

FEDERAL -- MINING

Daniel A. Jensen, Reporter

Court Enjoins Valley Fills from Mountaintop Removal Mining

A federal district court judge in West Virginia has enjoined the Army Corps of Engineers from issuing valley fill permits in connection with the controversial practice of mountaintop removal coal mining. *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, Civil No. 2:01-0770 (S.D. W. Va., May 8, 2002). The decision holds that the Corps' longstanding practice of issuing fill permits under §404 of the Clean Water Act, 33 U.S.C. §1344, is illegal because the fill material serves no useful purpose and is deposited solely for purposes of waste disposal, contrary to the text and legislative history of the Clean Water Act. The decision further holds that agency regulations allowing such permits are invalid because they exceed the scope of regulatory authority delegated under the Clean Water Act.

Common in Appalachia, mountaintop removal mining involves removal of overburden from atop the coal seam and placement of that overburden in adjacent valleys. Environmental groups oppose the practice because of its effect on stream channels in the valleys. For at least 25 years, the Corps, with oversight by the Environmental Protection Agency (EPA), has regulated the practice through issuance of §404 fill permits.

The district court's ruling was based on cross motions for summary judgment. The court's analysis hinges on a conclusion that the redeposited overburden does not constitute "fill material," which is regulated by §404 of the Act (dredge and fill permits), and instead constitutes "waste material," which must be regulated under §402, 33 U.S.C. §1342, of the Act (National Pollutant Discharge Elimination System permits). The decision includes a lengthy review of the background of the Clean Water Act and subsequent regulatory efforts by the Corps and the EPA. Against that background, the court concludes that "fill material" must be "deposited for some beneficial primary purpose," and not merely deposited for purposes of waste disposal. Memorandum Opinion and Order at 5. The beneficial purpose must involve use of the land created by the fill. *Id.* at 20-21. According to the court, overburden disposal from mountaintop mining is purely an exercise in waste disposal, and approval of that activity under §404 is *ultra vires* to the authority of the Corps and the EPA. *Id.* at 5.

In an effort to resolve the interpretive ambiguity before the court, the Corps and the EPA amended their definitions of "discharge of fill material" to explicitly include placement of overburden, slurry, tailings, or similar mining-related materials. 67 Fed. Reg. 31,129, 31,142-43 (May 9, 2002). The amendments also clarified that overburden from mining was included within the definition of "fill material." *Id.* That action seems only to have angered the judge, who opined that the agencies were disingenuously attempting "to make their original error and administrative practice the law" by administrative fiat, without the necessity of legislation, in order to appease the mining industry and its employees. Memorandum Opinion and Order at 38-41, 43. The decision refers to the amended definitions as "purported rulemaking" inconsistent with the Clean Water Act and therefore *ultra vires*. *Id.* at 41.

The court enjoined the Corps "from issuing any further §404 permits that have no primary purpose or use but the disposal of waste." *Id.* at 44. More specifically, the "issuance of

mountaintop removal overburden valley fill permits solely for waste disposal under §404" was enjoined. *Id.*

The Corps has moved to stay the court's order pending an appeal to the Fourth Circuit. The Corps contends the court's injunction wrongly purports to have nationwide applicability, covering all permits (whether for mining or non-mining) "that have no primary purpose or use but the disposal of waste," when the only issue before the court was the propriety of a single §404 permit for a specific mine site in Kentucky. The Corps further argues that the court's apparent invalidation of the May 9, 2002, rules is improper because the rules were not even published in final form until the day after the court's order, the rules were never challenged by the plaintiff, and any judicial review of the rules would have to be based on the official agency record, which was never before the court. In addition, the court's opinion contains no discussion at all of the established elements for injunctive relief. *United States' Memorandum in Support of Motion for Stay*, Civil No. 2:01-0770, at 13-16 (May 13, 2002). Hence, the scope and duration of the court's injunction are less than clear.

Regulation Allowing Underground Mining of Protected Lands Held Contrary to SMCRA

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) prohibits "surface coal mining operations" in national parks, wilderness areas, historic sites, and other protected lands, and within a certain distance of roads, public buildings, occupied dwellings, parks, and cemeteries. 30 U.S.C. §1272(e). For many years the government and environmental groups have litigated the scope of "surface coal mining operations," including the issue of whether §1272(e) also prohibits *underground* mining activities that may cause *surface subsidence* (downward settling of the earth's surface with little or no horizontal motion) in those restricted areas. The Interior Department issued an interpretive regulation in 1999 providing that subsidence from underground coal mining is *not* included within the statutory definition of "surface coal mining operations" and therefore is not prohibited within the areas protected by §1272(e), although operators must comply with other provisions of SMCRA requiring prevention of subsidence to the extent technologically and economically feasible and repair of or compensation for damages to homes and water sources. 30 C.F.R. §761.200(a); 64 Fed. Reg. 70,838, 70,843 (Dec. 17, 1999). The Federal District Court for the District of Columbia, however, recently ruled that the Secretary's interpretive regulation violates the statutory language of SMCRA and is thus invalid. *Citizens Coal Council v. Norton*, 193 F. Supp. 2d 159 (D.D.C. 2002). The practical result of the court's ruling is that SMCRA prohibits underground mining activities that will cause surface subsidence within the statutorily protected areas.

The term "subsidence" does not appear in §1272(e), but the Secretary's regulation was challenged nonetheless on the theory that surface subsidence and underground activities leading to subsidence are included within the term "surface coal mining operations" as that term is used in §1272(e) and defined in 30 U.S.C. §1291(28). On cross-motions for summary judgment, the district court applied the familiar two-step *Chevron* analysis in determining whether the Secretary's regulation interpreting the scope of "surface coal mining operations" should be upheld. Under *Chevron*, the court decides whether the underlying statute speaks directly to the precise question at issue, and if it does the agency and the court must give effect to Congress' unambiguously expressed intent. If, however, the statute is silent or ambiguous, the agency's interpretation is entitled to deference if it is a reasonable construction, even if there are other or more reasonable interpretations.

The legal dispute amounted to a battle over where missing commas should be placed in the rather garbled statutory definition of "surface coal mining operations." The court disagreed with the Secretary's interpretation, finding that it was not the "most natural reading" of the statute and that, "[i]n the context of SMCRA's broader structure and purpose, the meaning of 'surface coal mining operations' is clearly different from what the Secretary has found it to be." 193 F. Supp. 2d at 163. The court thus gave no deference to the Secretary's interpretation, and concluded that the Secretary's interpretive regulation was contrary to the statute. *Id.* at 163-65. The court found no ambiguity in the statutory language despite the confusing absence of commas, the court's lengthy statutory analysis which differed in substance and outcome from the detailed analysis published by the Secretary, and the court's acknowledgment that the definition of "surface coal mining operations" has been in litigation for the last 15 years. Under *Chevron*, ambiguity compels deference to the Secretary's interpretation if it was reasonable, even if another interpretation might be considered more reasonable. The court instead found that Congress expressed its intent clearly on the precise point at issue and that the Secretary's regulation interpreting §§1272(e) and 1291(28) is contrary to law. *Id.* at 165. The district court's decision has been appealed to the United States Court of Appeals for the D.C. Circuit.

IBLA Clarifies Surface Occupancy Rules for Mining Claimants

In *Thomas E. Swenson*, 156 IBLA 299, GFS(MIN) 12(2002), the Interior Board of Land Appeals (IBLA) clarified that seasonal, casual use activities on an unpatented mining claim may be sufficient to justify mining-related occupancy of public lands, despite strict rules regarding surface occupancies promulgated by the Bureau of Land Management (BLM) in 1996. 43 C.F.R. subpt. 3715. BLM had assumed that casual use activities cannot reasonably justify occupancy of a mining claim. The IBLA found that assumption contrary to the express language of the regulations. *Id.* at 308-09. The IBLA further noted that mining-related work on one claim may justify occupancy on a nearby claim, rejecting BLM's assertion that occupancy must occur on the same property where mining occurs. *Id.* at 307-08. The IBLA set aside BLM's order that the mining claimant remove two trailers from a remote Alaska mining claim, and remanded the case for a determination of whether the occupancy is permissible. The trailers are onsite year-round, but are used for only two weeks each summer.

