# **Oil and Gas Update: Legal Developments in 2022 Affecting the Oil and Gas Exploration and Production Industry**

2023

**Reporter**

60 Found. J. For Nat. Resources & Energy L. 1 \*

**Length:** 23088 words

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**Text**

**[\*1]** I. ALASKA

*A. Legislative Developments*

No substantive ***oil*** and gas legislation was passed in this year's state legislative session.

*B. Administrative Developments*

1. Department of Natural Resources Allows Santos to Use Roads Which ConocoPhillips Constructed on State ***Oil*** and Gas Leases

Santos, Ltd. (Santos) is an Australian ***oil*** and gas producer, formerly known as ***Oil*** Search, LLC.   [[2]](#footnote-3)2For several years, Santos has sought to use roads built by ConocoPhillips (Conoco) at Conoco's Kuparuk River Unit (the KRU), which is located on state-owned land that is leased to Conoco pursuant to state ***oil*** and gas leases, so Santos could access other state lands for resource development at Santos' Pikka project.   [[3]](#footnote-4)3Conoco and Santos failed to reach a permanent agreement regarding Santos' use of the KRU roads, and Santos filed an application for a miscellaneous land use permit to allow it access the roads, which was granted by the Director of the Alaska Division of ***Oil*** and Gas.   [[4]](#footnote-5)4Conoco appealed and the Commissioner of the Alaska Department of Natural Resources decided that Santos could use the KRU roads because roads constructed by ***oil*** and gas lessees on state-owned lands are allowed to be concurrently **[\*2]** used by other parties, like Santos, for the development of other state ***oil*** and gas leases, especially given that the usage of those roads by Conoco was not being unreasonably impaired.

2. Alaska Administrative Code Updates

The Alaska ***Oil*** and Gas Conservation Commission has amended 20 AAC 25.072(d), 20 AAC 25.105(c)(2), 20 AAC 25.110, 20 AAC 25.534, and 20 AAC 25.990, which "update drilling, wells, inspections, and definitions to provide more clarity in carrying out the purposes of Alaska Statutes 31.05."   [[5]](#footnote-6)5The amendment was signed into law on June, 28, 2022, and appears in Register 243, October 2022, of the Alaska Administrative Code.   [[6]](#footnote-7)6

*C. Judicial Developments*

In *Sagoonik v. State*, a group of young Alaskans sued the State of Alaska, "alleging that its resource development is contributing to climate change and adversely affecting their lives."   [[7]](#footnote-8)7The young Alaskans sought declaratory and injunctive relief based on allegations that the State has, through existing policies and past actions, violated both the constitutional natural resources provisions and their individual constitutional rights. However, the superior court dismissed the case, and the Alaska Supreme Court upheld dismissal on appeal in part, reasoning that the legislature's stated energy policy both recognizes "concerns about global climate change" and "encourage[s] economic development by . . . promoting the development, transport, and efficient use of non-renewable and alternative energy resources . . . ."   [[8]](#footnote-9)8The import of "purposeful development of the state's abundant natural resources" was only undertaken with the consideration of citizens' social and economic views and assurances of adequate protection of Alaska's environment.   [[9]](#footnote-10)9

II. ARKANSAS

*A. Legislative Developments*

There were no 2022 Arkansas legislative developments. The Arkansas General Assembly meets in general session biannually, in odd numbered years.

*B. Administrative Developments*

Because the Arkansas ***Oil*** and Gas Commission's regulations are constantly in revision, practitioners are advised to regularly check these regulations, **[\*3]** online at http://www.aogc.state.ar.us. Proposed rule changes as well as a tabulation of recently enacted, repealed, or amended rules are available online at http://www.aogc.state.ar.us/rules/new.aspx.

*C. Judicial Developments*

Numerous Arkansas appellate decisions involving deed interpretation have relied upon the so-called "four corners" rule to determine the intent of the grantor and grantee.   [[10]](#footnote-11)10That rule requires the court to determine whether the deed in question is ambiguous. Outside evidence of the parties' intent is only admissible if the deed is determined to be ambiguous.

Two recent decisions of the Arkansas Court of Appeals cited the four corners rule but appear to have expanded the inquiry from the "four corners" of the deed itself to include consideration of prior and contemporaneous instruments within in the parties' title chain.

*Phifer v. Ouellette*,   [[11]](#footnote-12)11involved a series of conveyances, the last of which was a deed from Appellee, Ruth Wilburn, now deceased, to Appellant, Phifer. The question presented was whether that deed conveyed a one-half or one-fourth mineral interest. The answer depended upon the interpretation of a prior instrument in the parties' title chain. That prior instrument excepted "one-half of all ***oil***, gas and other minerals . . . previously conveyed . . . ."   [[12]](#footnote-13)12The "previous conveyance" thus referred conveyed a one-half mineral interest to the other Appellees, Richard and Margot Cowin, immediately prior to the Phifer deed. The question was whether the exception in the Phifer deed of "one-half previously conveyed" excepted the full one-half or only one-half of that one-half. The court permitted evidence of the entire title chain including the mineral deed to Richard and Margot and concluded that a full one-half mineral interest had been excepted.

*Mehaffy v. Clark*,   [[13]](#footnote-14)13involved two quitclaim deeds that had been executed on the same day to different grantees. The deeds were otherwise identical. Each quitclaimed to its respective grantee one-half of the grantor's interest which, at the time, included a 75% mineral interest. The two deeds were not recorded until two and one-half years later, also on the same day. Clark, the grantee of the deed which was recorded first, claimed a full one-half mineral interest out of the grantor's three-quarter interest based the earlier recording time, rather than three-eighth's interest (one-half of the common grantor's three-quarter interest). The appeals court recited the identical "four corners" deed interpretation rule quoted above, but did not decide whether or not the deed to Clark was ambiguous. Instead, it merely held that, in the context of the other near-identical contemporaneous deed, the common grantor had intended to convey one-half of the grantor's interest to each grantee.

**[\*4]** III. CALIFORNIA

*A. Legislative Developments*

1. Prohibition on Drilling and Reworking Wells Within "Health Protection Zones"

With the enactment of Senate Bill 1137,   [[14]](#footnote-15)14the California legislature has effectively attempted to ban drilling and reworking operations in any inhabited area within the state and has imposed broad new requirements on existing ***oil*** and gas production operations. Senate Bill 1137 added new Article 4.6 (commencing with section 3280) to Chapter 1 of Division 3 of the Public Resources Code. New section 3281   [[15]](#footnote-16)15prohibits the California Geologic Energy Management Division (CalGEM) from approving any "notice of intention" submitted by an operator under Public Resources Code section 3203   [[16]](#footnote-17)16for the drilling of ***oil*** or gas wells or the reworking of existing ***oil*** or gas wells within a "health protection zone," defined as the area within 3,200 feet of a "sensitive receptor."   [[17]](#footnote-18)17Sensitive receptors include any residence, school, community resource center, health care facility, long-term care hospital, prison, and building housing a business open to the public.   [[18]](#footnote-19)18Section 3281(a) does contain limited exceptions to respond to health, safety, or environmental threats, to plug and abandon a well, or "[t]o comply with a court order finding that denying approval would amount to a taking of property, or a court order otherwise requiring approval of a notice of intention."   [[19]](#footnote-20)19Section 3281 also requires operators to submit additional information with a notice of intention, including a sensitive receptor inventory and map, and "a statement certifying that the operator has confirmed . . . that there are no sensitive receptors . . . within 3,200 feet of the well-head . . . ."   [[20]](#footnote-21)20Section 3284 requires operators to provide baseline and follow-up surface water and groundwater testing to property owners and tenants within the health protection zone.   [[21]](#footnote-22)21

SB 1137 also imposes a number of new requirements on existing production operations. Every operator must submit a sensitive receptor inventory and map to the CalGEM by July 1, 2023, and annually provide updates.   [[22]](#footnote-23)22Commencing January 1, 2025, all ***oil*** or gas wells and production facilities within a health protection zone will have to comply with new requirements for sound levels, lighting, dust control measures, emissions and vapor venting, and chemical analyses of produced waters, as well as comply with applicable state, federal, and local permits.   [[23]](#footnote-24)23Operators within a health protection zone will be required **[\*5]** to submit a leak detection and response plan by January 1, 2025, and implement their plan by January 1, 2027.   [[24]](#footnote-25)24

The ***oil*** and gas industry has submitted a referendum to repeal SB 1137 and reportedly obtained enough voter signatures for certification of the referendum, thereby allowing it to go on the ballot.   [[25]](#footnote-26)25Upon certification by the Secretary of State, SB 1137 may be delayed from going into effect until the referendum is voted on in the 2024 statewide election.   [[26]](#footnote-27)26

*B. Administrative Developments*

1. Implementation of SB 1137

Despite the referendum challenging SB 1137, CalGEM gave notice of a proposed emergency rulemaking action on December 19, 2022, to adopt emergency regulations implementing SB 1137, with an intended effective date of January 7, 2023. The proposed regulations would, among other things, impose new requirements for the permitting of production facilities.   [[27]](#footnote-28)27

2. Proposed Cost Estimate Report Regulations

Public Resources Code § 3205.7, enacted in 2019, directed CalGEM, commencing July 1, 2022, to require each operator to submit a report to the Supervisor "demonstrat[ing] the operator's total liability to plug and abandon all wells and to decommission all attendant production facilities, including any needed site remediation . . . ."   [[28]](#footnote-29)28In April 2022, CalGEM released a pre-rulemaking draft of proposed regulations for such cost estimates for the purpose of receiving public input.   [[29]](#footnote-30)29Formal rulemaking has not yet commenced.

3. CalGEM Permits in ***Kern*** County

***Kern*** County, the largest ***oil***-producing region of California, in conjunction with CalGEM and industry stakeholders, approved an ordinance in 2015 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).   [[30]](#footnote-31)30In 2021, the ***Kern*** County Superior Court in **[\*6]** *Vaquero Energy Inc. v. County of* ***Kern***   [[31]](#footnote-32)31ordered the County to suspend the review and approval of ***oil*** and gas permits until the court determined that the ordinance complied with CEQA requirements. On November 2, 2022, the court lifted the suspension of the operation of the ordinance, thereby allowing ***Kern*** County to resume permitting of ***oil*** and gas operations with CEQA as the lead agency and CalGEM as a responsible agency.   [[32]](#footnote-33)32Accordingly, CalGEM issued Notice to Operators 2022-06, advising operators that CalGEM "w[ould] consider ***Kern*** County's [Final Supplemental Recirculated Environmental Impact Report] when reviewing any Notice of Intention or UIC application," but would "reach its own conclusion on whether and how to approve the project."   [[33]](#footnote-34)33

*C. Judicial Developments*

The Ninth Circuit held in *Environmental Defense Center v. Bureau of Ocean Energy Management*   [[34]](#footnote-35)34that the Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE) violated the National Environmental Policy Act (NEPA),   [[35]](#footnote-36)35the Endangered Species Act (ESA),   [[36]](#footnote-37)36and the Coastal Zone Management Act (CZMA)   [[37]](#footnote-38)37in authorizing permits for ***oil*** well stimulation treatments, including hydraulic fracturing, on federal leases off the coast of California without preparing a full environmental impact statement consistent with California's coastal management program.

In *In re Venoco, LLC*,   [[38]](#footnote-39)38a bankruptcy court held that the takeover by the California State Lands Commission and its operation of an offshore platform after the operator quitclaimed its leases back to the Commission and filed for bankruptcy was "a reasonable exercise of [the State's] police power[s] and not a taking in violation of the Fifth Amendment of the U.S. Constitution" or the California Constitution.

In January 2022, the California Supreme Court granted review of the court of appeal's opinion in *Chevron U.S.A., Inc. v. County of Monterey*   [[39]](#footnote-40)39(discussed in The Year in Review 2021), which had held that a Monterey County ordinance banning well stimulation treatments, wastewater injection and impoundment, and the drilling of new wells in the County was preempted by Public Resources Code § 3106.   [[40]](#footnote-41)40The court's minute order stated that "[p]ending review, the opinion of the Court of Appeal, which is currently published at 70 Cal.App.5th 153, may be cited, not only for its persuasive value but also for the limited purpose of establishing the existence of a conflict in authority . . . . The parties are ordered **[\*7]** to brief the following issue: Does Public Resources Code section 3106 impliedly preempt provisions LU-1.22 and LU-1.23 of Monterey County's initiative 'Measure Z?'"   [[41]](#footnote-42)41

IV. COLORADO

*A. Legislative Developments*

1. PFAS Disclosures and Prohibition

In June 2022, Governor Jared Polis signed two bills into law in response to growing public concern in Colorado and elsewhere regarding chemicals used in ***oil*** and gas operations, other industrial operations, and consumer products, with a particular focus on a broadly defined group of perfluoroalkyl and polyfluoroalkyl compounds (PFAS chemicals). The first bill, House Bill 22-1348, implements disclosure requirements for any chemical that may be used in ***oil*** and gas production in Colorado, including PFAS chemicals.   [[42]](#footnote-43)42The second bill, House Bill 22-1345, prohibits the sale or distribution of consumer (and industrial) products that contain intentionally-added PFAS chemicals.   [[43]](#footnote-44)43

House Bill 22-1348 requires disclosers that sell, distribute, or use a chemical product in downhole operations in Colorado to disclose information about the product to the Colorado ***Oil*** and Gas Conservation Commission (COGCC), including the chemical trade name of the product, details about the chemicals used in the product, the intended purpose of the product, and a declaration to the COGCC that the product does not contain intentionally-added PFAS chemicals.   [[44]](#footnote-45)44A discloser may refuse to disclose this information if it is protected by trade secrets.   [[45]](#footnote-46)45A discloser is defined as an operator or service provider that uses chemical products in the course of downhole operations, or any direct vendor that provides chemical products to an operator or service provider for use at the well site.   [[46]](#footnote-47)46

