# **1 Regulation of the Gas Industry § 51.02**

***Regulation of the Gas Industry* > *DIVISION VIII Administrative Law, Civil Procedure and Judicial Review* > *CHAPTER 51 LITIGATION AFFECTING THE NATURAL GAS INDUSTRY***

**Author**

Tré Fischer and Carter Dickson[[1]](#footnote-2)\*

**§ 51.02 Real Property Interests in Minerals and Production Rights**

1. **Real Property Interests in Minerals**

The dramatic growth in ***oil*** and gas production from continuing horizontal drilling and hydraulic fracturing is now well known and documented. Shale formations in many parts of the U.S. have been unlocked and exploited. The Marcellus Shale in the Eastern U.S. runs generally along the Appalachian Mountains—areas that saw significant ***oil*** production during the early years of the industry, but have been dominated by coal mining for decades. The ability to extract natural gas from either the coal beds or underlying shale provided new economic opportunities. But when the “minerals” were originally severed from the surface estate—generally with the intent of extracting the coal—the ownership of the natural gas was not always considered.

With this historical backdrop, Pennsylvania developed a rule of law by which natural gas and ***oil*** “simply are not minerals because they are not of a metallic nature, as the common person would understand minerals.”[[2]](#footnote-3)1 Pursuant to the Dunham rule, which was crafted in 1882, “[i]f, in connection with a conveyance of land, there is a reservation or an exception of minerals without any specific mention of natural gas or ***oil***, a presumption, rebuttable in nature, arises that the word ‘minerals’ was not intended by the parties to include natural gas or ***oil***.”[[3]](#footnote-4)2 In *Butler v. Charles Powers Estate*, landowners sought to quiet title to the Marcellus shale natural gas contained beneath their property based on a deed executed in 1881 which reserved to the grantor the subsurface and removal rights of “one-half [of] the minerals and Petroleum ***Oils***” contained beneath the subject property.[[4]](#footnote-5)3 The trial court sustained the landowner’s demurrer based on the Dunham Rule.[[5]](#footnote-6)4

The appellate court reversed the trial court, however, and remanded the case with instructions to the trial court to determine, among other things, whether Marcellus shale is a “mineral,” pursuant to a 1983 Pennsylvania Supreme Court decision[[6]](#footnote-7)5 which held that the owner of coal also owns the coalbed gas.[[7]](#footnote-8)6 The Pennsylvania Supreme Court reversed the appellate court and reaffirmed the Dunham Rule.[[8]](#footnote-9)7 While the rationale for this rule may be “cryptic, conclusory, and highly debatable,”[[9]](#footnote-10)8 and in fact contrary to the majority rule that ***oil*** and natural gas *are* minerals, disrupting the Dunham rule would have resulted in grave consequences. In the 131 years between the creation of the Dunham rule and *Butler*, thousands of mineral leases relied on the assumed validity of Pennsylvania’s idiosyncratic rule of law, and by preserving the Dunham rule, the Court safeguarded the reasonable economic expectations of Pennsylvania mineral rights’ owners.

On May 25, 2018, the Second Circuit Court of Appeals affirmed decisions by the United States District Court for the Southern District of New York and a bankruptcy court which held that Sabine ***Oil*** & Gas Corporation (“Sabine”) could utilize the U.S. Bankruptcy Code to “reject” certain midstream gathering and processing agreements, upending the generally held view that the agreements create real property interests under applicable state law.[[10]](#footnote-11)9 As is typical with its gathering and processing agreements, Sabine agreed to “dedicate” certain ***oil*** and gas production to the midstream companies, and they, in turn, committed at their own expense to construct, operate, and maintain for Sabine a system of gathering and processing facilities. The agreements, formed under Texas law, specifically provided that they are covenants intended to “run with the land.” Sabine sought to reject the midstream agreements pursuant to Bankruptcy code section 365, which permits debtors to walk away from unexpired contracts and leases if they can demonstrate that such agreements are burdensome to their bankruptcy estates and that doing so would be in the best interests of the debtor and all of its creditors.[[11]](#footnote-12)10 The midstream companies objected, asserting that the midstream agreements conveyed real property interests that could not be extinguished through bankruptcy.

Recognizing the trend towards abolishing the horizontal privity requirement for covenants, as reflected in the Restatement (Third) of Property, the Second Circuit agreed with the bankruptcy court’s 2016 determination that Texas courts had yet to affirmatively remove the horizontal privity requirement.[[12]](#footnote-13)11 And because Sabine and the pipeline did not have a common interest in the land when the covenant was executed, there could be no horizontal privity. Thus, the court did not have to determine whether the purported covenant “touches and concerns” the land—a universal requirement for real covenants—which the district court had previously found lacking.[[13]](#footnote-14)12

With the Second Circuit’s more narrow ruling based on horizontal privity, it remains open whether such midstream covenants remain enforceable in states that have abolished the horizontal privity requirement. Moreover, the decision was framed as a summary order, meaning that it has no precedential value. Still, the Second Circuit and lower courts’ decisions have made their mark, as other stressed exploration and production companies have started leveraging the rulings to renegotiate, or even reject, the gathering and processing contracts previously thought to have established covenants running with the land.[[14]](#footnote-15)13 Moving forward, midstream companies—especially in states that still require horizontal privity—will need to reevaluate their agreements to address the elements missing in order to create an enforceable property interest.

