197 263 A.3d 1144 (Pa. 2021). [↑](#footnote-ref-198)
198. 198  *Id.* at 1158. [↑](#footnote-ref-199)
199. 199  *Id.* at 1149. [↑](#footnote-ref-200)
200. 200  *Id.* [↑](#footnote-ref-201)
201. 201  *Id.* at 1150. [↑](#footnote-ref-202)
202. 202  *Id.* [↑](#footnote-ref-203)
203. 203  *Id.* [↑](#footnote-ref-204)
204. 204  *Id.* at 1158. [↑](#footnote-ref-205)
205. 205  *Id.* at 1156. [↑](#footnote-ref-206)
206. 206  *Id.* at 1157. [↑](#footnote-ref-207)
207. 207  *Id.* [↑](#footnote-ref-208)
208. 208 268 A.3d 1138 (Table) (Pa. Commw. Ct. Nov. 30, 2021) (unpublished). [↑](#footnote-ref-209)
209. 209  *Id.* slip op. at 1-2. [↑](#footnote-ref-210)
210. 210  *Id.* at 3-4. [↑](#footnote-ref-211)
211. 211  *Id.* at 4. [↑](#footnote-ref-212)
212. 212  *Id.* [↑](#footnote-ref-213)
213. 213  *Id.* at 5. [↑](#footnote-ref-214)
214. 214  *Id.* [↑](#footnote-ref-215)
215. 215  *Id.* at 12. [↑](#footnote-ref-216)
216. 216 620 S.W.3d 380 (Tex. 2021). [↑](#footnote-ref-217)
217. 217 640 S.W.3d 237 (Tex. App.--Fort Worth 2020), *aff'd*, 639 S.W.3d 682 (Tex. 2022). [↑](#footnote-ref-218)
218. 218 573 S.W.3d 198 (Tex. 2019). [↑](#footnote-ref-219)
219. 219 483 S.W.3d 870 (Tex. 2016). [↑](#footnote-ref-220)
220. 220 615 S.W.3d 144 (Tex. 2020). [↑](#footnote-ref-221)
221. 221  *Id.* at 155 (quoting Knight v. Chi. Corp., 188 S.W.2d 564, 566 (Tex. 1945)). [↑](#footnote-ref-222)
222. 222 622 S.W.3d 884 (Tex. 2021). [↑](#footnote-ref-223)
223. 223 624 S.W.3d 643 (Tex. App.--El Paso 2021, pet. granted). [↑](#footnote-ref-224)
224. 224 MRC executed four identical leases covering the subject tract, which were analyzed as one lease. [↑](#footnote-ref-225)
225. 225 634 S.W.3d 483 (Tex. App.--Eastland 2021, no pet.). [↑](#footnote-ref-226)
226. 226 623 S.W.3d 83 (Tex. App.--Eastland 2021, no pet.). [↑](#footnote-ref-227)
227. 227 629 S.W.3d 189 (Tex. 2021). [↑](#footnote-ref-228)
228. 228 618 S.W.3d 857 (Tex. App.--El Paso 2020, pet. denied). [↑](#footnote-ref-229)
229. 229 505 F. Supp. 3d 681 (S.D. Tex. 2020). [↑](#footnote-ref-230)
230. 230 No. 14-20-00070, 2021 WL 786541 (Tex. App.--Houston [14th Dist.] Mar. 2, 2021, pet. denied) (mem. op.). [↑](#footnote-ref-231)
231. 231 No. 03-19-00516-CV, 2021 WL 904864 (Tex. App.--Austin Mar. 10, 2021, no pet.) (mem. op.). [↑](#footnote-ref-232)
232. 232 630 S.W.3d 427 (Tex. App.--San Antonio 2021, pet. filed). [↑](#footnote-ref-233)
233. 233 623 S.W.3d 480 (Tex. App.--Dallas 2021, pet. denied). [↑](#footnote-ref-234)
234. 234  *Id.* at 491 (quoting Ambrosio v. EPA Wireless, Inc., No. 05-99-01442-CV, 2000 WL 1160696, at \*3 (Tex. App.--Dallas Aug. 18, 2000, no pet.) (unpublished)). [↑](#footnote-ref-235)
235. 235 866 S.E.2d 91 (W. Va. 2021). [↑](#footnote-ref-236)
236. 236 64 S.E. 140 (W. Va. 1909). [↑](#footnote-ref-237)
237. 237  *Orville Young*, 866 S.E.2d at 95. [↑](#footnote-ref-238)
238. 238 855 S.E.2d 332 (W. Va. 2021). [↑](#footnote-ref-239)
239. 239 2021 WY 64, 486 P.3d 980. [↑](#footnote-ref-240)