House Bill 22-1345 requires manufacturers and distributors to phase out the sale and distribution of certain PFAS-containing consumer products and ***oil*** and gas products.   [[47]](#footnote-48)47On or after January 1, 2024, the use and sale of PFAS-containing ***oil*** and gas products, including hydraulic fracturing fluids, drilling fluids, and proppants, will be prohibited.   [[48]](#footnote-49)48

2. Financial Assurance Rulemaking

Effective April 30, 2022, the COGCC approved new regulations requiring financial assurance to cover the cost of plugging and abandoning wells and reclaiming **[\*8]** well sites.   [[49]](#footnote-50)49Pursuant to Senate Bill 19-181, which was signed into law by Governor Jared Polis, the COGCC updated the financial assurance rules to include (1) requiring that operators are financially capable of meeting their obligations under Senate Bill 19-181 through an operator-specific financial assurance plan, (2) increasing financial assurance for transferred and inactive wells, (3) requiring financial assurance accounts for new wells funded in the initial years of operations, (4) creating an orphan well fund, (5) applying Colorado's new rules to federal wells for the first time, (6) broadening access for local governments regarding the plugging of wells, and (7) developing an out-of-service plugging program.   [[50]](#footnote-51)50Operators are required to use the COGCC's newly-developed Form 3 to submit financial assurance plans.   [[51]](#footnote-52)51

The orphan well fund was established in June 2022. Operators must pay a mitigation fee for each well that has been spud but not plugged and abandoned.   [[52]](#footnote-53)52The mitigation fees collected will "fund the plugging, reclaiming, and remediating of orphaned wells" in Colorado.   [[53]](#footnote-54)53

*C. Judicial Developments*

In *Great Northern Properties, LLLP v. Extraction* ***Oil*** *& Gas, Inc.*, the Colorado Court of Appeals held that the centerline presumption applies to mineral interests underlying a dedicated right-of-way.   [[54]](#footnote-55)54In that case, a real estate developer owned a parcel of land in Greeley, Colorado, which is located in Weld County in the heart of the Denver-Julesburg Basin. The developer subdivided the parcel into individual lots and dedicated a right-of-way across its land to the City of Greeley. The developer granted three parcels, all abutting the right of way, to separate grantees, but did not expressly reserve any mineral interests. Years later, the developer conveyed "whatever interest it had in the minerals" under the right-of-way to Great Northern Properties (GNP).   [[55]](#footnote-56)55GNP subsequently sought to quiet title to the mineral estate.

Extraction ***Oil*** & Gas, Inc. (Extraction) held ***oil*** and gas leases with land abutting the right-of-way and was entitled to drill ***oil*** and gas beneath the right-of-way.   [[56]](#footnote-57)56Extraction argued that in applying the centerline presumption, the landowners of the parcels abutting the right-of-way owned the mineral rights and GNP did not own any mineral rights. The centerline presumption provides "a conveyance of land abutting a road or highway is presumed to carry title to the center of that roadway to the extent the grantor has an interest therein, unless a contrary intent appears on the face of the conveyance."   [[57]](#footnote-58)57Further, the **[\*9]** law presumes a grantor conveys all appurtenant advantages and rights along with the property, including all mineral interests, unless specifically reserved to the grantor. Therefore, Extraction argued the real estate developer did not own any interest in the mineral rights beneath the right-of-way at the time of the conveyance to GNP, and the landowners took title to both the mineral estate to the centerline of the right-of-way.

Moreover, the court held the centerline presumption only applies when the following criteria is met:

(1) the grantor conveys ownership of a parcel of land abutting a right-of-way; (2) at the time of conveyance, the grantor owned the fee underlying the right-of-way; (3) the grantor conveys away all the property they own abutting the right-of-way; and (4) no contrary intent appears on the face of the conveyance.   [[58]](#footnote-59)58

In *Weld County Colorado Board of County Commissioners v. Ryan*,   [[59]](#footnote-60)59the Board of County Commissioners of Weld County, Colorado (Weld County), sued the Colorado Department of Public Health and Environment (CDPHE) and the Air Quality Control Commission (Commission), challenging the Commission's new air quality control regulations on ***oil*** and gas operations. The Commission proposed to revise its Regulation No. 7 to impose (1) additional leak detection and repair inspections at well production facilities and natural gas compressors and (2) increased emission controls for storage tanks. The Commission initiated rulemaking processes to review and revise Regulation 7 and eventually adopted the new rules.

Once the new rules took effect, Weld County sued, asserting the Commission and CDPHE allowed a local community group to submit a late amendment without allowing other parties to respond, and the Commission failed to prioritize Weld County's concerns regarding economic impacts of the rules and its land use powers.   [[60]](#footnote-61)60The CDPHE and the Commission moved to dismiss Weld County's claims for lack of standing to sue a state agency under the *Martin v. District Court* holding and failure to establish an injury-in-fact. The *Martin* decision provides that "absent 'an express statutory right, a subordinate state agency'--possibly a county--'lacks standing or any other legal authority to obtain judicial review of an action of a superior state agency.'"   [[61]](#footnote-62)61The district court dismissed Weld County's suit.

On appeal, Weld County argued that it is not a subordinate agency because its powers and rights as a county are like those of an agency, and because the Colorado Air Pollution Prevention and Control Act (Colorado Air Act) requires the Commission to prioritize the economic impact concerns of local government with respect to proposed regulations.   [[62]](#footnote-63)62However, the court of appeals disagreed and found the Colorado Air Act limits the County to adopting regulations that conform to, or may be more restrictive than, the Commission's standards. Accordingly, the court held Weld County did not have standing to **[\*10]** seek judicial review of the Commission's rulemaking pursuant to the *Martin* decision and affirmed the district court's dismissal. Importantly, in November 2022, the Supreme Court of Colorado granted a petition for writ of certiorari to determine whether the court should review and clarify the *Martin* decision, and in doing so, whether Weld County may have standing to seek a decision on the merits in the district court.   [[63]](#footnote-64)63

V. KANSAS

Kansas had a relatively quiet year in both the legislature and the judiciary. Two case decisions were issued by Kansas courts.

*A. Judicial Developments*

1. *Fawcett* and the Marketable Product Rule

In the longstanding *Fawcett* litigation, the Kansas Supreme Court issued its decision on the plaintiffs' amended petition.   [[64]](#footnote-65)64 *Fawcett* was 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 for gas to be marketable."   [[65]](#footnote-66)65The Class challenged OPIK and third-party gas marketers' use of net-back formulas to determine royalty payments--essentially alleging that such formulas suggest bad faith toward lessors.

The court found that its prior decision did not reflect a change of existing law. In doing so, the court relied on "the law of the case" doctrine, which "provides that when a second trial or appeal is pursued in a case, the first decision is the settled law of the case on all questions addressed in a first appeal and reconsideration will not be given to such questions."   [[66]](#footnote-67)66As such, the owners were precluded from relitigating that the operator breached its implied duty to market or from raising a good-faith argument based on an intended market theory. This opinion appears to have finally brought the *Fawcett* saga to a close, but new royalty owner class actions may still arise in the future over the marketable product rule.

2. Wrongful Royalty Payments and Insurance Coverage

In *Deutsch v. BITCO General Insurance Corp.*,   [[67]](#footnote-68)67the U.S. District Court for the District of Kansas heard an insurance case arising out of a royalty misallocation dispute and found that coverage did not apply. Deutsch was the operator of an ***oil*** and gas lease in Stafford County. The property was originally **[\*11]** leased in the 1970s. In 2012, the operator drilled another well on the leasehold without realizing that the property had been subdivided into two tracts and the new well had differing mineral ownership than the previous ones. The affected royalty owners sued the operator for breach of contract, conversion, and negligence. As part of Deutsch's attempt to fix the problem, Deutsch successfully unitized the two tracts to address royalty payments going forward. The Tract A owners (who had been overpaid by Tract B production) then sued Deutsch because the unitization would dilute their royalties from Tract A and cause them "financial injuries."

Deutsch sent notices of the claims to BITCO seeking coverage because the claims involved damage to property. BITC denied both requests because the relevant policies provided coverage only if the damage was either physical or involved "the loss of use of 'tangible property.'"   [[68]](#footnote-69)68When Deutsch sued, BITCO sought a motion for summary judgment on the grounds that royalty misallocations were purely intangible losses. Deutsch argued that 'tangible' meant "anything 'capable of being appraised at an actual or approximate value,'" and that ***oil*** is tangible.   [[69]](#footnote-70)69Deutsch likewise urged the court not to adopt the Black's Law definition because it a specialized resource for lawyers.

The district court granted summary judgment for BITCO and adopted the Black's Law Dictionary definition for tangible.   [[70]](#footnote-71)70The court noted the frequent use of Black's Law Dictionary by both Kansas and federal courts. In addition, the court relied on an older Kansas case which characterized ***oil*** and gas leases as "the source of intangible interests."   [[71]](#footnote-72)71It is worth noting that the court's description of the ***oil*** and gas lease suggests that the lessor was entitled to a one-eighth share of the ***oil*** produced. BITCO had a separate argument that severed ***oil*** would exempt as personal property under the insured's control, but the court declined to address that issue in its decision.

VI. LOUISIANA

*A. Legislative Developments*

Louisiana's risk-fee statute, La. R.S. 30:10 (also known colloquially as the statutory JOA), was amended by Act No. 5 of the 2022 Regular Session, effective August 1, 2022.   [[72]](#footnote-73)72The major substantive changes fall into three primary categories. First, the amendment creates new rights for operators remitting a nonparticipating owner's lease burdens for the benefit of the nonparticipating owner's royalty and overriding royalty owners as required by the statute. Nonparticipating owners must now furnish the operator with the instruments creating the royalty and overriding royalty obligations, along with title information pertaining to the nonparticipating owner's interest in the unit. A nonparticipating owner who receives payment based upon the information it furnishes to **[\*12]** the operator must indemnify and hold the operator harmless for claims arising from such payments and must restore any payments made by the operator in reliance upon incorrect information. Following the amendment, the operator may also secure a title opinion for the nonparticipating owner's tract(s) in the unit and recoup the cost out of the nonparticipating owner's allocable share of production from the unit well. In addition, any mineral lease royalty owner or overriding royalty of the nonparticipating owner making demand on the operator for failure to remit the nonparticipating owner's lease burdens must now enclose the applicable instruments as part of the demand to the operator.

The second major substantive change affects the manner in which the operator proposes the well under La. R.S. 30:10. The amendment gives operators the discretion to include a statement in the risk charge notice that payment in full of an owner's share of the authorization for expenditure (AFE) costs and cost estimates must be included with an election to participate in the well. Finally, the third major change in the amendment relates to a "subsequent unit operation." The amendment authorizes an operator to recover a risk charge of 100% of a tract's allocated share of actual reasonable expenditures incurred in conducting a subsequent unit operation if an owner in the unit elects not to participate in the risk and expense of the subsequent unit operation (or is deemed to be a nonparticipating owner as to the subsequent unit operation). "Subsequent unit operation" is defined as "a recompletion, rework, deepening, sidetrack, or extension . . . ."   [[73]](#footnote-74)73And each of these operational terms in the definition are also defined in both the amendment and the original statutory JOA.

*B. Judicial Developments*

In October 2022, the U.S. Court of Appeals for the Fifth Circuit in *Plaquemines Parish v. Chevron USA, Inc.*, affirmed the district court's decision to remand the coastal legacy lawsuit against ***oil*** and gas companies who operated along the coast to state court in Plaquemines Parish.   [[74]](#footnote-75)74The lawsuit, originally brought by the plaintiff in state court, is one of over 40 like it seeking to determine the ***oil*** and gas industry's potential liability (and potential restoration obligations) for the deterioration of Louisiana's coastal wetlands.   [[75]](#footnote-76)75The merits of that challenge have not yet been reached. Instead, the parties have been debating the appropriate forum for the dispute. The plaintiff argued the case belongs in state court, alleging violations of Louisiana's State and Local Coastal Resources Management Act. The defendants, however, argued the case was properly removable to federal court because the government directed the ***oil*** and gas industry to increase production as part of the nation's combined wartime efforts during the Second World War, and thus, the ***oil*** and gas companies qualify as federal officers to anchor federal jurisdiction. However, after nearly a decade of debate, the Fifth Circuit resolved this dispute in favor of remanding the case to the 25th Judicial District Court in Plaquemines **[\*13]** Parish. In doing so, the Fifth Circuit potentially cleared the way for at least 41 similar lawsuits collectively alleging billions of dollars in damages for environmental damages to the Louisiana coast. The defendants recently sought but were denied a stay to allow for a writ of certiorari to the United States Supreme Court.   [[76]](#footnote-77)76

A significant decision impacting operators across Louisiana was handed down this year by the U.S. District Court for the Western District of Louisiana, which reversed a decision from three years ago. Originally, in 2019, the Western District of Louisiana granted summary judgment in favor of unleased mineral owners included in drilling units created by the Louisiana Commissioner of Conservation in the case of *Johnson v. Chesapeake Louisiana, LP*.   [[77]](#footnote-78)77The court concluded that the unit operator was not authorized to recover the unleased mineral owner's pro rata share of post-production costs incurred by the operator to market the unleased mineral owner's share of production from the unit. Days after the decision was rendered in 2019, class action lawsuits were filed on behalf of unleased mineral owners in the state of Louisiana against Chesapeake Operating, L.L.C., and BPX Operating Company, and these putative class action lawsuits were assigned to the same judge who rendered the *Johnson* decision.   [[78]](#footnote-79)78In *Johnson*, the defendant filed a motion for reconsideration of the summary judgment ruling.   [[79]](#footnote-80)79In *Self v. BPX Operating Co.*, the defendant filed a Federal Rule of Civil Procedure 12(b)(6) motion for partial dismissal aimed at dismissing the primary claim that assessing post-production costs to the proceeds of unleased mineral owners is per se illegal.   [[80]](#footnote-81)80On March 31, 2022, the district court reversed its prior ruling in the 2019 *Johnson* case and granted BPX Operating Company's motion for partial dismissal in *Self*.   [[81]](#footnote-82)81In rendering its decision, the court relied upon Louisiana jurisprudence that confirmed when an operator markets production on behalf of an unleased mineral owner, the operator does so pursuant to the Civil Code quasi-contractual regime of *negotiorum gestio*. The court concluded that this regime (specifically Civil Code article 2297) authorizes the legal recovery of post-production costs by the operator as a matter of law.