Nevertheless, some courts have ruled in favor of midstream gathering agreements forming real property covenants in spite of *Sabine*. In *Alta Mesa Holdings LP v. Kingfisher Midstream LLC* (“*Alta Mesa*”),[[15]](#footnote-16)14 the U.S. Bankruptcy Court for the Southern District of Texas held that gathering agreements created covenants running with the land and could not be rejected by Alta Mesa’s debtors. In distinguishing *Alta Mesa* from *Sabine*, the court stated that “unique facts in *Sabine* led to that court’s conclusions,” and “[t]o the extent that the pronouncements in *Sabine* were intended to be generalized, this Court must reject them.”[[16]](#footnote-17)15 Applying Oklahoma law, the court found that Alta Mesa’s gathering agreements “satisf[ied] all three elements needed to form real property covenants,” as the agreements “touch and concern Alta Mesa’s mineral leases, privity is present, and both parties intended that the covenants bind successors.”[[17]](#footnote-18)16

In October 2020, however, that same bankruptcy court held that gathering agreements containing purported covenants running with the land could be rejected under Texas law in *In re Chesapeake Energy Corporation* (“*Chesapeake*”).[[18]](#footnote-19)17 In *Chesapeake*, the court concluded that despite contract language attempting to convey covenant status (“the parties intended for the obligation to run with the land”), there was no requisite intent to form a covenant, the “parties’ chosen words [did] not create a covenant that touches and concerns Chesapeake’s land,” and there was an absence of horizontal privity.[[19]](#footnote-20)18 Accordingly, the agreement at issue did not contain a covenant running with the land, and could be rejected in bankruptcy as an executory contract.[[20]](#footnote-21)19 This decision was joined in quick succession by a Delaware bankruptcy court ruling on an issue of gas gathering agreements under Wyoming law, finding them likewise lacking in all three requirements to form covenants running with the land.[[21]](#footnote-22)20 And in 2021, the United States District Court for the District of Delaware interpreted master service agreements under North Dakota law, holding that despite the intent to create covenants running with the land, such intent was not sufficient to create covenants under applicable state law.[[22]](#footnote-23)21

An earlier bankruptcy court in Colorado came to a different conclusion in *Monarch Midstream, LLC v. Badlands Production Co*. (“*Badlands*”).[[23]](#footnote-24)22 In *Badlands*, the bankruptcy court held that under Utah law (where the land is situated) the gas gathering and processing agreement and the salt water disposal agreement “constitute[d] covenants running with the land that continue to encumber the [land and mineral assets], and to which [the new purchaser of the land] is bound.”[[24]](#footnote-25)23 The court found that the agreements satisfied the four criteria under Utah law for covenants running with the land: (1) touch and concern the land, (2) covenanting parties intend the covenant run with the land, (3) privity of estate, and (4) the covenant must be in writing such that it satisfies the statute of frauds.[[25]](#footnote-26)24 It is important to note that while *Chesapeake* applied Texas law, the inquiry is necessarily fact intensive and a situation where the elements of a real covenant that runs with the land are met may still arise. Despite the results in *Badlands* or *Alta Mesa* finding covenants running with the land, *Sabine* may yet represent the expanding perspective regarding midstream agreements and their status as real property interests.

The Texas Supreme Court opined in great detail on a dominant mineral estate’s rights to exclude others seeking to pass through it in *Lightning* ***Oil*** *Co. v. Anadarko E&P Onshore, LLC*.[[26]](#footnote-27)25 In this case, Anadarko obtained permission from the owner of a surface estate, the Briscoe Ranch, to drill for minerals located beneath an adjacent tract; however, in order to reach the adjacent tract, Anadarko intended to drill through the mineral estate of Lightning ***Oil***, located beneath the Ranch. Lightning ***Oil*** sought to enjoin Anadarko from drilling under a trespass theory, arguing that “the dominant mineral estate has the right to exclude those seeking to pass through it.”[[27]](#footnote-28)26 In affirming the dismissal of the suit, the court noted that while a mineral lessee owns a property interest in the ***oil*** and gas in the subsurface materials, the surface owner retains ownership and control of the subsurface materials themselves.[[28]](#footnote-29)27 Thus, “an unauthorized interference with the *place* where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee’s ability to exercise its rights.”[[29]](#footnote-30)28 The court held that Lightning ***Oil***’s allegations that Anadarko’s well would interfere with the subsurface spaces were too speculative to obtain injunctive relief.[[30]](#footnote-31)29 As to Lightning ***Oil***’s minerals that would be displaced from the drilling itself, the court performed a balancing test to determine that the small loss of minerals of a lessee was outweighed by the longstanding interests in maximizing ***oil*** and gas recovery.[[31]](#footnote-32)30

The Texas Supreme Court has also reaffirmed the primacy of contracts in ***oil*** and gas leases. In *Samson Exploration, LLC v. T.S. Reed Properties, Inc.*, Samson sought to “avoid a contractual obligation to pay royalties … for production from a zone shared by … two pooled units.”[[32]](#footnote-33)31 Samson claimed that it should not have to pay both sets of royalty owners because it should not have been permitted to enter a second contract covering an already pooled area, that the contract was the result of a scrivener’s error, and that the court should disgorge the royalty payments from one set of the pooled units. The court rejected all of these arguments, finding that “Samson must bear its contractual obligation to pay royalties out of its working interest rather than seeking reimbursement from stakeholders … . Though Samson bemoans the economic consequences of its actions, this is a circumstance of Samson’s own making[.]”[[33]](#footnote-34)32