Two other recent IBLA decisions also addressed surface occupancy of unpatented mining and millsite claims. *Bruce M. Lewis*, 156 IBLA 287, GFS(MIN) 11(2002) (trailer, septic system, storage facilities, gates, and restrictive signage); *Howard Sadlier*, 156 IBLA 311, GFS(MIN) 13(2002) (several trailers, toxic chemicals, and fuel storage). Both decisions found improper occupancies, but reversed BLM's suspension and cessation orders because of failure to follow proper administrative procedures. Under the surface occupancy regulations, BLM must follow specific procedures to force a suspension or cessation of activities. Both cases were remanded to allow for proper enforcement action.

FEDERAL -- OIL & GAS

Gregory R. Danielson, Reporter

IBLA Reverses BLM's Decision Approving Issuance of Powder River Basin Leases

As reported in a previous Mineral Law Newsletter, Vol. XVII, No. 4 (2000), the Interior Board of Land Appeals (IBLA) granted a stay of the Bureau of Land Management's (BLM) decision to issue oil and gas leases on three parcels of land located in the Powder River Basin

which had been offered at the February 1, 2000, competitive oil and gas lease sale (the IBLA dismissed the protest of lease issuance on 46 other parcels based on lack of standing). After further proceedings, the IBLA, in *Wyoming Outdoor Council*, 156 IBLA 347, GFS(O&G) 6 (2002), reversed and remanded the decision of the BLM holding that significant omissions in both the Buffalo Resource Management Plan and the Wyodak Environmental Impact Statement rendered the documents insufficient to provide the requisite preleasing National Environmental Policy Act (NEPA) analysis for the sale of these three parcels.

In its decision reversing the BLM's approval of issuing leases on the three parcels, the IBLA defined the primary issue as whether the resource management plan satisfied section 102(2)(c) of NEPA. The adequacy of any environmental impact statement (EIS) under that section depends on whether it constitutes a detailed statement which takes a hard look at the environmental consequences of the proposed action. The IBLA noted that the Buffalo Resource Management Plan addressed general oil and gas leasing and analyzed the impacts of conventional oil and gas exploration production and development but did not specifically discuss coalbed methane (CBM) extraction and development since these were not contemplated uses in 1985. The IBLA found that the resource management plan did not adequately address the magnitude of water production from CBM extraction in the Powder River Basin and the critical air quality issues associated with development and transportation. Further, IBLA noted that the BLM itself had acknowledged the inadequacy of the resource management plan in addressing CBM issues. IBLA held that these inadequacies did not meet the requirements for a hard look at the impacts associated with CBM extraction and development and, therefore, the resource management plan could not satisfy the NEPA obligations for the proposed leasing decisions at issue.

The IBLA also rejected BLM's contention that the 1999 Wyodak Final Environmental Impact Statement justified its decision to issue the leases without further NEPA analysis. IBLA explained that the Wyodak EIS is a project level document designed to analyze the impacts of developing federal CBM properties by drilling, completing, and operating 5,000 new wells and related facilities. Since the leases had already issued, BLM lacked the authority to deny all federal drilling activity based on environmental concerns unrelated to threatened or endangered species. Since the leasing decisions had already been made, the EIS did not consider the reasonable alternatives available in a leasing decision including whether specific parcels should be leased, appropriate lease stipulations, and non-surface occupancy areas. The IBLA concluded that the document's failure to consider reasonable alternatives relevant to preleasing environmental analysis factually impairs its ability to serve as the requisite preleasing NEPA document for the parcels.

D.C. Circuit Upholds MMS Valuation Rules Except as to Unused Firm Demand Charges

In Vol. XVII, No. 2 (2000) of this *Newsletter*, we reported that the Federal District Court for the District of Columbia held that the Department of the Interior's (DOI) amendments to the regulations governing royalty valuations for federal and Indian oil and gas leases were invalid to the extent that they pose a duty on lessees to market downstream at no cost to the lessor and disallow the deduction of downstream marketing costs. *Indep. Petroleum Ass'n of Am. v. Armstrong*, 91 F. Supp. 2d 117 (D.D.C. 2000). The case was appealed and in *Indep. Petroleum Ass'n of Am. v. Dewitt*, 279 F.3d 1036 (D.C. Cir. 2002), the D.C. Circuit Court of Appeals reversed the district court decision on all issues except for the court's holding that the DOI's regulations were invalid with respect to not allowing the deduction of unused firm demand charges.

The D.C. Circuit Court of Appeals rejected the producer's argument that the courts owe no deference to DOI's judgments where the case involves interpretations of contract and not of statutes or regulations. The court noted that the regulations are incorporated into the federal oil and gas lease which leads back to a deference to the agencies' interpretation. The court also rejected the producers' argument that deference to the government's interpretation of the statute under the *Chevron* deference test is inappropriate for regulations that affect contracts in which the government has financial interests. The court held that the availability of *Chevron* deference depends on congressional intent and seemed to find that the Mineral Leasing Act grants sweeping authority to prescribe necessary and proper rules and regulations to carry out the purposes of the Act including the administration of federal leases and collection of royalties. The concurrence of this opinion describes the discussion of *Chevron* deference as "confusing and indeed troubling."

The court found nothing unreasonable in DOI's refusal to allow deductions for downstream marketing costs. The court stated that there was no persuasive rationale for introducing a distinction between marketing for leasehold sales and for downstream sales. While the court recognized to some extent the producers' argument that downstream marketing adds value to the gas that benefits the royalty owners, the court did not find the arguments so compelling as to force DOI to give up its usual distinction between marketing and transportation costs.

The court invalidated that portion of the gas valuation regulations which disallowed a deduction for the costs of unused firm demand charges. The court of appeals agreed with the district court that the unused firm demand charges are part of the actual transportation costs and should be deductible except that the government royalty share will be credited with any recovery of the unused charge.

MINING -- OIL & GAS, ENVIRONMENTAL ISSUES

Adam S. Cohen, Guest Reporter

Ninth Circuit Excludes Passive Soil Migration from Definition of "Disposal" Under CERCLA

A recent decision by the U.S. Court of Appeals for the Ninth Circuit holds that the definition of hazardous substance "disposal" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, does not include "the gradual passive migration of contamination through the soil." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001). This decision has important implications for determining the CERCLA liability of former or interim owners of contaminated sites, including oil and gas and mine sites, who have not themselves actively contributed to the placement or movement of hazardous substances at a site during the period of ownership. It also may be important to persons owning property onto which contamination has passively migrated from off-site sources, which can be a common scenario at resource extraction or production sites. The decision limits the basis for CERCLA liability in both situations.

After granting a rehearing *en banc*, 240 F.3d 841 (9th Cir. 2001), the Ninth Circuit reversed, in part, its earlier decision on the issue of passive migration. *See Carson Harbor Village, Ltd. v. Unocal Corp.*, 227 F.3d 1196 (9th Cir. 2000). Upon reconsideration, the court adopted a "plain meaning" definition of the term "disposal," and concluded that such definition does not include the gradual spread of already deposited contaminants through the soil. Subsequently, and despite a range of views among the various circuits, the United States Supreme Court denied plaintiff's

petition for certiorari. *Carson Harbor Village, Ltd. v. Braley*, 122 S. Ct. 1437 (2002). This marks the second time that the Supreme Court has declined to review the meaning of the term "disposal" under CERCLA. In the prior case left standing by the Supreme Court, the U.S. Court of Appeals for the Fourth Circuit reached a contrary conclusion, holding that disposal includes not only "active human conduct," but also passive migration of contaminants, at least in the context of underground storage tanks. *Nurad, Inc. v. Wm. E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992).

Plaintiff, Carson Harbor, is the current owner of a contaminated wetlands site in California used originally for petroleum production and later as a mobile home park. Carson Harbor brought suit under CERCLA against prior owners of the site to recover costs incurred in cleaning up the property. Certain defendant prior owners (Partnership Defendants), who likewise operated the site as a mobile home park, in turn, moved for summary judgment, on two issues: (1) whether Carson Harbor's cleanup costs were "necessary" and thus recoverable under CERCLA, and (2) whether defendants owned or operated the site at the time of disposal of any hazardous substances, and thus could be deemed potentially responsible parties, or "PRPs," under section 9607(a)(2) of the statute. On the first issue, the court held that genuine issues of material fact precluded summary judgment, since there was conflicting evidence as to whether there was a threat to human health or the environment and whether the response action taken was addressed to that threat. The court then thoroughly analyzed the meaning of the term "disposal" under CERCLA, reviewing other courts' decisions, statutory construction, and legislative history. Ultimately, the court granted summary judgment in favor of the Partnership Defendants. It held that the plain meaning of the term "disposal" could not be stretched to include, without more, the simple passive migration of contaminants through soil during the Partnership Defendants' period of site ownership.