This year the Fifth Circuit also had occasion to interpret the notice requirements of La. R.S. 30:103.1 and 103.2, which, if satisfied, expose an operator to the statutory penalty of forfeiting the "costs of drilling operations of the well." In *B.A. Kelly Land Co. v. Aethon Energy Operating, L.L.C.*, the Fifth Circuit reversed the district court's conclusion that the correspondence sent by an unleased mineral owner to an operator failed to satisfy the requirements of La. R.S. 30:103.1 and 103.2.   [[82]](#footnote-83)82The district court deemed the first letter at issue, which was dated December 15, 2017, to be insufficient notice under La. R.S. **[\*14]** 30:103.1 primarily because it did not reference either of the two statutes at issue or expressly use the term "initial report" or "quarterly report." On appeal, however, the Fifth Circuit rejected this rationale. Instead, the Fifth Circuit noted that the express requirements of La. R.S. 30:103.1 were met, i.e., the correspondence was in writing, sent by certified mail to the operator, and identified the name and address of the unleased mineral owner. Furthermore, the letter tracked the language of La. R.S. 30:103.1 with respect to the specific information that the statute requires the operator to report, and it identified the drilling units and wells at issue. Similarly, as to the second letter at issue, which was dated April 17, 2018, the district court concluded it did not satisfy La. R.S. 30:103.2 because the letter did not expressly reference either of the two statutes at issue or "the possibility of 'a lawsuit, penalty or forfeiture under § 103.2.'"   [[83]](#footnote-84)83The Fifth Circuit, however, explained that La. R.S. 30:103.2 only required the notice to "'call[] attention' to [an] operator's 'failure to comply with the provisions of R.S. 30:103.1.'"   [[84]](#footnote-85)84Here, the second letter expressly identified the prior letter dated December 17, 2017, and reiterated the plaintiff's unleased status and request for "written reports concerning operating costs and expenses."   [[85]](#footnote-86)85Furthermore, the April 17, 2018, letter also tracked the language of La. R.S. 30:103.2. As such, the Fifth Circuit concluded that the writings from the plaintiff satisfied both La. R.S. 30:103.1 and 103.2.

Finally, there were also a number of significant rulings from the Louisiana Supreme Court in the realm of legacy litigation, which generally refers to lawsuits involving claims of oilfield contamination to land, including soil and groundwater, that allegedly arose from historical ***oil*** and gas operations. The Louisiana Supreme Court held in *State ex rel. Tureau v. BEPCO, L.P.*, that citizen enforcement actions under La. R.S. 30:16 are not subject to liberative prescription.   [[86]](#footnote-87)86The statute in question, La. R.S. 30:16, is a statute that allows citizen enforcement actions in instances where the Commissioner of Conservation fails to bring suit pursuant to La. R.S. 30:14 against a person who is violating or is threatening to violate state law with respect to conservation of ***oil*** or gas.   [[87]](#footnote-88)87In *Tureau*, the plaintiff claimed that the defendants maintained several unlined pits in connection with wells being operated on their property and on adjacent property. Further, the plaintiff claimed that the unlined pits were either never closed or were not closed pursuant to "Statewide Order 29-B, which, among other things, requires the registration and closure of [such] unlined oilfield pits, [along with] the remediation of various enumerated contaminates in the soil to certain minimum standards."   [[88]](#footnote-89)88In lieu of asserting a private right of action related to these claims, the plaintiff sought injunctive relief under La. R.S. 30:16, which would force the defendants' compliance with Statewide Order 29-B. In response, the defendants raised an exception of prescription, alleging **[\*15]** that the one-year prescriptive period in Louisiana Civil Code article 3492 applies to the plaintiff's claims. However, the Louisiana Supreme Court found these kinds of lawsuits are not subject to *any* liberative prescriptive period because the legislature has not enacted such a period for claims under La. R.S. 30:16, and further, because such claims allow a citizen to act for the Commissioner rather than for personal damages.

On June 1, 2022, the Louisiana Supreme Court affirmed its interpretation of Act 312 in a previous landmark decision of the same name.   [[89]](#footnote-90)89This new decision, referred to as *Louisiana Land III*, stands as the final chapter in a trilogy of Louisiana Supreme Court cases interpreting the extent of recovery under the 2006 version of Act 312. Prior to the introduction of Act 312, there was no legal mechanism requiring a landowner to use money awarded to remediate environmental damage on the actual cleanup of the allegedly contaminated property. In 2006, the Louisiana legislature introduced Act 312 to require all damages awarded for evaluation or remediation of environmental damage to be paid into the registry of the court and used for cleanup of the property at issue. Then, in *Louisiana Land I*, the Louisiana Supreme Court interpreted Act 312 to potentially allow juries to award damages in excess of actual costs to remediate environmental damages.   [[90]](#footnote-91)90The court overturned this ruling in *Louisiana Land II*, concluding that a landowner's recovery is limited to a regulatory cleanup of contaminated property unless specifically contracted otherwise.   [[91]](#footnote-92)91Thereafter, in *Louisiana Land III*, the Louisiana Supreme Court granted rehearing of its *Louisiana Land II* decision and ultimately affirmed its ruling to explain that any award in excess of what is necessary through the feasible plan under Act 312 would be an unacceptable windfall to a landowner, and any tort damages received cannot be duplicative of the award under the Act.   [[92]](#footnote-93)92

VII. NEW MEXICO

*A. Judicial Developments*

There were not any topical reported decisions in New Mexico in 2022.

*B. Administrative Developments*

On March 25, 2022, the New Mexico ***Oil*** Conservation Commission (NMOCC) adopted a series of rule amendments related to the venting and flaring of natural gas with the ultimate goal of having operators capture 98% of their natural gas by the end of 2026. The NMOCC adopted a new form identified as a C-115B on which operators are to report all volumes of natural gas vented and flared.   [[93]](#footnote-94)93After drilling and completion operations are finished, the **[\*16]** new rules prohibit venting or flaring except in cases of emergency or malfunction, various sorts of enumerated clean-up or maintenance activities, or for the first 12 months of production for a well classified by the New Mexico ***Oil*** Conservation Division as an exploratory well.   [[94]](#footnote-95)94The new rules also require that facilities constructed after the effective date be designed to minimize waste of gas, including flare stacks having automatic ignitors or continuous pilots, and that permanent storage tanks installed shall be equipped with an automatic gauging system that reduces venting.   [[95]](#footnote-96)95The rules also includes provisions requiring operators to adopt practices, retrofit wells, and otherwise take necessary actions to annually increase the percentage of natural gas captured to achieve 98% capture by the end of 2026.   [[96]](#footnote-97)96Improvement is to be judged on percentages captured by an operator in the last quarter of 2021 and first quarter of 2022.   [[97]](#footnote-98)97There is no exception in the rules for older stripper (low producing) wells.   [[98]](#footnote-99)98

Effective August 5, 2022, ozone precursor rules were adopted by the New Mexico Environment Department (NMED). The basic purpose of those rules "is to establish emission standards for volatile organic compounds (VOCs) and oxides of nitrogen (NOx) from ***oil*** and gas production, processing," and transmission facilities.   [[99]](#footnote-100)99The rules contain detailed requirements for monitoring, installing, operating, maintaining, performing, and/or replacing ***oil*** and gas related engines and turbines,   [[100]](#footnote-101)100compressor seals,   [[101]](#footnote-102)101control devices and closed vent systems,   [[102]](#footnote-103)102leaking equipment and other fugitive emissions,   [[103]](#footnote-104)103unloading of natural gas liquids,   [[104]](#footnote-105)104glycol dehydrators,   [[105]](#footnote-106)105heaters,   [[106]](#footnote-107)106hydrocarbon liquid transfers and related equipment,   [[107]](#footnote-108)107pipeline pig launching and receiving,   [[108]](#footnote-109)108pneumatic controllers and pumps,   [[109]](#footnote-110)109storage tanks,   [[110]](#footnote-111)110well workovers,   [[111]](#footnote-112)111produced **[\*17]** water management units,   [[112]](#footnote-113)112and flowback vessels and preproduction operations.   [[113]](#footnote-114)113

VIII. OHIO

Like in recent years, Ohio courts tackled a variety of ***oil*** and gas issues, ranging from the interpretation of deeds and leases to the application of Ohio's statutory mechanisms for terminating severed mineral interests.

*A. Legislative Developments*

Effective July 21, 2022, Ohio's statutory unitization law was amended to impose timing requirements upon the Division of ***Oil*** and Gas Resources Management (Division) in both setting hearings and issuing unit orders. The amendment provides that the Division must hold a hearing on an application within 60 days after the filing date. However, the hearing may be continued if the operator fails to correct any issue causing the application to be "materially incomplete" within three business days of receiving notice of the issue from the Division.   [[114]](#footnote-115)114Further, assuming the statutory elements are met by the applicant, the Division is now required to issue a unit order within 60 days of the hearing.   [[115]](#footnote-116)115

*B Judicial Developments*

1. Deed Construction

In *Bates v. Bates*,   [[116]](#footnote-117)116Ohio's Seventh District Court of Appeals interpreted a mineral reservation in a deed that also reserved a life estate unto one of many grantors. Here, the owners of a collective seven-ninths interest in the subject property conveyed the land, reserving a life estate unto Anna Bates, one of the grantors who personally owned a one-third interest.   [[117]](#footnote-118)117In addition, the deed reserved unto Ms. Bates "the one half interest in the ***oil*** and gas in and under the [land] together with the right to lease and dispose of the same in any manner she sees fit . . . ."   [[118]](#footnote-119)118The court rejected the argument that the mineral reservation merely created a life estate in Ms. Bates, finding that the language used in the separate life estate and mineral reservations, as well as the surrounding paragraphs in the deed, showed that the mineral reservation was not to be limited to Ms. Bates' lifetime.   [[119]](#footnote-120)119The court also disagreed that the mineral reservation contained a latent ambiguity simply because Ms. Bates only owned a one-third **[\*18]** interest in the land.   [[120]](#footnote-121)120Instead, the court stated that "[t]he reservation language is exact," as it specifically reserved a one-half interest in the minerals, and the grantors collectively owned and conveyed more than just the one-third interest that Ms. Bates owned.   [[121]](#footnote-122)121The court ultimately concluded that nothing prohibits grantors from combining their interests to reserve an amount unto one of the grantors who *individually* owns less than that amount.   [[122]](#footnote-123)122

In *Senterra, Ltd. v. Winland*,   [[123]](#footnote-124)123the Supreme Court of Ohio considered whether the *Duhig* rule applies to an overconveyance resulting from an attempted mineral severance.   [[124]](#footnote-125)124At issue was the effect, if any, of a purported reservation of a one-quarter interest in the ***oil*** and gas in a 1954 deed.   [[125]](#footnote-126)125Due to prior severances, the grantor only owned a three-eighths interest in the ***oil*** and gas at the time, but these prior severances were not mentioned in the 1954 deed.   [[126]](#footnote-127)126As a result, the grantee's successor argued that because the grantor purported to *convey* a three-quarter interest--an amount greater than that which the grantor actually owned--the one-quarter reservation was immediately void under the *Duhig* rule.   [[127]](#footnote-128)127The court disagreed, instead relying on another Texas case   [[128]](#footnote-129)128to hold that because the grantor "did not own the exact interest necessary to remedy the breach at the time of the conveyance," the *Duhig* rule did not apply.   [[129]](#footnote-130)129In other words, because the grantor did not own a three-quarter interest in the ***oil*** and gas (the interest purportedly conveyed by the 1954 deed), the *Duhig* rule was inapplicable.

In *Peppertree Farms, L.L.C. v. Thonen*,   [[130]](#footnote-131)130the Supreme Court of Ohio analyzed the impact on a mineral severance of a common-law rule providing that a grantor could only convey or retain a fee simple absolute interest in real property by including words of inheritance in the deed.   [[131]](#footnote-132)131Although Ohio abrogated this rule by statute in 1925, it still applied to deeds executed prior where, without words of inheritance, a conveyance or retention of an interest would only create a life estate.   [[132]](#footnote-133)132Important to this common-law rule, there is a distinction between the terms "reservation" and "exception," despite the two terms often being used interchangeably today. A reservation creates a new property right **[\*19]** for the grantor, while an exception withholds from a conveyance an existing fee simple property right already owned by the grantor.   [[133]](#footnote-134)133Because of the distinction, words of inheritance were needed to create a fee simple interest by *reservation*, but not by *exception*.   [[134]](#footnote-135)134In this case, the court looked at a 1916 deed severing "one half of the royalty of the ***oil*** and gas" and a 1920 deed severing "the 3/4 of ***oil*** Royalty and one half of the gas," neither of which included words of inheritance.   [[135]](#footnote-136)135Reiterating that the use of the words "reserve" or "except" is not determinative of whether a severance was a reservation or exception, the court held that each severance was an exception and thus words of inheritance were not required to retain more than a life estate.   [[136]](#footnote-137)136The court reasoned that, in both instances, the ***oil*** and gas was already in existence and owned in fee simple before the severance, and thus the severance did not create the interest.   [[137]](#footnote-138)137The court explained that because unaccrued royalties are classified as real property and "the right to receive royalt[ies] in the future is one of the separately alienable incidents of ownership of the full mineral interest," the right to future royalties may be retained by exception.   [[138]](#footnote-139)138