1. **State and Local Efforts to Limit Natural Gas Drilling**

1. **Background**

Widespread growth of ***oil*** and gas development has met resistance from local populations, both in more densely populated areas where communities are not accustomed to development and where substantial portions of the community object based on environmental, health, or safety concerns. These concerns may be more acute where the mineral rights have been severed and the mineral owners are not long-standing members of the community who may benefit from the development. Residents in certain localities and their elected representatives reacting to these concerns have bypassed traditional regulators by imposing various restrictions, or even bans, on ***oil*** and gas extraction and production. Many of the restrictions have been challenged in the courts, where judges have been asked to define the limits of the authority of state and local governments to restrict exploration and development of hydrocarbon resources.

1. **Local Restrictions on Exploration and Production**

The efforts of county, city, and township entities to facilitate or to block natural gas drilling activities both create supremacy issues with respect to state law and initiatives, and impact land and mineral owners’ rights. In November 2014, voters in Denton, Texas, approved a ban on fracking within city limits.[[34]](#footnote-35)33 This ban was quickly challenged by the Texas ***Oil*** and Gas Association, an industry trade association,[[35]](#footnote-36)34 and the Texas General Land Office (“Texas GLO”), which claimed to own millions of dollars’ worth of mineral rights within the city’s limits.[[36]](#footnote-37)35 Both the trade association and Texas GLO claimed that state law preempted the ban,[[37]](#footnote-38)36 and the Texas GLO additionally claimed that the ordinance could not be applied to state owned land and mineral interests.[[38]](#footnote-39)37 Partly in response to the ban and the resulting litigation, Texas lawmakers passed a bill in May 2015 that not only bars cities from banning drilling and fracking, but prohibits municipalities from regulating subsurface activity beyond what is “commercially reasonable.”[[39]](#footnote-40)38 As a result, Denton repealed the fracking ban[[40]](#footnote-41)39 and mineral interest owners gained significant protection from local attempts to restrict resource development.

Texas lawmakers have continued to wrestle with local attempts to control ***oil*** and gas development, including in the 2023 legislative session. In fact, the Texas state legislature has proposed and passed House Bill 2127, which amends the state’s Natural Resources Code to preempt all municipal and county ordinances, rules, and orders “regulating conduct in a field of regulation that is occupied by a provision” of the Code.[[41]](#footnote-42)40

Prior to officially implementing a fracking ban in New York, the State had imposed a temporary moratorium on hydraulic fracking. Nevertheless, several local municipalities passed their own restrictions. In August 2011, the Town of Dryden passed a zoning ordinance that banned all activities relating to the exploration, production, and storage of natural gas and petroleum.[[42]](#footnote-43)41 A driller and developer of ***oil*** and natural gas wells sued, alleging that the ordinance was preempted by New York’s ***Oil***, Gas and Solution Mining Law (“OGSML”), which specifically provided that it “shall supersede all local laws or ordinances relating to the regulation of the ***oil***, gas and solution mining industries.”[[43]](#footnote-44)42 The New York appellate court disagreed, finding that the zoning ordinance did not seek to “regulate” the ***oil***, gas, and solution mining industries, but instead established permissible and prohibited uses of land within the town. As a result, the court held that the OGSML did not preempt a municipality’s authority to enact a local zoning ordinance prohibiting drilling activities within its borders, confirming the authority of New York municipalities to effectively prevent any development on property within their jurisdiction.[[44]](#footnote-45)43

In 2012, the Pennsylvania legislature enacted Act 13, which amended the Pennsylvania ***Oil*** and Gas Act to prohibit localities from regulating ***oil*** and gas operations.[[45]](#footnote-46)44 In response, several municipalities, an environmental group, and a physician challenged the law, alleging it violated the Pennsylvania Constitution. An *en banc* panel of the Commonwealth Court agreed in part, finding Act 13 violated the citizens’ due process rights because it forced municipalities to amend existing zoning ordinances without regard for basic zoning principles.[[46]](#footnote-47)45 The Pennsylvania Supreme Court affirmed the Commonwealth Court’s decision, but was split on the rationale for why Act 13 was unconstitutional.[[47]](#footnote-48)46 However, according to the plurality, Act 13 violated Pennsylvania’s Environmental Rights Amendment, which designates the Commonwealth as trustee for Pennsylvania’s natural resources.[[48]](#footnote-49)47 Within this role, the Court determined that the government was prohibited from actions that unreasonably caused actual or likely deterioration of the environment.[[49]](#footnote-50)48 According to the Court, Act 13 was incompatible with the Commonwealth’s trustee obligations over Pennsylvania’s public natural resources and therefore unconstitutional.[[50]](#footnote-51)49 Subsequent attempts to sustain Act 13 have been unsuccessful.[[51]](#footnote-52)50 As a result, Pennsylvania natural gas operators lost a significant protection from municipalities crafting a patchwork of regulations across the state that restrict—and even ban—natural gas operations within those jurisdictions.