Under CERCLA, liability can be imposed on four categories of PRPs, as defined in section 9607(a) of the statute. Briefly, these are: (1) the current owner and operator of a facility where there has been a release of a hazardous substance; (2) any person who formerly owned or operated the facility *at the time of disposal* of any hazardous substance; (3) any person who arranged for the disposal, treatment, or transport of hazardous substances at or to the facility; and (4) any person who transported hazardous substances to the facility. Category 2 was at issue in the *Carson Harbor* case. The question addressed by the court was whether the Partnership Defendants, simply by virtue of owning the mobile home park property at a time when contaminants—which were already in place at the time the Partnership Defendants assumed ownership—migrated passively through the soil at the site, could be deemed PRPs under CERCLA. The court concluded that they could not.

For purposes of its decision, the court in *Carson Harbor* assumed that all of the contamination at issue -- tarlike and slag materials determined to be wastes or by-products of petroleum production -- had been on the property for several decades prior to its development as a mobile home park. These hazardous substances were attributed to operations by Unocal Corporation, which used the property for petroleum production and maintained a number of oil wells, pipelines, above-ground storage tanks, and production facilities from 1945 until 1983. The Partnership Defendants owned the property from 1977 to 1983, using it only as a mobile home park. Plaintiff Carson Harbor took over ownership in 1983, soon discovered the presence of the petroleum contamination, was ordered to remove it, and did so in 1995, and then sought to recover its cleanup costs and other damages. In its suit, Carson Harbor asserted, among other

things, that Unocal was responsible for dumping the hazardous substances on the property and that the Partnership Defendants were liable as past owners during the time of disposal.

The court began its analysis with the statutory definition of "disposal." CERCLA defines the term by referencing the definition of "disposal" in the Resource Conservation and Recovery Act (RCRA), see 42 U.S.C. §9601(29), which in turn defines it as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous wastes or any constituent thereof may enter the environment or be emitted into the air or discharged into or on any waters, including ground waters." 42 U.S.C. §6903(3). Since the question of whether the definition of disposal includes passive soil migration was an issue of first impression for the court, it then turned to the opinions of other circuit courts for guidance. The *Carson Harbor* court determined that there was no clear consensus or dichotomy among the other opinions. Instead the cases suggest a range of views, depending in large part on the particular facts of the cases considered. These views range from: (1) the Sixth Circuit's "active only" approach, which requires human activity in the placement or movement of hazardous substances to find disposal, see *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6th Cir. 2000); (2) the Third Circuit's and Second Circuit's conclusions that the gradual spreading of contamination already in the ground is not disposal, see *United States v. CDMG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996); *ABB Industrial Systems Inc. v. Prime Technology, Inc.*, 120 F.3d 351, 353 (2d Cir. 1997); and (3) the Fourth Circuit's decision in *Nurad*, 966 F.2d at 846, that disposal does include passive migration of contaminants, at least when it comes from leaking underground storage tanks.

Turning then to a plain meaning interpretation of the definition of disposal, the court determined that "disposal" should not be interpreted as broadly as the term "release." The court also noted that the specific terms used to define "disposal" (*i.e.*, discharge, deposit, injection, dumping, spilling, leaking, or placing, per 42 U.S.C. §6903(3)) could not support an absolute "active/passive" distinction. Instead, the court required a fact-specific examination to determine whether or not the movement of the contaminants at issue fit within the plain meaning of the various defining terms. The court went through each term, concluding that the gradual passive spreading of the viscous, uniform petroleum contamination could not legitimately be characterized as "discharge," "injection," "dumping," or "placing," all of which connote some form of active human conduct. Nor could the gradual spread be deemed a "deposit" or "spilling" of a hazardous substance. Nothing had spilled out of anything, and no one had left or deposited the contamination at the site during the time in question. Perhaps most significantly, the court also concluded that the gradual spread of contamination was not "leaking." That term, according to the court's interpretation of congressional intent, requires circumstances comparable to a substance leaking from a container or underground storage tank.

The gist of *Carson Harbor* is that "it depends" on the specific facts and circumstances at issue whether passive migration of contaminants constitutes "disposal" for purposes of assigning former owner/operator liability under CERCLA. See *Servco Pacific Inc. v. Dods*, 193 F. Supp. 2d 1183, 1197 (D. Hawaii 2002) (recently construing *Carson Harbor's* holding). According to the Ninth Circuit, contamination already present in or on the ground at the time ownership of a site begins, which begins or continues to spread through the subsoil on its own and without human intervention, will not by itself subject a property owner to liability under CERCLA. However, "disposal" may encompass the passive migration of hazardous substances in some other circumstances. The court did not go so far as to hold that disposal always requires active or affirmative human conduct. Rather, the *Carson Harbor* decision leaves open the possibility to

find disposal in situations where the passive migration of contaminants occurs in such a way as to fit factually within the specific terms used to define disposal. Thus, the spilling or leaking of contaminants from any form of container or impoundment, even without active human conduct or intervention, *i.e.*, even if passive, could be deemed disposal under the *Carson Harbor* decision; and it could subject a former property owner to CERCLA liability.

This "already-in-the-ground versus leaking-tank" distinction is precisely how the court in the just-issued *Servco Pacific* decision differentiated among the various defendants in the case. *Id.* at 1199-1200. The court found that those defendants owning or operating property where there was a leaking storage tank were PRPs under section 9602(a)(2). In contrast, those defendants who simply owned or operated property onto which contaminants passively migrated, or where there was passive migration of contaminants *after* the contaminants had already leaked from a tank, were not deemed PRPs under *Carson Harbor*.

It is often the case that an entity will hold an ownership interest in or conduct operations at a site where hazardous substances have already been disposed of and/or are being released. The *Carson Harbor* decision addresses the potential CERCLA liability incurred where the entity later sells the property, without having done anything to actively disturb or contribute to the release of the hazardous substances. *Carson Harbor* provides some, but not total, clarity on the question of when the spreading of pre-existing contamination may subject a former facility owner or operator to CERCLA liability. Clearly, under the decision, the simple spreading of oily substances through the soil with no human intervention is not disposal and will not give rise to liability. Likewise, the leaking of contaminants from some form of manmade container, conveyance structure, or impoundment, even if passive, will be deemed disposal and will confer potential CERCLA liability. In between is a myriad of situations requiring a court to apply the specific factual circumstances at issue to the various terms used to define "disposal" in CERCLA. These may include passive drainage from mine adits, leaching of metals through waste-rock piles, and contaminant migration through subsurface fractures created by exploration activity. The more that the facts of a particular case resemble the leaking or spilling of a hazardous substance from a manmade container or enclosure, the more likely a court is to determine that disposal has occurred and to find a basis for assigning liability under section 9607(a)(2) of CERCLA.

Carson Harbor also has potentially dramatic implications for sites onto which off-site contamination has migrated. Under the court's holding, disposal will not have occurred at a site where contamination passively migrated in from an off-site source. *See, e.g., Servco Pacific*, 193 F. Supp. at 1200. Arguably, then, any former owner of such a site, who did nothing to contribute to or exacerbate the contamination on his property, should not be deemed a PRP under CERCLA section 9607(a)(2). This particular effect of the decision has the EPA especially concerned. The agency estimates that it has a potential financial impact of over half a trillion dollars at over 600,000 sites, according to the petitioner's brief filed in the *Carson Harbor* appeal to the Supreme Court. This is because a strict interpretation of *Carson Harbor* would mean that former owners of properties contaminated by off-site migration could avoid CERCLA liability for cleanup costs. By selling such a property, potential liability could be terminated, leaving EPA and the Superfund responsible for cleanup costs where no current, solvent owner exists.