2. Ohio's Dormant Mineral Act and Marketable Title Act

In *Fonzi v. Brown*,   [[139]](#footnote-140)139the Supreme Court of Ohio addressed the level of diligence a surface owner must exercise in attempting to identify and locate holders of a severed mineral interest under the Ohio Dormant Mineral Act (DMA).   [[140]](#footnote-141)140Referencing its prior decision in *Gerrity v. Chervenak*,   [[141]](#footnote-142)141the court reiterated that, while a search "of the public records in the county where the mineral interest is located will 'establish a baseline of reasonable diligence,'" the facts of each case may require additional searching to satisfy the standard of reasonable diligence.   [[142]](#footnote-143)142In this case, the surface owners only searched the public records of the Ohio county where the mineral interest was located, despite the severance deed identifying the county in Pennsylvania where the reserving parties resided.   [[143]](#footnote-144)143As a result, the court ruled that it was unreasonable for the surface owners not to search the public records of the identified Pennsylvania county.   [[144]](#footnote-145)144Additionally, rejecting the argument that the 2006 amendment to the DMA created two distinct methods for abandonment--one where post-notice protections are afforded to the holder and one where they are not--the court confirmed that "[t]wenty years without a saving event, service by mail **[\*20]** (when feasible), and post-notice opportunity to preserve the mineral interest are indispensable elements" of a successful abandonment process.   [[145]](#footnote-146)145

In *Stalder v. Gatchell*,   [[146]](#footnote-147)146Ohio's Seventh District Court of Appeals faced the unique issue of whether backdating the effective date of an ***oil*** and gas lease could result in earlier production from the subject property being attributed to that lease. The surface owners entered into an ***oil*** and gas lease, despite the ***oil*** and gas having been previously severed, and in early 2015 a well began producing from a unit including the subject property. Later in 2015, the surface owners abandoned the severed mineral interest under the DMA.   [[147]](#footnote-148)147Years later, the operator entered into an ***oil*** and gas lease with the successor to the mineral reserver. Notably, the effective date of that lease was dated before the *well's initial production*.   [[148]](#footnote-149)148While ***oil*** and gas production can constitute a savings event under the DMA, it requires that production be *by the holder* or under a lease *to which the mineral interest is subject*.   [[149]](#footnote-150)149Here, production occurring prior to the 2015 abandonment was obtained solely under the surface owners' lease (and thus not by a holder or under a lease to which the mineral interest was subject). And, despite the backdated effective date, the court held that past production was not "by" the new lessor.   [[150]](#footnote-151)150In fact, by the time the production was actually attributable to the new lease, that lessor was no longer a holder (because of the 2015 abandonment).   [[151]](#footnote-152)151

In *Hamm v. Lorain Coal & Dock Co.*,   [[152]](#footnote-153)152Ohio's Seventh District Court of Appeals addressed whether a claim to preserve filed by an alleged shareholder of a dissolved corporation could prevent the abandonment of that corporation's mineral interest under the DMA. The Lorain Coal & Dock Company--the owner of a severed mineral interest--was dissolved in the mid-20th century.   [[153]](#footnote-154)153This mineral interest was never conveyed out of the corporation, and the surface owners sought to have it abandoned.   [[154]](#footnote-155)154However, an heir of an alleged shareholder in the company, along with her successor, filed claims to preserve the mineral interest.   [[155]](#footnote-156)155If timely filed, a claim to preserve "filed for record by [a] holder" will prevent the abandonment of a severed mineral interest.   [[156]](#footnote-157)156Even though the court agreed that holders other than the dissolved corporation (i.e., the record holder) could exist, it ultimately concluded that there was not enough evidence presented to confirm that the claims to preserve were filed by actual holders.   [[157]](#footnote-158)157It was uncertain whether the filers did in fact inherit and **[\*21]** own shares in the company, especially given conflicting evidence that all shares had been cashed in during dissolution.   [[158]](#footnote-159)158

In *Peppertree Farms, L.L.C. v. Thonen*,   [[159]](#footnote-160)159the Supreme Court of Ohio answered the narrow question of whether a decedent's Last Will and Testament could prevent the extinguishment of a severed mineral interest under the Ohio Marketable Title Act (MTA),   [[160]](#footnote-161)160when it did not include a specific devise of the interest or a residuary clause. The MTA provides that a claimant's marketable record title shall be subject to "[a]ny interest arising out of a *title transaction* which has been *recorded* subsequent to the effective date of the root of title . . . ."   [[161]](#footnote-162)161And a title transaction is defined as a "transaction *affecting title* to any interest in land, including title *by will or descent* . . . ."   [[162]](#footnote-163)162Here, because the severed mineral interest owner's will did not include a specific devise of the interest or a residuary clause, the interest passed as if he had died intestate.   [[163]](#footnote-164)163Looking to the relevant statutory language, the court found that the decedent's will was not a title transaction under the MTA, as it did not transfer, encumber, or in any way affect title to the interest.   [[164]](#footnote-165)164And while the intestate transfer of the interest *was* a title transaction, it was not a *recorded* title transaction.   [[165]](#footnote-166)165

3. ***Oil*** and Gas Leases

In *Zehentbauer Family Land, LP v. TotalEnergies E&P USA, Inc.*,   [[166]](#footnote-167)166the U.S. Court of Appeals for the Sixth Circuit was tasked with applying Ohio law to determine the proper method for calculating royalty payments for a class of lessors. The ***oil*** and gas leases at issue provided for a royalty payment "based upon the gross proceeds paid to Lessee for the gas marketed and used off the leased premises, . . . *computed at the wellhead* from the sale of such gas substances so sold by Lessee."   [[167]](#footnote-168)167Here, the defendant lessees sold their gas at the wellhead to midstream affiliates and were paid using the netback method.   [[168]](#footnote-169)168The lessor royalties were then calculated using the netback price as the base.   [[169]](#footnote-170)169Finding no conflict between the terms "gross proceeds" (from the perspective of the lessee) and "computed at the wellhead" under the circumstances, the court approved of the calculation methodology.   [[170]](#footnote-171)170Based on the plain language of the leases, the royalty calculations were to be based on the **[\*22]** amount paid to the lessees at the point of sale (i.e., the wellhead), and the netback method was commonly used to calculate that amount.   [[171]](#footnote-172)171

In *Hogue v. Whitacre*,   [[172]](#footnote-173)172Ohio's Seventh District Court of Appeals elaborated on what qualifies as a "direct expense" when conducting a "paying quantities" analysis. The Supreme Court of Ohio's decision in *Blausey v. Stein*   [[173]](#footnote-174)173provided the starting point of the analysis--that a paying quantities determination involves "the difference between gross profit and the direct expenses attributable to the production of ***oil*** or gas."   [[174]](#footnote-175)174Whether the investment in a well is profitable is not relevant; rather, the inquiry involves the simple mathematical equation of subtracting direct expenses (i.e., "expenses that directly relate to the production of ***oil*** and gas") from gross income to determine the profit.   [[175]](#footnote-176)175At issue was whether a flat monthly fee paid by the lessee to a wholly separate entity under common ownership constituted a direct expense.   [[176]](#footnote-177)176Looking at the evidence presented, the court determined that the monthly fee was an *indirect* expense, as it was used to pay the business expenses of that entity, and the same total amount was paid regardless of a well's performance.   [[177]](#footnote-178)177Applying the mathematical formula set forth in *Blausey* (i.e., without accounting for the monthly fee, as it was an indirect expense) the court found that the well was producing in paying quantities.   [[178]](#footnote-179)178

4. Adverse Possession

In *Cottrill v. Quarry Enterprises, LLC*,   [[179]](#footnote-180)179Ohio's Fifth District Court of Appeals addressed the effect of an existing ***oil*** and gas lease on the "exclusive possession" element of adverse possession. Here, the plaintiff continuously cared for, maintained, and used a portion of her neighbor's property for over 21 years.   [[180]](#footnote-181)180As the sole occupier of the property's surface, the plaintiff believed she met all the elements of adverse possession--"exclusive possession and open, notorious, continuous, and adverse use of the disputed property for a period of twenty-one years."   [[181]](#footnote-182)181However, the court pointed to the existence of an ***oil*** and gas lease and associated producing well covering, in part, the disputed property. Because the lease gave the lessee the right of possession of the subsurface and the reasonable use of the surface to allow for the extraction of minerals, the plaintiff's possession was not exclusive and therefore a finding of adverse possession was precluded.   [[182]](#footnote-183)182

**[\*23]** IX. OKLAHOMA

*A. Oklahoma Corporation Commission Developments*

Documents filed in the rulemakings referred to below can be viewed on the Oklahoma Corporation Commission's (Commission) website.

1. ***Oil*** & Gas Conservation Rules

Amendments to Title 165, Chapter 10 of the Oklahoma Administrative Code (OAC), which comprises the Commission's ***Oil*** *& Gas Conservation Rules*, were addressed in Cause RM No. 202200002. Following is a brief summary of the amendments that became effective on October 1, 2022:

The amendments

streamline and clarify the ***Oil*** & Gas Conservation rules, update the list of ***Oil*** & Gas Conservation Division prescribed forms and eliminate forms, change requirements regarding operator agreements, modify Permit to Drill requirements, allow the Commission to issue a Permit to Drill prior to the issuance of an order under certain circumstances, establish parameters concerning cementing of wells and submission of cementing reports, and revise provisions pertaining to notice of hydraulic fracturing operations and eliminate a reference to citations.   [[183]](#footnote-184)183

The amendments also clarify requirements regarding submission of well logs, update specifications concerning approval of underground injection wells, increase the amount and type of information to be supplied in connection with applications for approval of underground injection wells, modify requirements pertaining to simultaneous injection wells, and streamline provisions pertaining to issuance of licenses for pulling casing and plugging wells.   [[184]](#footnote-185)184"Certain amendments in [] OAC 165:10-1-22, OAC 165:10-1-24, OAC 165:10-3-1, and OAC 165:10-3-27 regarding issuance of Permits to Drill prior to the issuance of orders in particular circumstances are consistent with amendments to 52 O.S. section 87.1 in House Bill 3039 approved by Governor Stitt on May 22, 2022."   [[185]](#footnote-186)185

2. Rules of Practice

Amendments to Title 165, Chapter 5 of the Oklahoma Administrative Code, which comprises the Commission's Rules of Practice, were addressed in Cause RM No. 202200001.   [[186]](#footnote-187)186Following is a brief summary of the amendments that became effective on October 1, 2022:

The amendments add and clarify requirements and rules relating to the Commission's Electronic Case Filing System.   [[187]](#footnote-188)187Additionally, the amendments **[\*24]** "add definitions, clean up language throughout to accurately reflect current terms and processes, reorganize sections of the rules, clarify docket types, clarify notice requirements, and give priority status to hearings on the Oklahoma Universal Services Fund (OSF) docket."   [[188]](#footnote-189)188Additionally, the amendments

require the submission of an "as drilled" plat constructed from the results of the directional survey in connection with proposed location exception orders regarding directionally drilled or horizontal wells, clarify procedures for obtaining changes of operator designation regarding pooling, location exception, and increased density orders, require submission of secondary recovery unit certificates of dissolution to the Managers of the Commission's Technical Services and Underground Injection Control Departments, require submission of brine and associated solution gas unit certificates of dissolution to the managers of the Commission's Technical Services and Underground Injection Control Departments, and eliminate forms regarding the use of state funds to conduct remedial action, and to clarify procedures concerning requests for the use and authorization of such state funds.   [[189]](#footnote-190)189

Finally, the amendments "increase or remove fees, and assess a new fee of $ 20.00 per applicable electric vehicle supply equipment (EVSE) port."   [[190]](#footnote-191)190

X. PENNSYLVANIA

*A. Legislative Developments*

On July 19, 2022, the Pennsylvania General Assembly enacted House Bill 2644 without Governor Wolf's signature.   [[191]](#footnote-192)191The law amends Title 58 (***Oil*** and Gas) of the Pennsylvania Consolidated Statutes by providing for ***oil*** and gas well plugging oversight and establishing the ***Oil*** and Gas Well Plugging Grant Program.   [[192]](#footnote-193)192The law also lowers the bond required for "a well other than an unconventional well" and eliminates the authority of the Environmental Quality Board to adjust the bond amounts for these wells for 10 years following the law's effective date.   [[193]](#footnote-194)193

*B. Judicial Developments*

In *Dressler Family, LP v. Pennenergy Resources, LLC*,   [[194]](#footnote-195)194the Pennsylvania Superior Court concluded that a lease provision setting royalties at one-eighth of "gross proceeds received from the sale of [gas] at the prevailing price for gas sold at the well" was ambiguous regarding whether the deduction of post-production costs was permissible.   [[195]](#footnote-196)195The plaintiff argued that the "gross proceeds" language clearly meant that royalty payments must be calculated using the gross sales price for the gas.   [[196]](#footnote-197)196The defendant, on the other hand, relied on **[\*25]** *Kilmer v. Elexco Land Services, Inc.*,   [[197]](#footnote-198)197to argue that the unambiguous meaning of "royalty" and "at the well" in the ***oil*** and gas industry permitted deduction of postproduction costs.   [[198]](#footnote-199)198The trial court agreed with the defendant and found that the lease language was clear and unambiguous and permitted the deduction of post-production costs.   [[199]](#footnote-200)199The superior court reversed, explaining that "[a] finding that a contract is clear and unequivocable [] must be made on the contents of the contract 'alone, within the four corners of the document,'" but the parties' arguments and the trial court's opinion all relied on extrinsic evidence.   [[200]](#footnote-201)200The superior court explained that the industry terms for "royalty" and "at the well" could not be neatly applied to this case to interpret the contract, necessitating remand.   [[201]](#footnote-202)201On remand, the trial court is to consider several factors, including whether it should apply the accepted meanings in the ***oil*** and gas industry for the terms "gross proceeds" and "at the well" and the contractual intent of the original parties to the lease.   [[202]](#footnote-203)202

In *Commonwealth v. International Development Corp.*,   [[203]](#footnote-204)203the Pennsylvania Commonwealth Court affirmed the Board of Property's final adjudication that International Development Corporation (IDC), rather than the Commonwealth, owned the ***oil*** and gas rights underlying a Bradford County property based on language in a century-old deed between the Commonwealth and the property's previous owner.   [[204]](#footnote-205)204In 1894, the property was sold via deed which "expressly reserve[d] and save[d] to themselves, their heirs and assigns, all [of] the minerals, coal, ***oil***, gas or petroleum found now or hereafter on or under the surface of any or all of the lands described . . . ."   [[205]](#footnote-206)205In 1920, Central Pennsylvania Lumber Company (CPLC) sold the property to the Commonwealth, and the deed stated that