In November 2012, the City of Longmont, Colorado, imposed a ban on hydraulic fracturing.[[52]](#footnote-53)51 In response, a Colorado industry trade group, the state agency charged with regulating ***oil*** and gas activity, and an ***oil*** and gas operating company sued the city, arguing that the ban is preempted by the Colorado ***Oil*** and Gas Conservation Act, which grants the Colorado ***Oil*** and Gas Conservation Commission the authority to regulate ***oil*** and gas activity within the state.[[53]](#footnote-54)52 The district court agreed with the plaintiffs and overturned the fracking ban. After accepting a transfer of the case from the Colorado Court of Appeals, the Colorado Supreme Court affirmed the district court, finding that the Colorado ***Oil*** and Gas Conservation Act preempts home-rule cities in Colorado from prohibiting hydraulic fracturing.[[54]](#footnote-55)53 Specifically, the Colorado Supreme Court concluded that the fracking ban created an operational conflict with state law which, “if left in place, could ultimately lead to a patchwork of regulation that would inhibit the efficient development of ***oil*** and gas resources.”[[55]](#footnote-56)54 The court distinguished the Pennsylvania Supreme Court’s ruling in *Robinson Township*, as that ruling relied on a “relatively rare” provision in the Pennsylvania Constitution—the Environmental Rights Amendment—which, as discussed above, established a public trust doctrine. The Colorado Supreme Court thereby limited the impact of *Robinson Township*, while conversely establishing strong precedent in support of a unified statewide regulatory landscape.

In November 2016, Monterey County California amended its general plan by passing “Measure Z,” which added three land use policies including a prohibition on fracking and on the drilling new ***oil*** and gas wells.[[56]](#footnote-57)55 In response, Chevron U.S.A., Inc. attacked these prohibitions via several procedural mechanisms, including mandate petitions and complaints for declaratory and injunctive relief and inverse condemnation.[[57]](#footnote-58)56 The Court of Appeals affirmed the trial court’s holding that regulation of operational aspects of ***oil*** and gas drilling are preempted by Article 9, Section 7 of the California Constitution and by section 3106 of the California Public Resources Code.[[58]](#footnote-59)57 However, the court noted that “state law leaves room for *some* local regulation of ***oil*** drilling,” though it held the restrictions in Measure Z went beyond a county’s authority to regulate.[[59]](#footnote-60)58 On January 26, 2022, the Supreme Court of California granted review of the lower court’s decision, which the certified question indicates will touch on the preemption of issues discussed at the trial court.[[60]](#footnote-61)59

Not all localities have been so hostile to natural gas development. In Pennsylvania, Middlesex Township was sued by environmental groups after passing an ordinance that permitted natural gas drilling within the municipality.[[61]](#footnote-62)60 The environmental groups claimed that the zoning board overlooked the effects of drilling.[[62]](#footnote-63)61 The ordinance was ultimately upheld, with the court ruling that the zoning board’s rationale for the ordinance was “well-reasoned and sufficiently supported.”[[63]](#footnote-64)62 On June 7, 2017, the Commonwealth Court of Pennsylvania affirmed the trial court, finding—among other things—that “there is substantial evidence supporting the Board’s determination that the ‘***oil*** and gas well site development’ use is compatible with the other permitted agricultural and residential uses and that it will limit sprawl and protect agricultural land.”[[64]](#footnote-65)63 The Pennsylvania Supreme Court vacated its decision in the *Middlesex Township* case for reconsideration in light of additional cases; however, those cases adopted similar pro-***oil*** and gas positions and appear to maintain Pennsylvania’s support for natural gas development.[[65]](#footnote-66)64

Similarly, in *Murraysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd.*, the Commonwealth Court of Pennsylvania—in an unpublished opinion—upheld a local ordinance in support of local ***oil*** and gas drilling, going so far as to say that “this Court has rejected any presumption that the activity [of unconventional ***oil*** and gas drilling] will have an adverse effect on the environment or the population or that it is incompatible with residential zoning districts.”[[66]](#footnote-67)65

1. **State Fracking Bans and Moratoria**

State fracking bans and moratoria have created a number of issues, including potentially restricting the property and mineral interest value for landowners, and affecting ***oil*** and gas leases in unpredictable ways. New York in particular gained significant attention in 2010 when then-Governor David Paterson imposed a statewide moratorium on fracking. One consequence of the moratorium was that mineral lease holders were no longer able to extract ***oil*** and gas.

In *Beardslee v. Inflection Energy, LLC*, over 30 landowners sought a declaratory judgment against two energy companies that the moratorium did not extend the term on the energy companies’ leases.[[67]](#footnote-68)66 The energy companies countered that the moratorium constituted a *force majeure* event and thus extended the leases’ primary terms.[[68]](#footnote-69)67 The Second Circuit certified the question to the New York Court of Appeals, which found that the leases’ *force majeure* clause did not modify the primary term of the habendum clause and, therefore, did not extend the leases.[[69]](#footnote-70)68 The New York Court of Appeals thereby avoided the question of whether the moratorium amounted to a *force majeure* event, while simultaneously ensuring that the energy companies no longer held mineral leases in New York.