Sites used for natural resource exploration and production tend to change hands frequently. Even if ownership remains constant, numerous leaseholders and operators may enter onto the site for distinct periods of time. Some of these entities may never be directly involved with the handling or placement of hazardous substances at the site; but, by the mere fact of site ownership

or operation of a site later found to be contaminated, they could incur CERCLA liability. With respect to these interim owners and operators, however, CERCLA liability attaches only if there was a "disposal" of a hazardous substance during the time of ownership and operation. Under *Carson Harbor*, the definition of what constitutes "disposal" has been limited. Site operators would be wise to consider the court's holding when making decisions about the types of sites to become involved with and the nature of operations to be conducted. The holding also provides strong support for a defense to CERCLA liability where contamination has only passively migrated during the time of site ownership/operation, either within the confines of a site or from off-site sources.

CONGRESS / FEDERAL AGENCIES -- GENERAL

Laura Lindley, Reporter

BLM Expedites Plan Updates

The Bureau of Land Management (BLM) has identified 21 so-called "time sensitive plans" on which it is focusing its efforts so as to develop new or revised plans for areas facing increased development pressures. A number of these plans cover areas where there is significant interest in mineral (particularly oil and gas) development, including the Vernal and Price Resource Management Plans (RMPs) in Utah, the Farmington RMP in New Mexico, and the Pinedale, Buffalo/Powder River and Great Divide/Rawlins RMPs in Wyoming. Most of these plans are scheduled for completion in 2003. BLM has established a "National Planning Support Team" in the Washington Office to "facilitate the timely completion of legally sustainable" time sensitive plans. Washington Office Instruction Memo No. 2002-081 (Feb. 4, 2002). This effort is part of BLM's implementation of the President's National Energy Policy.

CONGRESS / FEDERAL AGENCIES -- MINING

Randall E. Hubbard, Reporter

Update on 3809 Regulations

As reported in previous newsletters, on October 30, 2001, the Bureau of Land Management (BLM) announced the promulgation of both a final rule and a proposed rule that made changes to the recently adopted (January 20, 2001) regulations for surface management of activities on unpatented mining claims (the 3809 Regulations). 66 Fed. Reg. 54,834 (Oct. 30, 2001). The changes to the 3809 Regulations that were set forth in the final rule became effective December 31, 2001. On April 12, 2002, the BLM reopened the comment period on the proposed rule, extending that period through May 13, 2002. 67 Fed. Reg. 17,962 (Apr. 12, 2002).

In the proposed rules, the BLM has asked for public comment on five specific topics: (1) whether BLM should amend the surface management regulations regarding BLM's relationship to states and the delegations those rules provide; (2) the current availability of financial guarantees to assure the performance of reclamation and the availability of additional means to provide sound and reliable financial guarantees; (3) whether BLM should always perform a claim validity examination before approving a plan of operation on withdrawn lands; (4) whether BLM should add a specific reference to cave resources in the performance standards; and (5) whether the final rules contain other provisions which are either overly burdensome or fail to provide adequate environmental protection.

Proposed Legislation on Abandoned Mine Reclamation Fund

On March 20, 2002, Representative Mark Udall (D-CO) introduced H.R. 4078, the "Abandoned Hardrock Mines Reclamation Act of 2002." As drafted, this proposed legislation would establish a fund dedicated to the cleanup of inactive and abandoned mine sites. Monies for the fund would come from the imposition of a reclamation fee on mineral production from either unpatented or patented (regardless of when the patent was obtained) mining claims. The fee would be a percentage of net proceeds, on a sliding scale (from 2% to 5%) based on the ratio of net proceeds to gross proceeds at a particular mine. The bill would exempt mines with gross proceeds of less than \$500,000 in any calendar year from paying the fee. Only the United States, a state or any political subdivision thereof, or an Indian tribe would be eligible to conduct required remediation without inheriting liability for the entire site under the Federal Water Pollution Control Act. 33 U.S.C. §1342.

ALASKA -- OIL & GAS

John K. Norman, Reporter

Court Holds Alaska Coastal Management Act Requires "Project-Specific" Consistency Review

On May 3, 2002, the Alaska Supreme Court held that the state has a statutory duty to conduct a project-specific consistency review under the Alaska Coastal Management Act (ACMA) encompassing all activities for which a project needs a permit, notwithstanding the fact that the project already has a general permit covering some of the project's same activities. *Cook Inlet Keeper v. Alaska*, No. S-9730, 2002 WL 844036 (Alaska, May 3, 2002) (not yet released for publication).

The ACMA, Alaska Stat. §§46.40.010 *et seq.*, requires the state to establish and enforce a coastal management program (Coastal Program) protecting Alaska's coastal areas by insuring that development is consistent with Alaska's environmental and cultural interests. State agencies are permitted to authorize activities in a project that will have significant impacts in Alaska's coastal areas only if the state finds the project to be consistent with applicable Coastal Program standards. *Cook Inlet Keeper*, 2002 WL 844036 at *4, citing *Hammond v. North Slope Borough*, 645 P.2d 750, 761 (Alaska 1982).

Under the ACMA, the state must take a "hard look" at each phase of development of a project, and issue a "conclusive consistency determination relating to that phase before the proposed development may proceed." *Cook Inlet Keeper*, 2002 WL 844036 at *6. The ACMA consists of both local district program standards and state standards found in Alaska Admin. Code tit. 6, §§80.040-80.120. The Alaska Supreme Court has described the "state standards [as] extremely protective of the environment." *Hammond*, 645 P.2d at 761. Activities and uses that conflict with the ACMA's standards (both local and state) may be allowed only if a three-pronged test delineated in Alaska Admin. Code tit. 6, §80.130(d) is satisfied.

In the present case, the state had issued a final consistency determination approving installation and operation of a new offshore exploratory drilling platform at Redoubt Shoal in Upper Cook Inlet, Alaska (the "Osprey project"). In finding this project to be consistent with the Coastal Program, the state excluded from review the platform's proposed discharges of various wastes, because such discharges were already authorized under a general federal permit covering exploratory drilling discharges throughout the Upper Cook Inlet area.

As part of the state's review process, it was noted that the Environmental Protection Agency (EPA) was finalizing a general federal wastewater permit expected to cover all discharges into Cook Inlet by various exploratory drilling operations and that the individual wastewater permit application for the Osprey project would be withdrawn in favor of the general permit if the general permit was issued first. By the time the state public comment period ended, the EPA had in fact finalized and issued the general permit authorizing specified wastewater discharges for existing and future exploratory drilling projects throughout state waters within Upper Cook Inlet. The EPA's general permit had undergone its own consistency review process which culminated in the state's issuance of a final consistency determination finding the general EPA discharge permit to be consistent with the state's Coastal Program.

The state subsequently found the Osprey project to be consistent with the Coastal Program but excluded the Osprey's wastewater discharge activities from the project's consistency review because the exploratory discharge permit issued by the EPA already covered such activities. Cook Inlet Keeper (CIK) appealed this decision first to the Superior Court and then to the Alaska Supreme Court.

CIK asserted that even though the state had determined EPA's general permit to be consistent with the Coastal Program, the state had failed to conduct a specific consistency review of the discharge activities in the particularized context of this specific project, and thus had failed to accurately assess the environmental consequences of the Osprey project as a whole. *Cook Inlet Keeper*, 2002 WL 844036 at *3.

The Alaska Supreme Court found merit in CIK's arguments. The court held that the state is obligated to conduct a "project-specific consistency review" whenever a project requires a permit, lease, or authorization from one or more state resource agencies. *Id.* at *1. The court emphasized the project-specific nature of the ACMA consistency review process and found no support in applicable statutes or regulations, or the federal permit, for exempting the Osprey project's discharge activities from the overall project review process even if such discharges were already authorized by a general EPA permit which itself had been found to be consistent with the Cook Inlet Region Coastal Management Program.

The court reached its conclusion by examining the ACMA's implementing regulations, noting that the regulations governing permit issuance require a consistency determination "in addition" to agency findings of compliance with regulations and compliance for uses and activities of a given project. Furthermore, the court looked to the statutory provisions requiring project-specific consistency review. The court noted that Alaska Stat. §44.19.145(a)(11) specifically provides that when "a project" requires a permit, a consistency review must be undertaken. The court said "[t]hese statutory provisions unequivocally establish that consistency review must be a project-specific process." *Cook Inlet Keeper*, 2002 WL 844036 at *5. Finally, using the analogy of a "phased consistency review," the court noted that "the issuance of a permit or authorization based on a consistency review conducted at an early phase of a project does not exempt the permitted use or activity from further review." *Id.* at *6.