[t]his conveyance is made *subject to* all the minerals, coal, ***oil***, gas or petroleum found now or hereafter on, or under the surface on any or all of the lands described in each of the above mentioned parts or divisions [of the 1920 deed]; together with the right and privilege of ingress, egress and regress upon said lands for the purpose of prospecting for, or developing, working or removing the same, *as fully as* said minerals and mineral rights were excepted and reserved in deed dated October 27, 1894, from . . . Proctor [and Hill] to . . . Union . . . , recorded in the Office for recording deeds in Bradford County in deed book Vol. 205, page 436.   [[206]](#footnote-207)206

The second clause in the deed stated that the conveyance was also "subject to all the reservations, exceptions, covenants and stipulations" contained in the 1894 deed and the deed conveying the property to CPLC.   [[207]](#footnote-208)207Subsequently, **[\*26]** CPLC executed a quitclaim deed for any ***oil*** and gas rights it had in the property, and IDC ultimately acquired these interests.   [[208]](#footnote-209)208The issue on appeal was whether the clause in the 1920 deed (quoted above) reserved the property's mineral rights for CPLC or was simply a warranty disclaimer provision.   [[209]](#footnote-210)209The commonwealth court concluded that the "as fully as" language in the 1920 deed transformed the clause from one that would operate as a warranty to one that limited the scope of the property transfer memorialized in the 1920 deed.   [[210]](#footnote-211)210The court explained that its conclusion was reinforced by the second clause that acted as a warranty provision.   [[211]](#footnote-212)211Therefore, the commonwealth court concluded that CPLC did not transfer ownership of the ***oil*** and gas rights underlying the property via the 1920 deed and IDC was the current owner of those rights.   [[212]](#footnote-213)212

In *Salevsky v. Seneca Resources Co.*,   [[213]](#footnote-214)213plaintiff landowners brought suit against the lessee of ***oil*** and gas rights to their property, Seneca Resources Company, LLC, seeking declaratory relief to eject Seneca Resources and to quiet title on the property.   [[214]](#footnote-215)214In 2008, the plaintiffs entered into a lease with Seneca's predecessor that contained a shut-in royalty clause stating that "[i]f during or after the primary term of this lease, all wells on the leased premises or within a unit that includes all or a part of the leased premises, are shut-in, suspended or otherwise not producing for any reason whatsoever for a period of twelve (12) consecutive months," the lessee could "maintain this lease in effect" by the payment of shut-in royalties.   [[215]](#footnote-216)215In 2012, Seneca's predecessor applied to the Pennsylvania Department of Environmental Protection to have the wells on the property listed as "Inactive Status."   [[216]](#footnote-217)216Starting in 2013, Seneca's predecessor, and subsequently Seneca, issued shut-in royalty payments to the plaintiff landowners.   [[217]](#footnote-218)217The landowners argued that these payments were insufficient to continue the lease because the wells had not been shut-in.   [[218]](#footnote-219)218The district court disagreed, noting that the "broad language" of the shut-in royalty provision did not require the wells to be shut-in to be applicable; the clause also applied when the wells are "suspended or otherwise not producing for any reason."   [[219]](#footnote-220)219The court also rejected the landowners' arguments regarding improper unitization and abandonment because the payment of shut-in royalties alone was sufficient to continue the lease.   [[220]](#footnote-221)220

**[\*27]** In *Laudato v. EQT Corp.*,   [[221]](#footnote-222)221the U.S. Court of Appeals for the Third Circuit vacated and remanded the district court's certification of a class of all owners of real property within EQT's natural gas storage fields who allege they have not been compensated for EQT's use of their property.   [[222]](#footnote-223)222In its analysis, the Third Circuit explained that when evaluating class certification under Federal Rule of Civil Procedure 23, a court must engage in "'a rigorous analysis,' including a thorough examination of the factual and legal allegations," before making a determination as to whether the requirements of that rule have been satisfied.   [[223]](#footnote-224)223Per Rule 23(a), a class should be certified only if numerosity, commonality, typicality, and adequacy of representation are shown.   [[224]](#footnote-225)224Per Rule 23(b), the party seeking certification of the class must also show that the action is one of the types of class actions that can be maintained.   [[225]](#footnote-226)225Only after these prongs of both Rule 23(a) and (b) are met can a class be certified.   [[226]](#footnote-227)226The Third Circuit concluded that the district court's explanation for certifying the class, which was merely included in a footnote, "was no more than a recitation of the Rule 23(a) prerequisites and [was] a far cry from the 'rigorous analysis' that long-standing precedent requires."   [[227]](#footnote-228)227The district court's opinion was also devoid of any analysis into the requirements of Rule 23(b).   [[228]](#footnote-229)228As such, the Third Circuit stated it was not even in a position to conduct the analyses of Rule 23 as required.   [[229]](#footnote-230)229The Third Circuit ultimately vacated the district court's order and remanded for further proceedings.   [[230]](#footnote-231)230

In *Lodge v. Robinson Township Zoning Hearing Board*,   [[231]](#footnote-232)231the Commonwealth Court of Pennsylvania evaluated property owners' challenge to a zoning ordinance allowing ***oil*** and gas development in Robinson Township, Pennsylvania.   [[232]](#footnote-233)232The property owners, who lived near the natural gas well development at issue, claimed that the operations affected their way of life due to traffic, noises, emissions, and concerns for well water, among others.   [[233]](#footnote-234)233Ultimately, the commonwealth court affirmed the trial court's decision that the property owners lacked standing to challenge the ordinance.   [[234]](#footnote-235)234Citing a prior Pennsylvania Supreme Court opinion, the commonwealth court explained that "[i]n order to be aggrieved in the zoning context, a party must have a substantial, direct, **[\*28]** and immediate interest in the claim sought to be litigated."   [[235]](#footnote-236)235Moreover, "[t]o have a substantial interest, there must be some discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law."   [[236]](#footnote-237)236Reviewing the record evidence, the commonwealth court concluded that there was sufficient evidence to support the trial court's determination that neither the challenged ordinance, nor the well pad, were the cause of the landowners' alleged harms."   [[237]](#footnote-238)237The commonwealth court also rejected the landowners' reliance on the Pennsylvania Supreme Court's decision in *Robinson Township v. Commonwealth of Pennsylvania*, explaining that that case "in no way announced a new rule of law that individual objectors have automatic standing to pursue the validity of a zoning ordinance in the abstract or that ***oil*** [or] gas development is necessarily incompatible with Pennsylvania citizens' constitutional rights."   [[238]](#footnote-239)238Ultimately, the commonwealth court held that the landowners lacked standing to sue and affirmed the trial court's decision.   [[239]](#footnote-240)239

In *Diehl v. SWN Production Co.*,   [[240]](#footnote-241)240the U.S. District Court for the Middle District of Pennsylvania dismissed the plaintiff landowners' claim for breach of contract--implied covenant to develop hydrocarbons, but allowed their claim for quiet title to go forward.   [[241]](#footnote-242)241The parties' dispute centered on the sufficiency of the plaintiffs' complaint with respect to the alleged breach of the implied covenant to develop.   [[242]](#footnote-243)242The ***oil*** and gas lease at issue provided that the lease would remain effective for as long after the primary term, or the optional extension, "as ***oil*** or gas is produced, or considered produced under the terms of this lease, in paying quantities from the premises or from land pooled therewith."   [[243]](#footnote-244)243The defendant asserted that the claim for breach of the implied covenant to develop must fail because the lease terms precluded application of that duty and the complaint contained no facts regarding fraud.   [[244]](#footnote-245)244The court cited its earlier opinion on the defendant's motion to dismiss the prior complaint in which it had concluded that the express terms of the lease--rather than an implied duty to develop--controlled where development had commenced, as it had here.   [[245]](#footnote-246)245The plaintiffs failed to raise any new arguments on this issue, so the court declined to revisit its prior conclusion.   [[246]](#footnote-247)246With respect to the failure to allege fraudulent conduct, the court noted that Pennsylvania law requires averments of fraud in order to make out a claim for failure to develop.   [[247]](#footnote-248)247 **[\*29]** The court rejected the plaintiffs' claim for breach of the implied duty to develop, as the plaintiffs failed to aver fraud with particularity as required.   [[248]](#footnote-249)248As to the plaintiffs' quiet title claim, the court held that the claim could proceed.   [[249]](#footnote-250)249The defendant had the opportunity to raise arguments against the quiet title claim in its prior motions to dismiss, but chose not to.   [[250]](#footnote-251)250Moreover, the court refused to entertain the defendant's arguments.   [[251]](#footnote-252)251

In *Yaw v. Delaware River Basin Commission*,   [[252]](#footnote-253)252the Third Circuit held that the plaintiffs--two Pennsylvania state senators, the Pennsylvania Senate Republican Caucus, and several Pennsylvania municipalities--lacked standing to challenge the Delaware River Basin Commission's (Commission) ban on fracking in the Delaware River Basin.   [[253]](#footnote-254)253The court reasoned that individual legislators did not have standing to assert that the Commission "deprived [them] of their lawmaking authority," and instead, such injuries "belong[] to the legislature as a whole."   [[254]](#footnote-255)254The court further reasoned that "under well-established Supreme Court caselaw, 'individual members lack standing to assert the institutional interests of a legislature.'"   [[255]](#footnote-256)255In addition, the court held that the municipalities lacked standing because they failed to identify an actual injury that was imminent to support their request for prospective relief, instead identifying only a past injury and the possibility of future economic injury.   [[256]](#footnote-257)256The court held that the plaintiffs lacked standing as "trustees of natural resources" under the Environmental Rights Amendment to the Pennsylvania Constitution because the Commission's ban on fracking " *promotes* the purposes of the trust and *protects* its corpus."   [[257]](#footnote-258)257Ultimately, the court dispensed with the senators' and municipalities' challenges to the Commission's ban on fracking in the Delaware River Basin because the claims "complain[] of a bare procedural violation divorced from any concrete harm."   [[258]](#footnote-259)258

In *Anderson Excavating, LLC v. Weiss World L.P.*,   [[259]](#footnote-260)259the U.S. District Court for the Western District of Pennsylvania held that under Pennsylvania's mechanic's lien law, a contractor cannot assert a lien against a surface owner's property interest based on the subsurface owner's failure to pay on a contract for work performed on the subsurface property.   [[260]](#footnote-261)260After the owner of the subsurface rights failed to pay the plaintiff excavation contractor, the contractor sought enforcement of a mechanic's lien against the owner of the property's **[\*30]** surface rights.   [[261]](#footnote-262)261The contractor asserted that the subsurface owner was a subcontractor to the surface owner because the subsurface owner had an easement to construct a storage area and sediment pond.   [[262]](#footnote-263)262The court disagreed, explaining that the subsurface owner could not have conveyed interest or title in the surface to the contractor because the easement did not grant such rights to the subsurface owner and "nobody can give what he does not have."   [[263]](#footnote-264)263

In *Adorers of the Blood of Christ U.S. Province v. Transcontinental Gas Pipe Line Co.*,   [[264]](#footnote-265)264the Third Circuit affirmed the district court's dismissal of the plaintiff convent's claims that the defendant's pipeline through the convent's property violated the nuns' rights under the Religious Freedom and Restoration Act.   [[265]](#footnote-266)265The court held that the convent's failure to present their claims at any time during the administrative proceedings prior to the authorization of the pipeline precluded their instant claims in light of the Natural Gas Act's "exclusive-review framework."   [[266]](#footnote-267)266

*C. Administrative Developments*

The Pennsylvania Department of Environmental Protection (DEP) is in the process of revising its Environmental Justice (EJ) Policy, which was last updated in 2004.   [[267]](#footnote-268)267The most recent policy draft, released on March 12, 2022, would implement a public participation process related specifically to the unconventional ***oil*** and gas industry to engage with EJ communities where ***oil*** and gas related operations are sited or proposed.   [[268]](#footnote-269)268The DEP would ask operators to "develop an overview of projects that explains the scope and operations of the projects in terms understandable to a considerable majority of readers within an EJ Area."   [[269]](#footnote-270)269The DEP would also engage in community education efforts about the ***oil*** and gas permit process and developments.   [[270]](#footnote-271)270

On October 12, 2022, the Pennsylvania DEP executed a consent agreement with Shell Pipeline Company LP and Minnesota Limited (collectively, "Shell") in which Shell agreed to pay the Commonwealth of Pennsylvania $ 670,000 in civil penalties.   [[271]](#footnote-272)271The penalties were levied because Shell's construction of a **[\*31]** pipeline through Western Pennsylvania caused drilling fluid spills and sediment discharges into Pennsylvania streams.   [[272]](#footnote-273)272

XI. TEXAS

*A. Judicial Developments*

In 2022, Texas courts issued several impactful opinions clarifying numerous ***oil*** and gas issues. The clarifications addressed issues applicable to lease and deed interpretation, subsurface ownership, successor liability and obligations, royalty calculations and payments, the Texas Oilfield Anti-Indemnity Statute, oilfield liens, operator exculpatory provisions in a JOA, pipeline common-carrier status, and the treatment of royalty claims during a lessee's bankruptcy.