In December 2014, the New York Department of Environmental Conservation (“DEC”) announced a ban on high-volume hydraulic fracturing. In response, David Morabito, a landowner, filed a petition against the New York DEC seeking to overturn the ban on the basis that it was arbitrary and capricious.[[70]](#footnote-71)69 In support, Morabito cited to the Department’s 25 year history of studying hydraulic fracturing and its various findings that the practice could be performed safely in New York.[[71]](#footnote-72)70 Morabito alleged that the DEC’s own determinations that hydraulic fracturing was a viable and acceptable practice, including the Department’s own detailed recommendations on how to implement safety regulations, demonstrated that the decision to ban fracking was driven by politics and not science.[[72]](#footnote-73)71 The appellate division affirmed the supreme court’s dismissal of Morabito’s action, finding that he lacked standing because he never applied for a permit or offered proof that he met any of the prerequisites for a permit.[[73]](#footnote-74)72

In 1961, the Delaware River Basin Commission (the “Commission”) created the Delaware River Basin Compact (the “Compact”) to police and conserve surrounding basins, interconnecting through Delaware, New Jersey, New York, and Pennsylvania.[[74]](#footnote-75)73 In 2009, the Compact executives issued a moratorium on natural gas fracking projects within the proximity of the Delaware Basin as part of environmental and water conservation efforts.[[75]](#footnote-76)74 The moratorium expressly stated that project entities “may not commence any natural gas well project[s] for the production from or the exploration of shale formations … without first obtaining the approval of the commission.”[[76]](#footnote-77)75 Wayne Land & Mineral Group, LLC (“Wayne Land”) alleged that the Commission unduly burdened its natural gas fracking project efforts, and exceeded its authority by requiring Commission approval for any “projects.”[[77]](#footnote-78)76 Wayne Land claimed that, according to the Compact, the term “projects” included all projects that utilized water, and that Wayne Land’s natural gas fracking plans were not within the scope of the Compact.[[78]](#footnote-79)77

The district court dismissed Wayne Land’s complaint for its failure to state a claim, reasoning that the Compact’s definition of what constituted a project clearly identified natural fracking projects.[[79]](#footnote-80)78 On appeal, the United States Court of Appeals for the Third Circuit disagreed that the Compact’s definition of projects was unambiguous.[[80]](#footnote-81)79 The Third Circuit interpreted the language of the Compact using contract principles pursuant to the holding in *Tarrant Reg’l Water Dist. v. Herrmann*.[[81]](#footnote-82)80 In *Tarrant*, the U.S. Supreme Court held that “[i]nterstate compacts are construed as contracts under the principles of contract law.” Applying contract principles, the Third Circuit interpreted that the Compact’s provisions were intended to be liberally construed.[[82]](#footnote-83)81 However, the Third Circuit concluded that Wayne Land’s argument was meritorious enough for reasonable minds to differ and remanded the case for further determination, reasoning that the Compact does not expressly speak to whether natural gas fracking projects are a threat to water conservation.[[83]](#footnote-84)82

On April 13, 2021, California Governor Gavin Newsome directed the Department of Conservation’s Geologic Energy Management Division to stop issuing new permits for hydraulic fracturing by January 2024 in what has been called a “de facto moratorium.”[[84]](#footnote-85)83 Several suits have been filed in California challenging the Governor’s policy, including the March 17, 2022 lawsuit brought by industry leader Chevron.[[85]](#footnote-86)84 With the exception of one case dismissed on anti-SLAPP grounds, the California state courts have not yet issued an opinion regarding these similar cases.[[86]](#footnote-87)85 With multiple related cases before California Superior Courts, further development is expected in the coming two years, especially as January 2024 approaches without any legislation to give effect to Governor Newsom’s proposed ban.

Regulation of the Gas Industry

Copyright 2024, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

**End of Document**

1. \*Joseph “Tré” August Fischer, III has 30 years of experience representing companies in the energy and manufacturing industries in complex litigation of all kinds, in a wide range of transactional matters, and concerning compliance and liability issues. Mr. Fischer’s litigation experience includes a wide range of complex business and commercial disputes involving all phases of the ***oil*** and gas production cycle from exploration and production, through midstream gathering and transportation, and to delivery to the end-user, including work for several pipeline and electric generator clients. Mr. Fischer also has considerable experience in transaction structuring, negotiation, and documentation in the energy and manufacturing industries across a broad range of transactions in several states and internationally, with particular experience with midstream energy agreements such as gathering and processing agreements and with transactions involving ***oil*** and gas proprieties, midstream pipeline and related assets, contaminated properties, environmental risk transfer, brownfield redevelopment, distressed assets, and other complex legal and risk management issues.