The court did acknowledge the duplicative nature of the requirement that the state undertake a consistency review of the same discharge activities already examined during the federal permit issuance and stated "[t]o this extent, then, the evidence presented in the earlier review . . . could have illuminated the later process: the need for a second, project-specific review certainly would not have required the state to ignore the first or to redetermine issues that it had already fully considered." *Id.* at *7. Nonetheless, the court concluded that the state must assess the whole

project in the consistency review process, which the state had failed to do with the Osprey project.

Having found the consistency review process deficient, the court vacated the state's final administrative consistency determination and remanded the matter for a new consistency determination to consider discharge activities from the Osprey platform within the scope of the Osprey project's overall consistency review. Additionally, the court affirmed an April 19, 2002, injunction halting the drilling of a fifth exploratory well at this location.

This case makes clear that approval of a general permit authorizing a particular activity may not be used as grounds to exclude review of that same activity as part of the project-specific consistency review mandated by the Alaska Coastal Management Act.

ARKANSAS -- OIL & GAS

Thomas A. Daily, Reporter

Arkansas Oil and Gas Commission Proposes Change to Rule Regulating Seismic Operation

On April 23, 2002, the Arkansas Oil and Gas Commission (Commission) approved a change to its Rule B-42, which regulates seismic operations. The previous rule required a seismic operator to have express permission from all surface owners as a condition of securing a permit to conduct seismic operations. Arguably, at least, that requirement was an unconstitutional restriction of a severed mineral owner's right of surface ingress and egress.

The revised Rule B-42 merely requires that the surface owner be given notice prior to the conducting of surface operations. Commission rule changes require approval by the Arkansas legislative counsel. The change will therefore not be effective until some time during summer 2002.

LOUISIANA -- OIL & GAS

Edward B. Poitevent, II, Reporter

Louisiana Court Enters Large Judgment for Surface Restoration and Other Costs

In *Corbello v. Iowa Production*, 806 So. 2d 32 (La. App.3d Cir. 2001), plaintiffs claimed damages for failure to restore 120 acres of land leased by Shell Oil Company under a lease granted in 1961. During the term of the lease, Shell injected saltwater produced from oil wells in the vicinity, and operated an oil terminal for transportation of oil. Plaintiffs also claimed damages on the theory that Shell had wrongfully injected saltwater and failed to vacate the premises promptly after termination of the lease, and for attorneys' fees and punitive damages for wrongful handling of hazardous materials.

The land was apparently worth about \$900 an acre in its restored condition, or a total of \$108,000. The jury awarded damages in the amounts of \$33 million to restore the leased premises to its 1961 condition; \$16,679,100 for Shell's illegal disposal of saltwater on the leased premises; and \$927,000 for Shell's failure to vacate the leased premises after the lease expired. Plaintiffs were also awarded \$689,510 in attorneys' fees and expert fees of \$65,000.

The trial court reduced the jury's award of \$927,000 for failure to vacate the leased premises to \$32,500. The trial court also rejected plaintiffs' claim for punitive damages under the provisions of now-repealed La. Civ. Code Ann. art. 2315.3 pertaining to the handling of hazardous waste.

The court of appeal affirmed the \$33 million awarded in damages for failing to restore the premises, holding that, because the lease expressly provided that the lessee would "reasonably restore the premises" to their 1961 condition, the lease provided sufficient grounds to conclude that the lessors had a "reason personal" under Louisiana law for restoration of the premises, and thus permitted recovery of the costs of restoration significantly in excess of the value of the property. The court also held that the lease did not permit the injection of saltwater from certain sources, that the fair costs of injecting such water was \$1.00 a barrel, and that this should be increased by an "investment factor" from approximately \$1 million to the more than \$16 million awarded by the jury, as expert testimony disclosed that the defendants could have invested the amounts in such a manner as to have realized that much by the time of trial. The court also found that Shell was a "bad faith possessor" by remaining on the premises after a suit for its eviction was filed and while the parties were negotiating for an extension of the lease, and as such was liable for the profits it realized by the use of its facilities on the leased premises. It also held that the saltwater produced from the oil and gas wells is a hazardous substance within the meaning of La. Civ. Code Ann. art. 2315.3 and remanded the case for trial on the issue of punitive damages.

TEXASA -- OIL & GAS

William B. Burford, Reporter

Abatement of Pollution Suit Not Required Pending Railroad Commission Proceeding

Landowner Marion complained to the Texas Railroad Commission about contamination of aquifers underlying his land by water escaping from oil and gas wells operated by Apache Corp., and the Railroad Commission began proceedings. Before the administrative proceedings had concluded, Marion filed suit for damages. Apache sought to stay the lawsuit pending the Railroad Commission outcome, but the trial court denied its motion. In *In re Apache Corp.*, 61 S.W.3d 432 (Tex. App.--Amarillo 2001, orig. proceeding [pet. denied]), the court of appeals held the denial proper.

Apache argued that the doctrines of exclusive and primary jurisdiction compelled abatement of the suit. The court first observed that the theory of exclusive jurisdiction would require abatement only if a statute evinced legislative intent to vest the Railroad Commission and no other body, judicial or administrative, with authority over the matters in question. Although Tex. Nat. Res. Code Ann. §91.101 makes the Railroad Commission solely responsible for the control and disposition of oilfield waste and the prevention of water pollution from oil and gas activity, other statutes, Tex. Nat. Res. Code Ann. §§85.321 and 85.322, authorize property owners to sue anyone violating Railroad Commission rules and, moreover, provide that no Railroad Commission suit, and no penalties imposed or claimed by the agency, shall impair, abridge, or delay a private cause of action. The legislature's express permitting of suits to proceed is hardly indicative of an intent to prevent the judiciary from acting, the court declared.

Turning to the more difficult primary jurisdiction argument, the court acknowledged the concept that government agencies should not be bypassed on matters especially committed to them but noted that this rule, like most, has its exceptions. One pertains to actions or disputes that are inherently judicial in nature and over which the legislature has not vested exclusive jurisdiction in some administrative agency. The doctrine of primary jurisdiction does not apply in such cases even though a particular agency has extensive regulatory authority in the area. It was beyond dispute that Marion's trespass claim was inherently judicial in nature, said the court, and the same conclusion could be reached regarding one or more of his remaining "shotgun"

claims. That the dispute involved causes of action inherently judicial in nature, created and historically resolved by the judiciary, was in the court's view beyond doubt.

The court's disposition of the primary jurisdiction argument is disappointingly conclusory. It provides little, if any, support for its assumption that a dispute implicating a common law cause of action is inherently judicial in nature for purposes of a primary jurisdiction analysis. It is far from clear why this should be as obvious as the court assumes. Particularly striking is that the court's analysis included no inquiry into whether application of the primary jurisdiction doctrine here would aid its purpose of ensuring that the administrative agency decide, at least initially, questions that require its special knowledge, experience, and services and that uniformity of ruling be maintained where essential to the purposes of the regulatory statute. Such an analysis is seemingly required by *Cash America International Inc. v. Bennett*, 35 S.W.3d 12, 18-19 (Tex. 2000), the Texas Supreme Court's latest pronouncement on the doctrine of primary jurisdiction. Indeed, the court here did not even cite *Cash America*. Under this decision it appears that the Railroad Commission could rarely, if ever, have primary jurisdiction of a dispute without exclusive jurisdiction.

Express Negligence Rule Applied to Seismic Agreement, but Only as to Negligence Claims

The court in *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880 (Tex. App.--Houston [14th Dist.] 2001, no pet. h.), considered the indemnity provisions of a geophysical services agreement between DDD, the owner of an oil and gas leasehold interest, and Veritas, a seismic contractor. The agreement included two indemnity provisions:

Veritas shall indemnify, defend, . . . [DDD] for all claims, damages, causes of actions [*sic*], and liabilities resulting from Veritas' failure to conduct seismic operations in an orderly and workmanlike manner

Veritas shall protect, indemnify, defend and save [DDD] . . . harmless from and against all claims . . . and causes of actions [*sic*] . . . asserted by third parties on account of . . . damage to property of such third parties, which . . . damage is the result of the negligent act or omission, breach of this Basic Agreement or the Supplemental Agreement, or willful misconduct of Veritas Likewise, [DDD] shall protect, indemnify, defend and save Veritas . . . harmless from and against all claims, . . . causes of action . . . asserted by third parties on account of . . . damage to property of such third parties, which . . . damage is the result of the negligent act or omission of [*sic*] willful misconduct of [DDD].