The Texas courts affirmed the ongoing existence of various leases. In *Elmen Holdings, LLC v. Martin Marietta Materials, Inc.*,   [[273]](#footnote-274)273the court reviewed "the enforceability of an over-50-year-old agreement for the mining of sand and gravel"   [[274]](#footnote-275)274(the "lease"), challenged on the basis that it lacked a specified term. The lease granted "the exclusive right" to mine gravel and similar materials on the land "for as long as merchantable materials are mined or produced [from the leased premises,] or for as long as Lessee shall pay the advance minimum royalty."   [[275]](#footnote-276)275The original lessor sold the land to Elmen Holdings, which promptly sought a declaratory judgment that the lease was terminable at will by either party because it lacked a "definite initial term" and, because sand and gravel are part of the surface estate of real property instead of a separate mineral estate like ***oil*** and gas, it operated as a "true occupancy lease" governed by generally applicable tenancy law.   [[276]](#footnote-277)276The court rejected Elmen's assertions. The court clarified that "whether sand and gravel are considered part of the surface estate does not affect whether a lease with an indefinite term can create a fee simple determinable interest in the sand and gravel."   [[277]](#footnote-278)277Therefore, like an ***oil*** and gas lease, this is a "'no term' lease that conveys a fee simple determinable interest in sand gravel to the Lessee."   [[278]](#footnote-279)278

In *Thistle Creek Ranch, LLC v. Ironroc Energy Partners, LLC*,   [[279]](#footnote-280)279the court analyzed a mineral lease's habendum clause to determine whether the lease had terminated when "operations" were conducted continuously enough to maintain the lease but the production was not in paying quantities. The habendum clause states that the lease shall remain in force after the primary term had ended as long as "operations . . . are conducted upon said land with no cessation **[\*32]** for more than 90 days."   [[280]](#footnote-281)280The lease partly defined "operations" as "operations for and any of the following . . . [including] production of ***oil***, gas, sulphur or other minerals, . . . *whether or not in paying quantities*."   [[281]](#footnote-282)281Both parties conceded that gas had been produced under the lease with no cessation greater than 90 days and that production had not been in "paying quantities." Both parties disputed, though, whether production in any amount was sufficient to maintain the lease. The court here held that the production did not need to be paying quantities to maintain this lease. It relied on contract construction principles that a court must give meaning to every word in a contract and cannot rewrite a contract to ignore a clearly and expressly defined term, while the court also reiterated Texas law's strong public policy favoring freedom of contract. While the court acknowledged well-established case law that the word "produced" or "production" in a habendum clause of a mineral-lease means "production in paying quantities," here, the clause did not use those words; rather, the express clause in the lease provided that it be maintained beyond the primary term as long as "operations" are conducted. The court also rejected use of the "reasonably-prudent-operator" test, since that test is used to determine whether a well is producing in paying quantities, an irrelevant inquiry in this circumstance where production in paying quantities is expressly not required.

Royalty calculations and payment obligations continued to rank as hot issues for the Texas courts. In *Nettye Engler Energy, LP v. BlueStone Natural Resources II, LLC*,   [[282]](#footnote-283)282the Texas Supreme Court clarified the point at which a nonparticipating royalty interest (NPRI) owner must begin bearing its share of post-production expenses within a gas pipeline system. In this case, Nettye, a NPRI owner who had previously enjoyed royalty payments free of postproduction costs, sued BlueStone for conversion once BlueStone assumed operations and began deducting post-production costs from Nettye's royalty interest at the point where the unprocessed gas reached the onsite gathering system.   [[283]](#footnote-284)283The NPRI reservation described Nettye's NPRI as "a free one-eighth (1/8) of gross production . . . free of cost in the pipe line, if any, otherwise free of cost at the mouth of the well . . . ."   [[284]](#footnote-285)284In a summary judgment motion, Nettye argued that its royalty interest, by the terms of the contract, was to be free of all post-production costs.   [[285]](#footnote-286)285Alternatively, Nettye also argued "that a gathering system is not a pipeline" for the purposes of determining a delivery point from which to begin deducting post-production costs under the terms of the contract.   [[286]](#footnote-287)286Ultimately, the Texas Supreme Court disagreed and held that Blue-Stone had satisfied its obligation to Nettye under the terms of the contract. The court affirmed that the deed did not limit delivery to a specific method and **[\*33]** thus must be interpreted in a way that is commonly understood within the industry.   [[287]](#footnote-288)287The court determined that within the ***oil*** and gas industry, a gas gathering system is commonly understood as a pipeline and is thus a valid delivery point for the calculation of post-production costs.   [[288]](#footnote-289)288Thus, the court determined that BlueStone had properly delivered royalties "free of cost in the pipe line" by deducting from Nettye's royalty payment their pro rata share of post-production costs incurred following the delivery of gas into the gathering system.   [[289]](#footnote-290)289

In *Enervest Operating, LLC v. Mayfield*,   [[290]](#footnote-291)290the court held that the lessee did not owe royalties on produced gas used offsite to compress and dehydrate gas produced from the leased premises. The gas royalty provision required payment based on the market value at the mouth of the well for all gas produced from the land or used off the premises. The free-use clause gave the lessee "free use of all gas 'for all drilling operations hereunder.'"   [[291]](#footnote-292)291The lessor argued that because the gas was used offsite, the lessee owed royalties on gas used to compress and dehydrate produced gas. The lessor further argued that the free-use clause did not apply, since compression/dehydration operations do not constitute "drilling operations." The court disagreed, holding that the free-use clause did not change the basic structure of the gas royalty clause, which, under *Heritage Resources, Inc. v. NationsBank*,   [[292]](#footnote-293)292meant that gas used in compression and dehydrating amounted to a post-production expense that was clearly chargeable to the lessor.

*Samson Exploration, LLC v. Bordages*   [[293]](#footnote-294)293involved a lessee's withholding of royalties because of a title dispute. Samson (lessee) withheld royalty payments from Bordages (lessor) in light of a title dispute with the Bordages' property.   [[294]](#footnote-295)294Samson argued that it was entitled to withhold payment, interest free, until the dispute was resolved.   [[295]](#footnote-296)295The trial court held in favor of Bordages and awarded nearly $ 13 million in damages including interest.   [[296]](#footnote-297)296The lease language on the timing of royalty payments provided that it was "in lieu of the terms and provisions contained" in the Texas division order statute and that the "parties further, by their signatures below, waive any and all rights which might be claimed or asserted under" the division order statute."   [[297]](#footnote-298)297In determining whether the lease excused paying royalties and penalties because of a title dispute, the court first observed that the lease expressly supplanted the entire Texas division order statute, including the safe-harbor provision allowing a lessee **[\*34]** to suspend royalties if a title dispute exists and the provision allowing suspension without interest.   [[298]](#footnote-299)298The court further noted that even if the parties had not contracted around the safe-harbor provision, no true title dispute existed because no other party claimed the Bordages' royalty interest. Thus, there was no basis for Samson's assertion that it was entitled to withhold payment in the midst of a title dispute.   [[299]](#footnote-300)299

Through several cases, the Texas courts also provided guidance on liability obligations for contractors, operators, successors and landowners. In *Cimarex Energy Co. v. CP Well Testing, LLC*,   [[300]](#footnote-301)300the court ruled that the Texas Oilfield Anti-Indemnity Act (TOAIA) limited a contractor's indemnity obligation under a master service agreement to the amount agreed on between parties, regardless of how high the contractor's insurance coverage actually was. CP Well and Cimarex entered into a master service agreement (MSA) that contained a mutual indemnity provision for personal injury of their respective employees and contractors. CP Well's employee working on the Cimarex well was severely injured from a flash fire that arose at the well. The employee sued Cimarex, CP Well, and others. Cimarex settled the lawsuit with the employee for $ 4.5 million. Under the MSA, CP Well was obligated to obtain a minimum of $ 1 million in commercial general liability insurance and $ 2 million in excess liability insurance. However, CP Well obtained a $ 1 million general liability policy and an excess liability policy with coverage limits of $ 10 million--which was $ 8 million more than the minimum coverage that CP Well agreed to carry under the MSA. Cimarex sought indemnity from CP Well after the settlement, for which CP Well paid only the $ 3 million set forth in the MSA. Cimarex sought payment for the remaining $ 1.5 million, claiming CP Well had a duty to defend up to its actual insurance coverage, not contracted amounts. The court held that in a mutual indemnity agreement, TOAIA limits the indemnity obligation of an indemnitor to the amount the indemnitor has agreed to carry for the benefit of the indemnitee and thus denied Cimarex's claim against CP Well for the remaining $ 1.5 million.

In *In re Eagleridge Operating, LLC*,   [[301]](#footnote-302)301the Supreme Court of Texas decided that a former working-interest owner of a well does not bear continuing responsibility for a defective gas line after conveying its ownership interest. A worker who was injured by a burst gas pipeline brought a premises defect action against Aruba Petroleum, Inc., the former wellsite owner and former contract operator. Aruba was responsible for drilling, operating, and servicing the well and securing proper equipment. While Aruba was the wellsite's owner-operator, a gas line was installed on the property. Four years later, Aruba conveyed its ownership interest to its co-tenant and ceased serving as the operator of record. The owner of the well then contracted with Eagleridge Operating to serve as the operator. A couple of months after Eagleridge assumed control of the wellsite, the gas line ruptured, injuring the plaintiff. The supreme court **[\*35]** held that a former co-tenant was not a responsible third party under premises-liability principles. Eagleridge contended Aruba was responsible for injuries caused by the burst gas pipeline under a theory that the former owner acted as an independent contractor in constructing, installing, and maintaining the pipeline. The court held that Aruba was acting in its capacity as co-owner and not as an independent contractor when improving the property. Therefore, the owner's responsibility for premises defects did not survive the conveyance of its ownership interest.

*Bachtell Enterprises, LLC v. Ankor E&P Holdings Corp.*   [[302]](#footnote-303)302addressed the issue of whether an exculpatory clause in a joint operating agreement (JOA) may exonerate an operator of ***oil*** and gas projects. This case analyzed an exculpatory clause that differed from the AAPL standard form JOAs. The operator (Ankor) negotiated to construct a gas production plant. The applicable JOAs required the operator to acquire consent from all parties to undertake any project in excess of $ 50,000. The JOAs also included an exculpatory clause that provided Ankor would conduct its activities in good faith and "shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from willful misconduct."   [[303]](#footnote-304)303The non-operators alleged that Ankor breached the JOAs by taking multiple actions relating to the gas plant construction without consent, and that the exculpatory clause did not apply to negate the operator's corresponding liability. On the other hand, the operator argued that the exculpatory clause broadly covers all its alleged conduct because the losses sustained or liabilities incurred, if any, did not result from willful misconduct. In assessing these arguments, the court first stated that the purpose of an exculpatory clause is to protect the operator from liability caused by *ordinary negligence*, and no precedent requires the court to extend that protection further than negligent injury. Consequently, the court found that because the operator's actions were not based on activities envisioned by the exculpatory clause, the exculpatory clause does not apply under the circumstances. In reaching this conclusion, the court emphasized that it is the court's job to avoid "unreasonable constructions when possible and proper."   [[304]](#footnote-305)304

*Foote v. Texcel Exploration, Inc.*,   [[305]](#footnote-306)305involves the duty of a mineral lessee toward a surface owner vis-à-vis an ***oil*** spill that poisoned the surface owner's cattle. The court held that "an operator has no duty to fence, or otherwise protect or prevent livestock from entering, the premises of the mineral lease," noting that "the only duty owed with respect to [the] cattle is to not intentionally, willfully, or wantonly injure them when they are injured on the area of the ***oil*** and gas operations."   [[306]](#footnote-307)306

**[\*36]** In *Energen Resources Corp. v. Wallace*,   [[307]](#footnote-308)307the Supreme Court of Texas clarified that Chapter 95 of the Texas Civil Practice and Remedies Code would protect a landowner from liability for a shut in gas well that impacted a nearby water well. In this case, the plaintiff sustained injuries while working on a water well that also included natural gas. This water well was near a shut-in gas well. Where Chapter 95 applies, it limits the negligence liability of a real property owner arising out of a third party contractor's work on an improvement to the owner's property. The Texas Supreme Court had previously held in *Valdez*   [[308]](#footnote-309)308that Chapter 95 required the claim to result from "a condition or use of the same improvement" that the plaintiff is working on when the injury is sustained.   [[309]](#footnote-310)309In this case, the court reasoned that because the plaintiff asserted a negligence claim for a dangerous condition to an improvement that the owner "negligently failed to 'become aware of, rectify, and communicate" (that condition being natural gas within the water well plaintiff was working on), the claim arose from a condition of the same improvement that the plaintiffs were hired to work on.   [[310]](#footnote-311)310As a result, Chapter 95 applied to the plaintiff's claims and insulated the landowner from liability.

*Allison v. State*   [[311]](#footnote-312)311provides a stern reminder that tampering with ***oil*** and gas wells is a third-degree felony under section 85.389(a) of the Texas Natural Resources Code. Allison received a sentence of 18 years' imprisonment on each of eight counts for tampering with a well, along with a sentence to make restitution and pay court costs.

The Texas Supreme Court entertained a challenge to common carrier status in a condemnation dispute involving a pipeline. In *Hlavinka v. HSC Pipeline Partnership, LLC*,   [[312]](#footnote-313)312the court refused a challenge to whether a pipeline company demonstrated common-carrier status with eminent domain authority to condemn an easement and construct a pipeline that transports polymer-grade propylene. HSC initiated condemnation proceedings after the Hlavinkas rejected HSC's attempt to negotiate a right of way on the Hlavinkas' property. The Hlavinkas challenged HSC's power to exercise common-carrier eminent domain authority, arguing that the transport of polymer-grade propylene was not for public use. The court held that HSC possessed common-carrier eminent domain authority and that the pipeline transport of polymer grade propylene qualified as an ***oil*** product in holding that the pipeline was for public use. As to the compensation due to the Hlavinkas, the court held that consideration paid to the Hlavinkas for recent easements on such property is acceptable evidence of the current highest and best use of the property taken. The court also held that a condemnor must pay a fair price for the value of the land taken, and evidence of recent fair market sales to secure easements are admissible to determine that property's market value at the time of the taking.