   David Carter Dickson, IV is a 2018 graduate of the University of Houston Law Center where he obtained is JD and his LL.M. in Energy, Environmental, and Natural Resource law. In his litigation practice, Mr. Dickson represents sophisticated clients in the energy and infrastructure sectors, including in trials and appeals before state and federal courts. [↑](#footnote-ref-2)
2. 1Butler v. Charles Powers Estate, 65 A.3d 885, 898 (Pa. 2013). [↑](#footnote-ref-3)
3. 2Butler v. Charles Powers Estate, 65 A.3d 885, 891 (Pa. 2013) (quoting Highland v. Commonwealth, 161 A.2d 390, 398 (Pa. 1960)). [↑](#footnote-ref-4)
4. 3Butler v. Charles Powers Estate, 65 A.3d 885, 887 (Pa. 2013). [↑](#footnote-ref-5)
5. 4Butler v. Charles Powers Estate, 65 A.3d 885, 888 (Pa. 2013). [↑](#footnote-ref-6)
6. 5United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983). [↑](#footnote-ref-7)
7. 6Butler v. Charles Powers Estate, 65 A.3d 885, 888 (Pa. 2013). [↑](#footnote-ref-8)
8. 7Butler v. Charles Powers Estate, 65 A.3d 885, 897 (Pa. 2013). [↑](#footnote-ref-9)
9. 8Butler v. Charles Powers Estate, 65 A.3d 885, 899 (Pa. 2013) (Saylor, J., concurring). [↑](#footnote-ref-10)
10. 9Sabine ***Oil*** & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC, 734 Fed. Appx. 64 (2d Cir. 2018). [↑](#footnote-ref-11)
11. 10*See* *In re* Sabine ***Oil*** & Gas Corp., *et al.*, 567 B.R. 869, 873–874 (S.D.N.Y. 2017). [↑](#footnote-ref-12)
12. 11Sabine ***Oil*** & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC, 734 Fed. Appx. 64, 67 (2d Cir. 2018). [↑](#footnote-ref-13)
13. 12Sabine ***Oil*** & Gas Corp. v. Nordheim Eagle Ford Gathering, LLC, s734 Fed. Appx. 64, 66 (2d Cir. 2018). [↑](#footnote-ref-14)
14. 13*See, e.g.*, *In re* Quicksilver Resources Inc., *et al.*, No. 15-10585-LSS (Bankr. D. Del. filed Mar. 17, 2015) (settlement reached); Findings of Fact, Conclusions of Law, and Order Confirming Third Amended Joint Chapter 11 Plan of Reorganization, *In re* Magnum Hunger Resources Corp., *et al.*, No. 15-12533-KG, ¶ 142 (Bankr. D. Del. Filed Dec. 15, 2015), Dkt. No. 1175 (agreements assumed by debtor); *In re Emerald* ***Oil****, Inc.* No. 16-10704-KG (Bankr. D. Del. Filed Mar. 22, 2016) (settlement reached). [↑](#footnote-ref-15)
15. 14613 B.R. 90 (Bankr. S.D. Tex. 2019). [↑](#footnote-ref-16)
16. 15Alta Mesa Holdings LP v. Kingfisher Midstream LLC (*In re* Alta Mesa Res., Inc.), 613 B.R. 90, 102 (Bankr. S.D. Tex. 2019). [↑](#footnote-ref-17)
17. 16Alta Mesa Holdings LP v. Kingfisher Midstream LLC (*In re* Alta Mesa Res., Inc.), 613 B.R. 90, 102–03 (Bankr. S.D. Tex. 2019). [↑](#footnote-ref-18)
18. 17622 B.R. 274, 284 (Bankr. S.D. Tex. 2020). [↑](#footnote-ref-19)
19. 18622 B.R. 274, 282–284 (Bankr. S.D. Tex. 2020). [↑](#footnote-ref-20)
20. 19622 B.R. 274, 284 (Bankr. S.D. Tex. 2020). [↑](#footnote-ref-21)
21. 20*In re* Southland Royalty Co. LLC, 623 B.R. 64, 88 (Bankr. D. Del. 2020). [↑](#footnote-ref-22)
22. 21*See In re* Nine Point Energy Holdings, Inc., 633 B.R. 124, 139 (D. Del. 2021) (holding that the agreements did not create covenants running with the land because North Dakota law lacks an intent requirement and that “the dedications did not benefit the land” as required under state law). [↑](#footnote-ref-23)
23. 22608 B.R. 854 (Bankr. D. Colo. 2019). [↑](#footnote-ref-24)
24. 23Monarch Midstream, LLC v. Badlands Prod. Co. (*In re* Badlands Energy, Inc.), 608 B.R. 854, 876–77 (Bankr. D. Colo. 2019). [↑](#footnote-ref-25)
25. 24Monarch Midstream, LLC v. Badlands Prod. Co. (*In re* Badlands Energy, Inc.), 608 B.R. 854, 867 (Bankr. D. Colo. 2019). [↑](#footnote-ref-26)
26. 25520 S.W.3d 39 (Tex. 2017). [↑](#footnote-ref-27)
27. 26Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 44 (Tex. 2017). [↑](#footnote-ref-28)
28. 27Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 46–48 (Tex. 2017). [↑](#footnote-ref-29)
29. 28Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49 (Tex. 2017); *see, e.g.*, Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 820 (Tex. 2021) (determining statute-of-limitations issue; “Because the surface owner, and not the mineral lessee, owns the possessory rights to the space under the property’s surface, the mere fact that contaminants have migrated into the subsurface space covered by a mineral lease does not itself establish that the lessee has sustained … legal injuries.”). [↑](#footnote-ref-30)