After numerous mesquite and oak trees were cut in the clearing of brush subcontracted by Veritas, the landowner sued DDD for (1) breach of duty to manage and administer the lease, (2) breach of contract, (3) negligence, (4) malicious trespass, (5) negligent misrepresentation, (6) breach of fiduciary duty, (7) gross negligence, and (8) intentional tort. DDD brought suit against Veritas for a declaratory judgment that the agreement obligated Veritas to indemnify it against the landowner's damage claims.

The trial court granted summary judgment to Veritas on the basis that the indemnity clause was unenforceable in that it did not meet the Texas express negligence test. Under Texas law an agreement indemnifying a party from the consequences of its own negligence must express that intent in specific terms, or it will not be enforced. There was no hint in the agreement's

indemnity provisions that DDD was to be indemnified for its own negligence, the court of appeals noted in upholding the summary judgment that Veritas was not obligated to indemnify DDD against the landowner's negligence claims.

Some of the claims by the landowner against DDD were not based on negligence, however. The express negligence rule should not apply to those claims, the court of appeals held. It reversed summary judgment for Veritas on DDD's suit for indemnity against the nonnegligence claims.

Lease Held Revived by Mineral Owners' Agreement among Themselves Acknowledging its Existence

Natural Gas Pipeline Co. v. Law, 65 S.W.3d 121 (Tex. App.—Amarillo 2001, pet. filed), is another of several reported court of appeals cases in which Texas Panhandle mineral owners have alleged expiration of the oil and gas leases on their land because of long-ago temporary cessation of gas production. In this case two gas wells had been completed within the primary term of a 1933 oil and gas lease executed by members of the Haas family. There was production from one or both wells every month thereafter except for several periods of one or two months each between 1959 and 1964. In 1979 the successors to the interests of the lessors all joined in the execution of an agreement in which they recited their family history and current ownership and appointed one of themselves to act as trustee for purposes of collecting and distributing royalties accruing from the lease and paying taxes and expenses. The agreement included a recital that the land was "now subject to an oil and gas lease in favor of Natural Gas Pipeline Company of America, Lease #8070-O&G, known as the Mary Haas #1 and #3." The agreement, once recorded, was submitted to the lessee with a division order directing royalty payment to the trustee.

Agreeing with the lessee that the 1979 agreement had revived the lease as a matter of law, the court of appeals reversed the trial court's judgment for the plaintiffs and rendered judgment for the lessee. The 1979 agreement's recital that the land was "now subject to" the lease amounted to a recognition by the royalty owners that the lease was in force at the time of the agreement. Such an affirmative declaration, not merely a casual reference to the lease, was sufficient recognition of the ineffective lease to constitute its revival.

The court rejected the plaintiffs' argument that their agreement did not constitute a revival because it was not sufficient as a conveyance. It distinguished *Westbrook v. Atlantic Richfield Co.*, 502 S.W.2d 551 (Tex. 1973), on the basis that the lessors did not contend that the agreement's reference to the lease was ambiguous or included by fraud, accident, or mistake and that the instrument at issue in *Westbrook* did not contain sufficiently affirmative statements. Moreover, the rule that parties to a contract must be presumed to intend every clause to have some effect would not allow the court, it said, to disregard the mineral owners' use of the phrase "now subject to an oil and gas lease." The opinion does not explain as adequately as it might how the lessee, in effect, became the beneficiary of the 1979 agreement when it was not a party to it.

Groundwater Pollution Suit Barred by Limitations

In *Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262 (Tex. App.—El Paso 2001, no pet. h.), the court of appeals considered a summary judgment granted to defendant oil companies in a rancher's water contamination suit. Walton, the rancher, alleged that Phillips and Pioneer had operated open salt water disposal pits and had failed to prevent the migration of pollutants from the pits to his groundwater.

With respect to Pioneer, Walton produced evidence showing merely that Pioneer currently conducted operations on the same land where his contaminated water wells were located. He could not point to any evidence that Pioneer had ever improperly disposed of salt water. The court of appeals therefore upheld summary judgment for Pioneer on the issue of causation. The trial court found, on the other hand, that the trial court had erred in granting summary judgment to Phillips on the causation question. There was evidence, Phillips conceded, from which it might be concluded that it had disposed of salt water in pits in the early 1960s. There was also expert testimony that a pit on the Phillips lease was a probable source of contamination.

The court concluded, nevertheless, that the suit against Phillips was barred by the two-year statute of limitations against tort actions. An action for permanent injury to land, noted the court, must be brought within two years of the date of discovery of the initial injury. Here the contamination of Walton's groundwater was a permanent injury, the court held, as opposed to a temporary injury for which Walton could have sought damages accruing within the past two years. The activity that allegedly caused the contamination, the operation of open pits, was a continuous source of pollution rather than the type of sporadic activity or injury at issue in cases of temporary injury, and the summary judgment evidence established that Walton's groundwater was contaminated and had been for several years.

Contamination of the groundwater occurred during the 1960s, while Phillips operated the disposal pit. Walton had in 1993 contacted the Texas Water Commission about his groundwater and was advised of contamination at certain depths and that further testing should be done to determine the contamination's lower limits. This evidence conclusively established facts that would cause a reasonably prudent person to make inquiry into whether his groundwater had been contaminated. Because Walton failed to bring his claims within two years after discovering the contamination, they were barred.

Institution of Waterflood Did Not Require Consent of All Parties to JOA

Cone v. Fagadau Energy Corp., 68 S.W.3d 147 (Tex. App.—Eastland 2001, no pet. h.), decided multiple complaints by Cone, a minority working interest owner, against Fagadau, the operator under an AAPL Form 610-1982 operating agreement. Most of these revolved around Fagadau's having implemented waterflooding and unitization of the contract area without Cone's consent and its having charged Cone's account for water used in the waterflooding.

The court first considered whether the conversion of one or more producing wells to injection wells without Cone's consent was prohibited by Article VI.E.2. of the operating agreement, which provided that any well completed as a producer "shall not be plugged and abandoned without the consent of all parties." The court held this provision inapplicable. The wells had not been abandoned, because they continued to be used for injection. Furthermore, the court noted, even though hydrocarbons were not produced directly from these wells, they were used to obtain production, to Cone's benefit, from other wells.

The court then addressed Cone's argument that Fagadau had breached the agreement because the institution of the waterflood was prohibited without unanimous nonoperator consent. This argument was premised on Article VII.D.3. of the agreement, providing, "Without the consent of all parties, Operator shall not undertake any single project reasonably estimated to require an expenditure in excess of Fifteen Thousand Dollars (\$15,000) except in connection with a well, the drilling, reworking, deepening, completing, recompleting, or plugging back of which has been previously authorized by or pursuant to this agreement." Although it appears to limit activities on the contract area, this provision is only for accounting purposes, the court held. It

did not alter the common-law rule allowing one cotenant unilaterally to develop the minerals and did not allow a nonoperator to prohibit operations by withholding consent. The provision only meant that a nonoperator could not be compelled to bear part of the cost of the operation, not that the operation was prohibited. The court cited no direct precedent for its far-reaching holding, and its explanation is cursory.

The court upheld no-evidence summary judgment against Cone's claim that the waterflood would cause damage from future drainage on the basis that Cone's expert summary judgment evidence was too speculative to raise a fact issue. It sustained, however, Cone's argument that summary judgment should not have been rendered against his claim for Fagadau's improper assessment of a monthly accounting fee. The amount of the accounting charges had been reimbursed, but there was a fact question concerning alleged damages for the loss of use of the funds before reimbursement. The court then considered Cone's contest of the assessment of a charge to his account for water used in the waterflood on the basis that it was an expenditure arising from an operation to which he had not consented. Citing the operating agreement's provision that "all cost and liabilities incurred in operations under this agreement shall be borne and paid . . . by the parties" and that the waterflood had been recommended by an expert and had increased production, the court of appeals held there was evidence to support the trial court's determination that the cost of water used in operating the waterflood was chargeable to Cone as an expense incurred in the necessary and proper conduct of joint operations. The opinion does not explain how this squares with the court's earlier discussion of Article VII.D.3. and its holding that it was a limitation on a nonoperator's exposure to liability for expenses incurred in an operation although not a prohibition against it. Possibly the court deemed the cost of the water not to be a part of the "single project" for which Article VII.D.3. required nonoperator consent, but more explanation would have been helpful.