**[\*37]** Of particular interest to practitioners drafting settlement agreements or purchase agreements, the Texas courts broadly affirmed waivers and disclaimers and supported a party's enforcement rights upon offering full performance. *Transcor Astra Group S.A. v. Petrobras America Inc.*   [[313]](#footnote-314)313involved a dispute between two large corporations which the parties ultimately resolved through a comprehensive settlement agreement. One of the parties later attempted to invalidate the settlement agreement as a result of alleged bribes by the defendant during settlement negotiations. The defendant relied on the settlement agreement's broad release discharging both parties of "any and all claims." The court found that because the parties mutually agreed to broadly release certain claims, the bribes connected to the settlement agreement fall squarely within the scope of the general release. Another argument to nullify the settlement agreement centered on claims of negligent misrepresentations as a result of defendant offering and failing to disclose bribes during negotiations. The defendant argued that the parties mutually agreed to include a contractual disclaimer of reliance in the settlement agreement, thus relieving the defendant of liability, and the court agreed. In assessing the applicability of the reliance disclaimer, the court ruled that the settlement agreement makes clear that the reliance disclaimer applies to claims of both misrepresentations and omissions. The court concluded that because the disclaimer of reliance is enforceable and applies to the parties' representations, and because the disclaimer negated the reliance element of the fraud claim, the defendants were entitled to summary judgment.

In *Kongvongsay v. Sayasane*,   [[314]](#footnote-315)314Kongvongsay entered into an oral agreement to sell commercial real estate to Sayasane. Both parties acknowledged the existence of the agreement but disagreed over several terms, including the timing of payment, the remaining amount of payment due, and the timing of deed delivery. Due to the dispute, Sayasane ceased making monthly payments and offered full performance (through a final payment of all amounts due) to have Kongvongsay immediately sign the deed over, which Kongvongsay refused to do. The appellate court held that Kongvongsay either agreed or acquiesced to receiving the payment for the property in monthly installments rather than in a lump sum, and Kongvongsay had failed to transfer the deed when obligated. Kongvongsay argued that Sayasane forfeited his right to specific performance by ceasing the monthly payments, but both the trial and appellate courts disagreed with such argument. The appellate court held that by offering full performance and pleading that he was ready to fully perform, Sayasane did not breach his duty of making payments and was therefore entitled to specific performance to require deed delivery.

Texas courts further provided guidance on successor-in-interest obligations. In *Lennar Homes of Texas Land & Construction, Ltd. v. Whiteley*,   [[315]](#footnote-316)315the court clarified the circumstances under which agreements contained in a deed to real property will bind subsequent purchasers of the property. While not **[\*38]** strictly an ***oil*** and gas case, the opinion has obvious application to the ***oil*** and gas practitioner. Lennar built and sold a house to Isaacson. The Lennar/ Isaacson deed contained an arbitration provision. Isaacson eventually sold the house to Whiteley. Whiteley later sued Lennar, asserting mold related construction deficiencies. Lennar argued that the arbitration language in the deed to Isaacson bound Whiteley as a subsequent purchaser. In rejecting this argument, the court of appeals explained:

[C]ovenants that do not burden or restrict the use of the conveyed property are not covenants that run with the land. . . .

Here, we conclude the arbitration agreement in the special warranty deed does not touch and concern the land; therefore, it is not a covenant that runs with the land. The arbitration agreement is not premised on the physical use or enjoyment of the conveyed property -- instead, the "fundamental purpose of arbitration [is] to provide a rapid, less expensive alternative to traditional litigation." Avoiding the time and expense of litigation inures to the benefit of the parties-- *not* to the property itself. Accordingly, the special warranty deed's arbitration agreement is more akin to a personal covenant rather than a covenant that touches and concerns the land.   [[316]](#footnote-317)316

The Texas Supreme Court granted Lennar's petition for review.

The Texas courts clarified rights owned, reserved, or conveyed, including, in one case, through the use of extrinsic evidence. Several issues were addressed in *Myers-Woodward, LLC v. Underground Services Markham, LLC*,   [[317]](#footnote-318)317but of most interest is the issue of whether the surface owner, Myers-Woodward, also owned the subsurface of the property, including the salt caverns at issue. In making this decision, the court declined to apply *Mapco, Inc. v. Carter*.   [[318]](#footnote-319)318 *Mapco*, failing to cite any authority for its holding, held that the mineral owner had storage rights for underground storage facilities. This court disagreed and concluded that the well-recognized, decisional law states that the mineral estate owner owns the minerals but not the subsurface. Ultimately, the court held that Myers-Woodward, as the surface owner, owned the subsurface, and the mineral estate ownership by Underground Services only gave it the right to produce minerals on the land.   [[319]](#footnote-320)319

In *Hughes v. CJM Resources, LP*,   [[320]](#footnote-321)320the court examined whether certain causes of action were excepted or reserved from a deed. In 2018, Hughes conveyed certain mineral properties and causes of action related to such mineral properties to Decatur. In 2019, Decatur purported to assign the causes of action back to Hughes, although in November 2018 there had been an intervening deed, whereby Decatur purported to convey everything Decatur received in the Hughes/Decatur deed to Universal. The issue was whether Decatur still owned the disputed causes of action when it signed the 2019 assignment back to Hughes. The court analyzed whether language in the Decatur/Universal deed created an exception from the conveyance. It stated that "[i]t is understood **[\*39]** that the Grantee shall have, receive, and enjoy the Grantor's proportionate right, title, and interest in or to bonus, rents, and royalties and other benefits which may accrue after the date of this Mineral Deed . . . ."   [[321]](#footnote-322)321The court held that the quoted language did not create an exception because, while there are no necessary "magic words," the conveyance must identify the excepted property with reasonable certainty and must use enough words to provide reasonable certainty that something is being withheld from the assignment. An expectation by implication is disfavored under Texas law. The court reasoned that because the language in this clause neither mentions the causes of action specifically nor indicates that the Decatur/Universal conveyance was made subject to the causes of action being retained by Decatur, this sentence did not make it reasonably certain that Decatur intended to except the causes of action. The court referenced *Pauler as Trustee of Janysek Survivor's Trust v. M & L Minerals, LP*,   [[322]](#footnote-323)322in which another court construed a deed that purported to convey an entire tract of land but contained both a subject-to clause ("conveyance is subject, however, to all mineral conveyances, mineral reservations, ***oil***, gas and other mineral leases") and a specific reservation. The *Janysek* court held that an exception had not been created because it did "not state with any certainty that the disputed royalties are reserved or excepted from conveyance."   [[323]](#footnote-324)323Similar to the *Janysek* court, the court here reasoned that because the subject-to clause did not mention causes of action specifically nor use language that would clearly indicate that property was being withheld from the conveyance, the causes of action were not excepted from the conveyance.   [[324]](#footnote-325)324As a last consideration, the court further analyzed whether the causes of action could be considered "other benefits." Here, the subject-to clause listed interests in "bonus, rents, royalties *and other benefits*." The court acknowledged that under *ejusdem generis*, an interpretative canon, when specific terms are followed by a catchall term, such as "other benefits," the catchall term is limited to things that are, like the proceeding, more specific terms. The court here declined to conclude that causes of action are "other benefits," so even if it had construed the subject-to clause to create an exception, the language of the paragraph itself was not sufficiently clear to include the causes of action.

In *Calvert v. Crawley*,   [[325]](#footnote-326)325the court clarified a settlement agreement for the conveyance of certain mineral interests, described in the agreement as the "MWI mineral interests." This term was not otherwise defined in the agreement, but the court held the contract was not ambiguous and looked to extrinsic circumstantial evidence to ascertain the meaning of the undefined term. The court observed that "understanding the context in which an agreement is made is essential in determining the parties' intent as expressed in the agreement."   [[326]](#footnote-327)326 **[\*40]** The court noted, however, that such evidence was "'of limited relevance' and 'can only provide the context in which the agreement was reached.'"   [[327]](#footnote-328)327The court also held that the failure to define "MWI mineral interests" did not render the agreement unenforceable under the statute of frauds because the meaning of the term could nevertheless be identified with reasonable certainty based upon information contained in, and other documents referenced in, the settlement agreement.

The Texas courts issued opinions affirming actions taken under the correction instrument statute, Texas Property Code section 5.029. In *Endeavor Energy Resources, LP v. Trudy Jane Anderson Testamentary Trust by and Through Anderson*,   [[328]](#footnote-329)328the court considered the construction and validity of a correction deed. The corrective deed had been executed in 2007 to correct a potential over-conveyance in the original 2003 general warranty deed. Unfortunately, one spouse of the two married grantors passed away before the corrective deed was executed. The issue arose out of her husband's execution of the corrective deed pursuant to his testamentary powers as executor under the wife's will. Endeavor challenged the validity of the mineral deed and sought affirmation of its title to the mineral interests. Texas law requires a correction deed be "executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, if applicable, a party's heirs, successors, or assigns . . . ."   [[329]](#footnote-330)329Further, under the statute, corrective instruments recorded prior to September 1, 2011, are only required to substantially comply with the above requirements. Ultimately, the court found that the execution of the correction deed substantially complied with section 5.029 because the husband was the wife's sole successor under section 5.029, he had the authority to execute the correction deed in this successor capacity, and when he executed the deed, he did so both in his individual capacity and in his capacity as his wife's sole successor despite the lack of any specific recital in the signature block asserting his capacity as successor.

In *Fugedi as Trustee Carb Pura Vida Trust v. Initram, Inc.*,   [[330]](#footnote-331)330Texas real property was conveyed via a general warranty deed to a trust, rather than to its trustee. Shortly after the conveyance, the trustee, Nicholas Fugedi, brought an action to quiet title on the property and executed a corrected deed naming himself as the grantee in his capacity as trustee. Fugedi also filed an affidavit stating that the original deed contained a scrivener's error, and he was always meant to be the grantee in his capacity as trustee. The U.S. Court of Appeals for the Fifth Circuit upheld the district court's conclusion that "a trust is a relationship, not a legal entity."   [[331]](#footnote-332)331However, the courts will ignore such formalities and infer a grantee if one is ascertainable. Here, the court could ascertain that Fugedi was the trustee because he was the trustee at the time of the deed, **[\*41]** remains the trustee today, and is the only person who can hold property for the trust. Therefore, he was the proper party to be named as the trustee, and the correction deed is valid. In addition, the appellate court ruled that Fugedi made a nonmaterial correction to the deed, which is of the type allowed by Texas Property Code section 5.029.   [[332]](#footnote-333)332

Although, as seen in the cases above, the correction instrument statute is a helpful tool, practitioners should take note that the statute has its limits. The courts invalidated the attempt to rely on the statute when not signed by all applicable parties. In *Brown v. Underwood*, a Texas court of appeals reviewed the conveyance of royalty interest in mineral rights.   [[333]](#footnote-334)333Brown, the executrix of her late husband's estate, sued the Underwoods on a theory that her husband conveyed the wrong interest to them in 1985. Brown's late husband, Smith, possessed two identical 35/1920th nonparticipating royalty interests--one he held individually and the other he held in trust for the Underwoods.   [[334]](#footnote-335)334In 1985, Smith conveyed one of the interests to the Underwoods for ten dollars. Both parties agree that the interest conveyed was Smith's individual interest, but Brown contends that this was a mistake.   [[335]](#footnote-336)335She filed a correction affidavit in 2017 to clarify that the interest conveyed was the interest held in trust and argues that this correction affidavit should control. The court rejected the correction affidavit because, under Texas Property Code section 5.029, material corrections must be executed by both parties to the original conveyance.   [[336]](#footnote-337)336Brown also asserted a title attorney's affidavit attesting to Smith's mistake in support of the claim, but the court rejected this affidavit as well because it was founded on a review of the documents rather than any personal knowledge.   [[337]](#footnote-338)337The court held both affidavits to be "little more than an effort to speculate about the interest that Smith intended to convey . . . ," which is "legally insufficient as evidence."   [[338]](#footnote-339)338

Given the numerous bankruptcies in the industry, the Texas courts provided guidance on a variety of issues presented by creditors. In *In re EP Energy E&P Co.*,   [[339]](#footnote-340)339the court addressed the ability of a lessor to terminate a lease for non-production during the stay in bankruptcy. In this case, EP Energy, the lessee, shut-in wells for less than 120 days to mitigate the effect of free-falling ***oil*** prices during the pandemic. At the time of the shut-in, EP Energy was undergoing bankruptcy proceedings. After production resumed, the mineral owners brought suit in a Texas bankruptcy court for a Temporary Cessation Claim, arguing that the shut-in resulted in the termination of the mineral lease and the continued operations constituted trespass. The mineral owners would have been able to assert the trespass claim in Texas state court but for EP Energy's **[\*42]** bankruptcy. The bankruptcy court found that the lease had not terminated, that EP Energy was not trespassing, and that it could continue production. Nevertheless, the mineral owners continued to pursue the claim and filed suit in a Texas state court on the same grounds. The mineral owners argued that the bankruptcy plan authorized mineral owners to seek expenses for "post-petition, but pre-Effective Date, actions of the Debtors" for leases and allowed mineral owners to retain their real property interest, and equitable remedies did not constitute "Claims.   [[340]](#footnote-341)340The mineral owners argued that the state court proceeding was valid under the bankruptcy plan because it sought to exercise an equitable right related to the contract: a reversionary interest through termination of the mineral lease. However, the court determined that the shut-in did not terminate the lease. As such, there was no reversion, no trespass, and no equitable claim. Without the equitable claim, the mineral owners could not relitigate the issue in Texas state court.   [[341]](#footnote-342)341

In *In re Lilis Energy, Inc.*,   [[342]](#footnote-343)342the court considered whether recovery for unpaid royalties is available to a mineral owner even if a bankruptcy plan of reorganization treats claims for unpaid royalties as general unsecured claims. The parties' dispute centers on the debtor's (Lilis Energy's) Plan of Reorganization which included a "good faith compromise and settlement of all [c]laims . . . ."   [[343]](#footnote-344)343However, the mineral owner creditor asserted several arguments to maintain a claim for payment, including that the debtor held the creditor's unpaid royalties in trust for the creditor's benefit, thereby precluding the inclusion of the royalties in the debtor's bankruptcy estate; and that the Plan's plain language contravened Texas law and should have prevented the court from confirming the Plan. The court rejected the creditor's arguments, reasoning that because the creditor received notice that the Plan settled the creditor's claim, it was the creditor's responsibility to object to the Plan based on its perceived legal error or appeal the Confirmation Order. The court held that because the creditor failed to timely challenge the Plan's treatment of the claim, the creditor cannot now circumvent the consequences of their inaction. As such, the court denied the creditor's request for relief from the Confirmation Order and granted the Liquidating Trustee's request to confirm that the creditor's claim is a general unsecured claim.