30. 29Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 49 (Tex. 2017). [↑](#footnote-ref-31)
31. 30Lightning ***Oil*** Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 50–51 (Tex. 2017). [↑](#footnote-ref-32)
32. 31521 S.W.3d 766, 770 (Tex. 2017). [↑](#footnote-ref-33)
33. 32Samson Expl., LLC v. T.S. Reed Props., Inc., 521 S.W.3d 766, 780 (Tex. 2017). [↑](#footnote-ref-34)
34. 33Texas ***Oil*** and Gas Association v. Denton, No. 14-08933-431, slip op. at 1 (16th Dist. Ct., Denton Cnty., Tex. Sept. 4, 2015) (agreed order of dismissal). [↑](#footnote-ref-35)
35. 34Original Petition, Texas ***Oil*** & Gas Association v. Denton, No. 14-08933-431 (16th Dist. Ct., Denton Cnty., Tex. Nov. 5, 2014). [↑](#footnote-ref-36)
36. 35Original Petition at 3–4, Patterson v. Denton, No. D-1-GN-14-004628 (53rd Dist. Ct., Travis Cnty., Tex. Nov. 5, 2014). [↑](#footnote-ref-37)
37. 36*See* Original Petition at 7–10, Texas ***Oil*** & Gas Association v. Denton, No. 14-08933-431 (16th Dist. Ct., Denton Cnty., Tex. Nov. 5, 2014) and Original Petition at 5, *Patterson v. Denton*, No. D-1-GN-14-004628 (53rd Dist. Ct., Travis Cnty., Tex. Nov. 5, 2014). [↑](#footnote-ref-38)
38. 37Original Petition at 4–5, Patterson v. Denton, No. D-1-GN-14-004628 (53rd Dist. Ct., Travis Cnty., Tex. Nov. 5, 2014). [↑](#footnote-ref-39)
39. 38H.B. 40, 84th Leg., R.S. (Tex. 2015) (codified as Tex. Nat. Res. Code § 81.0523). [↑](#footnote-ref-40)
40. 39Texas ***Oil*** & Gas Association v. Denton, No. 14-08933-431, slip op. at 1 (16th Dist. Ct., Denton Cnty., Tex. Sept. 4, 2015) (agreed order of dismissal). [↑](#footnote-ref-41)
41. 40H.B. 2127, 88th Leg., § 13, R.S. (Tex. 2023) (to be codified as Tex. Nat. Res. Code § 1.003) (This bill is currently proposed and subject to the Governor’s signature before enactment, although at the time of publication public indications suggest the Governor’s intent to sign the bill in to law.). [↑](#footnote-ref-42)
42. 41Norse Energy v. Town of Dryden, 964 N.Y.S.2d 714, 716 (N.Y. App. Div. 2013). [↑](#footnote-ref-43)
43. 42Norse Energy v. Town of Dryden, 964 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013). [↑](#footnote-ref-44)
44. 43Norse Energy v. Town of Dryden, 964 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013). [↑](#footnote-ref-45)
45. 44Robinson Twp. v. Commonwealth, 83 A.3d 901, 915 (Pa. 2013). [↑](#footnote-ref-46)
46. 45Robinson Twp. v. Commonwealth, 83 A.3d 901, 931 (Pa. 2013). [↑](#footnote-ref-47)
47. 46Robinson Twp. v. Commonwealth, 83 A.3d 901, 913 (Pa. 2013). [↑](#footnote-ref-48)
48. 47Robinson Twp. v. Commonwealth, 83 A.3d 901, 948–949 (Pa. 2013). [↑](#footnote-ref-49)
49. 48Robinson Twp. v. Commonwealth, 83 A.3d 901, 953 (Pa. 2013). [↑](#footnote-ref-50)
50. 49Robinson Twp. v. Commonwealth, 83 A.3d 901, 985 (Pa. 2013). [↑](#footnote-ref-51)
51. 50*See, e.g.*, Yaw v. Del. River Basin Comm'n Del. Riverkeeper Network, 49 F.4th 302, 307 (3d Cir. 2022) (holding that Pennsylvania state senators lacked standing to challenge a fracking ban within the Delaware River Basin because they did not have a particularized harm in the act’s nullification). [↑](#footnote-ref-52)
52. 51Colorado ***Oil*** & Gas Ass’n v. City of Longmont, 13CV63 (Dist. Ct., Boulder Cnty, Colo., July 24, 2014) (order granting motions for summary judgment). [↑](#footnote-ref-53)
53. 52The City of Fort Collins similarly passed a five-year moratorium on hydraulic fracturing in November 2013, which was challenged by the same Colorado industry trade group. City of Fort Collins v. Colo. ***Oil*** & Gas Ass’n, 369 P.3d 586, 2016 CO 28 (Colo. 2016). [↑](#footnote-ref-54)
54. 53City of Longmont Colo. v. Colo. ***Oil*** & Gas Ass’n, 369 P.3d 573, 2016 CO 29 (Colo. 2016). [↑](#footnote-ref-55)
55. 54City of Longmont Colo. v. Colo. ***Oil*** & Gas Ass’n, 2016 CO 29, ¶ 25, 369 P.3d 573, 581 (Colo. 2016). [↑](#footnote-ref-56)
56. 55Chevron U.S.A., Inc. v. Cty. of Monterey, 70 Cal. App. 5th 153, 160 (2021). [↑](#footnote-ref-57)
57. 56Chevron U.S.A., Inc. v. Cty. of Monterey, 70 Cal. App. 5th 153, 160 (2021). [↑](#footnote-ref-58)
58. 57Chevron U.S.A., Inc. v. Cty. of Monterey, 70 Cal. App. 5th 153, 174 (2021). [↑](#footnote-ref-59)
59. 58Chevron U.S.A., Inc. v. Cty. of Monterey, 70 Cal. App. 5th 153, 172 (2021) (emphasis in original). [↑](#footnote-ref-60)
60. 59Chevron U.S.A., Inc. v. Cty. of Monterey, 70 Cal. App. 5th 153, 153 (2021), *pet. granted*, 2022 Cal. LEXIS 450 (Cal., Jan. 26, 2022) (note that this case was argued and submitted to the court on May 25, 2023). [↑](#footnote-ref-61)