Cone contended in the trial court that his failure to respond to a well proposal made by Fagadau should not be binding on him as a nonconsent election triggering the operating agreement's nonconsent penalty provisions. Correspondence sent by Fagadau after the election period had expired contained information that Cone asserted would have induced him to elect to participate in the well. The events on which Cone relied occurred after the deadline for his participation election, the court pointed out, and thus did not support his argument.

An interesting aspect of the opinion is its discussion of the trial court's having awarded Fagadau \$65,306.95 for attorney's fees as sanctions against Cone for having asserted counterclaims that were groundless and brought for the purpose of harassment. The court of appeals reversed the trial court's award of sanctions. The counterclaims that formed the basis for the sanctions apparently were tort claims. The trial court had granted special exceptions raised by Fagadau, striking Cone's pleadings to the extent that they sought to hold Fagadau liable absent a showing of gross negligence or willful misconduct. Because the operating agreement contained an exculpatory clause providing that Fagadau would have no liability to the other parties for losses or liabilities except for those resulting from gross negligence or willful misconduct, the trial court had held, any complaint by Cone not based on allegations of gross negligence or willful misconduct did not state a cause of action. This was incorrect, the court of appeals held, because Cone alleged breaches of specific terms of the agreement to which the exculpatory clause did not apply. Although this error was harmless since the record indicated that the trial court heard and determined all of Cone's allegations on a simple breach of contract standard, it had, in effect, required Cone to plead gross negligence and/or willful misconduct, causes of action sounding in tort, in order to litigate his breach of contract claims. Against this

backdrop, the court of appeals held, Cone's claims were not groundless in that there was some basis in law and fact for their assertion. That Cone could not prove his claims at trial did not mean they were groundless.

Inverse Condemnation Claim on City of Houston's Revocation of Drilling Permit Not Barred

Maguire Oil Co. v. City of Houston, 69 S.W.3d 350 (Tex. App.—Texarkana 2002, no pet. h.), decided Maguire's appeal of a summary judgment in favor of the City of Houston. The city had issued a permit to Maguire authorizing it to drill a gas well near Lake Houston, the city's main source of drinking water. A few months later, after Maguire had begun preparing the land for drilling, signed a drilling contract, acquired offset leases, and moved equipment onto the location, the city revoked the permit and ordered Maguire to stop work, alleging the permit had been issued in error and citing a city ordinance prohibiting drilling within the city's extraterritorial jurisdiction and within 1,000 feet of the lake. Maguire sued the city, seeking declarations that its permit was valid, that the ordinance on which the city relied was unreasonable, and that the city engaged in selective enforcement by allowing others to drill in similar circumstances. Maguire also sought damages for inverse condemnation and reliance damages on a negligent misrepresentation theory, if the permit was invalid, or under a promissory estoppel theory if the permit was valid.

Addressing first the inverse condemnation issue, the court noted that a property owner may recover damages in an inverse condemnation suit when the government appropriates the property by unreasonably interfering with the landowner's right to use and enjoy it, such as by restricting access or denying a permit for development. The city contended Maguire was barred by limitations because it had not filed an inverse condemnation action within ten years after the 1967 enactment of the ordinance against drilling. Maguire countered that the ordinance was inapplicable to its proposed drilling. The ordinance prohibited drilling within the city's extraterritorial jurisdiction (areas outside the city but where it had the power to make and enforce certain ordinances), but not expressly within the city limits. Maguire's proposed drilling would be inside the city limits and, it contended, outside the purview of the ordinance. The city argued that the ordinance's obvious purpose was to protect Lake Houston and that Maguire's narrow interpretation would frustrate that purpose. The city construed the ordinance to apply to drilling both within the city and in the area of its extraterritorial jurisdiction and urged the court to defer to its construction. Based on the ordinance's literal language, the court agreed with Maguire. It was conceivable, it said, that the city council determined it could protect the lake and still allow drilling within the city limits but not in its extraterritorial jurisdiction. Because the ordinance's plain language did not prohibit drilling inside the city, it would give no weight to the city's construction. Summary judgment for the city on the inverse condemnation claim on the basis that it was barred by limitations was therefore inappropriate.

The city also contended there was no evidence Maguire suffered any loss or damage as a result of inverse condemnation. Maguire's principal summary judgment evidence for damages consisted of expert testimony of the volume of recoverable gas underlying Maguire's lease and its discounted value using a projected cash flow analysis. The court, although acknowledging that the normal measure of damages is the land's market value and the city's argument that Maguire's expert's opinion was speculative because it presumed recoverable minerals were present, nevertheless held that the expert provided some evidence of market value. Comparable sales provide a superior measure of market value, the court agreed, but the discounted cash flow

analysis Maguire's expert used provided some proof of market value in the absence of comparable sales evidence.

The city had moved for summary judgment against Maguire's claims for reliance damages under the doctrine of sovereign immunity. A municipality may be estopped from invoking sovereign immunity, however, in exceptional cases where justice requires the application of estoppel and there is no interference with the exercise of its governmental functions. In such cases, the court observed, the court must determine (1) whether the landowner is relying on an authorized act of a city official or employee, (2) whether the case is one in which justice requires the application of estoppel, and (3) whether the application of estoppel would interfere with the exercise of the city's governmental functions. One seeking to invoke estoppel against a city must also, it said, demonstrate he or she qualifies under each element of equitable estoppel.

Here Maguire had presented sufficient summary judgment proof that the city's action in initially granting the permit was authorized: the ordinance the city used to assert the permit's invalidity did not prohibit Maguire's drilling. Maguire also had demonstrated that this was the kind of case in which justice required application of estoppel by showing its expenditure of some \$190,000.00 in preparing a drill site, clearing a wooded area, building a road, driving pipe, and reinforcing a bridge. Application of estoppel to require the city to pay damages for Maguire's reliance would not interfere with the exercise of its governmental functions. Finally, Maguire's summary judgment evidence raised a fact issue concerning each element of equitable estoppel. The doctrine of equitable estoppel, the court noted, can be invoked where a party, by its conduct, induces another to act in a particular manner before taking an inconsistent position and thereby causing loss or injury to the other.

The city argued further that even if the sovereign immunity defense were unavailable, Maguire's negligent misrepresentation and promissory estoppel claims nevertheless failed as a matter of law. The court agreed with respect to negligent misrepresentation, because the drilling permit was valid and no misrepresentation. Maguire had presented sufficient evidence to avoid summary judgment on promissory estoppel, however, the elements of which, according to the court, are (1) a promise; (2) foreseeability of reliance by the promisor; and (3) substantial reliance by the promisee to his detriment. Here the city's promise was represented by its issuance of the drilling permit, which vested in Maguire the right to drill unless some ordinance allowed the city to revoke it or the city determined drilling was affecting public health and safety. There was no summary judgment proof showing any ordinance that would authorize revocation of the permit or showing that drilling was a threat to public welfare.

The court finally turned to Maguire's claim based on the city's selective enforcement of its alleged ordinance. On the basis of *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), the court rejected the city's contention that Maguire could not recover without making a showing that it was part of a protected class. A party may be able to make an equal protection claim, the court said, if he or she was intentionally treated differently from others similarly situated and if there was no rational basis for the differential treatment. Maguire's presentation of evidence that twenty-one wells had been drilled after 1967 within the city limits and within 1,000 feet of Lake Houston was sufficient to raise a fact issue concerning whether the city intentionally enforced its ordinance against Maguire differently from the way it enforced it against others.

Payment of Draft Made Subject to Approval of Title Does Not Waive Lessee's Right to Claim on Breach of Warranty

The court in *Broughton Associates Joint Venture v. Boudreaux*, 70 S.W.3d 324 (Tex. App.—Waco 2002, no pet. h.), upheld the lessee's right to reimbursement of bonus paid to lessors on their general warranty of title in an oil and gas lease. Broughton Associates took a lease, containing a general warranty of title, from Melvin and Dee Ann Boudreaux, in exchange for a bank draft for almost \$300,000, calculated at \$750 per acre for 399 net acres, payable "on approval of title to [the lease] by drawee not later than 15 days after arrival of this draft at collecting bank." Broughton experienced delays in verifying the title and paid the draft two days before learning that the lessors owned far less than the 399 mineral acres for which they had been paid. It immediately requested reimbursement from the Boudreauxs and sued when the lessors refused. The trial court rendered judgment against Broughton on a jury finding that it had waived the Boudreauxs' failure to comply with their warranty.