A Texas bankruptcy court examined the validity of a subcontractor's lien claim against debtor-property owner's interest in *In re Pearl Resources LLC*.   [[344]](#footnote-345)344The debtor's duty to pay further payments to a contractor was discharged after the contractor failed to provide a successful well, as provided in the drilling contract. A property owner is liable to a subcontractor only to the extent that he is liable to his contractor. Since the debtor no longer owes any obligation to the contractor, the debtor does not owe any obligation to the subcontractor. Even though the subcontractor signed a master service agreement with the **[\*43]** debtor, a master service agreement standing alone is not a contract; instead, it requires the issuance of work orders, and a binding contract exists only upon acceptance of the work orders. The court found that a contract between the debtor and contractor existed, a contract between the contractor and subcontractor existed, but a contract between the debtor and subcontractor did not exist. Since the subcontractor could not prove by a preponderance of evidence that a contract between it and the debtor existed, the limit of liability for the property owner protected the debtor from the subcontractor's lien claim, and as a result, the debtor is not liable to the subcontractor.

Beyond bankruptcy, lien availability was a frequent issue litigated in the Texas courts in light of the challenges the industry continued to face. In *Platinum Energy Solutions, Inc. v. Lazarus Operating LLC*,   [[345]](#footnote-346)345the court analyzed whether a mineral lien filed by a contractor against a lessee-operator could attach to more than just the leasehold when the contractor did not perform work for the property owner itself. Platinum contracted with Richland, a prior working interest holder on the lands at issue, to provide hydraulic fracturing services. Richland failed to pay Platinum for its services, and Platinum filed mineral liens as a result. Platinum subsequently sought foreclosure on these liens, and Richland then filed for bankruptcy. After Platinum and Richland reached a settlement agreement that was approved by the bankruptcy court, the lessor terminated Richland's lease and leased the wells at issue to Lazarus. Platinum added Lazarus to the existing suit, stating that it "learned that the property owners re-leased the affected wells/mineral interests, without regard to Platinum's valid liens attaching thereto . . . ."   [[346]](#footnote-347)346Under section 56.003(b) of the Texas Property Code, a "lien created by performing labor or furnishing or hauling material, machinery, or supplies for a leaseholder does not attach to the fee title to the property."   [[347]](#footnote-348)347The court emphasized that the underlying contract was between Platinum and Richland, the initial lessee. There was no contract between Platinum and the lessor. Platinum argued that the services it provided for Richland were for the overall benefit of the well and that any person with an interest in the ***oil*** and gas produced at the well benefitted from its work. Finding no case law to support Platinum's argument that "the mineral lien can attach to the fee title when the [contractor] performed work for someone other than" the lessor, the court held that the liens did not attach to more than the leasehold.   [[348]](#footnote-349)348

In *Pearl Resources Operating Co. v. Transcon Capital, LLC*,   [[349]](#footnote-350)349the court rejected a subcontractor's attempt to foreclose a mineral lien filed against property where the owner/operator of the property had paid all amounts due to the contractor, even though that contractor had not paid the lienor/subcontractor. Because the owner/operator had paid the contractor, the subcontractor was **[\*44]** not allowed to foreclose the mineral lien against the owner/operator's property.

XII. WEST VIRGINIA

*A. Legislative Developments*

The 2022 Legislative Session in West Virginia resulted in enactment of two major ***oil*** and gas bills. First was SB 650.   [[350]](#footnote-351)350Previously, section 37B-1-4, West Virginia's co-tenancy statute, enabled ***oil*** and gas producers to develop ***oil*** and gas rights so long as three-fourths of the owners of the tract consented.   [[351]](#footnote-352)351However, the co-tenancy statute applied only if the property to be developed involved seven or more landowners. SB 650 eliminates this requirement and enables producers to develop ***oil*** and gas rights so long as they have consent from three-fourths of the landowners.   [[352]](#footnote-353)352SB 650 became effective June 3, 2022.

Second, after many years of contentious debate, the legislature enacted a forced pooling bill, SB 694, which became effective on June 7, 2022.   [[353]](#footnote-354)353The new law permits ***oil*** and gas producers to obtain a horizontal well unit order so long as they: (1) made good-faith offers to "known and locatable royalty owners having executory interests in the ***oil*** and gas in the target formation" who have not previously consented to development; (2) with respect to the royalty interest, have obtained consent from landowners amounting to "75 percent or more of the net acreage in the target formation"; and (3) control, by ownership or lease, of "55 percent or more of the net acreage in the target formation . . . ."   [[354]](#footnote-355)354

*B. Judicial Developments*

In *Equitrans, L.P. v. Public Service Commission of West Virginia*,   [[355]](#footnote-356)355the West Virginia Supreme Court of Appeals held that a company operating its gathering line from various wells to a central facility and interstate pipeline fell under the subject matter jurisdiction of the Public Service Commission of West Virginia (PSC), because the contemplated gathering lines were used directly to serve rural retail consumers over a long period of time, and such use constituted a dedication of the line to public service. Equitrans, L.P. (Equitrans) owns and operates gathering lines from various production wells to central facilities and interstate pipelines. These gathering lines transport third-party gas, from which Equitrans collects a transportation fee. Equitrans denied Hope Gas, Inc., d/b/a Dominion Energy of West Virginia, as a direct-to-consumer utility, from tapping into an existing gathering line. The court held that the PSC had subject matter **[\*45]** jurisdiction over such matters, because the gathering line at issue had been used to serve rural West Virginia consumers for several decades, including more than 25 years under Equitrans' ownership. The court applied its prior analysis from *Boggs v. Public Service Commission of West Virginia*,   [[356]](#footnote-357)356holding that a gathering line's use to service rural customers caused it to be considered dedicated to public service, and therefore the operator of such gathering line continued to be a public utility until such time as the PSC terminated its status.

In *SWN Production Co. v. Kellam*,   [[357]](#footnote-358)357the West Virginia Supreme Court of Appeals considered two certified questions presented by the U.S. District Court for the Northern District of West Virginia. The first question was whether its holding in *Estate of Tawney v. Columbia Natural Resources, LLC*   [[358]](#footnote-359)358is still good law in West Virginia, to which the court answered in the affirmative.   [[359]](#footnote-360)359The second question involved the level of specificity required in an ***oil*** and gas lease to permit the deduction of post-production costs, and how these deductions are to be calculated, which the court declined to answer as it determined it was a question of contract interpretation. Furthermore, the court determined that this interpretation was to be determined by examination of the individual lease in question, with appropriate application of pertinent legal principles.

The court's memorandum opinion in *Antero Resources Corp. v. Irby*   [[360]](#footnote-361)360addressed the methodology and evaluation of tax assessments for horizontal wells producing both ***oil*** and gas, in light of the Supreme Court of West Virginia's prior decision in *Steager v. Consol Energy, Inc.*   [[361]](#footnote-362)361

The memorandum decision in *Cofield v. Antero Resources Corp.*   [[362]](#footnote-363)362addresses the interpretation and application of certain reservation language contained in a deed of conveyance, and whether the said reservation language was unambiguous.

In *Antero Resources Corp. v. L&D Investments, Inc.*,   [[363]](#footnote-364)363the court held that, when considering an agreement to settle claims against an operator for invalid payment of royalties, the provisions for attribution of settlement amounts to specific claims must be drafted in plain and unambiguous language sufficient to make such intent clear. Critically, the court noted that the settlement agreement lacked "any apportionment of the settlement proceeds to the claim for the royalty payments."   [[364]](#footnote-365)364

The West Virginia Supreme Court of Appeals held in *Antero Resources Corp. v. Directional One Services Inc. USA*   [[365]](#footnote-366)365that, where a master services **[\*46]** agreement (MSA) between an ***oil*** and gas producer and a directional drilling equipment supplier references a separate rate sheet, they may be construed together, provided the parties and the subject matter are the same, and where there is a clear relationship between the documents. Antero Resources Corporation (Antero), as an ***oil*** and gas producer of shale formations of the Appalachian Basin, entered into a written proposal, or rate sheet, with Directional One (Directional), as drafter, detailing daily fees for supplying various types of drilling tools and equipment. This document included a provision that in the event any down-hole equipment is damaged or lost in a well, Antero shall either recover the same without cost to Directional, or pay for any damage to the equipment. Thereafter, the parties entered into an MSA, drafted by Antero, which referred to certain work, as defined in the contract, that Directional would perform. Notably, the MSA provided that the work would be paid in accordance with Directional's "published schedule of rates and/or prices."

Subsequently, equipment owned by Directional was lost in two different wellbores.   [[366]](#footnote-367)366After failing to retrieve the equipment, Antero cemented and plugged the wellbore. A conflict arose when Directional sent invoices to Antero for reimbursement of the lost equipment, and Antero refused payment. After considering a number of counter arguments by Antero, the court held that the MSA and rate sheet must be read together, that the MSA expressly requires Directional to incorporate certain types of pricing into its rate sheets, and that the record established that it is industry practice to impose liability for lost equipment on the party controlling said equipment in the wellbore. Based on this, the court held that Antero must reimburse Directional for its lost equipment.

*C. Administrative Developments*

The legislature, in SB 312, relating to section 64-7-5(a), provided that

[t]he legislative rule filed in the State Register on July 30, 2021, authorized under the authority of section 11-1C-10 of this code, relating to the Tax Department (Valuation of Producing and Reserve ***Oil***, Natural Gas Liquids, and Natural Gas for Ad Valorem Property Tax Purposes, 110 CSR 01J), is not authorized.   [[367]](#footnote-368)367

XIII. WYOMING

*A. Legislative Developments*

During Wyoming's 2022 Legislative Budget Session, the legislature amended certain statutes related to the taxation of mineral production. First, HB 89 amended Wyoming Statute section 30-5-104 by authorizing the Wyoming ***Oil*** and Gas Conservation Commission (WOGCC) to order wells to be shut in and sealed and to prohibit drilling if an owner or operator is 120 days delinquent on mineral-related taxes.   [[368]](#footnote-369)368It further amended Wyoming Statute sections 39-13-113 and 39-14-208 to subject taxpayers to the penalties outlined **[\*47]** in section 30-5-104 for failure to timely pay ad valorem taxes or severance taxes on mineral production.   [[369]](#footnote-370)369

In SF 38, the legislature amended Wyoming Statute section 39-13-113.   [[370]](#footnote-371)370This amendment modified reporting and payment requirements for ad valorem taxes on mineral production and set forth invoicing requirements for the Department of Revenue. It also clarified the payment of deferred taxes on mineral production for 2020 and 2021 and set forth invoicing and tracking requirements for counties. Finally, the amendment outlined penalties for failing to make deferred tax payments and the procedure for making deferred payments if the taxpayer sells, divests, or liquidates its producing mineral asset such that filing a monthly severance tax report with the Department of Revenue is no longer required.

*B. Judicial Developments*

In *Solvay Chemicals, Inc. v. Wyoming Department of Revenue*, the Wyoming Supreme Court concluded that the capture and use of waste mine gas (WMG) by Solvay Chemicals, Inc. (Solvay) was subject to severance and ad valorem taxation.   [[371]](#footnote-372)371Solvay operates a trona mining operation that releases WMG. To reduce risk to miners, Solvay drilled gob-vent boreholes to release the WMG from the mine. In 2012, Solvay began collecting the released WMG and utilizing it to power industrial dryers at its soda ash processing plant. In 2015, the Wyoming Department of Revenue (DOR) imposed severance and ad valorem taxes on the WMG capture, and Solvay objected, arguing the WMG was not "natural gas" under the applicable statutes, it was not subject to severance taxation because it did not have the "privilege of severing or extracting" the WMG, and it was not subject to ad valorem taxation because it did not meet the definition of a "taxpayer." On appeal, the supreme court determined that the WMG captured and utilized by Solvay met the statutory definition of "natural gas" and was subject to both the severance and ad valorem taxation statutes.

In *North Silo Resources, LLC v. Deselms*, the Wyoming Supreme Court resolved a mineral ownership dispute.   [[372]](#footnote-373)372While the court engaged in extensive analysis of various mineral conveyances, it also clarified two notable questions related to rights of mineral owners and lessees. First, the court addressed to what extent a party holding a life estate in minerals may encumber those mineral rights. In doing so, it looked to the instrument in question, which reserved a life estate in the minerals, and found it did not limit the nature of the leases that the holder of the life estate could enter into. As such, the holders of the life estate had the power to enter into ***oil*** and gas leases that extended past their lifetimes. Second, the court addressed whether a mineral lessee has standing to quiet title under Wyoming Statute section 1-32-201. Finding that an **[\*48]** ***oil*** and gas lease constitutes an "interest" in land pursuant to section 1-32-201, the court held an ***oil*** and gas lessee does have standing to seek to quite title.

*C. Administrative Developments*

The WOGCC announced that it received the Attorney General's opinion regarding Wyoming Statute section 30-5-109(d) on March 15, 2022, and voted to waive its attorney-client privilege as to the opinion.   [[373]](#footnote-374)373That opinion addressed whether the WOGCC, when entering an order under section 30-5-109(d) for "additional wells to be drilled within established [drilling] units," establishes "new, individual, smaller drilling units" and determines the acreage for each new unit.   [[374]](#footnote-375)374The Attorney General concluded that section 30-5-109(d) does not authorize the WOGCC to establish new units, but rather to modify a unit and permit additional wells within the unit.

The Foundation Journal for Natural Resources and Energy Law

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151. 151 *Id.* P 91. [↑](#footnote-ref-152)
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154. 154 *Id.* PP 6-7. [↑](#footnote-ref-155)
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