61. 60Notice of Land Use Appeal, Delaware Riverkeeper Network, *et al.* v. Middlesex Township Zoning Hearing Board, No. 15-10429 (Ct. of C.P. of Butler Cnty., Penn., June 5, 2015). [↑](#footnote-ref-62)
62. 61Notice of Land Use Appeal, Delaware Riverkeeper Network, *et al*. v. Middlesex Township Zoning Hearing Board, No. 15-10429 (Ct. of C.P. of Butler Cnty., Penn., June 5, 2015), at 5–7. [↑](#footnote-ref-63)
63. 62Delaware Riverkeeper Network, *et al.* v. Middlesex Township Zoning Hearing Board, No. 15-10429, slip op. at 10 (Ct. of C.P. of Butler Cnty., Penn. Nov. 19, 2015). [↑](#footnote-ref-64)
64. 63Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Bd., 2017 Pa. Commw. Unpub. LEXIS 415, at \*31 (Pa. Commw. Ct. June 7, 2017). [↑](#footnote-ref-65)
65. 64*See* Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd., 647 Pa. 552, 553 (2018) (vacating Commonwealth Court’s order and remanding the case for reconsideration); *see also* Pa. Envtl. Def. Found. v. Commonwealth, 640 Pa. 55, 64 (2017) (holding that ***oil*** and gas proceeds from publically-leased land should be held in the public trust); Gorsline v. Bd. of Supervisors of Fairfield Twp., 646 Pa. 553, 557 (2018) (noting that ***oil*** and gas development may be permitted in residential/agricultural districts). [↑](#footnote-ref-66)
66. 65Murrysville Watch Comm. v. Municipality of Murrysville Zoning Hearing Bd., 2022 Pa. Commw. Unpub. LEXIS 32, at \*67 (Pa. Commw. Ct. Jan. 24, 2022). [↑](#footnote-ref-67)
67. 66798 F.3d 90, 92 (2d Cir. 2015). [↑](#footnote-ref-68)
68. 67Beardslee v. Inflection Energy, LLC, 798 F.3d 90, 92–93 (2d Cir. 2015). [↑](#footnote-ref-69)
69. 68Beardslee v. Inflection Energy, LLC, 798 F.3d 90, 93 (2d Cir. 2015). [↑](#footnote-ref-70)
70. 69*See* Amended Petition at ¶ 134, Morabito v. Martens, No. 3265-15 (N.Y. Sup. Ct. May 22, 2015). [↑](#footnote-ref-71)
71. 70*See* Amended Petition at ¶ 12, Morabito v. Martens, No. 3265-15 (N.Y. Sup. Ct. May 22, 2015). [↑](#footnote-ref-72)
72. 71*See* Amended Petition at ¶¶ 9, 13, Morabito v. Martens, No. 3265-15 (N.Y. Sup. Ct. May 22, 2015). [↑](#footnote-ref-73)
73. 72*In re* Morabito v. Martens, 149 A.D.3d 1316, 53 N.Y.S.3d 213 (N.Y. App. Div. 2017). [↑](#footnote-ref-74)
74. 73Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 515 (3d Cir. 2018). [↑](#footnote-ref-75)
75. 74Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 517 (3d Cir. 2018). [↑](#footnote-ref-76)
76. 75Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 518 (3d Cir. 2018). [↑](#footnote-ref-77)
77. 76Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 519 (3d Cir. 2018). [↑](#footnote-ref-78)
78. 77Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 519 (3d Cir. 2018). [↑](#footnote-ref-79)
79. 78Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 519 (3d Cir. 2018). [↑](#footnote-ref-80)
80. 79Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 522 (3d Cir. 2018). [↑](#footnote-ref-81)
81. 80569 U.S. 614, 620, 133 S. Ct. 2120, 186 L. Ed. 2d 153 (2013). [↑](#footnote-ref-82)
82. 81Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 534 (3d Cir. 2018). [↑](#footnote-ref-83)
83. 82Wayne Land & Mineral Grp. LLC v. Del. River Basin Comm’n Maya Van Rossum, 894 F.3d 509, 534 (3d Cir. 2018). [↑](#footnote-ref-84)
84. 83Office of Governor Gavin Newsome, *Governor Newsom Takes Action to Phase Out* ***Oil*** *Extraction in California*, April 23, 2021, https://www.gov.ca.gov/2021/04/23/governor-newsom-takes-action-to-phase-out-***oil***-extraction-in-california/; *see also* Times Editorial Board, *Did California issues its last fracking permit? Let’s hope so*, Dec. 17, 2021, L.A. Times, https://www.latimes.com/opinion/story/2021-12-17/fracking-permits (noting that from July to December 2021, California had denied 109 permits for hydraulic fracturing). [↑](#footnote-ref-85)
85. 84*See generally* Original Petition, Chevron U.S.A. Inc. v. Gavin Newsom, et al., No. BCV-22-100636 (Superior Court of California, County of ***Kern***, March 17, 2022) (as of the date of publication, this matter is scheduled for a jury trial to begin on August 28, 2023). [↑](#footnote-ref-86)
86. 85*See* County of ***Kern*** v. Gavin Newsom, Order, No. 21-CECG-03695 (Superior Court of California, County of Fresno, April 6, 2022). [↑](#footnote-ref-87)