The court of appeals reversed, holding that no evidence supported submission of the waiver issue to the jury. The "approval of title" provision of the draft constituted a condition precedent to the formation of a contract. Broughton's funding of the draft waived the condition precedent and formed the contract. Broughton thus became liable on the draft, but it could not have waived the right to enforce the covenant of warranty. Since Broughton asserted the right to reimbursement a mere two days after paying the draft, reasonable minds could not reach the conclusion that Broughton intentionally waived its warranty rights. Thus the waiver finding could not stand.

Fifth Circuit Reverses Certification of Royalty Owner Class

In *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002), the court reviewed the district court's certification of a class consisting of all royalty owners under leases in the continental United States in which Exxon Corp. was the lessee providing for royalty payment on gas on either an amount realized/net proceeds basis or a market value/market price basis, from which Exxon had produced gas sold or transferred to or within Exxon itself after July 14, 1995 (four years before the suit was filed, in order to avoid any application of the Texas statute of limitations). The court reversed the class certification, accepting Exxon's argument that the representative plaintiff's claims were not typical of the class as required by Fed. R. Civ. P. 23(a)(3).

The critical inquiry, noted the court, is whether the class representative's claims have the same essential characteristics as those of the putative class; factual differences will not defeat typicality if the claims arise from a similar course of conduct and share the same legal theory. The plaintiffs' theory here was that Exxon engaged in a similar course of conduct with respect to each class member: the underpayment of royalties based on an implied duty to market. The class representative's leases included royalty provisions based on both market value and actual proceeds. There is no implied covenant to market under market value leases, although there is such an implied covenant in proceeds leases, under *Yzaguirre v. KCS Resources, Inc.*, 53 S.W.3d 368, 373 (Tex. 2001). At least under Texas law, therefore, there cannot be typicality where there are both market value leases and proceeds leases included in the class.

The district court had also erred in failing to consider the class representative's adequacy, not having conducted the required rigorous analysis, and in determining that the plaintiffs had met their burden of showing that there were common issues of law or fact, or that these predominated over individual issues. In order for class issues to predominate, said the court, each state whose

law was at issue must recognize an implied covenant to market. There is some uncertainty of this with respect to the laws of several states, the court noted, and, again, Texas does not recognize an implied covenant to market in market value leases. The differences in the law among the jurisdictions at issue, the court held, demonstrate that the law is not uniform as to any implied covenant to market, or at least that the plaintiffs had not demonstrated uniformity. Finally, the district court never considered whether a class action was a superior method for adjudicating the controversy.

Expert Testimony Insufficient to Show Operator Caused Pollution

Anthony v. Chevron U.S.A. Inc., 284 F.3d 578 (5th Cir. 2002), highlights the difficulty faced by a landowner seeking damages for pollution allegedly caused by oil and gas operations. Here the Fifth Circuit Court of Appeals affirmed a district court judgment that the plaintiffs' expert witnesses, as a matter of law, had failed to provide sufficient evidence for a reasonable jury to conclude that the oil production operations of Chevron, the defendant, had caused water and soil pollution on their ranch.

The plaintiffs' Bentley Windmill had produced drinking-quality water from the Allurosa aquifer at a depth of about 54 feet. Between 1975 and 1988, while Chevron was injecting salt water into the Monahans South Queen Field at a depth of about 3,000 feet in the vicinity, the chloride levels in the water produced from the Bentley Windmill increased dramatically so that the water was no longer potable. The plaintiffs also identified eight locations near Chevron wells and pipelines where oil spills or leakage had contaminated the soil. They sought damages, claiming that Chevron's negligent operations had caused the elevated chloride levels in their well and the soil contamination.

The plaintiffs relied primarily on expert witnesses, one of whom proposed three different ways Chevron's injected water could have flowed up to the fresh water aquifer. He first theorized that the injection increased pressure in the oil reservoir so as to force excess salt water upward along the casings of the various injection and production wells. His only evidence to prove this occurred, however, was that Chevron injected more fluid than it removed; he never established the size of the oil reservoir or how much it could hold. He also testified that one of Chevron's injection wells had developed problems with the integrity of its casing and claimed that salt water leaking through holes in the casing flowed toward a nearby producing well and migrated upward along the producing well's casing. Tests upon which he relied established the leakage but not, the court pointed out, that the water ever migrated upward to the fresh water zone or horizontally to the producing well. Finally, the expert testified that Chevron had fractured two wells and that the fissures extended upward toward the aquifer. Although he established a 166-foot upward fracture, his conclusion that Chevron's continuing injection of water extended the fractures so that salt water could migrate upward all the way to the aquifer was, according to the court, mere speculation. Taken as a whole, said the court, the water pollution expert's testimony raised suspicions about Chevron's operations but, since he provided no nexus between Chevron's water injection and the pollution of the aquifer, was not enough to present a question of fact to the jury on the issue of causation. Moreover, numerous other oil companies operated in the area, and the expert's testimony, which was not supported by any examination of the surrounding area or field tests, failed to address the possibility that other sources caused the salt water contamination.

Another expert concluded that Chevron caused the soil contamination because its oil facilities were near all the contaminated areas. Yet he could not be certain that sites on the west

side of the ranch had been contaminated before Chevron ceased its operations there in 1992; and he could only testify, with respect to sites on the east side of the ranch where Chevron still operated, that each site was close to a Chevron oil line. Although this testimony began to connect the soil pollution to Chevron, it was alone insufficient, the court held.

The plaintiffs' experts had shown how the injuries to their ranch could have occurred. Their testimony was insufficient, however, to prove that Chevron had in fact caused the damage.

UTAH -- MINING

Daniel A. Jensen, Reporter

Utah Establishes Non-Coal Mining Compliance Program

The Utah Legislature has established a comprehensive regulatory enforcement program for non-coal mining and exploration operations conducted within the state. The new enforcement procedures are similar to the existing procedures for coal mining. They include notices of violation, cessation orders, civil and criminal penalties for noncompliance, informal conferences with the enforcement agency (the Division of Oil, Gas and Mining), administrative hearings (before the Board of Oil, Gas and Mining) for resolving violations, and judicial review of the agency action. All monies received from civil penalties go into the state's abandoned mine reclamation fund for use in reclaiming mined land impacts not covered by reclamation bonds.

Senate Bill 159 (to be codified as part of the Utah Mined Land Reclamation Act at Utah Code Ann. §§40-8-4, 40-8-8, 40-8-9, 40-8-9.1) became effective May 6, 2002.

WYOMING -- OIL & GAS

William N. Heiss, Reporter

Wyoming Legislature Amends Severance Tax Lien Provisions and Provides Enforcement Mechanism

The recently adjourned Wyoming Legislature amended the provisions of the Wyoming Statutes relating to severance taxes. Wyo. Stat. Ann. §§39-14-108, -208, -308, -408, -508, -608, and -708. While these provisions have long needed clarification, the new amendments have not fully accomplished this purpose. The amendments provide that the severance tax lien is a lien on all Wyoming property, real and personal, including after-acquired interests, of any person severing minerals in the state and liable for the payment of severance tax. The lien is superior to all other liens and encumbrances except those held by bona fide creditors and properly filed or recorded prior to the filing of the severance tax lien.

Title examiners should note that in order to perfect a tax lien under this subsection, the Department of Revenue must file a notice of the lien with the secretary of state, who is required to maintain a database of such liens. Once filed, the lien is superior to all other liens and encumbrances of any kind except those held by a bona fide creditor and properly filed or recorded under Wyoming law prior to the filing of the severance tax lien notice. The filing of one notice of tax lien shall be sufficient to cover all taxes, interest, and penalties that may accrue after filing the notice.

A worrisome provision of the bill provides that the lien is "also a lien on all interests in the mineral estate from which the production was severed, and on all future production of the same mineral from the same leasehold, regardless of any change of ownership or change in the person extracting the mineral." The revenue department may, for good cause shown, release the lien on

all property and settle delinquent taxes, interest, and penalties to be collected against future production from the leasehold.